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Children's Rights & Brit Mila

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"Combating Antisemitism Through Legal Means" Conference

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

This is the first time that Justice is appearing exclusively in digital form. We trust that the new format will reach a wider readership than before, and that the articles and materials herein will contribute to and expand on the subjects dealt with by the IAJLJ.

Diaspora and Israeli Jewry are experiencing difficult times. Manifestations of antisemitism involve injury to Jews in various countries, of late in France in particular. In Israel, we are witnessing an occurrence still labeled as an "intifada of individuals," characterized by stabbing of citizens and soldiers.

As I am finishing to write this message, terrorism has reached a higher level. On February 3, 2016, a border policewoman was shot and killed at the Damascus Gate in Jerusalem and her female partner was critically wounded by a gang of three, which indicates planning and coordination. This brings us to the conclusion that we are dealing no more with individual initiatives. The result is that over 30 Israelis have been killed and over 300 wounded to date in this current wave of terrorism.

On October 4, 2015, Palestinian law student Muhammad Al-Halabi was killed after stabbing two Israelis to death in Jerusalem's Old City. Shockingly, the Palestinian Bar Association awarded an Honorary Law Degree to this murderer, referring to him as a "martyr," and stated that its next bar swearing-in ceremony would be dedicated to him. As the Palestinian Bar Association received funding from the European Union, IAJLJ sent a letter on October 13, 2015 to EU Ambassador to Israel, Lars Faaborg-Andersen, calling upon the EU to review its policy of supporting such an organization. Our letter and the reply we received are available on the IAJLJ website.

The year 2016 began with another deadly attack, in the heart of Tel Aviv. On January 1, 2016, three citizens were murdered by an Israeli Arab on Dizengoff Street. The fine fabric of civic relationships between Jews and Arabs was severely shaken by this horrendous murder. However, we must not forget that blame should not be cast on Arab society in its entirety, and that a large proportion among them condemned the murder and wish to live alongside us peacefully. This wish must be reinforced. Israel's Declaration of Independence reminds us that:

The State of Israel will be open for Jewish immigration and for the Ingathering of the

Exiles! ...it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex...



The contribution of Israeli Arabs to diverse areas of society must also be kept in mind.

I have already reported in our Newsletter of April 2015 and on our website, on establishing a joint council of Arab and Israeli lawyers together with IAJLJ members, the goal being to ensure that Israel's law will be enforced everywhere in an egalitarian manner, and that the phenomenon of racism is fought against.

Additional recent activities by the IAJLJ that we feel are highly important include efforts to develop dialogue with European Union states to discuss with them definitions of antisemitism, and action to enforce the law relative to crimes of antisemitism perpetrated in various countries.

In this context the IAJLJ, together with the Kantor Center for the Study of Contemporary European Jewry at Tel Aviv University, held a symposium at the Austrian Ministry of Justice, with the participation of Austria's Minister of Justice and Minister of the Interior, who delivered greetings and addressed the topic under discussion.

I take this opportunity, therefore, to thank the President of the European Jewish Congress, Dr. Moshe Kantor, whose generosity made this event possible.

The objective was to focus attention on the working definition of antisemitism, which was not adopted by EU countries, and which even includes "the new antisemitism," directed against the State of Israel. The lectures there were intended to expose the positive aspects of the definition, in an attempt to possibly lead to its eventual adoption. No less important is working with law enforcement authorities in the various countries, and conducting dialogue on how to enforce domestic law in each country relative to antisemitic crimes.

The EU indicated its serious intentions in this area by appointing Katharina von Schnurbein as EC Coordinator on Combating Antisemitism. We will of course be in touch with her.

This approach will also be applied to other states that expressed willingness to discuss the topics presented in

Austria. At the end of September 2016, the IAJLJ will hold its annual conference in Paris, where we will confront these and other issues, and try to cope with antisemitic manifestations and the attitude of states toward these, and more. I invite you all to participate in this important conference.

The IAJLJ has recently been very active against the boycott phenomenon, which is manifested on three levels: in academic institutions, including among students; in the media, through unfair coverage of events; and economically, by banning products from Israel, etc.

IAJLJ is in contact with other organizations, among them universities and international friends, concerning

actions where the law is significant, since this is the IAJLJ's realm of activity.

We also approached members of the Association in several countries and asked them to assist in locating and reporting such phenomena in their countries. Sadly, as their scope seems to be widening, we would appreciate your involvement and cooperation in this activity.

We wish our friends—wherever you are—that the year 2016 will bring with it good health and a better world than the one we witness today.

Irit Kohn
President, IAJLJ

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Combating Antisemitic Incitement through the European Courts and Online

Michael Whine

European law offers increasing protection for Jews and other minorities through judgments by the European Court of Human Rights (ECtHR), and successful case law from European national courts. This improvement in legal protection arises from recent and parallel developments that are not directly related, but are slowly changing perceptions about hate speech, and its links to racist violence, radicalization and extremism, while nevertheless recognizing the importance of free speech.

While there is no universally accepted definition of "hate speech," the ECtHR has established certain guidelines making it possible to characterize it in order to exclude it from the protection afforded to freedom of expression. At the political level, the Office for Democratic Institutions and Human Rights (ODIHR) at the Organization for Security and Cooperation in Europe has also published a definition agreed upon by its participating states and their criminal justice agencies, which participating states are urged to use.

Accordingly, ODIHR has noted that hate speech, however discriminatory or insulting, would not be a crime without a specific base offense, such as the glorification of Nazi ideology or Holocaust denial, which European Union (EU) member states are required to criminalize.¹

The second development is a consequence of continuing discussion between the major social networks, lawyers, a small group of NGOs and government experts. They have been brought together by shared concerns over the malign power of the Internet. This has led recently to the former agreeing to a set of standards to reduce online harmful content. This is fuelled by the realization that social networks have social as well as financial and technological interests, and demands by European states and international agencies for more effective controls against harmful online content. The over-riding consideration by all participants in these discussions is that self-regulation by the internet industry will be more effective than imposed rules and laws.

European Agreements

Three European agreements directly and indirectly offer protection to Jewish communities. Two of them are directives that have to be transposed by EU member states

and are attached to a time-scale governing their incorporation into national legislation. States transposing them are also subject to inspection by the European Commission, with the possibility of a referral to the European Court of Justice if a state either fails to transpose the directive or if it fails to transpose it effectively.

Chronologically, the first of the three agreements, the Additional Protocol on the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems to the Council of Europe Convention on Cybercrime (2003) is not enforceable, and only ratifying states are bound by its terms.

The Additional Protocol requires signatory states to adopt criminal laws against: making available racist and xenophobic material through a computer system; threatening persons distinguished by race, color, descent, religion or national or ethnic origin through a computer system; publicly insulting persons as defined above through a computer system; denying, grossly minimizing, approving or justifying genocide or crimes against humanity, including the Holocaust.²

All Council of Europe (CoE) member states were expected to ratify the Additional Protocol by January 1, 2014, but the European Commission has since extended the timeframe to allow EU member states to ratify it by the end of 2015.³

1. Hate Crime Laws - A Practical Guide, OSCE ODIHR (2009), at 25-26, available at www.osce.org/odihr/36426?download=true (last visited Sept. 9, 2015).
2. Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through Computer systems, 2003, Council of Europe, available at conventions.coe.int/Treaty/en/Treaties/Html/189.html, (last visited Sept. 9, 2015).
3. Council conclusions on combating hate crime in the European Union, December 2013, Council of the European Union, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139949.pdf (last visited Sept. 9, 2015).

The second agreement is the European Union Council Framework Decision 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law. This has enforcement powers from January 1, 2014, and requires EU member states to legislate against: publicly inciting to violence or hatred against a group of persons defined by reference to race, color, religion, descent or national or ethnic origin; publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes; publicly condoning, denying or grossly trivializing the Holocaust.⁴

The third agreement is the Framework Directive on Victims' Rights, which reinforces existing national measures with EU-wide minimum standards on the rights and protection of victims of crime, and which requires that victims of crime are recognized and treated in a respectful, sensitive and professional manner according to their individual needs without discrimination. The preamble to the Directive notes *inter alia* that victims must be encouraged to report crimes in order to break the cycle of repeat victimization, and that a respectful, sensitive, professional and non-discriminatory response by the authorities will increase victims' confidence in criminal justice systems and reduce the number of unreported crimes. A second introductory note states that the collection of systematic and adequate statistical data is an essential component of effective policy making and that states are required to publish relevant statistics on crime victims. While these provisions do not specifically apply to hate crime, another introductory note lists protected characteristics including race, religion, ethnicity etc. The Directive entered into force on November 15, 2012 with a deadline for transposition by member states of November 16, 2015.⁵

General Principles Underlying European Law on Incitement

The authors of the European Convention on Human Rights (the Convention) sought to establish an institutional framework based on democratic values in order to overcome extremism, following the Second World War, although critics, including the UK government, are now pressing for the Convention to be updated in the light of recent history.⁶

The ECtHR was established in 1959 to consider cases initiated by organizations, states and individuals against any state that has signed the Convention. Parties must comply with its rulings although the ECtHR has no enforcement power, unlike the Luxembourg-based European Court of Justice. Over the years the ECtHR has identified a number of forms of expression that were considered offensive and contrary to the Convention including racism, xenophobia, antisemitism, aggressive

nationalism and discrimination against minorities and immigrants. However, it has been careful to make a distinction in its findings between, on the one hand, genuine and serious incitement to extremism and, on the other hand, the right of individuals (including journalists and politicians) to express their views freely and to "offend, shock or disturb" others.⁷

While there is no universally accepted definition of the expression "hate speech," the ECtHR case-law has established certain parameters making it possible to characterize "hate speech" in order to exclude it from the protection afforded to freedom of expression (Article 10 of the Convention) or freedom of assembly and association (Article 11).⁸

The ECtHR therefore excludes hate speech from protection by means of two approaches:

(a) by applying Article 17 of the Convention (prohibition of abuse of rights) where the comments in question amount to hate speech and negate the fundamental values of the Convention, or

(b) by applying the limitations provided for in the second paragraph of Article 10 and Article 11 of the Convention. This approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention.⁹

4. Council Framework Decision 2008/913/JHA, Nov. 2008, O.J. (L.328/55), available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF (last visited Sept. 9, 2015).
5. Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L.315/57), available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF (last visited Sept. 10, 2015).
6. The Case for Change, p. 3, Protecting Human Rights in the UK - the Conservatives' proposals for changing Britain's human rights laws, The Conservative Party, 2015, available at https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf
7. Hate speech, ECtHR, June 2015, available at www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (last visited Sep. 10, 2015).
8. European Convention on Human Rights, art. 10, para. 2, Nov. 1950, noting that the exercise of these freedoms (of expression) may be subject to restriction in the interests of national security, available at www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Sep. 10, 2015).
9. *Ibid.*, art. 11, para. 2, noting that restrictions on freedom of assembly may be necessary for the prevention of crime or disorder.

European Case Law on Holocaust Denial

In three separate judgments, the ECtHR has ruled that Holocaust denial is a breach of the Convention, thereby establishing the fact that, in certain cases, Holocaust denial constitutes incitement to hatred.

In the first case, the French Holocaust denier Roger Garaudy sought to overturn his conviction for denying the Holocaust that was upheld by the Court of Cassation. The ECtHR ruled that his right to free speech enshrined in Article 10 of the Convention did not outweigh his duty not to dispute the existence of crimes against humanity, contained in Article 17. They further stated that the purpose of Holocaust deniers was to rehabilitate the National Socialist regime, to accuse the victims of the Holocaust of falsifying history, and therefore constituted one of the most severe forms of racial defamation, and of incitement to hatred.¹⁰

In *Honsik v. Austria*, the European Commission on Human Rights, sitting in private as a court, dismissed the applicant's complaint under Article 10 of the Convention that his right to freedom of expression had been violated when he had published material denying the facts of the Holocaust in his periodical, *Halt*, in September and November 1986, and that they constituted National Socialist activities within the meaning of Section 3(g) of the Austrian National Socialist Prohibition Act.¹¹

In *Marais v. France*, Pierre Marais had complained that the French courts had convicted and sentenced him for defending war crimes, publishing racial insults, denying crimes against humanity and publishing racially defamatory statements for an article about the Natzweiler-Struthof death camp in the journal *Revision*. In June 1996, the Court dismissed his claim that the French court was biased against him and had no right to rely on the judgment given by the Nuremberg International Military Tribunal.¹²

Although it does not deal with antisemitism, the *Delfi AS v. Estonia* case lays down an important principle, though one that some have found contentious, namely that a publisher is liable for the material on his platform if it contains illegal content. This has important implications for the right of Jews, among others, not to be defamed or not to be the focus of incitement to hatred.¹³

The case concerned the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. In particular, the domestic courts had rejected the portal's argument that under the EU Directive 2000/31/EC on Electronic Commerce, its role as an Internet society service provider or storage host was merely technical, passive or neutral, finding that the portal exercised control over the publication of comments. Before the Court, the applicant

company complained that being held liable for comments of its readers breached its right to freedom of expression.

The ECtHR upheld the judgment of the Estonian courts regarding the liability of an Internet news portal for offensive comments posted by readers in 2013. It rejected the argument that an ISP's role was merely technical, passive or neutral, finding that it must exercise control over the publication of comments. The judgment was upheld two years later by the higher Grand Chamber, to which the earlier judgment was referred for final adjudication.

The case therefore concerned the duties and responsibilities of Internet news portals that provide on a commercial basis a platform for user-generated comments on previously published content and some users, whether identified or anonymous, engaged in clearly unlawful hate speech that infringed the rights of others. The *Delfi* case did not concern other fora on the Internet where third party comments could be disseminated, for example an Internet discussion forum, a bulletin board or a social media platform. The Grand Chamber held by a majority decision that there had been no violation of the applicant's freedom of expression and therefore no breach of Article 10 of the Convention.¹⁴

Some Cases from the European Courts

On July 11, 2008, at Leeds Crown Court in the UK, Stephen Whittle was convicted of four counts of publishing racially inflammatory material and Simon Sheppard was convicted of nine counts of publishing racially

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10. *Garaudy v. France*, 65831/01, ECtHR, press release (2003).
 11. *Honsik v. Austria*, Eur. Comm'n H. R. First Chamber (1997), ECtHR, available at [hudoc.echr.coe.int/eng?i=001-46008#{"itemid":\["001-46008"\]}](http://hudoc.echr.coe.int/eng?i=001-46008#{) (last visited Sept. 9, 2015).
 12. *Marais v. France*, Application No. 31159/96, Decision of June 24, 1996 on the admissibility of the application, ECtHR, available at [hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88275#{"itemid":\["001-88275"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88275#{) (last visited Sept. 9, 2015).
 13. *Delfi AS v. Estonia*, ECtHR, Application No. 64569/09, Decision of October 10, 2013, available at [http://hudoc.echr.coe.int/eng?i=001-126635#{"itemid":\["001-126635"\]}](http://hudoc.echr.coe.int/eng?i=001-126635#{).
 14. Press Release, the Registrar of the Court, ECtHR. Commercially run Internet news portal was liable for the offensive online comments of its readers (June 16, 2015), available at <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5110487-6300958&filename=003-5110487-6300958.pdf> (last visited September 9, 2015).

inflammatory material. They fled the UK to the U.S., where they claimed asylum, but were returned nearly one year later, having failed in their asylum claim. On July 14, 2008, Whittle was convicted of a further count of the same offense, and Sheppard of a further two counts, in their absence. On July 10, 2009, Sheppard was sentenced to four years and ten months imprisonment, and Whittle to two years and four months imprisonment.

The material, which included antisemitic, Holocaust denial, and other criminally racist content, was posted on the heretical.com website, that Sheppard managed, and was hosted in California. The Court held that as the material in question was uploaded in the UK, and that it was available to the public at large, the offense occurred in the UK, and was therefore subject to British jurisdiction and was not extra jurisdictional as the defendants had argued. The convictions were upheld by the Court of Appeal, and the Supreme Court, although Sheppard's sentence was reduced by the former.¹⁵

On June 12, 2013, the French Court of Appeal rejected Twitter's attempt to shield the identities of those responsible for antisemitic posts made in 2012 with the hashtag #unbonjuif (a good Jew), that contravened French laws on hate speech.

The Union of French Jewish Students (UEJF) and four anti-racism organizations had asked Twitter to reveal the identities of the posters and to make it easy for its users to flag messages that contravene French hate speech laws.

In March 2013, faced with Twitter's reluctance to hand over the names, UEJF filed a criminal complaint against the company. Twitter appealed the initial ruling, which the Court rejected on June 12, 2013, ordering it to pay compensation and costs.¹⁶

In November 2010, Mohammed Sandia was convicted at Edinburgh's Sheriff's Court in Scotland for posting remarks on the website of *The Scotsman* newspaper in March 2008, which included "Jews are not fit to breathe our air. They must be attacked wherever you see them: throw rocks at their ugly hooked-nosed women and mentally ill children, and light up the REAL ovens."

He pleaded guilty, but sentence was deferred for a year pending reports on his behavior. When he appeared for sentencing in December 2011, he was found guilty and admonished, but no custodial sentence was handed down.¹⁷

In April 2013, four men from various Italian cities were convicted of inciting race hatred after posting antisemitic and white supremacist messages on the Italian website of the U.S. based neo-Nazi Stormfront website. A Rome court sentenced them for promoting and directing a group whose purpose was the instigation to ethnic, religious and racial discrimination and violence. Additionally, the

Court found the men guilty of "targeting Jews and immigrants, advocating the supremacy of the white race and instigating racism and Holocaust denial."¹⁸

In June 2013, a court in Feldkirch, Austria, sentenced a neo-Nazi to eighteen months in prison for posting on Facebook pictures of Adolf Hitler, swastikas and other material banned in Austria. The defendant admitted uploading the material but stated that he was not aware that it could be seen by anyone and that he did not intend to glorify Nazism. The Court however pointed out that his computer contained other material that is illegal and that he was active on the skinhead scene.¹⁹

In July 2013, Manchester-based DM Digital, a Muslim television channel, was fined £85,000 by OFCOM, the UK broadcasting regulator, for broadcasting a program in which Abdul Qadir Jilani, an east London-based preacher, urged Muslims to kill anyone who insulted Islam.²⁰

15. *Sheppard & Whittle v. Regina*, EWCA Crim 65 (January 29, 2010), available at www.bailii.org/ew/cases/EWCA/Crim/2010/65.html (last visited Sept. 10, 2015).
16. Somini Sengupta, *Twitter yields to pressure in hate case in France*, N.Y. TIMES, July 13, 2013, available at www.nytimes.com/2013/07/13/technology/twitter-yields-to-pressure-in-hate-case-in-france.html (last visited Sept. 9, 2015).
17. Narrative for Court on November 10, 2010, *Procurator Fiscal Edinburgh v. Mohammad Sandia*, ED09013728, document in author's possession. Sandia posted the comments on March 1, 2008 and March 2, 2008, but the Scotsman web-link no longer exists; Mohammed Sandia sentenced for posting Anti-Semitic comments on the Scotsman website, Dec. 9, 2011, SCOTTISH COUNCIL OF JEWISH COMMUNITIES, available at www.scojec.org/news/2011/11xii_sandia.html (last visited Sept. 9, 2015).
18. *Four race-crime convictions for neo-Nazi website*, GAZZETTA DEL SUD, April 8, 2013, available at www.gazzettadelsud.it/news/english/41782/Four-race-crime-convictions-for-neo-Nazi-website.html (last visited Sept. 9, 2015).
19. *Austrian neo-Nazi gets jail term for Facebook posts*, THE NEW AGE, June 27, 2013, available at www.thenewage.co.za/99730-1020-53-Austrian_neoNazi_gets_jail_term_for_Facebook_posts (last visited Sept. 9, 2015).
20. David Barrett, *Muslim television channel fined after preacher of hate incited murder live on air*, THE TELEGRAPH, July 5, 2013, available at www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10162099/Muslim-television-channel-fined-after-preacher-of-hate-incited-murder-live-on-air.html (last visited Sept. 9, 2015).

In August 2014, John Curchod from Sussex England, posted messages on Twitter, including the following: “The world will exterminate you. As Hitler failed to do in entirety”; “We are waiting - got the shotguns man – ready to shoot Jews”; “Why are Jews so despicable”. The following June, he pleaded guilty to sending messages that were antisemitic and of a grossly offensive, obscene or menacing character. He was fined £1,000 and ordered to pay costs at Hastings Magistrates Court, Sussex.²¹

In February 2015, Mahmudul Choudhury, a married teacher, was fined £464 plus costs at Bromley Magistrates Court, south east London, for posting a picture of Adolf Hitler on his Facebook site with the caption “Yes man, you were right. I could have killed all the Jews, but I left some of them to let you know why I was killing them. Share this picture to tell the truth [sic] a whole world.”²²

The cases cited above indicate that prosecutions against antisemitic incitement can now take place across the EU and span offenses across the social networks and electronic media. European law has therefore caught up with the use of the Internet and is applying the law to this medium, as it does with material published offline. Moreover, service providers will no longer be able to plead that they merely act as the unknowing vehicles for spreading criminal incitement against Jews, or any other minority, and that they bear no responsibility for what appears on their platforms. As the process of transposing the EU Directives into national legislation, and as the pressure on states to prosecute hate crime and hate speech that crosses a criminal threshold gain momentum, it is likely that the number of cases will increase.

Some states have publicized their determination to prosecute harmful content that crosses the criminal threshold, and the European agreements noted above will underpin their action. In the UK, which has gone further than most states in tackling the problem, a series of warnings and amendments to legislation are facilitating the prosecution of such material. After extensive consultation with the police and civil society experts, The Crown Prosecution Service published *Guidelines on prosecuting cases involving communications sent via social media* in 2013, and the Ministry of Justice published *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations* in 2014.²³ In 2012, the Chief Crown Prosecutor issued a public warning *Resolve to use Facebook responsibly this year – or risk jail*.²⁴ In July 2014, the House of Lords Select Committee on Communications published its review of legislation available to prosecute incitement and concluded that it is generally appropriate for the prosecution of offenses committed using social media, but that some laws might be adjusted, such as investigation

periods extended to twelve months, due to the frequent need to obtain evidence from abroad, and that questions of jurisdiction and access to communications data might be resolved by an international treaty.²⁵

Working with the Social Networks to Reduce Antisemitism

In 2012, the Inter-Parliamentary Coalition for Combating Antisemitism (ICCA), an organization of parliamentarians from around the world, asked the American Anti-Defamation League (ADL) to convene a Working Group on Cyberhate. The request followed the ICCA conference held in Ottawa in 2010, at which parliamentarians *inter alia* called for the establishment of an “International Task Force of Internet specialists comprised of parliamentarians and experts to create common indicators to identify and monitor anti-Semitism and other manifestations of hate online and to develop policy recommendations for governments and international frameworks to address these problems.”

21. *Fine for Antisemitic Twits*, Coordinating Forum for Combating Anti-Semitism, July 10, 2015, available at antisemitism.org.il/article/98128/fine-antisemitic-twits (last visited Sept. 9, 2015).
22. *Teacher fined for posting pro-Hitler image on Facebook aimed at Jews*, THE TELEGRAPH, Feb. 18, 2015, available at www.telegraph.co.uk/news/uknews/crime/11419645/Teacher-fined-for-posting-pro-Hitler-image-on-Facebook-aimed-at-Jews.html (last visited Sept. 9, 2015).
23. *Guidelines on prosecuting cases involving communications sent via social media*, June 2013, CPS, available at www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/ (last visited Sept. 9, 2015); *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations*, January 2014, Ministry of Justice, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/269138/defamation-guidance.pdf (last visited Sept. 9, 2015).
24. *Resolve to use Facebook responsibly this year – or risk jail* says Chief Crown Prosecutor, CPS, January 4, 2012, available at blog.cps.gov.uk/2012/01/resolve-to-use-facebook-responsibly-this-year-or-risk-jail-says-chief-crown-prosecutor.html (last visited Sept. 9, 2015).
25. *Social media and criminal offences*, 1st Rep. of Sess. 2014-15, Select Committee on Communications, House of Lords (UK), July 29, 2015, available at www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/37.pdf (last visited Sept. 9, 2015).

The Working Group's mandate was to develop recommendations for the most effective responses to antisemitism, and other forms of bigotry, online. Its membership includes representatives from the major social networks and internet industry, civil society, academia and the legal community.

Meeting over the course of two years, the Working Group members have shared information, experiences and knowledge of the developing legal frameworks and court cases described above. Their work culminated in the publication of the Best Practices for Responding to Cyberhate, a set of best practices that both sides agreed to share.

Since then, several of the major social networks have followed up the agreement, by inviting representatives of Jewish organizations, alongside police officers, prosecutors, and representatives of anti-racist NGOs to meetings at their European headquarters to discuss ways to reduce harmful content on their platforms, while respecting the free speech ethos that govern the Internet. An example of this determination to improve their service was Twitter's unveiling of a "Safety Centre" to improve reporting of, and action against, antisemitic messages, developed in conjunction with the Community Security Trust in the UK.

Twitter, Facebook and Google have all responded to invitations to meet NGOs campaigning against cyber hate. Twitter and Facebook, for example, have sent senior representatives to meetings of the International Network against Cyber Hate (INACH). Facebook and Google sent senior representatives to the Israel Ministry of Foreign Affairs Global Forum Against Antisemitism in 2015, to explain their developing strategies. The latter two companies are also funding the Facing Facts project to develop online programs to assist civil society to monitor hate crime to criminal justice standards.

Thus slowly but determinedly, the social networks are participating in a scheme to bridge the trans-Atlantic gap between the American stance which adheres closely to the First Amendment doctrine of free speech, and that of

Europe which holds that free speech is not absolute and that those who incite hatred are to be held accountable to law.

Conclusions

Jews and Jewish communities are therefore afforded protection in law against antisemitic incitement as a consequence of European agreements, directives and cases settled before the ECtHR. The realization by the social networks that their platforms provide a vehicle for antisemitic incitement, as well as all the benefits that the Internet has brought, should also begin to strengthen that protective shield.

The Additional Protocol to the Council of Europe Cybercrime Convention requires that signatory states criminalize incitement to hatred and Holocaust denial; the Council Framework Decision has greater force, and EU Member States are now inspected to ensure that it is properly implemented, while the Framework Directive on Victims' Rights reinforces existing measures, and Member States will again be inspected on its implementation.

The interpretation of the European Convention on Human Rights by the ECtHR criminalizes Holocaust denial, and has ruled that deniers cannot claim the right of free speech, nor can they seek to rehabilitate Nazism or Nazi ideology. However, European states have sometimes been reluctant to use the tools they have been provided with, and it is therefore the task of civil society, and Jewish communities to hold them to their responsibilities. This will become ever more vital as European populations react to economic decline and migration pressures, and turn to far right populism and other forms of extremism that appear to offer short term solutions. ■

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Facebook and Holocaust Denial

Raphael Cohen-Almagor

Introduction

In this article, I take issue with Facebook's policy that allows Holocaust denial on its web pages because its directors believe that Holocaust denial is not hateful per se. I aim to show that it is hateful and that Facebook and other networking sites should reconsider their position in line with their own terms of conduct. All Internet providers and web-hosting companies whose terms of service disallow hateful messages on their servers should not host or provide forums for such hate-mongering. This is of paramount importance as Holocaust denial is prevalent in Europe, in the United States, and across Arab and Muslim parts of the world. While some countries, mainly in Europe, prohibit Holocaust denial by law, other countries have no such prohibitions. The question, however, is not only legal. It is also ethical and a matter of social responsibility for Internet service providers (ISP) and Web-Hosting Services (WHS) to decide whether or not they wish to host this kind of hate speech on their servers.

Background

January 27 has been designated by the United Nations as International Holocaust Remembrance Day. On this day, Auschwitz-Birkenau was liberated. On this day, we remember the six million Jews who were murdered by the Nazi regime.

Despite clear historical evidence, some people deny the Holocaust. The Internet has become a very handy platform for spreading those claims and for making a case for what the deniers term "revisionist history." Among the major social networking sites that allow Holocaust denial on their platform, Facebook is the most prevalent.

Facebook prohibits posting content that is hateful or threatening. Facebook disabled a group called "I Hate Muslims in Oz." Barry Schnitt explained: "We disabled the 'I Hate Muslims in Oz' group... because it contained an explicit statement of hate. Where Holocaust-denial groups have done this and been reported, we've taken the same action."¹ In May 2010, Facebook took down a page titled "Kill a Jew Day," which urged Netusers to violence "anywhere you see a Jew" between July 4 and July 22.

Facebook distinguishes between an "explicit statement of hate" and Holocaust denial. Its directors believe that

Holocaust denial is not hateful per se and does not therefore contravene the company's terms of service. The terms of service state: "You will not post content that is hateful, threatening, pornographic, or that contains nudity or graphic or gratuitous violence."²

Many of the gatekeepers of the large IT companies – Google, Facebook, Yahoo and Twitter-- are young Americans who were brought up on the values of the First Amendment.³ For them, freedom of expression is the most important principle that guides their actions. So much so that Facebook at first did not have rules on what speech violated its terms of service,⁴ and Twitter's only exception to free speech stipulates that "You may not publish or post direct, specific threats of violence against others."⁵ Consequently, hate speech is legitimate, protected speech. But the role of gatekeepers, which gives them great powers, also requires great responsibility. A balance needs to be struck between freedom of expression and social responsibility, between rowdiness and civility, between the desire to have an open wide marketplace of ideas, and ascertaining that the marketplace of ideas does not facilitate violence and lawlessness.

Holocaust Denial

What do we mean by "Holocaust denial"? Why does this form of speech constitute hate? If you ask a person on the street what he or she knows about the Holocaust, and the answer is that he or she has never heard of it, this cannot be considered as Holocaust denial. Ignorance and denying reality are not forms of hate. Even if the person

1. Chris Matyszczyk, *Facebook disables 'hate Muslims' group*, CNET, June 10, 2009, available at news.cnet.com/8301-17852_3-10262136-71.html (last visited Oct. 19, 2015).
2. See www.facebook.com/terms.php (last visited Oct. 19, 2015).
3. <http://constitution.findlaw.com/amendment1.html>
4. Jeffrey Rosen, *The Delete Squad*, NEW REPUBLIC (April 29, 2013), available at www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules (last visited Oct. 19, 2015).
5. The Twitter Rules, support.twitter.com/articles/18311-the-twitter-rules (last visited Oct. 19, 2015).

appears to know, this does not necessarily constitute a form of hate. The content of the speech and the intention of the speaker should always be taken into account.

Disputing certain historical facts is not a form of hate either, and I doubt whether it can be considered Holocaust denial. If one argues that five million, not six million, were murdered during 1938-1945, based on a study of sorts done on Jewish demography in Europe, this is an issue that can and should be discussed in the open in order to discover a possible new facet of the truth.⁶ If one brings evidence showing that an alleged massacre did not happen, or happened on a different date, or more people were killed than we know, or that an alleged war criminal was not at an alleged place at the alleged time, then these are all issues that should be probed and discussed. All this does not constitute Holocaust denial or a form of hate.

Moreover, generally speaking, people are entitled to hold and express vilifying and outrageous views, to voice their dislike of other people and to use derogatory words and discriminatory adjectives against others. While we do not enjoy such expressions, we feel it is wrong, and we feel outraged confronting such statements, some liberals believe that such speech is protected under the **free speech principle**. The way to fight against such discriminating and damaging opinions is through more speech, not by silencing or censoring. This, indeed, is the essence of tolerance.

Nevertheless, Holocaust denial constitutes a special category of speech that does not necessarily merit protection, certainly not in all places. Consideration needs to be given to the historical context and circumstances of the utterance. Holocaust denial is far from being innocent. It is a propaganda movement that seeks to deny the reality of the Holocaust, the systematic mass murder of six million Jews and millions of others deemed "inferior" by the Nazi regime. Misrepresenting their propaganda as "historical revisionism," Holocaust deniers attempt to disseminate their extremist ideas by offering unsupported arguments against the well-established historical facts of the Holocaust. Their beliefs include accusations that Jews have falsified and exaggerated the tragic events of the Holocaust in order to exploit non-Jewish guilt. Holocaust denial groups have uploaded thousands of web pages, filled with distortions and fabrications, designed to reinforce negative stereotypes.⁷ Among the most visited sites promoting Holocaust denial are the Institute for Historical Review, originally and intentionally established for this purpose,⁸ Bradley Smith and his Committee for Open Debate of the Holocaust (focusing largely on U.S. college campuses),⁹ and sites sponsored by David Irving,¹⁰ Ahmed Rami,¹¹ and Ernst Zundel.¹² All portray themselves as hubs, even paradigms, of unbiased, unorthodox, gutsy historical research.

Holocaust denial is a form of hate speech because it willfully promotes enmity against an identifiable group based on ethnicity and religion. It is designed to belittle the tragedies of the Holocaust while providing a justification for murder, genocide, xenophobia and evil. Holocaust denial assumes a form of legitimacy for racism in its most evil manifestation to date, under the guise of a pursuit of "truth." It speaks of an international Jewish conspiracy to blackmail Germany and other nations, and to exploit others in order to create Israel. It depicts a scenario in which Jews conspired to create the greatest hoax of all time. Specifically, deniers claim that Adolf Hitler did not plan genocide for the Jews but wished instead to move them out of Europe. They claim that no gas chambers ever existed as if they were an invention of the Jews to dramatize the mere "fact" that in every war there are casualties, and World War II was no different. People from many countries were killed, many of them Germans. And yes, Jews were killed. But so were people from other religions.¹³

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6. For discussion of J.S. Mill's Truth Principle and its importance in generating a tolerant atmosphere for unconventional expressions, see R. Cohen-Almagor, *Why Tolerate? Reflections on the Millian Truth Principle*, 25 *PHILOSOPHIA*, Nos. 1-4, at 131-152 (1997); Eric Barendt, *FREEDOM OF SPEECH* 8-14 (2005); R. Cohen-Almagor, *John Stuart Mill: Utilitarianism*, in *ETHICAL COMMUNICATION: MORAL STANCES IN HUMAN DIALOGUE*, 25-32 (C. G. Christians and J. C. Merrill eds., 2009).
 7. Anti-Defamation League, *Hate on the Internet* (2003), at 14.
 8. www.ihr.org/ (last visited Oct. 19, 2015).
 9. www.codoh.com/ (last visited Oct. 19, 2015).
 10. www.fpp.co.uk/ (last visited Oct. 19, 2015); www.fpp.co.uk/online/index.html (last visited Oct. 19, 2015); Andrew Walker, *Profile: David Irving*, BBC, Feb. 20, 2006, available at news.bbc.co.uk/1/hi/uk/4449948.stm (last visited Oct. 19, 2015). For further discussion, see Ruth Wodak, *Saying the unsayable: Denying the Holocaust in media debates in Austria and the UK*, 3(1) *JOURNAL OF LANGUAGE AGGRESSION AND CONFLICT* 13-40 (2015).
 11. *Jews and the Black Holocaust*, available at radioislam.org/islam/english/toread/jewslave.htm (last visited Oct. 19, 2015); Statement of the Anti-Defamation League (ADL) Before the US Senate Committee of the Judiciary, Sept, 14, 1999, available at radioislam.org/adl/net.htm (last visited Oct. 19, 2015); Ahmed Rami, *Holocaust Denial*, ADL, available at adl.org/poisoning_web/rami.asp (last visited Oct. 19, 2015).
 12. www.zundel.org/ (last visited Oct. 19, 2015).
 13. www.hdot.org/en/learning/myth-fact (last visited Oct. 19, 2015).

According to the deniers, the Holocaust is the product of partisan Jewish interests, serving Jewish greed and hunger for power. Some Jews disguised themselves as survivors, carved numbers on their arms and spread atrocious false stories about gas chambers and extermination machinery. It was not Germany that acted in a criminal way. Instead, the greatest criminals are the Jews. The Jews are so evil that they invented this horrific story to gain support around the world and to extort money from Germany. For their extortion and fabrication, for creating the greatest conspiracy of all times, they deserve punishment, possibly even death. Jews are demonic and crooked people who deserve to die for making up this unbelievable tragedy. In effect, the ultimate purpose of Holocaust denial is to legitimize another Holocaust against Jews. Accordingly, Holocaust denial can be seen as the last stage of the Holocaust and it is the inception of a second stage of a vile bigotry that undermines Jewish existence in the world.

Those who deny the Holocaust are antisemitic. It is demeaning to deny the Holocaust, for it is to deny history, reality, and suffering. Holocaust denial might create a climate of xenophobia that is detrimental to democracy. It generates hate through the rewriting of history in a vicious way that portrays Jews as the anti-Christ, as destructive forces that work against civilization. Furthermore, hateful messages desensitize members of the public on very important issues while silencing others. Hate speech builds a sense of possible acceptability of hate and resentment of the other that might be more costly than the cost of curtailing speech. And hate speech, in its various forms, is harmful not only because it offends but because it potentially silences the members of target groups and interferes with their right to equal respect and treatment. Hateful remarks might reduce the target group members to speechlessness or shock them into silence. The notion of silencing and inequality suggests great injury, emotional upset, fear and insecurity that target group members might experience. Hate might undermine the individual's self-esteem and standing in the community.¹⁴

Drawing the Line

Deciphering what constitutes hate is not always simple. In my book, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway*,¹⁵ I argue that on the one hand, statements that assert "Jews are money hungry," "gays are immoral," "Israel is an apartheid state" and calls to boycott Israel¹⁶ are all unpleasant, yet legitimate speech. On the other hand, calls that provoke violence against target groups fall under the definition of incitement; here the context is harmful speech that is

directly linked to harmful action. By "hate speech" I refer to malicious speech that is aimed at victimizing and dehumanizing the targets, who are often (but not always) vulnerable minorities. Hate speech is fuzzier than incitement and concretely more damaging than advocacy, which is speech designed to promote ideas. Hate speech creates a virulent atmosphere of "double victimization": the speakers are under attack/misunderstood/marginalized/delegitimized by powerful forces (governments, conspiratorial organizations), and the answer to their problem is to victimize the target group. Their victimization is the speakers' salvation.

In 1996, the United States accounted for 66% of the world's Internet users, while in 2015 the American market was reduced to 9.3 percent.¹⁷ Still, the American influence on the Internet is very significant. As the United States is taking the most liberal view in the world on the scope of freedom of expression, hate speech is shielded under the First Amendment. There is no basic disagreement that hate speech is vile and offensive. Most people believe it is. Still, it is a price that Americans are willing to pay to preserve and protect free speech.

Generally speaking, hate is derived from one form or another of racism, which has facilitated and caused untold amounts of human suffering. It is an evil that has acquired catastrophic proportions in all parts of the world. Notorious examples include Europe under Nazism, and since then Yugoslavia, Cambodia, South Africa and

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14. See Gordon W. Allport, *THE NATURE OF PREJUDICE* (1954); Richard Moon, *THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION*, at 127 (2000); Phyllis B. Gerstenfeld, Diana R. Grant and Chau-Pu Chiang, *Hate Online: A Content Analysis of Extremist Internet Sites*, 3(1) *ANALYSIS OF SOCIAL ISSUES AND PUBLIC POLICY* 29-44 (2003); Richard Delgado and Jean Stefancic, *UNDERSTANDING WORDS THAT WOUND* (2004); Raphael Cohen-Almagor, *Harm Principle, Offense Principle, and Hate Speech*, in Raphael Cohen-Almagor, *SPEECH, MEDIA, AND ETHICS: THE LIMITS OF FREE EXPRESSION*, at 3-23 (2005); Jessie Daniels, *CYBER RACISM: WHITE SUPREMACY ONLINE AND THE NEW ATTACK ON CIVIL RIGHTS* (2009); Abraham H. Foxman and Christopher Wolf, *VIRAL HATE* (2013).
 15. Raphael Cohen-Almagor, *CONFRONTING THE INTERNET'S DARK SIDE: MORAL AND SOCIAL RESPONSIBILITY ON THE FREE HIGHWAY* (2015).
 16. Boycott Israeli Apartheid page, available at www.facebook.com/kaiser.hafeez1?fref=ts (last visited Oct. 19, 2015).
 17. World Internet Users and 2015 Population Stats, <http://www.internetworldstats.com/stats.htm>

Rwanda. Elsewhere I have argued that in hate messages, members of the targeted group are characterized as devoid of any redeeming qualities and as innately evil. Banishment, segregation and eradication of the targeted group are proposed to save others from the harm being perpetrated by this group. By using highly inflammatory and derogatory language, expressing extreme hatred and contempt, and through comparisons to and associations with animals, vermin, excrement and other noxious substances, hate messages dehumanize the targeted groups.¹⁸

Hate messages undermine the dignity and self-worth of the targeted group members and they erode the tolerance and open mindedness that should flourish in democratic societies committed to the ideas of pluralism, justice and equality. Hate messages undermine the targets' equal status in their community, their entitlement to basic justice and to the fundamentals of their reputation. Hate speech might lead to mental and emotional distress, racial discrimination and political disenfranchisement.¹⁹ Furthermore, hate speech might lead to hate crimes. Hate should not be taken lightly. Internalizing hatred can motivate and push bigots into action. Violent speech may lead to violent action. **When a direct link can be established between hate speech and hate crime, this is where we draw the line.** Freedom of speech is of vital importance but it must be confined. Freedom of speech is not a license to inciting people to lawless action that results in loss of life. The Southern Poverty Law Centers' (SPLC) two-year study shows that nearly 100 people in the last five years have been murdered by active users on one notorious hate site, Stormfront.org.²⁰ Christopher Wolf, Chair of the Internet Task Force of the Anti-Defamation League, argues while providing pertinent reports: "The evidence is clear that hate online inspires hate crimes."²¹ ISPs and Web-Hosting Services (WHS) should be aware of the connection between speech and action.

Responsibility on the Net

The Internet plays an instrumental role in spreading hate and in translating speech into action. *Confronting the Internet's Dark Side* is the first comprehensive book on social responsibility on the Internet. The book aims to strike a balance between the free speech principle and the responsibilities of the individual, corporation, state, and the international community. This book brings a global perspective to the analysis of some of the most troubling uses of the Internet: cyberbullying, cybercrime, terrorism, child pornography, hate and bigotry. It urges net users, ISPs and liberal democracies to weigh freedom and security, finding the golden mean between unlimited license and moral responsibility. This judgment is

necessary in order to uphold the very liberal democratic values that gave rise to the Internet and that are threatened by an unbridled use of technology.²²

Cyberhate produces a "permanent disfigurement" of group members.²³ Responsible organizations should always weigh the consequences of their conduct. They should not say "I did not know." Ignorance cannot absolve them of responsibility. They should know. Society cannot treat lightly calls for the murder of persons because of their race.²⁴

18. Raphael Cohen-Almagor, *In Internet's Way*, in ETHICS AND EVIL IN THE PUBLIC SPHERE: MEDIA, UNIVERSAL VALUES & GLOBAL DEVELOPMENT 93-115 (Robert S. Fortner and Mark Fackler eds., 2010).
19. WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, at 89-93 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberly W. Crenshaw eds., 1993); Ishani Maitra and Mary Kate McGowan, *On Racist Hate Speech and the Scope of Free Speech Principle*, 23 CANADIAN J. OF LAW & JURISPRUDENCE, at 364 (2010); Jeremy Waldron, THE HARM IN HATE SPEECH (2012); Raphael Cohen-Almagor, *Is Law Appropriate to Regulate Hateful and Racist Speech: The Israeli Experience*, 27 ISRAEL STUDIES REVIEW, 41-64 (2012).
20. Heidi Beirich, Frazier Glenn Miller, Longtime Anti-Semite, Arrested in Kansas Jewish Community Center Murders, Southern Poverty Law Center, April 13, 2014; Caitlin Dickson, *Where White Supremacists Breed Online*, THE DAILY BEAST (April 17, 2014), available at www.thedailybeast.com/articles/2014/04/17/where-white-supremacists-breed-online.html?utm_medium=email&utm_source=newsletter&utm_campaign=cheatsheet_afternoon&cid=newsletter%3Bemail%3Bcheatsheet_afternoon&utm_term=Cheat%20Sheet (last visited Oct. 19, 2015).
21. Christopher Wolf, Needed: Diagnostic Tools to Gauge the Full Effect of Online Anti-Semitism and Hate, OSCE Meeting on the Relationship Between Racist, Xenophobic and Anti-Semitic Propaganda on the Internet and Hate Crimes (Paris, June 16, 2004); Discussion with Wolf, Berkeley (June 5, 2009).
22. Raphael Cohen-Almagor, *Confronting the Internet's Dark Side* (July 21, 2015), available at www.cambridgeblog.org/2015/07/confronting-the-internets-dark-side/ (last visited Oct. 19, 2015).
23. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARVARD LAW REV., at 1601-1607 (2010).
24. The International Convention on the Elimination of All Forms of Racial Discrimination Dec. 21, 1965, available at www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last visited Oct. 19, 2015).

What ISPs and web-hosting companies could certainly do is to provide a uniform channel for user complaints. Such a channel (which could be as simple as a link to the CyberTipline) could easily be placed on the complaints or customer service page of the service provider.²⁵ In France, where there is a legal requirement for ISPs to inform officials, this method could work quite efficiently. In other countries, voluntary participation is to be encouraged.

From an ethical perspective, ISPs and WHSs can and should have codes of conduct explicitly stating that they deny service to hate mongers who clearly incite violence against certain target groups. This is not a free speech issue, as we are not free to inflict harm on others. It is about taking responsibility for stopping those who abuse the Internet for their vile purposes. ISPs and web-hosting companies should strike a balance between freedom of expression on the one hand, and principles of social responsibility on the other. At the very least, responsibility requires them to adhere to their own terms of service. If their terms of service prohibit the posting of hateful and threatening content, then they should ensure that such content is not present on their servers.

This is stressed because Facebook, despite what is said above, still hosts the National Association for the Advancement of White People.²⁶ In October 2015, I conducted a simple search on Facebook: “Holocaust denial” and found among the results: “Holocaust is a Myth,” a few “Holofoax” pages, two “Holocaust denial” groups, and one “Against Holocaust Denial Laws.” In response to pleas to remove those pages, Facebook said that “We think it’s important to maintain consistency in our policies, which don’t generally prohibit people from making statements about historical events, no matter how ignorant the statement or how awful the event.”²⁷ How can this stance be reconciled with Facebook’s prohibition on posting content that is hateful or threatening is something for Facebook managers to reconcile and answer.

Anti-hate speech advocates should explain to ISP managers the nature of the contested hate, its potential harms, and why corporate responsibility means taking the content off their servers. This may lead ISPs to take proactive steps, so as to avoid entertaining hate sites on their servers.

In this context, it is noteworthy that the United States Congress passed the “Good Samaritan provision,” included in the 1996 Communication Decency Act (section 230-c-2), which protects ISPs that voluntarily take action to restrict access to problematic material:

No provider or user of an interactive computer service shall be held liable on

account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.²⁸

ISPs and web-hosting companies should develop standards for responsible and acceptable practices for internet users. ISPs’ terms of service usually grant ISPs the unilateral right and ability to block service to those who violate the terms. ISPs are reluctant to do this, as they wish to maintain business. They are for profit. However, there were instances in which ISPs denied service, commonly due to violation of copyrights. Following complaints about copyright violation, ISPs took the material off their servers.

An example of cooperation between an Internet monitoring organization and an ISP concerns the Anti-Defamation League (ADL).²⁹ Brian Marcus, who headed the ADL Internet division, explained that private companies may decide not to post messages containing hate speech because this might be bad for their business. The ADL approached a CEO of a Texas web hosting company, asking him where he would draw the line between legitimate and illegitimate speech. The CEO answered that hate is protected speech, but threats are not. Marcus indicated that one of the sites the company had hosted claimed all members of minorities should be

25. YOUTH, PORNOGRAPHY, AND THE INTERNET, at 380 (Dick Thornburgh and Herbert S. Lin eds, 2002); interview with Herb Lin, Washington DC (May 15, 2008).

26. The National Association for the Advancement of White People www.facebook.com/pages/The-National-Association-for-the-Advancement-of-White-People/102208269835141 www.facebook.com/pages/The-National-Association-for-the-Advancement-of-White-People/102208269835141 (last visited Oct. 19, 2015).

27. Miriam Grosman, Facebook firm on Holocaust denial pages, despite survivors’ letter, JTA (July 28, 2011), available at www.jta.org/news/article/2011/07/28/3088748/facebook-firm-on-holocaust-denial-pages-despite-survivors-letter (last visited Oct. 19, 2015).

28. 47 U.S.C. §230, available at www4.law.cornell.edu/uscode/47/230.html (last visited Oct. 19, 2015).

29. www.adl.org/ (last visited Oct. 19, 2015).

hanged from street lamps. The CEO was surprised. For him, this was a threat even though it is not considered a threat according to American law.³⁰ For this CEO, however, it was too much and when Marcus showed him another 150 problematic sites, the company, after deliberation, decided to close some 110-120 of them.³¹

Ethics is not only a question of dealing morally with a given world. It is also a question of shaping the world for the better. This suggests a proactive approach that perceives agents as world owners, creators, game designers, producers of moral goods and evils, providers, hosts.³² Accordingly, ISPs should be able to plan and initiate action responsibly, in anticipation of future events, in an attempt to control their course by making or preventing something from happening.

Moreover, while the Internet is a form of new media, it is still a media. It is not reasonable to prohibit certain expressions in print and allow the same objectionable expressions electronically. We cannot be neutral with regard to certain conduct that falls within the parameter of harming others as then the dangers to democracy, to our fellow citizens, to the moral basis of society, to values that we hold dear, might be too grave.

Against content neutrality, I propose adopting a promotional approach. ISPs and WHSs should adhere to basic ethical principles necessary to maintain a civilized environment, first and foremost Do No Harm. Ethics require all of us to care about the consequences of our actions and to take responsibility for them. The promotional approach holds that ISPs and WHSs should not be neutral regarding different conceptions of the good. They should safeguard the basic tenets of democracy that enable and facilitate their operations. It is within ISPs and WHSs interest to adhere to them in their daily operation.³³

Lasting social change needs a combination of solid governmental support and committed corporate action. A comprehensive look at the movement for Corporate Social Responsibility (CSR) shows that market forces often jumpstart responsibility. Consumer demand for responsibility may push companies to produce certain products and abandon others; actual (or threatened) consumer boycotts influence decision-making processes; "naming and shaming" practices by non-governmental organizations, pressure from socially responsible investors, and values held by employees and management are all influential. Yet there is no guarantee that a company will sustain its efforts past a marketing campaign if practices and standards are not enshrined in law. Corporations will only participate for the long-term in CSR if it is good for their business. While profitability may not be the only reason corporations will or should behave virtuously, it

is the most influential one. CSR is sustainable only if virtue pays off.³⁴

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30. Anna S. Andrews, *When Is a Threat 'Truly' a Threat Lacking First Amendment Protection? A Proposed True Threats Test to Safeguard Free Speech Rights in the Age of the Internet*, THE UCLA ONLINE INSTITUTE FOR CYBERSPACE LAW & POLICY (1999).
 31. Interview with Brian Marcus, former ADL Director of Internet Monitoring, Washington DC (April 16, 2008). See also Jessica Henry, *Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States*, 18(2) INFORMATION & COMMUNICATION TECHNOLOGY LAW 235-251 (June 2009).
 32. Luciano Floridi, *Ethics after the Information Revolution*, in THE CAMBRIDGE HANDBOOK OF INFORMATION AND COMPUTER ETHICS (L. Floridi ed., 2010). See also L. Floridi, THE ETHICS OF INFORMATION (2013).
 33. R. Cohen-Almagor, *Content Net Neutrality – A Critique*, in LUCIANO FLORIDI'S PHILOSOPHY OF TECHNOLOGY: CRITICAL REFLECTIONS, 151-167 (Hilmi Demir ed., 2012) and CONFRONTING THE INTERNET'S DARK SIDE: MORAL AND SOCIAL RESPONSIBILITY ON THE FREE HIGHWAY (2015). See also Ugo Pagallo, *ISPs & Rowdy Web Sites Before the Law: Should We Change Today's Safe Harbour Clauses?* 24 PHILOSOPHY & TECHNOLOGY 419-436 (2011).
 34. Ki-Hoon Lee and Dongyoung Shin, *Consumers' Responses to CSR Activities: The Linkage between Increased Awareness and Purchase Intention*, 36 PUBLIC RELATIONS REVIEW 193-195 (June 2010); David Vogel, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005); Philip Kotler and Nancy Lee, CORPORATE SOCIAL RESPONSIBILITY: DOING THE MOST GOOD FOR YOUR COMPANY AND YOUR CAUSE (2005); HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANIZATIONS (Tom Campbell and Seamus Miller eds., 2004); Stewart Lewis, Reputation and Corporate Responsibility, 7 JOURNAL OF COMM. MANAGEMENT, No. 4, 356-394 (2003).

Conclusion

Those who deny the Holocaust deny history, reality, and suffering. Holocaust denial might create a climate of xenophobia that builds a sense of possible acceptability of hate and resentment of the "other," that might be more costly than the cost of curtailing speech.³⁵ At best, they show a strong form of ignorance. At worse, they intend to express bigotry and hate.³⁶

Facebook and other web-hosting and ISPs should reconsider their position on Holocaust denial, as it often does violate their own general terms of service. Don't keep silent in the face of hate. We learned that silence is conducive to the spread of hatred and bigotry, and that incitement might lead to harmful action. There is a direct link between inciting hate speech and conducting hate crimes. Hate messages deserve our full attention. They should be condemned and delegitimized before they create ripe circumstances for murdering the targets of hate. ■

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35. Raphael Cohen-Almagor, *Holocaust Denial Is A Form of Hate Speech and id.*, *Countering Hate on the Internet – A Rejoinder*, 2 *AMSTERDAM LAW FORUM* 125-132 (2010). See also Brian Cuban, *Facebook At Odds With Obama On Holocaust Denial*, *THE CUBAN REVOLUTION*, available at www.briancuban.com/facebook-at-odds-with-obama-on-holocaust-denial/ (last visited Oct. 19, 2015); Ian Paul, *Facebook Boots Holocaust Denial Groups*, *PC WORLD* (May 12, 2009), available at www.pcworld.com/article/164765/facebook_boots_holocaust_denial_groups.html (last visited Oct. 19, 2015); Chris Matyszczyk, *Facebook: Holocaust denial repulsive and ignorant*, *CNET* (May 6, 2009), available at news.cnet.com/8301-17852_3-10234760-71.html (last visited Oct. 19, 2015).
36. Some examples are who.org/aaargh/engl/engl.html (last visited Oct. 19, 2015), www.adelaideinstitute.org/ (last visited Oct. 19, 2015), www.toben.biz/ (last visited Oct. 19, 2015), and holywar.org (last visited Oct. 19, 2015).

Children's Rights and Brit Mila

Rhona Schuz

Introduction

In October 2013, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution and recommendation on the Child's Right to Physical Integrity (the "PACE Resolution"),¹ which *inter alia* expressed concern that ritual male circumcision violated children's rights protected by the UN Convention on the Rights of the Child (CRC);² urged Member States to consider forbidding the practice on children who were not old enough to consent and recommended inclusion of the child's right to physical integrity into relevant Council of Europe standards. In an earlier article,³ I argued that this resolution illustrates some of the pitfalls of children's rights discourse and highlights the risks of self-proclaimed children's rights advocates taking a monolithic, over-simplistic approach to rights analysis. I also exposed the defects in the process of the passing of the PACE Resolution and questioned which institutions should have the authority to make value judgments concerning children's rights.

In September 2015, the PACE adopted a new resolution on the Right to Freedom of Religion,⁴ which urges States to come to "reasonable accommodations" in relation to controversial religious practices, so as to ensure effective equality in exercise of the right to freedom of religion. The resolution specifically states that States should "provide for ritual circumcision of children not to be allowed unless practiced by a person with the requisite training and skill, in appropriate medical and health conditions," in order to ensure compliance with the rights of the child. The clear implication of this statement is that ritual circumcision is not a human rights violation, provided that it is carried out by a qualified person in proper conditions.

Whilst the latest resolution of the PACE appears to put an end to the efforts of anti-circumcision activists to use the Council of Europe⁵ as a vehicle to promote their agenda, it seems likely that the argument that the practice violates the rights of the child will continue to be used in attempts to get ritual male circumcision banned in individual countries. Accordingly, this article will focus on exposing the flaws in the claims that *brit milah* (Jewish ritual circumcision)⁶ violates children's rights and explaining how the practice actually promotes various rights of the child. By way of background, I will first outline briefly the religious and medical aspects of *brit milah*.

The Religious Precept

The origin of the practice of neonatal circumcision in Judaism⁷ is in the Divine command to Abraham in the following Biblical passage:

[You shall] keep My covenant, [you] and [your] seed after [you] throughout their

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1. Resolution 1952 (2013), Children's Right to Physical Integrity, Parliamentary Assembly Council of Europe, available at assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20174&lang=EN&search=MTk1Mnx0eXBIX3N0cl9lbjpsZXNvbHV0aW9u# (last visited Nov. 11, 2015).
 2. Convention on the Rights of the Child, Nov. 20, 1989, U.N.T.S. 3, available at www.ohchr.org/Documents/ProfessionalInterest/crc.pdf (last visited Nov. 11, 2015), ratified by all States apart from the U.S., Somalia and South Sudan.
 3. Rhona Schuz, *The Dangers of Children's Rights' Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case*, 21 CARDOZO JOURNAL OF LAW AND GENDER 347 (2015).
 4. Res. 2076, Freedom of Religion and Living Together (2015), Parliamentary Assembly Council of Europe, available at assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22199&lang=en (last visited Nov. 11, 2015).
 5. The Committee of Ministers had previously expressed reservations about the resolution on the Right to Physical Integrity and decided that no further action should be taken in relation thereto, Comm. of Ministers, Children's Right to Physical Integrity, Parliamentary Assembly Recommendation 2023 (2013), CM/AS(2014)Rec2023 final (Mar. 21, 2014), available at wcd.coe.int/ViewDoc.jsp?id=2173161&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (last visited Nov. 11, 2015).
 6. The arguments presented are equally applicable to ritual male circumcision carried out by Muslims. It has been suggested that anti-circumcision initiatives in Scandinavia are connected to Muslim migration, Johanna Schiratzki, *Banning God's Law in the Name of the Holy Body – The Nordic Position on Ritual Male Circumcision*, 5 FAM. IN L. 35 (2009), at 37-40 and 47.
 7. For discussion of circumcision in Islam, see Mesut Yavuz, Turkey Demir & Burak Dogangun, *The Effect of Circumcision on the Mental Health of Children: A Review*, 23 TURK. J. OF PSYCHIATRY 1 (2012).

generations. This is My covenant, which [you] shall keep between Me and you and [your] seed after [you]: every male among you shall be circumcised. And [you] shall be circumcised in the flesh of your foreskin; and it shall be a token of a covenant [between] Me and you. And he that is eight days old shall be circumcised among you, every male throughout your generations, he that is born in the house or bought with money of any foreigner, that is not of [your] seed. He that is born in [your] house, and he that is bought with [your] money, must needs be circumcised; and My covenant shall be in your flesh for an everlasting covenant. And the uncircumcised male who is not circumcised in the flesh of his foreskin, that soul shall be cut off from his people; he [has] broken My covenant.⁸

The duplication within these verses and elsewhere in the Old Testament⁹ together with the severe implications of not being circumcised perhaps explain the cardinal importance that has been attached to this commandment by Jews¹⁰ ever since biblical times,¹¹ in Israel and in the Diaspora. Indeed, it is one of the few commandments that is widely observed by Jews who regard themselves as entirely secular.¹² Another indication of the fundamental nature and importance of this commandment is that it overrides the laws of the Sabbath and thus where the eighth day after birth¹³ falls on the Sabbath, the circumcision is performed even though cutting the skin is normally prohibited on the Sabbath.¹⁴

As seen above, the Bible does not give any reason for the commandment other than that it is a sign of the covenant between the Creator of the world and the Jewish people. Rabbinical sources, developing this idea further, state that the purpose of the circumcision is to distinguish between Jews and other nations¹⁵ and that the reproductive organ was chosen as the location of the sign of the covenant, since this is the source of the existence of the human race.¹⁶ Another explanation offered is that the Creator made man with a redundant foreskin so that he could complete the creation of his own body and this would teach him that he must also strive to perfect his soul, the prime purpose of life, according to Jewish philosophy.¹⁷

Medical Aspects of Male Circumcision

In the nineteenth century, some doctors started circumcising newborn boys for preventative-hygienic reasons¹⁸ and the practice spread in some Western, largely Anglo-American countries.¹⁹ However, the prevalence

of non-ritual circumcision decreased in the second half of the 20th century.²⁰ Over the last few decades, there has emerged a divergence of medical opinion as to the

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8. 17 *Genesis* 9-14 (trans. Soncino ed., Soncino Press, London 1964).
 9. 12 *Leviticus* 3 (repeating the commandment of circumcision of male newborns on the eighth day).
 10. Whilst lack of circumcision does not prejudice the Jewish status of a male born to a Jewish mother, it remains an essential element of conversion to the Jewish faith.
 11. 4 *Exodus* 24 (Moses himself was nearly punished with death for not circumcising his second son, Eliezer, even though he was at the time travelling to Egypt to free the Children of Israel from slavery, in accordance with the Divine command. He was saved when his wife performed the circumcision). See also Yoreh Deah, *Laws of Circumcision* 260:1 (the leading Rabbinical codex of Jewish law, the Shulhan Aruch, written by Rabbi Yosef Karo in the 16th century, stating that the commandment to circumcise one's son is greater than the other positive commandments) (Hebrew).
 12. HCJ 8533/13 *Plonit v. High Rabbinical Court and others* (Justice Naor ¶17) [June 29, 2014] (Isr.). Justice Rubinstein, *id.* ¶4 refers to the tradition that the Jewish people will be redeemed in the merit of their having kept the commandment of *brit milah*.
 13. Assuming that the child is healthy. Where the child is underweight, has jaundice or any other illness, the circumcision is delayed until he is fit. Aryeh Carmell, *MASTERPLAN: JUDAISM, ITS PROGRAM, MEANINGS, GOALS* at 232 (1991).
 14. *Id.* By way of contrast, other positive commandments, such as blowing the ram's horn on the New Year, do not override the Sabbath, and so, are not performed when the festival falls on the Sabbath. Eliyahu Kitov, *THE BOOK OF OUR HERITAGE* 41, 163 (1978).
 15. *Sefer Hachinuch (Book of Education)* (Hebrew), commandment 2.
 16. *Id.* See also Carmell, *supra* note 13, 229 (suggesting that the choice of the reproductive organ is to teach that the sexual urge should be used for Torah purposes – for founding and cementing a Jewish marriage and a Jewish family – and not purely for self-gratification).
 17. *Id.*
 18. Marie Fox & Michael Thompson, *Short Changed? The Law and Ethics of Male Circumcision*, 13 *INT'L J. CHILD. RTS.* 161, 162, 170-3 (2005) (providing a historical medical narrative).
 19. *Id.* at 162 (in continental Europe and Scandinavia, the rate of non-therapeutic male circumcision is very low).
 20. W.D. Dunsmuir & E.M. Gordon, *The History of Circumcision*, 83 *BJU INT'L* 1 (1999).

desirability of performing circumcision, other than in cases where it is medically indicated.²¹ One of the most up-to-date and authoritative reports on the subject is that published in 2012 by the American Academy of Pediatrics (AAP) following a thorough investigation of the subject by a taskforce set up for this purpose.²² They summarize their conclusions as follows:

Evaluation of current evidence indicates that the health benefits of newborn male circumcision outweigh the risks; furthermore, the benefits of newborn male circumcision justify access to this procedure for families who choose it. Specific benefits from male circumcision were identified for the prevention of urinary tract infections, acquisition of HIV, transmission of some sexually transmitted infections, and penile cancer. Male circumcision does not appear to adversely affect penile sexual function/sensitivity or sexual satisfaction . . . Significant acute complications are rare.

Similarly, an article published in 2014 in the prestigious U.S. medical journal *Mayo Clinical Proceedings*, strongly supports neonatal circumcision.²³ In particular, this paper draws attention to the fact that whilst there has been a decrease in neonatal circumcision, there has been an increase in the incidence of circumcision in the male population as a whole.²⁴ In light of the considerable medical advantages of performing the procedure at a young age, the paper calls for newborn circumcisions to be funded by healthcare schemes and argues that this is cost-effective in the long term.²⁵

Opponents of circumcision dispute the scientific validity of the findings on which these and earlier pro-circumcision medical papers are based. Discussion of the competing claims is clearly outside the scope of this article. For current purposes, it is sufficient to note that a considerable body of reputable medical opinion supports neonatal circumcision.²³

The Child's Right to Physical Integrity

The child's right to physical integrity is derived *inter alia* from the obligation imposed on State Parties by Article 19 of the CRC to take all appropriate measures to "[p]rotect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."²⁶ There is no official definition of physical integrity, which like its synonym bodily integrity, is an inherently ambiguous notion.²⁷

The claim that ritual circumcision infringes this right ignores the fact that beneficial interference with a child's body, such as medically indicated surgery, is not considered to be a violation of the child's right, or is treated as a permissible violation, because the benefit to the child's health justifies the invasion.²⁸ By analogy, procedures which are not medically necessary, but which benefit the child, should not be treated as a forbidden violation of bodily integrity,²⁹ at least where the degree of interference is proportional to the benefit.³⁰ Indeed, it seems that this is the basis upon which immunization of infants has been justified.³¹ Since there is evidence that circumcision has

21. Michael Benatar & David Benatar, *Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision*, 3 AM. J. OF BIOETHICS 35, 48 (2003).
22. American Academy of Pediatrics, *Technical Report: Male Circumcision*, 130 PEDIATRICS, e756 (2012), available at pediatrics.aappublications.org/content/pediatrics/130/3/e756.full.pdf (last visited Dec. 3, 2015).
23. Brian J. Morris, Stefan A. Bailis & Thomas E. Wiswell, *Circumcision Rates in the United States: Rising or Falling? What Effect Might the New Affirmative Pediatric Policy Statement Have?* 89 MAYO CLINIC PROC. 677, 684 (2014).
24. *Id.* at 678.
25. *Id.* at 684.
26. Comm. on the Rights of the Child, General Comment No. 13 (2011) *The Right of the Child to Freedom From All Forms of Violence*, ¶ 3(b)(c), (e)(f), U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011), available at www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (last visited Nov. 11, 2015).
27. Wim Dekkers, Cor Hoffer & Jean-Pierre Wils, *Scientific Contribution, Bodily Integrity and Male and Female Circumcision*, 8 MED. HEALTH CARE PHIL, 179, 181 (2005), at 189. For discussion of the various approaches to physical integrity, see Schuz, *supra* note 3, at 364-6.
28. *Between Prophylaxis*, *supra* note 21, at 36 (giving the example of amputation of a gangrenous leg).
29. Joseph Mazon, *The Child's Interests and the Case for the Permissibility of Male Infant Circumcision*, 39 J. MED. ETHICS 421(2013), at 422; see also *R v. Brown*, 1 A.C. 212 (1994) (supporting the analogy between surgery, such as to correct a cleft lip, and that of circumcision, and commenting *obiter dictum* that both are lawful even though they involve actual bodily harm).
30. *Between Prophylaxis*, *supra* note 21, at 36 (arguing that the moral acceptability of a procedure can only be assessed by weighing the benefits against the harm).
31. *Id.*

prophylactic medical benefits,³² it is not clear how it can be distinguished from immunization.³³ In particular, it should be noted that the degree of bodily interference involved in immunization is by no means *de minimis* and in some ways not significantly less invasive than *brit milah*.³⁴ In addition, where ritual circumcision is concerned, there are likely to be emotional and social benefits in addition to the medical ones.³⁵ In this respect, it might be noted that various aesthetic invasive procedures, which involve more risks than circumcision, are quite commonly carried out on children purely on the basis of the emotional benefit.³⁶

The relevance of different types of benefit in determining legitimacy of interference with bodily integrity is supported by the philosophical claim that it is only “within a particular moral narrative that one can determine whether specific uses of the body are to be praised, condemned, or regarded as morally neutral”³⁷ and that accordingly, “every alteration or apparent violation of the human body must be considered in its own medical, religious, and cultural context.”³⁸ In this connection, it is pertinent to point out that Judaism forbids violation of bodily integrity in general and that the only reason that circumcision is allowed is because it is a divine command.³⁹ This apparent paradox surely means that careful consideration and analysis are required before branding *brit milah* as a prohibited violation of the right to bodily integrity.

The Child's Autonomy and Participation Rights

It is claimed that circumcision of young children involves a breach of the child's autonomy, synonymously referred to as his right to self-determination, because he does not consent to the operation. This claim is based on Article 12 of the CRC, which recognizes the child's right to participate in decisions concerning him and to have due weight attached to his views in accordance with his age and degree of maturity. It is argued that the child's participatory rights require delaying the making of important decisions that have irreversible consequences until the child has the capacity to participate in the decision-making, unless such delay is likely to be prejudicial. Accordingly, the PACE Resolution on Physical Integrity and other opponents of circumcision take the view that *brit milah* should be delayed until the child is old enough to make the decision for himself.

However, the assumption that delay is not prejudicial can be refuted *inter alia* because circumcision of an older child or adult is a much more complex and risky procedure, both from a medical and psychological perspective.⁴⁰ In addition, delay means that the child is deprived of the medical and other benefits of circumcision during his childhood⁴¹ because a later decision by the child to undergo circumcision cannot bring back the years

when he was not circumcised. Moreover, he is now placed in the unenviable situation of having to contend with the unpleasant physical, emotional, and psychological implications of undergoing circumcision as an adolescent or adult. In the case of Jewish young adults, the implications of such a choice might well give rise to considerable anxiety and even cause an identity crisis. Thus, Mazor argues that since “we cannot provide the child with—even roughly—the same choice facing the parents once he attains majority,” there can be no breach of his right to self-determination.⁴²

Accordingly, the best way to give effect to the child's participatory rights in cases where delaying making a particular decision may be prejudicial, is to assess how the child would decide if he had the capacity to do so, in accordance with Rawls' concept of “substitute judgment.”⁴³ This approach in turn involves considering what is likely to be the child's view about the decision in the future.⁴⁴

32. *Between Prophylaxis*, *supra* note 21, at 35.

33. Michael J. Bates et al., *Recommendation by a Law Body to Ban Infant Male Circumcision*, 13 BMC PEDIATRICS 136, 141 (2013).

34. The vaccine, which may contain a live, albeit weak, strain of the disease itself, permeates into the blood stream and is designed to have a long lasting effect. Moreover, relatively minor adverse reactions to vaccinations are common and they carry a small risk of serious disability and even death.

35. This seems to be the basis of the holding of the English court in *Re J* [1992] 4 All ER 614 that a decision by both parents to ritually circumcise their child is lawful.

36. These include cosmetic orthodontic surgery, correction of a simple harelip and administration of human growth hormone to short children. See Allan J. Jacobs, *The Ethics of Circumcision of Male Infants*, 15 ISR. MED. ASS'N J. 60, 63 (2013).

37. Dekkers, Hoffer & Wils, *supra* note 27, at 179.

38. *Id.*

39. Indeed, the removal of the foreskin is seen as perfecting the body and not detracting from its integrity, *supra* at text accompanying note 17.

40. Morris et al., *supra* note 23, at 683; see also Jacobs, *supra* note 36, at 63 (“Adult circumcision simply is not a reasonable substitute for infant circumcision.”).

41. *Between Prophylaxis*, *supra* note 21, at 37; see Morris et al., *supra* note 23.

42. Mazor, *supra* note 29, at 422-25

43. John Rawls, A THEORY OF JUSTICE 208 (revised ed. 1999).

44. Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 28 (Rolf Sartorius ed., 1984) (referring to this approach as “future-oriented consent”).

In the current context, the question to be determined is whether when the child reaches adolescence or adulthood, he will wish that he had been circumcised as an infant or not.⁴⁵ Both logic and the limited available evidence⁴⁶ suggest that the vast majority of Jewish males would, in fact, wish to have been circumcised as children.⁴⁷ Accordingly, if we take the view that the purpose of the child's right to self-determinism is to bring him "to the threshold of adulthood with the maximum opportunities to form and pursue life-goals that reflect as closely as possible an autonomous choice,"⁴⁸ we might conclude that not circumcising a Jewish child is, in fact, a breach of that child's autonomy.⁴⁹

The Child's Right to Freedom of Religion and Culture

Article 14 of the CRC requires State Parties to "respect the right of the child to freedom of thought, conscience and religion" and to "respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of child."⁵⁰ The latter provision clearly recognizes that a child's freedom of religion is dependent upon allowing his parents to teach and guide him in religious practice. It is important to emphasize that this provision is protecting the child's rights, and not only that of the parents. Article 14(3) strengthens the requirement to respect the child's right to freedom of religion by providing that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."⁵¹ Moreover, Article 30 provides specific protection for a child belonging to an ethnic or religious minority, who should "not be denied the right . . . to enjoy his or her own culture and, to profess and practice his or her own religion . . ."⁵²

It is abundantly clear that forbidding *brit milah* violates the child's freedom of religion and denies him the right to practice his own religion and enjoy his own culture. In particular, within Judaism, whilst the parent has the responsibility for circumcising his son, the *brit milah* has religious significance for the child as denoting the relationship between him and his Creator and a spiritual sanction is imposed on non-circumcised males.⁵³ Accordingly, the parent's act in arranging for the circumcision to be performed clearly comes within the meaning of providing direction to the child in the exercise of his religion in Article 14(2).⁵⁴

The Child's Right to Identity

Under Article 8 of the CRC, States undertake to respect the right of the child to preserve his or her identity. Ya'ir Ronen maintains that protection of identity "necessitates exploration of culture as a context of personal meaning

and is founded on empathic understanding of an individual child's experience."⁵⁵ It seems clear that identity must include religion, as well as culture, at least in so far as these have any meaning to the child. Bearing in mind that circumcision has historically been and still is treated as a primordial sign of identification and of belonging to a religious group for both Jews⁵⁶ and Muslims,⁵⁷ any

45. Michael D.A. Freeman, *A Child's Right to Circumcision*, 83 *BJU INTERNATIONAL*, Suppl. 1, at 74, 76 (1999).

46. James Badger, *Consent to Circumcision Survey* (2014), available at www.circlist.com/surveys/badger-03.html (last visited Nov. 11, 2015) (a large general survey published on the internet, in which most of the men questioned did not express regret about being circumcised and indicated that they had or would circumcise their sons. There is no breakdown of the reasons for circumcision but clearly many were not ritual because in 32% of cases the doctor had made the decision to circumcise and in 26% of cases the interviewee did not know who had made the decision).

47. Freeman, *supra* note 45, at 76; Mazor, *supra* note 29, at 426 claiming that most Jewish males would choose to be circumcised as adults, if they had not been circumcised as infants.

48. John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 *INT'L J.L. & FAM.* 42, 53 (1994).

49. Circumcision does not prejudice the child's right to an 'open future' in the sense used by Joel Feinberg (Joel Feinberg, *FREEDOM AND FULFILLMENT* 76-97 (1992)). Whilst there is always a chance that the child will later abandon his religion, he may still be satisfied with the medical benefits of the circumcision. In any event, the circumcision does not restrict the child's future religious freedom, as it does not in any way require him to practice his religion or preclude him from joining another religion.

50. CRC 1989, *supra* note 2, art. 14(1)-(2).

51. *Id.* art. 14(3).

52. CRC 1989, *supra* note 2, art. 30; *id.*

53. Accordingly, the comment in the PACE Explanatory Memorandum, *supra* note 1, at para. 21, that a naming ceremony can be an alternative to circumcision displays complete ignorance of the religious imperative of *brit milah*.

54. Simon Baum, *Religious Circumcision: Free from Interference?* 1999 *UCL JURISPRUDENCE REV.* 1, 18 (1999).

55. Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 *INT'L J. L. POLY & FAM.* 147, 148 (2004).

56. *Sefer Hachinuch*, *supra* note 15 (stating that one of the purposes of circumcision is to distinguish between Jews and other nations).

57. *Effect of Circumcision on ... Children*, *supra* note 7, at 6 (describing circumcision as a sign of social belonging in Turkey).

attempt to outlaw the practice of circumcision of children cannot be consistent with respecting the right of the child to preserve his identity.⁵⁸ Indeed, a decision of the Finnish Supreme Court that ritual male circumcision is lawful relied *inter alia* on the benefits to the child in developing his identity and his attachment to his social and religious community.⁵⁹

The Child's Right to Highest Attainable Standard of Health

Article 24 of the CRC provides that States “recognize the right of the child to the enjoyment of the highest attainable standard of health” and Article 24(2)(f) mandates States to develop preventative health care services.⁶⁰ The child’s right to health has been defined as “the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each child’s full potential.”⁶¹

On the basis of the medical evidence of the prophylactic effects of male circumcision, it can be argued that outlawing the practice prevents children from enjoying the highest standard of health. Not only does such a ban increase the risk that children will suffer from certain illnesses, but it may also have a negative effect on emotional and social welfare of those children who belong to communities in which circumcision is a religious imperative and/or has great social significance. Accordingly, even though, in light of the lack of consensus in relation to the medical benefits of circumcision, there would not seem to be any obligation upon States to make circumcision available to all children, any attempt to prevent those parents who wish to circumcise their children from doing so can be seen as a violation of children’s right to health.

The Best Interests of the Child

Article 3(1) of the CRC provides that “[in] all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁶² In addition, the ‘best interests of the child’ standard is to serve as a principle of interpretation in cases where the scope of the rights in the Convention is not clear or there are conflicts between different rights.⁶³ Thus, for example, assuming that *brit milah* were considered a breach of the child’s right to physical integrity, the conflict between that right and other rights of the child, which are promoted by *brit milah*, should be resolved by the best interests principle.

However, there are formidable difficulties in applying the best interests standard to the issue of ritual male circumcision at the collective level,⁶⁴ since the circumstances of Jewish and Muslim children cannot possibly be compared to those of other children.⁶⁵ Indeed, the claim that

circumcision is not in the best interests of these children⁶⁶ seems untenable in light of the evidence that this is what most such children would want⁶⁷ together with the medical, social and emotional benefits thereof. Furthermore, it should be remembered that under Article 3 of the CRC, the best interests of the child is not the sole or even the principal consideration in decisions concerning children, as long as it is one of the main considerations and that therefore it is permissible to take into account interests of the parents.⁶⁸ Outlawing *brit milah* would be a serious violation not only of the parents’ freedom of religion, but also of their parental autonomy,⁶⁹ an interest that also protects the child.⁷⁰

58. Freeman, *supra* note 45, at 74.

59. Heli Askola, *Cut-Off Point? Regulating Male Circumcision in Finland*, 25 INT J L. POLY & FAM. 100 at 108 (2011).

60. CRC 1989, *supra* note 2, at art. 24(2)(f).

61. Comm. on the Rights of the Child, General Comment No. 15 (2013) Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), ¶ 1, U.N. Doc CRC/C/GC/15 (Apr. 17, 2013), available at tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=RC%2fC%2fGC%2f15&Lang=en (last visited Nov. 11, 2015).

62. CRC 1989, *supra* note 2, at art. 3(1).

63. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, Para. 1), ¶¶ 1, 9, U.N. Doc. CRC/C/GC/14 (May 29, 2013), ¶ 33 available at www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (last visited Nov. 11, 2015); although this may lead to circular reasoning since the Children’s Rights Committee enjoins us to bear in mind the child’s rights when assessing his best interests; see Schuz, *supra* note 3, at 377-78.

64. As opposed to the case of a dispute between the parents, when the court can consider the impact of circumcision on the particular child, as in the two English mixed-faith cases, *In Re J* [1992] 2 FCR 34; *Re S* [2004] EWHC 1282.

65. Mazor, *supra* note 29, at 422-27.

66. Made by the Cologne court Landgericht Köln [LG] [Regional Court of Cologne] May 7, 2012, No. 151 Ns 169/11 at 2 (Ger.) and by Resolution 1952, *supra* note 1, ¶7.4.

67. See *supra* notes 46 and 47 and accompanying text.

68. General Comment No. 14, *supra* note 63, ¶ 39

69. Adrian Viens, *Value Judgment, Harm and Religious Liberty*, 31 J. OF J. MED. ETHICS 241, 245 (2004), at 246 (concluding that parental interests must be protected because it has not been proven that male circumcision is harmful).

70. *Inter alia* by limiting external interference which might destabilize the family unit. See e.g. Joseph Goldstein, Anna Freud & Albert Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979).

Summary

The conclusion reached by the PACE Resolution on the Right to Physical Integrity⁷¹ and other anti-circumcision activists that *brit milah* is a violation of a child's rights is based on a misconceived and selective approach to the doctrine of children's rights, which results in misrepresentation of the true interests of children. The claim of violation of physical integrity ignores the benefits to the child of *brit milah* and the claim of breach of autonomy fails to take into account that most Jewish boys would, as adults, wish to have been circumcised. Similarly, the opponents of ritual circumcision seem to forget that children's rights are relative and that *brit milah* is likely to promote various rights of the child, including the child's right to identity, to freedom of religion and to the highest attainable standard of health care.

Moreover, the anti-circumcision lobby ignores the CRC's fundamental message about the centrality of children and their perspectives in matters affecting them, which requires that matters affecting a child must be viewed through the child's eyes. The claim that *brit milah* violates children's rights illustrates the dangers of viewing issues concerning children from a particular adult stance, without considering the future implications from the perspective of the children in question. Defining and interpreting children's rights in a way that imposes restrictions on children that they would not, as adults, wish to have had imposed upon them is to lose sight of the original rationale of treating children as independent rights holders. Thus,

there is no need to protect children from an action which does not cause them real harm, to which both their parents consent, and of which they are likely to approve when they grow up. Indeed, such paternalistic protection is in itself a breach of their rights, especially where it results in prejudice to the child in later life, as would a ban on *brit milah*.⁷²

Finally, it should be remembered that the CRC, like all legislative instruments, should be interpreted in light of the intentions of those who framed and adopted the instrument. If the CRC had intended to outlaw ritual male circumcision,⁷³ it is inconceivable that Israel and the many Muslim countries in the world would have signed and ratified it. ■

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71. *Supra* note 1.

72. *See supra* notes 40 and 41 and accompanying text.

73. Art. 24(3) of the CRC, which requires State Parties to "take all effective and appropriate measures with a view to abolishing traditional practices," was directed against Female Genital Mutilation and does not refer to religious practices; Baum, *supra* note 54 and Freeman, *supra* note 45, at 76.

The Legality of the International Coalition against ISIS: The Fluidity of International Law*

Myriam Feinberg

Introduction

The international coalition against the Islamic State (ISIS)¹ has raised a number of legal questions: the complex and rapidly evolving situation has scholars and politicians discussing issues such as the use of force, self-defense, and humanitarian intervention. Moreover, it overlaps with the civil war in Syria and the various attempts to bring it to an end. The severity of the conflict in Syria has prompted UN Secretary General Ban Ki Moon to call for a referral of the situation to the International Criminal Court (ICC).² Finally, the growing number of refugees fleeing the atrocities in Syria is forcing the international community to address the consequences of the situation on their own territories.

This article focuses on the legal arguments presented by states to support their airstrikes against ISIS in Iraq and Syria under international law and analyzes the consequences on international law.

On August 15, 2014, in response to the rise of ISIS, the UN Security Council adopted Resolution 2170 requesting member states take "all measures as may be necessary and appropriate ... to counter incitement of terrorist acts ... perpetrated by individuals or entities associated with ISIL."³ These measures led to the inclusion of ISIS on the list of terrorist sanctions created by the UN⁴ and the adoption of Resolution 2178, which requires states to criminalize the movement of foreign terrorist fighters associated with ISIS.⁵ More controversial are the airstrikes that are conducted against ISIS, both in Iraq and more recently, in Syria.

The first section of this article compares the legal basis for the airstrikes in Iraq and Syria, as the consensus is much stronger for Iraq and the legality more controversial for Syria. I then make two analytical points: the first is that, especially regarding Syria, the legality of airstrikes rests on a number of justifications, which alone are legally unconvincing, but which combined are considered sufficient. The second is that the variety of legal justifications creates confusion over legal categories. I note that this confusion reflects the general trend in international law⁶ that views the merging of various legal areas in order to address developing and changing threats in a flexible way, but which can lead to abuses of this flexibility.

Iraq and Syria: A Fragile Legality

The background for discussions on the legal basis for airstrikes is the general prohibition on the use of force in international law. The UN Charter includes two exceptions to this prohibition: forcible enforcement measures within

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1. The United States, the UN and a number of other states use the ISIL acronym (Islamic State of Iraq and the Levant), but the group is also known as the Islamic State in Iraq and Syria (ISIS), or Daesh, which are the initials in Arabic. This article will use the ISIS acronym.
2. See UN Chief urges Syria referral to International Criminal Court at opening of global meeting, FOX NEWS, Sept. 28, 2015, available at www.foxnews.com/world/2015/09/28/un-chief-urges-syria-referral-to-international-criminal-court-at-opening-global/ (last visited Nov. 16, 2015). For an analysis of the possibility to try ISIS before the ICC, see Anna M. Brennan, Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles, ASIL, Sept. 17, 2015, available at www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles#_ednref3 (last visited Nov. 16, 2015).
3. S.C. Res. 2170 (2014) [on threats to international peace and security caused by terrorist acts by Al-Qaida], U.N. Doc. S/RES/2170 (2014), §6, (Aug. 15, 2014), available at www.refworld.org/docid/53f729b84.html (last visited Nov. 16, 2015).
4. The latest addition to the sanctions list includes four British nationals, added to the UN list at the request of the UK: Maya Lester, UN sanctions 4 British nationals fighting with ISIL, Sept. 29, 2015, available at europeansanctions.com/2015/09/29/un-sanctions-4-british-nationals-fighting-with-isis-2/ (last visited Nov. 16, 2015).

the framework of the UN's collective security system (i.e. the Security Council) and the right of self-defense against armed attacks.⁷ These exceptions give the right to one or several states to use military force abroad, under a number of conditions.

The Security Council used its powers under Chapter VII of the Charter to address the threat of foreign terrorist fighters who are linked to ISIS through the adoption of Resolutions 2178 and 2199.⁸ But it did not authorize the use of military force against ISIS. In fact, the Security Council has never explicitly authorized military action against terrorism.⁹ Even the latest resolution adopted after the November 2015 attacks in Paris does not explicitly authorize military force against terrorist groups.¹⁰

The second exception is self-defense, included in Article 51 of the UN Charter, which stipulates a number of conditions for its application. This exception is now considered by some states to apply also to attacks by non-state actors in the context of counterterrorism,¹¹ although there are still controversies over the scope of its application.¹²

Humanitarian intervention (and the related concept of responsibility to protect) is another exception to the prohibition on the use of force, developed more recently, but does not have the same legal status because it is not expressly contained in the UN Charter.¹³ In June 2015, Ben Emmerson, the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism, stated that the situation in Syria had reached the threshold of genocide and that the Security Council should therefore authorize military action and/or refer the situation to the International Criminal Court.¹⁴ Despite Emmerson's position, however, there is no agreement so far on the duty of the international community to intervene militarily against ISIS for humanitarian purposes. In fact, the international coalition does not offer this particular justification as a basis for airstrikes,¹⁵ although many states provide humanitarian aid, both in Iraq and Syria.¹⁶

The airstrikes against ISIS in Iraq and Syria lead to questioning these legal categories and their boundaries, although the legal basis for Iraq is less controversial.

In June 2014, Iraq formally asked the U.S. to assist against ISIS and Sunni allies in its territory.¹⁷ In August 2014, the U.S. started to conduct military airstrikes, that were followed by airstrikes from other states, forming an international coalition, which includes, among others, the UK, France, Canada, Australia, Holland and Jordan. Some of these states formally approved these airstrikes in their Parliament.¹⁸

The key legal concept in the context of Iraq is consent or request. Article 20 of the International Law Commission's Articles on State Responsibility provides that "valid consent by a State to the commission of a given

act by another State precludes the wrongfulness of that act."¹⁹ According to some scholars, including Mark Weller, the existence of consent or request for intervention from

5. S.C. Res. 2178 (2014) [on threats to international peace and security caused by foreign terrorist fighters], U.N. Doc. S/RES/2178 (2014), (Sept. 24, 2014), available at www.refworld.org/docid/542a8ed74.html (last visited Nov. 16, 2015).
6. U.N. Charter art. 2(4) states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
7. U.N. Charter art. 41, 42 and 51.
8. S.C. Res. 2178, *supra* note 5, and S.C. Res. 2199 (2015) [on threats to international peace and security caused by terrorist acts by Al-Qaida], U.N. Doc. S/RES/2199 (2015), (Feb. 12, 2015), available at www.refworld.org/docid/54ef1f704.html (last visited Nov. 16, 2015).
9. Geoffrey S. Corn et al., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 23 (2nd ed. 2015).
10. Dapo Akande and Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: Talk, Nov. 21, 2015, available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ (last visited Dec. 3, 2015).
11. Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors*, 106 AM. J. INT'L L. 769 (2012).
12. Stephen R. Ratner, *Self-Defense Against Terrorists: The Meaning of Armed Attack in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES*, 334-55 (N. Schrijver & L. van den Herik eds., 2013).
13. For a recent analysis of the practical implications of the concept of humanitarian intervention, see Thomas G. Weiss, *HUMANITARIAN INTERVENTION* (2nd ed. 2012).
14. "Security Council has 'obligation to act now' to protect civilians from ISIL – UN rights expert," UN News Center, June 22, 2015, available at www.un.org/apps/news/story.asp?NewsId=51217#.Vh3urqTJfi6 (last visited Nov. 16, 2015).
15. Milena Sterio, *The legality of ISIS air strikes under international law*, INTLAWGRRLS, Sept. 12, 2014, available at ilg2.org/2014/09/12/the-legality-of-isis-air-strikes-under-international-law/ (last visited Nov. 16, 2015).
16. For a summary of the humanitarian aid provided in Iraq and Syria, see Justine Drennan, *Who has contributed what in the coalition against the Islamic State?*, FOREIGN POLICY, Nov. 12, 2014, available at foreignpolicy.com/2014/11/12/who-has-contributed-what-in-the-coalition-against-the-islamic-state/ (last visited Nov. 16, 2015).

Iraq, therefore gives the sufficient legality to international strikes.²⁰ On the other hand, some scholars do not consider that consent is enough to constitute an exception to the prohibition on the use of force. In particular, they state that other sources of international law, such as human rights law, might make the actions illegal, even if there is consent.²¹

Mark Weller qualifies his argument supporting strikes in Iraq by stating that "a government is deprived of the entitlement to call in foreign military support where it has lost control over significant parts of territory and population due to a major public uprising against it."²² This is relevant, as Russia is currently conducting airstrikes in Syria, stating it is doing so at the request of President Assad²³ yet, there are debates about the status of the Syrian government and its legitimacy.²⁴

In practice, in the case of Iraq, there seems to be a general consensus that the international coalition is acting under request of the government of Iraq and, at least compared to Syria, there was, in practice, little debate over the legality of airstrikes in Iraq.²⁵

The legal basis for airstrikes in Syria is far more complex and experts warn that there is no satisfactory legal basis,²⁶ although the situation is constantly changing, thereby also raising different legal justifications. In September 2014, the U.S., along with Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates, began airstrikes against ISIS targets in Syria. This was followed by Canada in April 2015. Information was then published that the UK government had conducted airstrikes in Syria, despite a lack of authorization from Parliament when it had discussed the intervention in Iraq.²⁷ Moreover, the UK admitted that it had killed, by drone strikes, three Britons in Syria in August and September.²⁸ In July 2015, Turkey started carrying out airstrikes against ISIS on its border with Syria, after deadly terrorist attacks reached into Turkey's Kilis province.²⁹ France began conducting airstrikes in September 2015 as part of the international coalition led by the U.S.³⁰ Finally, Russia started its own airstrikes in Syria, although there are discussions about whether they aim to target ISIS or anti-Assad rebels.³¹ A new wave of parliamentary-authorized airstrikes (France, the UK and Germany) started in November 2015, following terrorist attacks in Paris.

There was no express or public request by the Syrian government for an international coalition of airstrikes against ISIS. The exception is Russia, which stated that its airstrikes are conducted at the request of President Assad and which has authorization from its Parliament.³² Some have argued that Syria has implied its consent for airstrikes³³ and a Syrian government spokesperson has reportedly stated, "we are facing one enemy. We should cooperate."³⁴ Syria has not interfered with the various airstrikes, possibly because strikes against ISIS could

benefit the government. Nevertheless, justifying the operations on the basis of implied consent is not widely supported by the international coalition, because it would amount to recognition of the Syrian government. The U.S. stated they are "not looking for the approval of the Syrian regime."³⁵

Instead, U.S. Ambassador Samantha Power's letter to UN Secretary-General Ban Ki-moon first stated that the U.S. airstrikes in Syria were consistent with the UN Charter

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17. Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addresses to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014) available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf (last visited Nov. 16, 2015).
 18. On Sept. 26, 2014, the House of Commons voted 524 to 43 to support military action against ISIS in Iraq, UK parliament approves air strikes against Isis in Iraq - as it happened, *THE GUARDIAN*, Sept. 27, 2014, available at www.theguardian.com/politics/blog/live/2014/sep/26/mps-debate-and-vote-on-air-strikes-against-islamic-state-politics-live-blog (last visited Nov. 16, 2015); in January 2015, the French Parliament authorized the continued strikes against Iraq (in French) Prolongation de l'intervention militaire en Irak: débat à la tribune du Sénat et vote le 13 janvier 2015, available at www.senat.fr/espace_presse/actualites/201409/intervention_militaire_en_irak_le_senat_debat.html (last visited Nov. 16, 2015).
 19. Report of the International Law Commission to the General Assembly, U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 chp.IV.E.1(2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts, available at www.refworld.org/docid/3ddb8f804.html (last visited Nov. 16, 2015).
 20. Marc Weller, *Islamic State crisis: What force does international law allow?*, BBC News, Sept. 25, 2014, available at www.bbc.com/news/world-middle-east-29283286 (last visited Nov. 16, 2015).
 21. Deborah Pearlstein, *Bombing Iraq Doesn't Just Pose Serious Questions of Domestic Law, International Law May Be a Problem, Too*, *OPINIO JURIS*, June 18, 2014, available at opiniojuris.org/2014/06/18/bombing-iraq-doesnt-just-pose-serious-questions-domestic-law-international-law-may-be-a-problem/ (last visited Nov. 16, 2015).
 22. *Supra* note 20.
 23. Russia carries out first air strikes in Syria, *ALJAZEERA*, Sept. 30, 2015, available at www.aljazeera.com/news/2015/09/russian-carries-air-strikes-syria-150930133155190.html (last visited Nov. 16, 2015).

because, Syria had proven "unwilling or unable to prevent the use of its territory" for attacks by ISIS against Iraq, and therefore U.S. actions in Syria were justified because of a link to Iraq.³⁶ Both the U.S. and the UK therefore use the argument of collective self-defense for Iraq, based on the "unwilling and unable" principle.³⁷ However, there does not seem to be a clear consensus on the "unwilling and unable" doctrine, at least in international law.³⁸ In its official letter to the UN, France did not mention the "unwilling and unable" test.³⁹

The U.S., which also claimed individual self-defense as a justification, has used the pre-emptive self-defense argument, developed after 9/11, as well as the War on Terror paradigm: it argues that ISIS is a terrorist group affiliated with Al-Qaeda, and that this gives authority to the U.S. government to address the threat through military force, even preemptively.⁴⁰ In practice, these arguments raise a number of issues on the domestic legal basis for the U.S. airstrikes⁴¹ and whether the coalition is engaged in an armed conflict with ISIS,⁴² leading to a confusion of legal justifications. Moreover, preemptive self-defense is still controversial under international law.⁴³ When justifying the state's killing of British citizens under self-defense, David Cameron stated that "there was clear evidence of the individuals in question planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies."⁴⁴ But the targeted killings were widely criticized.⁴⁵

The terrorist attacks against a Russian plane over Sinai, the attacks in Lebanon and the attacks in Paris, all in November 2015, will lend considerable basis for the self-defense argument. They have certainly led to political discussions of a wider coalition against ISIS,⁴⁶ as well as to a new Security Council resolution⁴⁷ and new states conducting airstrikes.

Yet, whether it is collective or individual self-defense or the "unwilling/unable" test, the self-defense argument is not widely accepted,⁴⁸ and in particular, the necessary threshold for armed attacks is questioned.⁴⁹ In any case, there are other conditions for acting in self-defense,⁵⁰ such as necessity and proportionality, which are questioned in this particular case⁵¹ and need to be further assessed.

Therefore, the legal basis for airstrikes in Syria is more complex and controversial than in Iraq. The evolving situation on the ground further contributes to a confusing legal landscape. The two different situations in Iraq and Syria, and the lack of clear legal basis, illustrate the fluidity of international law, creating confusion over legal categories.

The Confusion of Legal Categories and the Fluidity of International Law

– A Blessing or a Curse?

The legal discussion about the international coalition

against ISIS reflects a more general trend in international law where the boundaries of legal categories are increasingly being challenged and it is increasingly difficult for states to justify the legality of their actions.⁵² As a result, they will tend to offer a number of justifications for their actions. An analysis of the French military intervention in Mali notes this trend, as it points out that France advanced three different legal arguments as basis for their actions and experts asked what the need was for

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24. As early as 2011, former President Clinton stated that Assad had lost legitimacy to rule; *see* Clinton: Syria's Assad has lost legitimacy to rule, NBC News, July 11, 2011, available at www.nbcnews.com/id/43711672/ns/world_news-mideast_n_africa/t/clinton-syrias-assad-has-lost-legitimacy-rule/#.ViT0xaTJfi4 (last visited Nov. 16, 2015). Marc Weller further discusses the issue of 'authority to represent' both in Iraq and Syria, in Marc Weller, *Striking ISIL: Aspects of the Law on the Use of Force*, 19 ASIL March 11, 2015, available at www.asil.org/insights/volume/19/issue/5/striking-isil-aspects-law-use-force (last visited Nov. 16, 2015).
 25. Dapo Akande & Zachary Vermeer, The airstrikes against Islamic State in Iraq and the alleged prohibition on military assistance to governments in civil wars, EJIL: Talk, Feb. 2, 2015, available at www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/ (last visited Nov. 16, 2015).
 26. Islamic State: Legal justification for air strikes on Syria not even 'wafer-thin', says expert, INDEPENDENT, Sept. 14, 2014, available at www.independent.co.uk/news/uk/politics/islamic-state-legal-justification-for-air-strikes-on-syria-not-even-wafer-thin-says-expert-9731645.html (last visited Nov. 16, 2015) and (in French) *Légalité internationale d'une intervention militaire contre l'État islamique en Syrie*, Sept. 17, 2014, available at dommagescivils.wordpress.com/2014/09/17/legalite-internationale-dune-intervention-militaire-contre-letat-islamique-en-syrie/ (last visited Nov. 16, 2015).
 27. David Cameron knew UK pilots were bombing ISIS in Syria, THE GUARDIAN, July 17, 2015, available at www.theguardian.com/politics/2015/jul/17/david-cameron-knew-uk-pilots-were-bombing-isis-in-syria (last visited Dec. 3, 2015).
 28. Drone killing of British citizens in Syria marks major departure for UK, THE GUARDIAN, Sept. 7, 2015, available at www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron (last visited Nov. 16, 2015).

this multiplication:

A devil's advocate might even go as far as to think that if France has been invoking all these different legal arguments that may be down to a concern that none of them is capable by itself of providing sufficient justification for the intervention – but that the combination of all three might!⁵³

It is interesting to note that many states decided to send letters to the UN in order to justify their actions, thereby fulfilling the requirements for notification under Article 51 of the Charter. This is a welcome move, "as compliance with international law is in the interest of long-term peace and security ... and on the rule of law."⁵⁴ But political announcements and justifications do not amount to legality. Yet, in practice, challenges and criticism have mainly come from scholars and experts, or through government statements: in practice, "the rare States who expressed their opposition to this intervention did not challenge its legality."⁵⁵ In fact, despite criticism addressed against airstrikes in Iraq and Syria, there are yet to be actual challenges against specific states, such as through case law before courts, or demands for UN sanctions. Benvenisti notes that "put bluntly, absent Security Council condemnations, forceful action will not be deemed illegal."⁵⁶ On the other hand, Resolution 2249, while it "might confer a degree of legitimacy on actions against" ISIS, does not provide a legal basis for the use of force against the group,⁵⁷ even though states are using it as a justification for the airstrikes.⁵⁸

States may be trying to avoid setting precedents by legally challenging other states, in case they need to use a similar legal argument in the future. It is therefore interesting to see Russia stating that the coalition violates international law⁵⁹ while the international coalition disputes the legality of Russian strikes; and finally that Russia and other states are now discussing agreements on airstrikes against ISIS, while still disagreeing on the role of Assad.⁶⁰

The complexity of the situation on the ground, the various domestic interests,⁶¹ and the lack of legal clarity of the response are symptomatic of the increasing confusion over legal categories, which seems to define international law today.⁶²

The international coalition against ISIS raises similar questions. This is due, in part, to the difficult geo-political scene. But there is also a confusion of various discourses, which is reflected in the lack of clear legal basis for the interventions. There are two reasons for acting against ISIS which have an impact on the nature of the reaction

to it: one is because it brings to an area of the globe horrors that seem to be expanding and that could potentially form the legal basis for humanitarian intervention and the responsibility to protect. The humanitarian aid represents a response to this concern, but it has not led to a military response in Syria. The other reason for acting against ISIS

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29. Turkey carries out first ever strikes against ISIS in Syria, THE GUARDIAN, July 24, 2015, available at www.theguardian.com/world/2015/jul/24/turkish-jets-carry-out-strikes-against-isis-in-syria-reports (last visited Nov. 16, 2015).
 30. Frappes aériennes française en Syrie, Official statement by the Elysée (in French), September 27, 2015 available at www.elysee.fr/communiqués-de-presse/article/frappes-aeriennes-francaises-en-syrie/ (last visited Nov. 16, 2015).
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 37. U.N. President of the S.C., Letter dated Sept. 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 7, 2015) available at www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/688 (last visited Nov. 16, 2015).

is the threat of terrorism that it creates, both in the area of Iraq and Syria, and in other areas of the globe. And here, states mainly argue that they have a right to defend themselves against the threat, even if it is preemptively. The response to the second threat is the current priority of the international community, but it might impact on the realization of the first concern.

The fluidity of the threat and the increasing concerns linked with terrorism mean that the response constantly needs to adapt. By producing a number of legal arguments, states, in effect, aim to keep their options open. The advantage of this policy is that the response can adapt to the threat. Resolution 2178 was criticized for the confusion that it creates between counterterrorism and the law of armed conflict,⁶³ yet it also reflects the array of measures that need to be adopted to respond to the new threat of foreign terrorist fighters.

On the one hand, the conflation of legal categories is problematic because it might come at the expense of legality: the responsibility to protect was developed to focus on the plight of victims, rather than on legal argument for self-defense. On the other hand, it can also be used and abused in order to justify military action, which would not be legal under the self-defense argument.⁶⁴ There are similar risks of misuse of the self-defense argument. For instance, Russia originally invoked self-defense of Russian citizens for its annexation of Crimea.⁶⁵ Moreover, the UK based its argument regarding targeted killings of ISIS members on self-defense and this was criticized.⁶⁶ Further, while these killings could potentially be legal under parts of international law, they might still violate other branches of international law, which need to be taken into account during military operations.⁶⁷

The fluidity of legal categories is causing states to bend them by acting in a manner that can be rational and legitimate but that is also without a clear legal basis under international law. States must realize that this fluidity can also have unintended consequences, as the situation in Syria has the potential to escalate into an inter-state conflict, given the current dispute between Turkey and Russia.⁶⁸ ■

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41. The domestic basis for U.S. airstrikes focused on the question whether the President could include ISIS with the 2001 Authorization to Use Military Force, which authorizes military force against Al-Qaeda. For a summary of the legal issues discussed in the U.S., see William C. Banks, Myriam Feinberg and Daphné Richemond-Barak, An ISIL AUMF? Counterterrorism and Congressional Authorization in the United States, I-CONnect, Dec. 18, 2014, available at www.icconnectblog.com/2014/12/an-isil-aumf-counterterrorism-and-congressional-authorization-in-the-united-states/ (last visited Nov. 17, 2015); Myriam Feinberg, Guest Post: 'New Battlefields, Old Laws' – Debate on the Future of the 2001 AUMF, OPINIO JURIS Sept. 28, 2014, available at opiniojuris.org/2014/09/28/guest-post-new-battlefields-old-laws-debate-future-2001-aumf/ (last visited Nov. 17, 2015).

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49. See Ben Saul, *Paris attacks: France and the world should answer terror with liberty*, THE DRUM, Nov. 19, 2015, available at mobile.abc.net.au/news/2015-11-19/saul-france-tests-legal-boundaries/6954220 (last visited Dec. 3, 2015).
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BM.I

Republic of Austria
Federal Ministry of the Interior

Speech by Federal Minister Mag.a Ms. Johanna Mikl-Leitner

At the “Combating Antisemitism Through Legal Means” Conference

Monday, November 23, 2015, Federal Ministry of Justice

*The Honorable Vice President of the European Jewish Congress **Dr. Ariel Muzicant**, The Honorable Minister of Justice **Dr. Wolfgang Brandstetter**, The Honorable President of the International Association of Jewish Lawyers and Jurists, **Ms. Irit Kohn**, Ladies and Gentlemen.*

Many thanks for inviting me to this conference.

It has been 77 years since the pogroms against the Jews on November 9, 1938. 77 years - almost a lifetime.

Let us think of what one could learn within such a long period of time: One normally learns how to walk and talk, do arithmetic and write. Human beings also get to know their environment as well as social norms and rules, they learn a trade and perhaps some foreign languages or various hobbies. They continuously evolve in their lives, which eventually makes them mature people -- with a fulfilled existence.

Our European society too has lived for 77 years, since that dark night in November 1938.

And when we look at the way Europe has used the time since the Second World War, one can say that it has made very good progress in many fields -- I am thinking here about the establishment of the EU, new freedoms, technological advances and political developments.

It must also be pointed out, however, that in certain areas our society has learned nothing. By this I mean that xenophobia and antisemitism are still too prevalent in today's Europe.

Two years ago the “European Union Agency for Fundamental Rights” published a study that was based on surveys taken among nearly 6,000 Jewish citizens from eight European countries.

Two thirds of the participants regarded antisemitism as a big problem and 76 percent noted that the situation for people of Jewish faith has changed considerably for the worse.

I am also most horrified by the fact that over 70 percent of the victims of antisemitic attacks do not go to the police.

These figures clearly show that we must act in favor of our fellow Jewish citizens--based also on our past-- in order to demonstrate what we have learned over the past 77 years. That is because we do bear joint responsibility for the unspeakable crimes and the wartime atrocities and we are aware of this responsibility more than ever before.

What happened then is incomprehensible and unconceivable for us today. It was simply a fundamental attack on our core values as human beings, namely on the dignity of mankind. This chapter in history must not repeat itself, neither in Austria nor in any other place on the face of this earth.

Therefore, it is all the more tragic, that following the attack on the Jewish supermarket *Hyper Cacher* last January, one cannot rule out the possibility that the attack on the “Bataclan” music hall in Paris may have had an antisemitic background as well. After all, in the last few years the premises had been owned by a Jewish citizen and was not sold until September.

The event venue has been a focal point for anti-Israeli and Islamic groups time and again.

This means that we must fight not only against radicalization and extremism, but also against antisemitism and intolerance in Europe. Our goal is to preserve the diversity of our society and protect people of all convictions and faiths.

It is especially so in a year in which we mark the end of the Second World War and the liberation of the concentration camps, that we must consider the fact that an increasing number of our fellow Jewish citizens are leaving Europe. We must confront this resolutely—with a joint and loud “Never Again!”

The protection of the Jewish community is both our goal and obligation.

In the last few years, we in the Ministry of the Interior have introduced clear measures to counteract antisemitism.

This concerns first of all the careful and comprehensive

- **processing of criminal offenses** with antisemitic background; two official actions may be especially emphasized in this regard: namely the activity concerning the
 - website “**alpen.donau.info**,” which led to the condemnation of the perpetrators (including Gottfried Küssel) and subsequently to their long-time imprisonments, and a
 - **case in Salzburg**, where a series of criminal offenses have been committed since 2013, in which Jewish institutions have also been bedaubed and damaged. Since then, the State Office for the Protection of the Constitution in Salzburg has succeeded in investigating and proving the identity of eight suspects.

Such successes are also the result of intensive cooperation with the justice system as well as international partners.

Alongside the operational investigation work, the second pillar upon which we lean in our struggle against antisemitism is **prevention**.

In this regard I am referring to the National Security Reporting Office, the cooperation of the Federal Ministry of the Interior with the

- Documentation Archive of the Austrian Resistance;
- various NGOs such as ZARA, the Stop Line and Safe Internet Council, or the
- “Anti-Defamation League”—the latter being designated as Best Model Practice by the OSCE.

We perform preventive police works at schools and hold events aimed at raising awareness and providing information to citizens.

But we obviously provide intensive teaching within our own ranks as well, first and foremost by means of special continued education programs for our fellow state protection officers. In addition, all policewomen and policemen are made aware of antisemitism as a motive for extreme criminal activities during their basic as well as advanced training.¹

As part of their basic training, all police cadets also visit the Memorial in the concentration camp of Mauthausen.

The Memorial, whose maintenance lies under the responsibility of the Ministry of the Interior, is not only a cemetery, a museum and a place of remembrance, but also a learning and documentation center for contemporary history.

With each such visit by a class, the Mauthausen Memorial makes an especially valuable pedagogical contribution.

I myself have spoken over and over again with students during my visits to Mauthausen. I have also witnessed dismay, rage, lack of understanding as well as tears as a reaction to the crimes committed at that location.

I can assure you of one thing: the message hits home with these young people. It hits home in their minds and hearts, and that is something I find encouraging when looking ahead to the future.

It makes me confident, that our society shall eventually learn its outstanding lessons and that one day antisemitism will become a thing of the past.

Thank you very much.

1. E.g. the awareness program in the seminar titled “A World of Difference.”

Editor's Note: Following is the text of an address delivered at a symposium held in Vienna, November 23, 2015, on "Opening a Dialogue: Combating Anti-Semitism through Legal Means," co-sponsored by the IAJLI, the Kantor Center for the Study of Contemporary European Jewry and the Ministries of Justice and Interior of the Republic of Austria.

Defining and Fighting Antisemitism in 21st Century Europe

Aleksandra Gliszczynska-Grabias

Introduction

Very recently, a few words by a well-known Polish writer about Poles' shared responsibility for the fate of their Jewish neighbors during the Second World War proved to be sufficient to trigger a campaign of antisemitic hatred on the Internet and in public debate.¹ Soon after, other drastic cases of antisemitism were reported and were well captured in the official statement issued by the Polish PEN Club:

Following a series of physical and symbolic Nazi acts of violence in Wrocław and other cities around Poland, the demonstration of extreme nationalist groups performed an act of burning the figure of a Jew in the Wrocław market. This constitutes a neo-Nazi act of executing a death sentence in effigy – of the representation of an imaginary condemned convict. The direct perpetrator of this act was one of the closest – till quite recently – collaborators of a member of the Committee for Matters Relating to the Special Forces of the Polish Parliament, of a leader of a strong Parliamentary alliance.... We express our support for the stand taken by the President of the City of Wrocław who as the first representative of local government approached the law enforcement institutions demanding an immediate initiation of proceedings. We appeal to the highest authorities of the Republic of Poland to promptly bring to a stop the increasingly insolent racist acts that are taking place in Poland.²

One can never stop being vigilant. As Leszek Kołakowski, a great Polish philosopher, once said, "Fragile atoms of antisemitism, dispersed and harmless, under

favourable conditions can be rapidly grouped together into an immediate mixture which explodes into a crime. Tolerance of antisemitism in its present weakest manifestations is therefore tolerance of the pogroms of tomorrow."³ Nor can one stop being vigilant in the case of the so-called "new antisemitism," although, as we know, opinions on the matter differ: some researchers claim that antisemitism has remained one and the same for centuries – only the forms in which it is publicly manifested change. However, irrespective of whether one agrees with this approach or not, undoubtedly in the last decade we have witnessed characteristically different manifestations of antisemitism.⁴ Because of their specific character, they are presently the greatest challenge, not only for the

1. In 2015, Olga Tokarczuk won the most important Polish literary prize for her latest work, "Ksiągi Jakubowe" ["The Books of Jacob"]. During the award ceremony held on October 5, she said: "We contrived a narrative of Polish history depicting Poland as a tolerant, open country, one which has never disgraced itself with any wrongdoing towards its minority groups. Meanwhile, as colonisers and an ethnic majority we did appalling things, suppressing the minorities; we were slaveholders and murderers of Jews." Subsequently, a campaign of hatred erupted. For the coverage of the reaction of Tokarczuk's words in English, see for example, *Author Olga Tokarczuk spurs online lynch mob*, RADIO POLAND, Oct. 16, 2015, available at www.thenews.pl/1/9/Artykul/225180,Author-Olga-Tokarczuk-spurs-online-lynch-mob (last visited Dec. 13, 2015).
2. The Board of the Polish PEN Club, statement of Nov. 22, 2015, available at www.penclub.com.pl/biuletyn (last visited Dec. 21, 2015).
3. Leszek Kołakowski, *ANTYSEMICY. PIĘĆ STARYCH TEZ I PRZESTROGA [ANTISEMITES. FIVE OLD THESES AND A WARNING]* (1956).
4. See, for example, Roni Stauber, *THE ACADEMIC AND PUBLIC*

societies in which they exist but also for theorists and practitioners of law whose task it is to oppose them with legal instruments and definitions. They are also a challenge for prosecutors and judges who have to decide in specific situations how a given utterance or statement, publication or action should be classified.

As we know, antisemitism is commonly understood as beliefs and attitudes based on the feelings of reluctance toward, and hostility, hatred and contempt for Jews, pseudo-rational and pseudo-scientific justifications of defamation, discrimination and persecution of Jews as well as actions deriving from such justifications.⁵ Jews are targets of antisemitic hatred as individuals and as a national, ethnic, religious or cultural community. It is precisely this distinguishing, community-based factor: the manifestation of extreme hatred of Israel and Israelis, that nowadays targets Jewish minorities in Europe.

All over the world, Jews are a community that is directly and closely associated with Israel, whether intentionally or not. For a number of reasons, Jews living in Austria are associated with Israel much more than Poles living in Austria are associated with Poland. Protection of individuals against this "community-oriented" character of hatred and discrimination, which affects them as individuals somehow connected with the State of Israel, remains a challenge for theorists and practitioners alike. Is any legally valid and binding definition capable of guaranteeing such protection?

Diagnosis of the Phenomenon

It is necessary to make a caveat at this point: the view according to which every criticism of Zionism or policy of Israeli authorities is a manifestation of antisemitism must be rejected as completely unfounded. Such criticism is not only admissible but actually advisable, since a critique is needed by each state and society committed to the principles of democracy and respect for human rights. It is inadmissible to use and abuse accusations of antisemitism directed at everybody who criticizes Israel. At the same time, if one is a careful observer of the attitudes and behaviors recorded in particular in Arab states and in many states of Western Europe, one cannot fail to notice that criticism is often unambiguously motivated by antisemitic beliefs and is manifested in the manner practiced for centuries by antisemites. Extremely violent protests against Israel's military operation in Gaza staged by Scandinavian leftist movements in January 2009 in Oslo turned into hate-filled riots charged with intensity unheard of in Norway for decades. This is but one example of this trend. The slogans chanted against Israel very quickly degenerated into antisemitic slogans; the aggression was directed at the buildings of organizations and companies

believed by the demonstrators to be "Jewish."⁶

It is not possible to make an *a priori* assumption that anti-Zionism or criticism of Israel have never constituted manifestations of antisemitism, when in the context of the Middle East conflict Jews are called "Zionist Nazis," a "true image of Satan," "blood-thirsty barbarians" and "the source of rotteness," while Israel is described as the "carcinogenic ulcer of the world" or a "stinking corpse." This is how the problem was approached in a "Le Monde" editorial of November 6, 2003:

Those who practice a discourse of systematic and one sided denunciation consisting in demonizing Israel, as is customary in some European circles, do so beyond the area of criticism of government policy. With this rhetoric we are led to believe that a state of such a criminal character should be excluded from the family of nations. This is an almost unnoticeable transition from the criticism of government to the refusal of its right to exist.... It is a fact that anti-Israeli anger is excellent food for new antisemitism.⁷

Research has confirmed that this "anti-Israeli anger," most often connected with the Israeli-Palestinian conflict and, more broadly, the Middle East conflict, can be the direct cause of a growing number of verbal and physical manifestations of aggression against Jews who live outside of Israel.⁸

As indicated in the report of the European Union's Fundamental Rights Agency, released in November 2013, as many as 73% of French Jews pointed out that the Arab-Israeli conflict and its repercussions (such as the boycott movement) significantly affected their feeling of safety in France.⁹ In turn, nearly 60% of Belgian and Italian Jews

DEBATE OVER THE MEANING OF THE "NEW ANTISEMITISM" (2008).

5. Based on the definition proposed by Helen Fein, *Explanations of the Origin and Evolution of Antisemitism*, in *THE PERSISTING QUESTION: SOCIOLOGICAL PERSPECTIVES AND SOCIAL CONTEXT OF MODERN ANTISEMITISM* (Helen Fein ed., 1987).
6. Eirik Eglad, *THE ANTI-JEWISH RIOTS IN OSLO* (2010).
7. Quoted in Andre Glucksmann, *ROZPRAWA O NIENAWICI, [THE DISCOURSE OF HATE]* 82 (2008).
8. E.g. *DECIPHERING THE NEW ANTISEMITISM* (Alvin H. Rosenfeld ed., 2015).
9. "*Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism*", FRA REPORT, Nov. 2013, available at fra.europa.eu/en/

said that the blame associated with certain political and military decisions of Israeli authorities was “nearly always” or “often” ascribed to them. Answers recorded in the survey help clarify how antisemitism destructively affects the life of the people who experience its manifestations nearly every day. At the same time, the results show the depth and complexity of the social problem. The words of one of the respondents, a woman from the United Kingdom, are a good example: *“I feel worried about antisemitism now in a way that I did not 30 years ago. Something that should have disappeared from social acceptability is instead becoming stronger.”*

Another disturbing example: In 2003, Andrew Wilkie, Nuffield Professor of Pathology at Oxford University, refused an Israeli student’s employment in his laboratory.¹⁰ In his e-mail to the student, Professor Wilkie wrote:

Thank you for contacting me, but I don't think this would work. I have a huge problem with the way that the Israelis take the moral high ground from their appalling treatment in the Holocaust, and then inflict gross human rights abuses on the Palestinians because the Palestinians wish to live in their own country. I am sure that you are perfectly nice at a personal level, but no way would I take on somebody who had served in the Israeli army. As you may be aware, I am not the only UK scientist with these views but I'm sure you will find another suitable lab if you look around.

Is Professor Wilkie, who committed an obvious act of discrimination based on nationality, an antisemite? An answer to this question can be only determined by a court inquiring into this case. However, the very language of the letter quoted, the group-based responsibility invoked, and the reference to an often repeated antisemitic mantra about Jews abusing the Holocaust, prove that Professor Wilkie participated in the kind of social exclusion that antisemites have always practiced against Jews. This trend translates directly into the atmosphere and events recorded at many prestigious university campuses, where students of Jewish origin are intimidated and oppressed and where there are often antisemitic acts of violence and vandalism – they all ostensibly stem from anti-Israeli attitudes. Because of this, “anti-Israeli anger” can be automatically and simply turned into “anti-Jewish anger.”

As rightly pointed out by Walter Laqueur, in the case of the “new anti-Semitism,” a difficult question of key importance concerns the borderline after the crossing of

which a criticism of the Israeli state, authorities and society or criticism of Zionism becomes a concealed manifestation of antisemitism.¹¹ Therefore, in addition to advocating considerable caution before statements or actions hostile to Israel or anti-Zionist are classified as antisemitic, it is also necessary to boldly notice and call particular conduct and expressions antisemitic wherever they actually are such.

Need for Legal Protection

Undoubtedly, the behavior described above requires a legal response since it leads to the violation of various rights and freedoms: victims of any violation of human rights standards deserve help from the state and legislation. It is much easier to define/indicate antisemitism when the word “Israel” or “Israeli” is only a smokescreen for the use of the word “Jews.” Much more difficult dilemmas arise when it is hard to find antisemitic motivation or antisemitic tone in even very severe criticism of Israel. If, however, the criticism transgresses the borders of admissible public discourse, and makes those who associate themselves or who are associated with the Israeli state (in other words, the majority of the Jewish minorities living in European states) feel alienated, rejected or afraid, then there are equally strong grounds to guarantee protection to such persons, as is the case of “pure” hate speech or crimes motivated by hatred. Minorities have the right to feel safe and not be exposed to some kind of “collective liability” of all the persons of Jewish origin for the decisions of the Israeli government.

The existing, applicable legal framework providing for the protection needed in the cases of anti-Israeli hatred offers some solutions. However, it remains to be answered how to make this protection effective. A few scenarios are possible, including:

- amendments to the existing national (Council of Europe/EU member states level) legal frameworks: new laws defining anti-Israeli hatred as a form of hate speech/hate crime;
- insisting on a different interpretation of the existing provision, allowing them to include instances of anti-

publication/2013/discrimination-and-hate-crime-against-jews-eu-member-states-experiences-and (last visited Dec. 13, 2015).

10. For a detailed description of the case, see Geoffrey Short, *Antisemitism on Campus. A View from Britain*, in THE GENERIC HATRED. ESSAYS IN MEMORY OF SIMON WIESENTHAL 123–24 (Michael Fineberg, Shimon Samuels & Mark

Israeli hatred.

As the fate of the EUMC's (European Monitoring Centre on Racism and Xenophobia) Working Definition demonstrates, we are forced to make a careful evaluation whether efforts aimed at the incorporation of such definitions into criminal codes and other legally binding laws have any chance to be successful.¹² The key question, however, is about the rationality of such a move. Perhaps, instead of a precise definition with a list of manifestations of anti-Israeli attitudes that must be considered to be anti-Jewish, it would be better to insist that European governments obligatorily include the Working Definition into the official training materials for law enforcement officers and others. If such an important problem is left to the decision of individual prosecutors and judges, proper protection cannot be guaranteed. Consider the Austrian case of 2015: "I could have annihilated all the Jews in the world, but I left some of them alive so you will know why I was killing them..." -- Ibrahim B. wrote on his Facebook page. Ibrahim, the 29-year-old owner of a hair salon, attributed the quote to Hitler and posted a picture of the German dictator on his Facebook site. Ibrahim launched his pro-Nazi tirade in the context of criticizing Israel's military action against Hamas. The Austrian Prosecutor described Ibrahim's statements as merely expressing "displeasure toward Israel" and not a glorification of Hitler.¹³

Undoubtedly, there is a pressing need for redesigning the existing legal framework in a way that will allow for the inclusion of anti-Israeli hatred and discrimination as

basis for legal response. The question that remains open is how to accomplish that in the most effective way, in full accordance with the standards of human rights protection. Silencing the legitimate critics of state actions (no matter what state it is) is not an issue or aim here at all. The main object of concern is the need (or rather an obligation) to protect individuals affected adversely by hatred and discrimination. ■

*Dr. Gliszczynska-Grabias is Assistant Professor at the Pozna Human Rights Centre, Institute of Law Studies of the Polish Academy of Sciences. She specializes in the fields of anti-discrimination law, constitutional law, freedom of speech vs. hate speech and "memory laws." She authored a book *Combating Antisemitism: International Law Instruments* (in Polish, Wolters Kluwer: Warsaw 2014), as well as a number of book chapters, articles and commentaries on international and regional human rights systems, anti-discrimination law, and related issues. She actively participates in various civil society activities to combat*

Weitzman eds., 2007).

11. Walter Laqueur, *THE CHANGING FACE OF ANTI-SEMITISM: FROM ANCIENT TIMES TO THE PRESENT DAY* (2008).
12. See in particular: Dina Porat, *The International Working Definition of Antisemitism and Its Detractors*, 5 *ISRAEL JOURNAL OF FOREIGN RELATIONS* 93-101 (2011).
13. The initial decision of the Prosecutor has been re-examined and eventually quashed, resulting in charges laid against Ibrahim B. See the report on the case: *Austrian prosecutor: Call to kill Jews is legal criticism of Israel*, JERUSALEM



Mag. Johanna Mikl-Leitner, Austrian Federal Minister of Interior, and Irit Kohn
Photo: Andreas W. Rausch



Dr. Wolfgang Brandstetter, Austrian Federal Minister of Justice, and Irit Kohn
Photo: Andreas W. Rausch

BOOK REVIEWS

The Yale Papers: Antisemitism in Contemporary Perspective

Edited by Charles Asher Small

ISGAP - Institute for the Study of Global Antisemitism and Policy (2015) 531 pp.

ISBN: 978 1 515057 79 6

Reviewed by Robbie Sabel

This book of nearly thirty interesting essays makes reading that is both intellectually stimulating and emotionally disturbing.

Irwin Cotler opens his essay in the book with the dire warning that what has developed in the last 35 years is "a new, sophisticated, globalizing, virulent and even lethal antisemitism, reminiscent of the atmosphere of the 1930s." Yossi Klein Halevi, in his contribution, refers to a cartoon that is perhaps the embodiment of all the elements of modern antisemitism. The cartoon appeared on the front page of the Italian newspaper *La Stampa* during the siege of terrorists who were holding out in the Church of the Nativity in Bethlehem. The cartoon showed an Israeli tank moving towards the Baby Jesus who exclaims "Surely they don't want to kill me again."

The title of this collection of essays is perhaps a misnomer. It refers to them as "The Yale Papers," as the project was originally conceived as a project of Yale University's "Yale Initiative for the Interdisciplinary Study of Antisemitism" (YIISA). Yale, however, closed the Initiative in 2011. Alan Dershowitz commented on the closure that "Yale has a chance to be at the forefront of this study. Instead it has taken a cowardly step away from the controversy."¹ Among the reasons given by Yale for closing the "Initiative" was the lack of academic output. I believe this publication refutes that claim as it contains some first class academic studies.

The publication throughout refers to "antisemitism" as one word without a hyphen. I believe this is a correct usage and should be adopted generally. The justification is that it refers nowadays not to a general dislike of Semites, but explicitly to hatred of Jews.

Antisemitism, like pornography, is not always easy to define, but one can recognize it when one sees it. Hadar Lubin succinctly defines antisemitism as "hatred of Jews because they are Jews." Dina Porat, in her essay, points out that international efforts to define antisemitism routinely failed and it was only in 1994 that the UN

Commission on Human Rights acknowledged antisemitism "as a wrong that had to be rectified." This agreement by the Commission to refer to antisemitism was presumably only achieved as the Commission lumped together antisemitism with xenophobia, racial discrimination and Islamophobia.

The essays in the book examine the manifestation of classic antisemitism, as well as the newer forms of hatred toward Israel and of Zionism

In the former category, there is David Hirsh's essay which traces the various historical manifestations of antisemitism. The Medieval Christian antisemitism "demonized Jews as Christ-killers. It charged them with deicide and with regularly and ceremonially re-performing the crucifixion of Christ on innocent non-Jewish children." "An early left wing form of antisemitism saw Jews as evil capitalists or as greedy money lenders. Right wing antisemitism has often portrayed Jews as embodying the Bolshevik threat." Regarding Israel, there is now a "new antisemitism," which sees Israel as "standing in the way of world peace, of being responsible for stirring up wars, of being uniquely racist or an apartheid state." Hirsh remarks that one source of anti-Israeli feeling is related to those who "had great illusory hopes for Israel" and "who have now swung round in disgust when it turns out that Israel is not a utopian beacon for mankind," and they do this "with all the passion of people who have been made fools of by history and by the crumbling of their own adolescent illusions." Peter Glick, however, sees the source of antisemitism as envy at the socio-economic success of the Jews.

1. <http://www.gatestoneinstitute.org/2200/yale-antisemitism>

A recurring theme in many of the essays in the book refers to the question of whether, and how far, is demonization of Israel and Zionism to be considered as an aspect of antisemitism? David Hirsh's analysis is that "The central relationship between anti-Zionism and antisemitism may be thought of either as one of cause (underlying antisemitism motivates a disproportionate response to Israel) or as one of effect (a disproportionate response to Israel leads to antisemitic ways of thinking)."

It is now generally accepted that hatred of Israel and of Zionism is often related to antisemitism. The OSCE definition of antisemitism² explicitly refers to the Israel issue, stating, *inter alia*,

- Examples of the ways in which antisemitism manifests itself with regard to the State of Israel, could include:
- Denying the Jewish people their right to self-determination by claiming that the existence of a State of Israel is a racist endeavor;
- Applying double standards;
- Using the symbols and images associated with classic antisemitism;
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.

In the essay by Edward H. Kaplan and Charles A. Small, the authors point out that according to their research, "Those with extreme anti-Israel sentiment are roughly six times more likely to harbor antisemitic views than those who do not fault Israel." Hirsh attributes the anti-Israeli views of the left wing and "progressive" movements to the fact that they view Israel "to be a key site of the imperialist system." Hirsh examines what he calls the *Livingstone formulation*, attributed to the former Mayor of London who said that "for far too long the accusation of antisemitism has been used against anyone who is critical of the policies of the Israeli government." Hirsh paints a disturbing picture of the antisemitic undertones of the liberal anti-Zionist feelings in Britain, including a cartoon in the Independent newspaper where Ariel Sharon was caricatured eating a baby, and the cartoon was awarded "the political cartoon of the year" award. Hirsh also points out that Jews are not considered acceptable in some sections of the left and labor movement until they have answered as to their position on Israel "to the satisfaction of the anti-Zionists."

An interesting essay by Milton Shain examines the South African situation, referring to the extreme antisemitism of the Afrikaans community prior to 1948, which was based to a large extent on the Jews being associated with the English speaking "aliens" who had immigrated to South Africa. Shain adds that this antisemitism "helped to consolidate an all-embracing Afrikaner identity,

understood in terms of cultural unity, national roots and opposition to the foreigner." Modern South African antisemitism is attributed largely to the "younger generation of Muslims galvanized by the charged political atmosphere of the 1970s, inspired by new radical teachings and the 1976 African student uprising in Soweto."

Shalom Lappin's article about Britain and the Jews opens with a quote from the well-known hymn by William Blake about building Jerusalem "in England's green and pleasant land." The picture he paints of Britain's attitude to its Jewish population is, however, not a "pleasant" one. Lappin points out that "recent events have seen the emergence of a distinctly uncomfortable environment for Anglo Jewry." This, according to Lappin, "bears a clear connection to a well-established pattern of widespread hostility to Jews as members of a cultural and ethnic collective that has existed in Britain over many centuries." The popular notion of Britain as a society tolerant of Jews seriously misrepresents the history of the country's relations with its Jewish population." Lappin refrains from quoting the reputed English definition of an antisemite as "somebody who dislikes Jews more than is strictly necessary."

Roni Stauber, in his essay, places the emphasis on "a rise of a new type of Islamic antisemitism that perceives Jews as global enemies. Antisemitism became a central component in the ideology of extreme Palestinian and Middle Eastern Muslim groups, both Sunni and Shi'a." Stauber discusses and dismisses the phenomenon of explaining away Muslim antisemitism as "retaliation against Israel." Stauber's conclusion is that the cause of this Islamic antisemitism is "the perception of Jews and Israel as a single evil entity, a central pillar of corrupt Western civilization." Neil J Kressel sounds a similar note, quoting numerous examples of what he refers to as "dehumanizing bigotry."

An interesting point made by Catherine Chatterley is that the increasing stressing of the universal lesson to be learnt from the Holocaust has meant that a diminished role has been given to antisemitism as the underlying element.

For those who hoped that the memory of the Holocaust would prevent a resurgence of antisemitism, this collection of essays is a stark reminder of reality. ■

Robbie Sabel is Professor of International Law at the Hebrew University Jerusalem, a former Legal Advisor of the Israel Ministry of Foreign Affairs and a member of the Advisory Board of Justice.

2 <http://www.osce.org/odihr/29890?download=true>

The War of a Million Cuts: The Struggle against the Deligitimization of Israel and the Jews, and the Growth of New Anti-Semitism

by Manfred Gerstenfeld

RVP Press, Jerusalem Center for Public Affairs (2015).

ISBN 978-1-61861-341-7

Reviewed by Rabbi Abraham Cooper

By now, many Jews and other supporters of Zion have experienced one or more of the million cuts inflicted by Israel's enemies in their burgeoning and multifaceted asymmetrical war against the Jewish state.

I recall vividly the first of many painful blows I experienced myself, as one of the spokesmen for Jewish groups at the ill-fated United Nations World Conference against Racism that was held in Durban South Africa just before September 11, 2001.

I was speaking with a veteran Egyptian journalist who accompanied Anwar Sadat on his historic visit to Jerusalem, when a younger Arab journalist from Jordan happened to pass by. "Ahmed, come here, I would like to introduce you to someone from America." In the middle of our handshake, the Jordanian abruptly pulled back. "Are you a Jew? Had I known you were a Jew, I never would have shaken your hand," as he reached to "clean" his hand on his jacket. Throughout the next week, and in full view of over 3,900 NGOs from around the world supposedly united by the goal of "Civil Society," we Jews were taught a brutal lesson: Israeli policies were not the issue—Israel's very legitimacy as a state was under assault, led and validated by the official caretakers of global human rights.

Ever since, similar scenarios have played out in leading Protestant denominations, on university campuses, and throughout the media.

How did we get to the point where the memory of *Kristallnacht* in Germany generates more support for the Boycott, Divestment, and Sanction (BDS) movement than remembering the innocent Jews who suffered the Nazis' pogroms, where Israel's *Yom Ha'atzmaut* (Independence Day) is desecrated by "Israel Apartheid Week," when First Amendment supporters of free speech in the U.S. can call for total boycotts of Israeli schools and academics?

Dr. Manfred Gerstenfeld's definitive analysis of the current war on Israel and the Jewish people is a must for anyone who has suffered the indignity of such attacks and wants to develop strategies to defeat the haters.

Gerstenfeld begins with a historic overview of post-

World War II antisemitism and the mutation of medieval anti-Jewish motifs, and how they help sustain and legitimize highly discriminatory anti-Israel attitudes. The pivotal roles played by United Nations agencies, Arab and Muslim states, Muslims in the western world and the media are documented in a vivid and compelling way. Others include extreme leftist and extreme rightists, many social democrats, NGOs, trade unionists and a variety of mainstream politicians.

A short but critically important chapter provides an outline of one of the most insidious threats—"Lawfare"—where legal institutions and international law are manipulated to demean and delegitimize Israeli officials and cripple the Jewish state's ability to defend its citizens from terrorist attacks launched by Hamas from literally behind the skirts of civilians in Gaza.

Gerstenfeld also touches a raw nerve in discussing the impact of the tsunami of anti-Israel and anti-Jewish campaigns. Jews have a heightened fear of antisemitic hate crimes. Some Jewish leaders in Europe caution their constituents not to walk in public with a "Chai" necklace or a kippah. Few synagogues in Europe can function without security. Meanwhile, many heavily biased media rarely give a platform to defenders of Israel. In Europe and in particular in France and in Scandinavia, many Jews have opted to hide their identities in public; many thousands in France and the UK have opted for Aliyah.

In covering a multiplicity of many other fronts of the newest forms of the world's oldest hate, Gerstenfeld does not shirk from detailing the especially painful and harmful incitement by Israelis and Jews against the democratic state that is home to the world's largest Jewish community. For these critics, the Jewish state can do nothing right and the Palestinians can never be held accountable for any atrocity, however heinous.

Throughout the book, Gerstenfeld asserts that he should have never had to be the one to write it; that it is the responsibility of the Jewish state to formulate proper strategies and tactics to battle and ultimately win this

war. We at the Simon Wiesenthal Center agree with the author that the State of Israel must create a single address to effectively counter the many fronts of this war. The toxic propaganda left unchallenged will not only weaken the Jewish state but also poison attitudes towards the Jews the world over. Gerstenfeld provides the overview of the enemies' game plan. It is time now for Israel to approach this war as creatively and effectively as it has

done in combating its enemies on the military front.

The coherence of Gerstenfeld's analysis and the compelling, if sometimes depressing, narrative of this definitive work, makes it a must read for Israeli officialdom and all lovers of Zion. ■

Rabbi Abraham Cooper is the Associate Dean of the Simon Wiesenthal Center and a founding member of The Global Forum on Antisemitism.

*The Definition of Anti-Semitism*by *Kenneth L. Marcus**Oxford University Press (2015), 296 pp.*

ISBN 978 0199375646

Reviewed by **Günther Jikeli**

To define antisemitism is a difficult task, especially so in a way that brings agreement among a wide range of scholars and practitioners. Nevertheless, a widely accepted definition of antisemitism is necessary to enable meaningful data collection of antisemitic incidents, preventive measures, and law enforcement. Ideally, such a definition for practitioners is based on scholarly insights and debates about an understanding of contemporary antisemitism in its different forms and its multiple sources. This is precisely what Kenneth L. Marcus attempts to do in his noteworthy book *The Definition of Anti-Semitism*.

The importance of recognizing antisemitism is beyond scholarly debate. In extreme cases, its recognition can become a question of life and death. Marcus exemplifies this fact with the police investigation into the abduction and torture of Ilan Halimi in 2006. Halimi was abducted in Paris by a group that called itself “the Barbarians.” They selected Halimi as a Jew because they thought that his family, as Jews, was rich, and therefore could pay substantial ransom. The French investigators failed to see the antisemitic dimensions of this crime and thus might have underestimated the risk that Halimi’s torturers would eventually kill him. Yet “the Barbarians” aim to get ransom was not their only and possibly not even their main motivation. Murderous hatred of Jews was also part of it, as well as highly irrational expectations of the amount of ransom they could obtain. Both had to do with “the Barbarians” antisemitic views of Jews. Ilan Halimi eventually died of his severe wounds and the burns he endured during three weeks of horrendous torture, only hours after he was released, naked and handcuffed near a railway track. The police investigation did not lack for dedication, but their tactics and general approach probably would have been more effective had it taken into account the perpetrators’ antisemitism. As this case indicates, non-recognition of antisemitic acts also effects preventive action. College administrators, for example, might fail to protect Jewish students on campuses from aggression and hate crimes if they fail to recognize the antisemitic dimensions of some of the actions directed against such students on their campuses.

Marcus draws on different schools and disciplines in his discussion “toward a definition of antisemitism,” as Gavin I. Langmuir phrased it in his influential book of 25 years ago. The extraordinary strength of Marcus’ book is its detailed and sober discussion of the different approaches to and arguments about definitions of antisemitism. He covers the major contemporary debates and objections to different aspects of what might or might not be considered antisemitic today. One need not agree with every detail of Marcus’ conclusions, but he surely provides a thorough and clear discussion of the arguments in a most compelling way.

The book is organized in six chapters. One of the first questions focuses on how antisemitism can be conceptualized: as a set of attitudes, prejudices, specific behaviors, or as an ideology? Marcus shows that antisemitism involves all of these and argues that we would not be able to understand it if we reduced it to only one of these aspects. We can only observe actions, not attitudes, and we must take actions as indications to decide whether or not we consider them to be motivated by antisemitic attitudes. However, we also need an understanding of the ideologies within a given socio-historical context that produce, enable, and foster these attitudes to comprehend or even to recognize their forms. Explaining antisemitism on the basis of certain ideologies does not exonerate individuals from responsibility for their actions, even if some scholars make convincing arguments that antisemitism is ubiquitous. It can be argued, and Marcus refers in this context to Slavoj Žižek, that antisemitism “has become so deeply ingrained in the modern West as to be part of what it means to be ‘sane’ in today’s world” (p. 52). However, “the anti-Semite, or racist, makes a personal choice and may be held responsible, even though the speaker should not be assumed to originate or control what is said” (pp. 53-54). This is another reason why describing antisemitism as a disease or pathology is misleading.

Antisemitism has often been described as a specific form of racist or anti-religious bias. However, Marcus shows that antisemitism can come in racist or anti-religious

forms but goes beyond both. Framing antisemitism as a subcategory of racism may be useful in some legal frameworks, but it is analytically wrong and addresses only a small part of the problem. Pierre-André Taguieff observed that post-Nazi Jew-hatred is rarely grounded in late 19th century racist theories of an alleged war between “Semites” and “Aryans.” However, even Nazi antisemitism that led to its most destructive forms cannot be reduced to a form of racism only. Antisemitism under the Nazis still made use of negative images of Jews that had religious or cultural roots. The continuity of Jew-hatred among those who used the term antisemitism affirmatively in the late 19th century to distinguish themselves from religiously motivated “Jew-haters” is remarkable and provides another argument why it does make sense to use one term (“antisemitism” or “Jew-hatred”) for a phenomenon that has spanned across many centuries. This leads to Marcus' third main theme and chapter of “time and eternity,” in which he opposes eternalism and historicism. Seeing the flaws of both, he comes up with an interesting “theory of repetition” of antisemitic aggression at different times in history. Marcus uses observations of socio-psychologists that the mechanism (and not its sources as Marcus seems at times to assume) of antisemitism are projections (Horkheimer and Adorno). However, further research is needed to examine how this phenomenon has played out at different times in history.

Other important debates regarding “The Definition of Anti-Semitism” involve the universality of antisemitism versus its particularity and the tensions between Jewish identities and the figural Jew. Marcus also provides a good overview of the debates on the relations between anti-Zionism and antisemitism. He shows that the alleged equation that every criticism of Israel is antisemitic is a straw man argument. It often implies that *all* criticism of Israel was silenced by the accusation of antisemitism. This charge has been voiced by representatives of the University and College Union (UCU) in the UK against its Jewish members. However, in a court case, when the union's president, Alan Whitaker, was cross-examined and asked: “Do you know any member of the union who actually takes this view – that any criticism of Israel is antisemitic?” he acknowledged that this was not the case. The overwhelming majority of commentators from all spectra “agree that there are some forms of anti-Zionism, and certainly many criticisms of Israel, which are not anti-Semitic” (p.147). However, there are some commentators who want to exonerate all forms of criticism

and anti-Zionism in general of antisemitism. Marcus rightly points out that this categorical denial is as implausible as the equation of every criticism of Israel with antisemitism. Many examples in fact show that some antisemites voice their hatred of Jews in hateful generalizations and demonizations of Israel – often with the same images and tropes we know from age-old hatred of Jews. But when exactly does anti-Zionism become antisemitic? This question should be examined case by case, and examples can be used as indications to decide whether a certain verbal or physical action should be considered antisemitic or not. Marcus discusses a large number of criteria that help to recognize antisemitism. The most widely used hands-on definitions for practitioners, the “International Working Definition of Antisemitism,” also known as the “EUMC Working Definition”, and the U.S. State Department Definition, are very similar and provide many examples. Marcus suggests a slightly different, more academic definition, influenced by Helen Fein's and others' definitions, but he provides convincing arguments why both hands-on definitions and their respective contemporary examples of antisemitism can help practitioners to identify antisemitism and should be used more widely.

While most but not all forms of anti-Zionism today reveal prejudices against a Jewish collective and Jews, contemporary political anti-Zionism strikes me as a dangerous and potentially genocidal ideology, whether it is antisemitic or not. The dissolution of the State of Israel in the near future, given the militantly outspoken nature of its enemies in the region, would seriously endanger not only the living standards and democratic rights of all of its citizens, Jews and non-Jews alike, but also their very existence.

Kenneth L. Marcus has written a compelling book that will be of substantial interest to scholars, practitioners, and all who are interested in trying to understand what antisemitism actually is today. ■

Günther Jikeli, historian and sociologist of modern Europe, is Visiting Assistant Professor at the Institute for the Study of Contemporary Antisemitism and the Justin M. Druck Family Scholar in the Borns Jewish Studies Program, Indiana University. He is also a research fellow at the Institute for the Study of Global Antisemitism and Policy. In 2013, he was awarded the Raoul Wallenberg Prize in Human Rights and Holocaust Studies by the International Raoul Wallenberg Foundation and Tel Aviv University. His latest book “European Muslim Antisemitism. Why Young Urban Males Say They Don't Like Jews” was published by Indiana University Press (2015).



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

Human Rights Council 31st Session, 21 March 2016 Item 7 – General Debate

NGO: IAJLJ - The International Association of Jewish Lawyers and Jurists
Representative delivering the statement: Adv. Calev Myers

Thank you Mr. President,

The report of the Special Rapporteur emphasizes the need to lift the Israeli blockade on Gaza, and fails to recognize that it is actually the Hamas occupation of Gaza which creates the greatest abuses of human rights of both Palestinians and Israelis.

The International Association of Jewish Lawyers and Jurists would like to point out that after Israel's complete withdrawal from the Gaza Strip in 2005, and regardless of three wars instigated by Hamas since then, Israel has allowed massive financial aid, and tens of millions of tons of food, medical supplies and building materials into the Gaza Strip, including 1.2 million tons since the Egyptian brokered ceasefire of 2014.

What is the nature of Hamas' occupation of Gaza? Instead of using massive financial resources and building materials, to rebuild the civilian infrastructure in Gaza, Hamas has invested them, almost entirely, in building a sophisticated network of terror tunnels underneath Gaza. This militant infrastructure runs beneath Palestinian schools, hospitals and residential buildings creating a death trap for Palestinian men, women and children. Ironically, it is Hamas that creates a virtual blockade on Palestinian and Israeli civilians, preventing them from living normal lives each day.

The Special Rapporteur condemns the Israeli blockade in Gaza while neglecting to even mention the 25 deadly rockets fired from Gaza at Israeli civilian targets, in 2015 alone.

How many Palestinian and Israeli mothers and children must be traumatized by constant bombings and missile sirens? In the words of Maayan Zweig, an Israeli mother who lives close to the Gaza Strip, "while others wake up to sunshine, laughing and even the cries of a baby, we wake up to the sounds of missile sirens, and the need to protect our children with our own bodies".

Both peoples have been living in the midst of a Hamas death trap, since 2005. Both Palestinian and Israeli mothers, and their children, live trapped in a blockade of terror which threatens their most basic human right: the right to life.

We are concerned that this Council's neglect to condemn Hamas human rights violations in the disputed territories actually encourages more violence, more radicalization of both parties and, sadly, creates less chance for peace.

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

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צדק

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

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

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