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37

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In this issue:

The Paris Conference

The Supreme Court's Role
in a Democracy and the
Fight against Terrorism

8

International Terrorism:
Israeli, Jewish,
American and
French Perspectives

14-28

Anti-Zionism: a Form of
Anti-Semitism

29

Jewish Law

37

For full Table of Contents,
see overleaf



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TABLE OF CONTENTS

THE PARIS CONFERENCE

President's Message / Hadassa Ben-Itto - 2

**The Role of a Supreme Court in a Democracy and the Fight
against Terrorism / Aharon Barak - 8**

International Terrorism: An Israeli and a Jewish Perspective / Efraim Halevy - 14

**Respecting Human Rights in the War against Terror:
The American Perspective / Ruth Wedgwood - 18**

"We Must Gear Up to Win the War against the Terrorist Threat" / Dominique Perben - 23

Law, Rights and the French Experience / Yves Bot - 25

Anti-Zionism: a Form of Anti-Semitism / Georges Elia Sarfaty - 29

Xenophobia, Racism and Anti-Semitism / Shmuel Trigano - 32

"Freedom is an Asset that Cannot be Shared" / Joseph Roubache - 35

JEWISH LAW

**"A Box of Creeping Creatures" - The removal of public office holders as a result of
unseemly behaviour / Aviad Hacohen - 37**

The 12th International Congress of Jewish Lawyers and Jurists - Programme - 43

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The Paris Conference

Opening address delivered at the International Conference on "International Terrorism, Racism, Anti-Semitism: What Response to Evil?", held by the IAJLJ in Paris on 15-17 October, 2003. *JUSTICE* devotes this issue to a series of presentations delivered at the Conference.

T

he International Association of Jewish Lawyers and Jurists was founded at an international congress held in Jerusalem in August 1969. Its founders were three outstanding men who shared a common vision - Justice Haim Cohn from Israel, Justice Arthur Goldberg from the United States and the French Nobel Prize Laureate René Cassin. The three were not only great jurists; they were also great champions of causes crucial to the existence of a liberal, just and humane society. They lived through one of the darkest periods in human history. They witnessed the horrors of World War Two and the Holocaust, yet they also witnessed the emergence of a new era. They shared with the rest of the world the hope that a new international order would provide a better place

for future generations. After learning what man could do to man, they dedicated their lives to the creation of a better world. They believed in the sanctity of life, the promotion of human rights ideals and creating a new world order based on mutual respect and more equality. They shared a vision of a new world order based on a firm commitment to preventing the recurrence of what had happened in their lifetime.

This is why all three were so hopeful that the newly created United Nations, based on a Universal Declaration of Human Rights, would unify the nations of this world, big and small, poor and rich, old and newly emerged, in a common desire to create a better life for their people, to justly share in its riches, jointly protect it from disasters, afford each individual, wherever resident, basic rights and a hope for a better future. The contribution of each of these great men will go down in history. Their names will always be on the list of honour of great jurists who believe that the law does not exist solely to keep order in any given society. They believed that the law is a powerful weapon to be used in the establishment of a better society, and they were committed to using their professional expertise, experience and good standing in their respective communities to contribute to the creation of that better society.

But their vision was not only universal in character. The three were also great Jews, painfully aware of what had been done to their people, in their lifetime. This is why they did not stop at promoting universal goals; they swore that after the annihilation of one third of their people, they would strive to make sure that the same thing could never happen

PRESIDENT'S MESSAGE



again. This is the reason they strongly promoted the newly established Jewish state; this is why they saw fit to convene in Jerusalem and this is why they decided to establish this Association of Jewish Lawyers and Jurists, because they believed that in their generation and indeed in generations to come, Jews were obliged to pursue their common duty to protect their people and their common responsibility to preserve their great heritage. This was, in their view, the responsibility of Jews everywhere; albeit according to the founding articles of the Association, membership of the Association was open to any non-Jew who shared our aims and our agenda.

Had these founders been with us today they would have been dismayed by what has happened to the world. We could of course despair and say that their dreams were naïve, that there is no hope of implementing their vision; we could give up. But some of us share a conviction that if we give up there is no future for our children.

We are not a political association and we do not have a political agenda. Our members often disagree on a variety of issues, and we do not pretend to have ready solutions for all the ills that afflict human society, either on the universal scene or even in our own private corners of the world. But we persistently pursue those issues that to us seem crucial to the future of the human race, issues on which we must all agree if we wish to live. We do not pretend to deal with all such issues: there is poverty and famine, there is terrible disease spreading through whole continents, there are weapons of mass destruction which may well endanger the very existence of our globe and there is the endangered environment.

In this conference we have chosen to address some issues which in our view should be very high on the world agenda. This is why we shall discuss international terrorism. It is also why we must deal with the problem of racism and specifically with the new forms of anti-Semitism that endanger Jews wherever they live. This anti-Semitism also endangers the Jewish state, which was established by a resolution of the international community in order to secure the right of our nation to a land of its own, and to ensure that there would be one door that would never be closed to Jews, in the way that one door after another had been slammed shut before Jewish refugees escaping the Nazi beast.

Acts of terror are not new to human society. There have always been isolated acts of terror; there have always been individuals ready to murder others for what they believe is a good cause. There have always been leaders who use terror to further their aims.

But what the world faces today are not isolated acts of terror. We are facing a terrorized world threatened by a new weapon more dangerous than any previously known to us, because this new weapon is impossible to detect and to contain. We have a world that has not yet found the tools to defend itself from this new weapon, one that has not yet fully realized the scope of the danger to societies everywhere.

Unfortunately, we continue to use a variety of terms to describe phenomena which do not fit the original definition of the terms and thus we diminish, even banalize, such phenomena. This is a dangerous process which is not an issue of linguistics or of definition. It is a process which turns the horrors of yesterday into household expressions of today.

Sixty years ago, after seeing the pictures of Auschwitz, the whole world knew the meaning of "Holocaust". No definition was needed. By using this term to describe other disasters that have befallen humanity, some of them huge and absolutely horrible,

but others of minor scope, the horror of *The Holocaust*, which was incomparable, is diminished.

When we said “Nazi” there was no need for definition. We all knew who the real Nazis were and what they did. We knew their real agenda. Using this term to criticize present events, even those that are deplorable, diminishes and banalizes the actions of the Nazis and reduces the terrible monster they let loose on the world, a monster which continues to raise its ugly head in various corners of the world. It diminishes a term which should forever serve as a reminder of this unique horror in human history.

The fact that these terms are used by persons who have a clearly defined agenda, proves that they are aware of this process of banalization and encourage it to serve their own ends.

This is also true of the term “terror”, which to our mind needs no definition, but which leads others to busy themselves splitting hairs and creating absurd differences between various forms of terror.

The countries of the world are divided: there are those that have the luxury to discuss terror, even international terror, in a detached intellectual manner, even if they have been subjected to some isolated terrorist attacks within their borders and there are other countries, such as Israel, where terror dictates our daily existence. We wake in the morning and open the paper to learn of the latest suicide attack. We fear to turn on the television in case our children will see dismembered bodies and rivers of blood. We warn our children not to go by bus, following a bus explosion, only to learn that they went out with their friends to a neighborhood restaurant, and this time that was the target.

What is worse, we have learned to live with this. Terms like *jihad* and *shahid* are part of our everyday language. In the words of Bernard Lewis, one of the most eminent experts on Islam, those who fight in the *jihad* qualify for rewards in both worlds - booty in this one, paradise and eternal bliss in the next. We cannot prevent the promised bliss in the next world, but we must say in a loud and clear voice that those who promise the “booty” in this world are aiding and abetting terrorism and must be perceived as such by the international community.

In a candid interview on official Palestinian TV, on May 4, this year, the Director of the Palestinian “Children’s Aid Association”, whose function it is to help children, stated that as part of their education policy, Palestinians teach their children to aspire to Death for Allah - *Shahada*.

Interviewed by journalist Samir Shahin, Mrs. Firial Hillis, Director of the Children’s Aid Association said:

“The children only wanted to leave [school] and throw stones at the Israeli soldiers, and to reach *Shahada* [Death for Allah]. They aspired to *Shahada* as a first priority.”

Asked whether in her opinion the Palestinian child understands the concept of *Shahada*, she replied:

“The concept of *Shahada* for the child means belonging to the homeland, from a religious point of view. Sacrifice for his homeland. Achieving *Shahada* in order to reach Paradise and to meet his God. This is the best. We teach our children to protect the homeland, and to reach *Shahada*”.

Such examples abound, but we do not hear a clear and unequivocal condemnation of them from the so-called international human rights bodies.

We, in Israel, have become conditioned to terrorism in our daily lives. Others, around the world, are patiently putting up with the inconvenience of security checks in stores and long lines in airports. They open their papers in the morning and read about another suicide bomber in Jerusalem or in Kashmir or in Bali, and then they go about their daily business as usual, because terror has succeeded in becoming part of our existence, and it has made the world not only a more dangerous place objectively, but also a place where people can no longer **feel safe, and if they do, they shouldn't**.

I cannot describe this danger more forcefully than Elena Bonner, the widow of Andrei Sacharov, and herself a well-known fighter for human rights. In an "Appeal to all Citizens of the World", which she published in April 2002, she wrote:

"The suicidal terrorists brought to the world a new type of weapon for mass destruction - cheap and easy to be transported. It's beyond any doubt that it will spread all over the planet not only in order to achieve the political aims of different extremist groups but also in order to resolve the personal problems of tens and hundreds of psychologically unstable persons. If someone thinks today that the new kind of weapon - the ordered killing executed by a suicidal terrorist - could be localized on a specific territory by tacitly supporting the suicidal killers, he is wrong. It's absolutely obvious that if no effort is made to stop this new weapon then we won't be far away from the moment when these suicidal persons will blow themselves up not only in Jerusalem. They will blow themselves up on Champs Elisée, on the Red Square, on Broadway, on Piccadilly, on the streets of Beijing, Cairo, Baghdad and Damascus - depending on who has ordered and paid for the blast and on his aims.

Terrorist suicidal killers commit crimes without any doubt, but an even greater crime, a crime that should be qualified as a crime against humanity, commits he, who guides them, who orders the crime... Even though it may seem on the surface as a voluntary act, the deeds of the terrorist suicidal killers are always made forcefully under pressure, and the responsibility for them should be put to a full extent on those who have ordered these crimes, on those who ideologically manipulate the terrorists, often under-aged, those who arm them and mourn them post mortem. If the epidemics caused by the suicidal terrorists are not stopped today, then soon, having been encouraged by lucky petrodollars that will pay the fellowships of the suicidal killers' kids, the pensions to their parents and other allowances, it will sink the whole planet. In this quite realistic case, the bomb blasts on the streets of all cities around the world - Brussels and Delhi, Moscow and Berlin, Amman and Islamabad, Istanbul and Paris, will become a common thing. Muslims and Christians, Confucians and Hinduists, Catholics and Orthodox, Buddhists and Protestants, nobody will be sure that he won't be blown away.

The sudden death will become a common practice, as well as the fear before it. The confidence that this weapon is being used today only towards some states and is not used in respect of others, is temporary and illusory... This was realized with a big delay by those who signed the Munich Agreements in a hope that they would bring peace. Instead, they brought the Second World War..."

She warned that the practice of suicide killings has been put on a conveyor belt, and that again, Jews are being blamed. Aware of Russian history she warned that Europe and America are rolling towards something that equals the old slogan of the Black Hundreds in Tsarist Russia: "Beat the Jews and save Russia".

Scary words indeed from a non-Jewish fighter for human rights.

We were very pleased with the term "global village" when we were part of the revolution

in communications, transportation and commerce. Since 11th September we have become aware of the dark side of the “global village”. If five men armed with Japanese knives could demolish the Twin Towers and murder thousands of people; if a young, educated elegant woman could walk nonchalantly into a crowded café and detonate an explosive belt killing herself and wiping out whole families, three generations of some families as happened in Haifa recently; if a young man could board a plane, or a bus full of children, and push a button to kill them all, no one is safe any more. And it must be said again and again: **no one is safe anywhere.**

All of us, individuals, groups and leaders alike, pay lip service in condemnation of brutal murders. We are not shocked anymore, we “condemn”; we say the routine words, which in time have lost their meaning; we hear condemnations from the same people who sent the suicide killers on their missions, and we praise them for their empty words.

But it is not only the physical danger with which we live. This new kind of terror has undermined our faith in our neighbours. We no longer perceive the enemy as a foreign army in a far away land. It may be any one around us, the man in the seat next to us on a plane, a woman in line to pay for her groceries in the supermarket, a student carrying books in a backpack. We have become suspicious and as we become aware that these suicide bombers share common characteristics, national, ethnic and religious, who can blame us for creating stereotypes? After we see each suicide killer on television, boasting of his or her upcoming murderous mission, it would be unnatural to demand that we stayed neutral, that we refrained from stereotypes or did not view certain persons with more suspicion. This is a slippery slope that in the long run will create more division, more discrimination, more hatred and more violence.

We are slowly changing not only our perceptions but also our laws. What was once politically correct has lost its immunity when it comes to saving life. The absolute protection of individual privacy and freedom has been superseded by new laws that must necessarily be enacted and implemented in order to protect not only the citizens of countries but sometimes also national existence.

This is the task not only of legislatures but also of courts of law.

So, we ask, what response to evil?

I know it is too much to hope for, but as long as the international community does not realize the common danger and does not agree to possible solutions, we shall continue to face a very gloomy future.

It behooves us therefore to take a hard look at the international community, represented by official country delegations in international and regional bodies, as well as in thousands of non-governmental organizations that are becoming more and more influential, and, of course, the media.

It is to be expected that various countries and various societies will have different approaches to solutions. After all, these are difficult decisions. But these decisions should be based on facts. Some facts may be disputed, some may honestly be subject to differing interpretations, but there are also hard indisputable facts, and as long as these facts are blatantly distorted, there can be no real discussion of solutions. First the record must be set straight.

As long as we witness blatant hypocrisy in the international discourse, the distortion of proven facts and glaring double standards, the credibility, and therefore effectiveness of these international bodies will remain tainted and damaged.

The result is disastrous: countries which feel that they are being judged unjustly, either by official bodies or, more importantly, by world opinion created by a biased media, have no real choice but to go their own way and make their own decisions in order to ensure their survival and the protection of their citizens.

The subject of terrorism is closely connected to another subject, namely, the emerging and growing new wave of anti-Semitism, both in the form of traditional Jew-baiting, and in the form of singling out Israel, the Jewish State, as the most dangerous perpetrator of everything that is wrong with the world today.

Anti-Semitism, in all its forms, is a danger not only to Jews. It has been proved again and again that it is a cancer that eats away at the body of any given society. We Jews have no choice but to deal with it, but as so often expressed by Per Ahlmark, a former Deputy Prime Minister of Sweden and a tireless fighter against anti-Semitism: "this is an illness of the non-Jewish society, this is why primarily non-Jews have a duty to fight it".

I hope that this conference will send a message to the world, and that the message will not be ignored. The fact that the conference is held in the Palais de Justice in Paris, and that such important personages have lent their names and their patronage to the conference, should ensure that our message is heeded.

We thank them all for their support and for lending their names and their prestige to such an important cause.

I realize that a conference like this can only serve to arouse an element of public consciousness, and that it is a drop in the ocean, but for our conscience we must add drop after drop in the hope that the sea does not swallow us all.

Yadassa Ben-Yeh

The Role of a Supreme Court in a Democracy and the Fight against Terrorism

Aharon Barak

I see my role as a judge of a Supreme Court in a democracy as that of protecting the constitution and democracy. We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies, but it is also true of the old and well-established ones. The approach that 'it cannot happen to us' can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us. I do not know if the Supreme Court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that one of the lessons of the Holocaust and of the Second World War is the need to have democratic constitutions and ensure that they are put into effect by Supreme Court judges whose main task is to protect democracy. It was this awareness, in the post-World War Two era, which helped disseminate the idea of judicial review of legislative action and make human rights central. It led to the recognition of defensive democracy and



even militant democracy. And it shaped my perspective, that the main role of the Supreme Court judge in a democracy is to maintain and protect the constitution and democracy.

Everyone agrees that democracy means the rule of the people, acting through their representatives in the legislature. It is therefore essential to democracy that free elections are held periodically for the election of representatives on the basis of the political program proposed by them, and that they are accountable to the people, who can periodically replace them; hence the connection

between democracy and legislative supremacy. However, real or substantive democracy, as opposed to merely formal democracy, is not satisfied by the presence of these conditions. Democracy has its own internal morality, based on the dignity and equality of all human beings. Thus, in addition to formal requirements, there must also be substantive requirements. These are reflected in the supremacy of certain underlying values and principles based on human dignity, equality, and tolerance. There is no (real) democracy without recognition of values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights that the majority cannot take away by force of its numerical superiority. Real democracy is not just the law of rules and legislative supremacy. Democracy is a multi-dimensional concept. It requires recognition of the power of the majority and limitations on the power of the majority. It

Justice Aharon Barak is President of the Supreme Court of Israel. This address was delivered at the session on "International Terrorism" in the Paris Conference on "International Terrorism, Racism, Anti-Semitism: What Response to Evil?" held on 15-17 October, 2003.

is based on legislative supremacy and the supremacy of values, principles and human rights. When there is internal conflict, the formal and substantive elements of democracy must be balanced, to protect the essence of each of the aspects of democracy. In this balance, limitations are placed both on legislative supremacy and on the supremacy of human rights.

With that approach to my role as a judge I will turn to the role a Supreme Court should play when a democracy launches its war on terror. In doing so, I will refer to the Israeli Supreme Court's experience in dealing with that problem. My aim is not to discuss specific cases or specific results. My aim is to lay down a way of thinking about the judicial role in time of terror.

The Supreme Court and the Problem of Terrorism

1. Terrorism and democracy

Terrorism plagues many countries. The United States realized its devastating power on 11th September, 2001. Other countries such as Israel have suffered from terrorism for a long time. While terrorism poses difficult questions for every country, it poses especially difficult questions for democracies, since not every effective means can be used. I discussed this in one case, in which the Supreme Court of Israel held that violence (torture) in the interrogation of a suspected terrorist is not permitted, even if using violence may save human life, by preventing impending terrorist acts:

"We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open to it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

Terrorism creates much tension between the components of democracy. One pillar of democracy - the rule of the people through its elected representatives - may encourage taking all steps effective in fighting terrorism, even if their impact on human rights is harmful. The other pillar of democracy - human rights - may encourage protecting the rights of every individual, including the terrorist, even at the cost of undermining the fight against terrorism. Struggling with this tension is primarily the task

of the legislature and the executive which are accountable to the people. But the legislature and the executive must act within the Constitutional and legislative scheme - a scheme which is subject to judicial review.

We judges in modern democracies have a major role to play in protecting democracy. We should protect it both from terrorism and from the means that the state wants to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war on terrorism than in times of peace and security. If we fail in our role in times of war and terrorism, we will be unable to fulfill our role in times of peace and tranquility. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that we can limit our judicial rulings so that they will be valid only during wartime, and that we can decide that things will change in peace time. The line between war and peace is thin - what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long-term. We should assume that whatever we decide when terror is threatening our security will linger many years after the terror is over. Indeed, we judges must act with coherence and consistency. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes.

Moreover, democracy ensures us, as judges, independence. It strengthens us - because of our political non-accountability - against the fluctuations in public opinion. The real test of this independence comes in situations of war and terrorism. The significance of our non-accountability becomes clear in these situations when the opinion of most of the public is unanimous. Precisely in these times of war and terrorism, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the Constitution.

Admittedly, the struggle against terrorism turns our democracy into a 'defensive democracy' or even a 'fighting democracy'. Nonetheless, this defence and this fight must not deprive our regime of its democratic character. Defensive democracy - yes; uncontrolled democracy - no. Judges in the highest court of the modern democracy should act in this spirit.

2. In battle, the laws are not silent

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero when he said that *inter arma silent leges* (in battle, the laws are silent). These statements are regrettable. I hope they do not reflect the way things are. I am convinced they do not reflect the way things should be. Every battle a country wages - against terrorism or against any other enemy - must be carried out in accordance with rules and laws. On the international plain, these rules are of international law; on the domestic plain, they are the rules of domestic law. There is always law according to which the state must act. There are no black holes where there is no law. And the law needs Muses. We need the Muses most when the cannons speak. We need laws most in times of war. During the Gulf War, Iraq fired missiles at Israel. Israel feared chemical and biological warfare as well, so the government distributed gas masks. A suit was brought against the military commander in which the petitioner argued that the commander had distributed gas masks unequally in the West Bank. We accepted the petitioner's argument. In my opinion, I wrote:

"When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on the recognition that it is fighting for values that deserve protection. The rule of law is one of these values."

Indeed, the struggle against terrorism is not conducted 'outside' the law but 'within' the law using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists. They act against the law, by violating and trampling it. In its war against terrorism a democracy acts within the framework of the law and according to the law.

Indeed, the war against terrorism is a war of a law abiding nation and law abiding citizens against law breakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies.

3. The balance between national security and freedom of the individual

Democracies should conduct the struggle against terrorism with the proper balance between two conflicting values and principles. On the one hand, we must consider the values and principles relating to the security of the state and its citizens. Human rights

cannot justify undermining national security in every case and in all circumstances. Human rights are not a stage for national destruction. The Constitution is not a suicide pact. As I stated in one case:

"A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction (*cf.* the remarks of Justice Jackson in *Terminiello v. Chicago*). The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the state, and they should not be made into a spade with which to bury it."

On the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights, in every case and in all circumstances. National security does not grant an unlimited license to harm the individual. Democracies must find a balance between these conflicting values and principles. Neither side can rule alone. Every balance that is made between security and freedom will impose certain limitations both on security and on freedom. A proper balance will not be achieved when human rights are fully protected, as if there was no terrorism; similarly a proper balance will not be achieved when national security is afforded full protection, as if there were no human rights. The balance and compromise are the price of democracy. Only a strong, safe and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can exist with security. It follows that the balance between security and freedom does not reflect a lack of a clear position. On the contrary, the proper balance between security and freedom is the result of a clear position that recognizes the need for security and the need for human rights.

When I speak about the balance, I do not mean an external normative process that changes the scope of rights and the protection accorded them because of terror. I mean the ordinary process that takes place every day, when we address the relationship between individual rights and the needs of society. In this latter process, rights are not absolute. They may be limited to serve the needs of society. I do not have the right to shout "fire" in a crowded theater. The threat of terrorism increases the probability that serious damage may occur, which allows the right to be limited. But note: we do not conduct two systems of balancing, one for regular times, and an additional one under a threat of terrorism. There is one balancing process, and terrorism determines the physical conditions under which the balancing process is carried out.

When the court rules on the balance between security and freedom during times of terrorist threats, it often encounters complaints from both sides. The supporters of human rights argue that the court gives too much protection to security and too little to human rights. The supporters of security argue that the court gives too much protection to human rights and too little to security. Frequently, the persons making these arguments only read the judicial conclusion without considering the judicial reasoning that seeks to draw a proper balance between the conflicting values and principles. None of this intimidates the judge. He must and does rule according to his best understanding and conscience.

Our point of departure in Israel has been that the doors of the Supreme Court - which in Israel serves as court of first instance for complaints against the executive branch - are open to anyone wishing to complain about the activities of a public authority. There are no black holes where there is judicial review.

The open door approach is expressed in a number of ways. *First*, it is very rare for the court to close its doors on grounds of nonjusticiability. At times the state may argue that most of its counter-terrorism activities are beyond the reach of the judiciary because they take place outside the country, because they constitute an act of state, or because they are political in nature. All these arguments were made before us in the Israeli Supreme Court, and most of them were rejected when human rights were directly affected. Thus, we have ruled on petitions concerning the power of the state to arrest suspected terrorists and the conditions of their confinement. We have ruled on petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated. *Second*, the court opens its doors to anyone claiming that civil rights have been violated. Everyone has standing. This is the general approach of the court in time of peace. We apply it also in time of terror. Thus, civil rights associations often come to us in defence of human rights of those sectors of society that most people do not wish to protect - including, of course, suspected terrorists. *Third*, our judgments regarding many of the terrorist cases are based on international law. Thus, for example, in a recent case the question was can the state relocate inhabitants of the West Bank to Gaza. We decided that it can be done to a person but only if there is convincing evidence that if the measure of assigned residence is not adopted, there is a reasonable likelihood that such person will present a real danger of harm to the security of the occupied territory. The state cannot assign residence of innocent persons. In deciding so, we relied exclusively on humanitarian provisions

of the Fourth Geneva Convention dealing with assigned residence and internment.

In all these decisions - and there have been hundreds of this kind - we recognized, on the one hand, the power of the state to protect its security and the security of its citizens. On the other hand, we emphasized that the rights of every individual must be preserved, including those of the individual suspected of being a terrorist. The balancing point between the conflicting values and principles is not fixed. It differs from case to case, from issue to issue.

4. The scope of judicial intervention

Judicial review of the war against terrorism by its nature raises the question of the timing and scope of judicial intervention. There should not be a theoretical difference between applying judicial review at the time that the state is under terror threats or after the terror is gone. In practice, however, as Chief Justice Rehnquist correctly noted, the timing of judicial intervention affects its content. As he stated, "courts are more prone to uphold wartime claims of civil liberties after the war is over." In the light of this recognition, Chief Justice Rehnquist goes on to ask whether or not it would be better to abstain from judicial adjudication during warfare. The answer, from my point of view - and I am sure, also from the Chief Justice's point of view - is clear. Both of us will adjudicate a question when it is presented to us. We will not defer it until the war on terror is over, because the fate of a democracy and human beings may hang in the balance. Protection of human rights would be bankrupt if, during combat, courts - consciously or unconsciously - decided to review the behaviour of the executive branch only after the period of emergency has ended.

From a judicial review point of view, the situation in Israel is unique. Petitions from suspected terrorists reach the Supreme Court - which has exclusive jurisdiction on the matter - in real time. The judicial adjudication takes place not only during combat, but often while the events being reviewed are taking place. For example, the question of whether the General Security Service may use extraordinary methods of interrogation (including what has been classified as torture) did not come before us in the context of a criminal case in which we had to rule, *ex post facto*, on the admissibility of a suspected terrorist's confession. Rather, the question arose at the beginning of his interrogation. At the start of the interrogation, the suspect's lawyer came before us and claimed - on the basis of his past experience - that the General Security Service would use force against his client. We summoned the state's representative - the same day or the next day - and we heard arguments, and made a decision in real time.

Our basic premise is that the court should not adopt a position on the question of the efficient security measures for the war against terrorism. As I said in one case: "This court will not adopt any position about the manner of conducting the war". Indeed, the efficiency of the security measures is a matter that is in the proper jurisdiction of the other branches of government. As long as they are acting within the framework of the 'zone of reasonableness', there is no basis for judicial intervention.

Often the court will encounter the argument from the executive that security considerations led to an action of the government, followed by a request that the court be satisfied with this statement. Such a request should not be granted. 'Security considerations'

are not magic words. The court must insist on hearing the specific security considerations that prompted the government's actions. The court must be persuaded that the security considerations actively motivated the government's action, and were not merely a pretext. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights. Indeed, in several of the many security cases that the Supreme Court has heard, senior army commanders and heads of the security services testified before us. Only if we were convinced, that the security considerations were the dominant one, and that the security measure was proportionate, did we dismiss the challenge against the security action. In following



Judge Hadassa Ben-Itto, President of the IAJLJ, opens the Paris Conference, at the Sorbonne University

this approach we should be neither naïve nor cynical. We should analyze the evidence before us objectively.

Is it proper for judges to review the legality of the fight on terrorism? Many argue that the court should not become involved in these matters. These arguments are heard from both extremes of the political spectrum. On one side, critics argue that judicial review undermines security; on the other side critics argue that judicial review gives legitimacy to actions of the government authorities in their war against terrorism. Both arguments are unacceptable. As to the argument that judicial review undermines security: judicial review of the legality of the war on terrorism may make the war against terrorism harder in the short term. However, it fortifies and strengthens the people in the long term. The rule of law is a central element in national security. In the final analysis, this subservience does not weaken democracy, but actually strengthens it. It makes the struggle against terrorism worthwhile. With regard to considerations of legitimacy: to the extent that legitimacy by the court means that the acts of the state are lawful, the court fulfills its traditional role. Both when the state wins and when the state loses, the rule of law and democracy benefit: for it should be remembered that the main effect of the judicial decision does not occur in the individual instance that comes before it. Rather the main effect occurs in determining the general norms according to which the governmental authorities act, and establishing the deterrent effect that this norm will have. The test of the rule of law arises not merely in the few cases brought before the court, but also in the many cases that are not brought before it, since government authorities are aware of the ruling of the court and act accordingly. The argument that the judicial review by the court somehow validates the governmental action does not take into account the nature of judicial review. In hearing a case, the court does not examine the wisdom of the war against terrorism, but only the legality of the acts taken in furtherance of the war. The court does not ask itself if it would have adopted the security measures that were adopted, if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be prudent to adopt the security measures that were adopted. Thus, the court does not express agreement with the means adopted but rather fulfills its role by judicial review of the constitutionality and legality of the executive acts.

Naturally, one must not go from one extreme to the other. One must recognize that the court will not solve the problem of terrorism. It is a problem to be addressed by the other branches of government. The role of the court is to ensure the constitutionality

and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law and not outside it. This is the courts' contribution to the struggle of democracy to survive. In my opinion it is an important contribution, one that aptly reflects the judicial role in a democracy. Realizing this rule during a war against terrorism is difficult. We cannot and would not want to escape from this difficulty, as I noted in one case:

"The decision has been laid before us, and we must stand by it. We are obligated to preserve the legality of the regime even in difficult decisions. Even when the artillery booms . . . law exists and acts and decides what is permitted and what is forbidden, what is legal and what is illegal. And when law exists, courts also exist to adjudicate what is permitted and what is forbidden, what is legal and what is illegal. Some of the public will applaud our decision; others will oppose it. Perhaps neither side will have read our reasoning. We have done our part, however. That is our role and our obligation as judges."

I regard myself as a judge who is sensitive to his role in a democracy. I take the tasks imposed on me - protecting the constitution and democracy - seriously. Despite the criticism often heard - and it frequently descends to personal attacks and threats of violence from extremists - I have continued on this path for many years. I hope that by doing so, I am serving my legal system properly. Indeed, as judges in the highest court, we must continue on our path according to our conscience. We, as judges, have a North Star that guides us - the fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. Even in hard times, we must remain true to ourselves. I discussed this in the opinion considering whether extraordinary methods of interrogation could be used against a terrorist in a 'ticking bomb' situation:

"Deciding these applications weighed heavily on this court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our fellow-citizens demand that we act according to the law. This is also the same standard that we set for ourselves. When we sit at trial, we stand on trial."

International Terrorism: An Israeli and a Jewish Perspective

Efraim Halevy

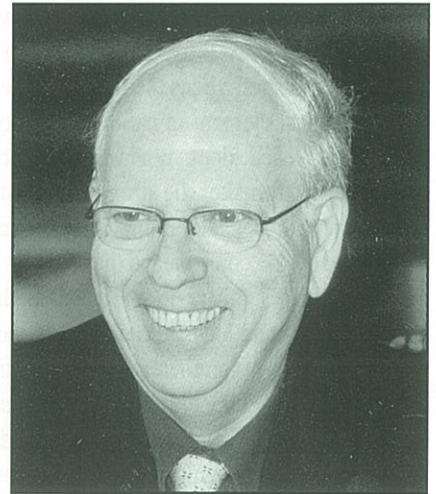
Thirty years have passed since the Yom Kippur war of 1973; this was the last attempt by a coalition of Arab states to defeat Israel on the battlefield; let us remember that the outbreak of war was a devastating surprise for Israel, for the entire world; it was an intelligence failure - one of the biggest in world history reminiscent of the Japanese attack on Pearl Harbor in the United States in 1941. Within the span of three weeks, Israel mourned more than two thousand dead; the toll rose later to close to three thousand. Those days were among our darkest hours; there was so much valour during those days and so much pain.

From the Arab perspective the Yom Kippur war was launched against Israel in the very best of circumstances; it was, as I said, a total surprise, from countless aspects. It followed a long series of terrorist attacks carried out by Palestinian groups against Israeli targets, mainly in third countries; the most prominent of these attacks was that perpetrated against Israeli sportsmen who came to the Munich Olympic games in 1972. Eleven persons died in that attack. Other operations took place in airports, in Rome, in Vienna, in Zurich. Europe, in the years 1972 and 1973, was the scene of a new type of warfare; a terrorist war designed to effect a strategic change on the Israeli-Palestinian front. In one case, an attempt was made to hijack a train carrying immigrants from Russia via Vienna to Israel; this event was the last to precede the Yom Kippur war.

I have gone back, thirty years and more, because the roots of international terrorism are deeply embedded in that past. It

is essential to understand what happened then, in order to evaluate what is taking place here and now and what might transpire in years to come. The sharp rise in the scope and intensity of Palestinian terrorism and its growing influence on current affairs is the direct result of the failure of the original Arab strategy to bring about the desired result. From the War of Independence in 1948 till the year 1973 - for twenty-five years, the hope and understanding was that the unified Arab world would produce the desired result for the Palestinians. The war of 1973 shattered that dream. Just as the terrorist wave of 1972-1973 failed to move Israel, so did the joint Egyptian-Syrian offensive of 1973 end in disaster. Within four years, Egypt went its own way and reached its peace treaty with Israel; the Pan-Arab anti-Israel front never recovered. This is in itself a fascinating turn of history; but it lies outside our terms of reference, here and now.

As of the end of the Yom Kippur war, the Palestinian terrorist movements turned their attention to the international scene. After having failed to galvanize the Pan-Arab world to fight their cause, the Palestinians went to the world beyond. In 1976 an attempt to shoot down an Israeli El-Al aircraft was uncovered in Nairobi, Kenya. A group comprising Palestinians and Germans of the Bader-Meinhoff group was seized, the operation aborted, and the plot exposed. Shortly afterwards there was the Entebbe seizure of



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an Air France aircraft carrying many Jews and Israelis. Here again the international aspect of the operation was paramount. Time and time again the Palestinians tried to embroil others in their objectives and policies. By the year 1982 they were cooperating with the pro Iranian Shiites in Lebanon and already then, twenty and more years ago, enjoying hospitality in Tehran. These were the formative days of the Muslim international terrorist effort. The seeds were sown then, the bitter fruit of which we are reaping in recent years.

During the seventies, after the Yom Kippur war and parallel to attacks against Israeli targets, terrorist attacks were launched in Europe against Jewish targets: one was a failed attempt to murder a leading figure of the Sieff family in London, another an attack against the Jewish synagogue in Rue Copernic in Paris. There was also a futile attempt to poison Israeli citrus produce sent to British stores. The terrorist effort was gradually becoming broader in scope, wider in territorial coverage; it was bringing the targets of Israelis and Jews closer and closer together, regardless of how Israel and international Jewry looked upon themselves.

It is more than interesting to note that at the very time that international Muslim terror in the seventies and in the eighties was developing, in various parts of the world efforts to bring about Israeli-Palestinian conciliation were reaching unprecedented proportions.

Secret and effective channels of communication between Israel and the Arab and Palestinian world were being built and extensively used during that period of time. As the eighties ended, the Palestinians seemed to be edging forward to constructive dialogue, whereas the Arab world was somehow becoming attuned to a rapprochement.

Then came the First Gulf War in 1991. The Arab world was irrevocably split, never to recover even its pro-forma unity, and the Palestinians who had sided with Sadaam Hussein against the U.S. led coalition, found themselves in a state of inferiority.

In quick succession we witnessed the Madrid Peace Conference, the Washington three track negotiations between Israel and Syria, Jordan and a Jordanian-Palestinian delegation. And then we had the secret Oslo track and the surprising Oslo agreement of September 1993.

The rapid succession of events in what was then called the "Peace Process" triggered, as expected, reaction among all those opposed to conciliation. Very soon Damascus became the hub of activity of the rejectionist front and the Damascus-Teheran-Beirut axis became the backbone of the *Hizbullah* movement, one of

several Islamic international orientated groups, operating on a global scale.

In 1993 as *Hizbullah* attacks increased along Israel's northern border, a decision was taken to eliminate a prominent *Hizbullah* operative, Mussawi. Israeli aircraft attacked his car killing him and unintentionally also killing members of his family. The *Hizbullah*, and its Iranian mentor retaliated; the Israeli Embassy in Buenos Aires was destroyed, killing several Israeli diplomats. And the Jewish community center, the Amia, was brutally eliminated causing more than eighty deaths.

We are now commemorating ten years since those bloody events. In the meantime the Muslim international terrorist movements have doubled and tripled their efforts. The targets are no longer only Israelis and Jews, but Americans, British, Australians; virtually everyone considered an enemy of Islam. Everybody now knows of Osama Bin Laden, of *Al Qaida*, of *Hizbullah*, of Iranian supported terrorist activities. The discovery of the *Karin A* shipment of arms sent directly from Iran, and destined to arrive in the Palestinian Authority, paid by the right hand operative of Chairman Yasser Arafat, and designed to facilitate a major effort directed at Israeli civilian non-combatant targets is one more manifestation of terrorism completing the full circle.

Having presented this thumb-nail review of events as seen from Israel, I believe we are duty-bound to dig as deeply as we can into the dilemmas with which the current situation confronts us, and when I say us, I mean the Jews in the Diaspora and us, the people of Israel. First of all let us remember that basically Israelis are now being targeted because they are Jews, and Jews are in jeopardy because they are identified with Israel. There might be differing views both in Israel and in the Diaspora concerning the relationship between the two of us; but in the eyes of the terrorist groups and movements, we are all part of the same target.

However, there is an anomalous situation which links Jews in the Diaspora to Israel. Israel is a sovereign state with a democratic form of government. Periodically, the electorate chooses its leaders and they bear responsibility for the security and well-being of all the inhabitants of Israel. In the Diaspora, there is no comparable "system". Jewish communities are part and parcel of the states in which they live. Even if a system of election exists, those elected do not bear sovereign responsibility for the lives of the members of the community. What responsibility do they bear? Given the unique threat to which Jews as Jews are exposed today, what is the substance and form, even the legal form, of these responsibilities? With all due respect I hazard the view that it will be difficult or

even impossible to reach consensus on this question.

But let me go a step further. What is the nature of the responsibility of the Government of Israel for the well-being of Jews who are not citizens or inhabitants of Israel? For example, in deciding on military operations or any other types of operations against terrorists threatening Israeli interests or persons, must the Government of Israel evaluate the effect of such operations on Jews throughout the world? If Israel does have a responsibility in this regard, does it also have authority in this regard? If there is a link that binds our destinies today because we are facing the very same threat, do Jewish communities have a *locus standi*, in expressing their views concerning Israel policy on combatting terrorism? If not, is Israel's responsibility unilateral? Is unilateral responsibility conducive to the norms of law?

Seen from a purely Jewish perspective, the view and policies of Jews living in countries round the world on issues pertaining to terrorism must be channeled and presented through their local national organs of government. But what happens when the Jews of country x are being targeted by international terrorists because in the eyes of the terrorists, Jews and Israelis are one and the same? What happens when country x states that its citizens, its Jewish citizens, are the victims not of international terrorism but of Israeli policies - and thus justify the terrorist acts in one way or another? What then?

In recent years I believe all of us have had to try and define for ourselves what is the true implication of the creation of the State of Israel for issues pertaining to the physical survival of communities and Jewish individuals the world over. It is now generally accepted that if a particular Jewish community is in a state of distress or clear physical jeopardy Israel must "come to the rescue". Why is that so? Why is Israel "responsible" for the lives of Jews in Morocco, Iran, Yemen and Ethiopia? And if this is so, what "responsibility" does Israel bear if the international terrorist threat develops into a potential existential threat to the Jewish people? Can such a burden be "shared"? Can such a responsibility be "split"?

The last three years have provided several instances when some of these questions have bordered on becoming very practical. The three year old *Intifada* - the *Al Aqsa intifada* or *Jerusalem Intifada* has left Israel with over eight hundred dead and thousands injured. It is providential that world Jewry has not suffered any loss even comparable to that suffered in the Argentinean dual attacks by the Iranian *Hizbullah* combination. We in Israel did assess at one time that Jewish targets could be a type of soft under-belly; there were

isolated incidents in Europe; a boy was seriously wounded when traveling on a bus in London; there were several attacks on Jewish centers in France; but these were local, limited events. There is no doubt that in the past the idea of attacking Jewish installations and persons was considered. If this had happened where would the locus of responsibility lie? And when I mention responsibility, I refer not only to the necessity of evaluating in advance what might happen but also to the question as to what and when a response to specific actions should be considered. Given the prospects of international Muslim terror in the years to come, these could become fateful issues determining the very destiny of the Jewish people.

At this stage I would like to add a note of optimism, a note of hope based on recent experience. As the war against Iraq loomed high on our horizon, we assumed it might release a terrible wave of terror worldwide and that Iraq and maybe others would try and hit back in Europe and elsewhere. We also believed there might be a dramatic escalation in the *Intifada* directed against Israel. In practice these fears did not materialize and I believe this fact should be a source of reassurance in our troubled times.

So, coming back to my questions, I do not pretend to have answers to all or to most of these issues. There will be those who say that there are many questions which it would be better not to ask. There are many who will recall the famous Yiddish dictum - "a *Shyleh* is *treif*!" There will be those who say that much should be left to constructive ambiguities. But when we approach issues of life and death or to be more precise when these issues approach us, we cannot leave issues in the hands of ambiguity.

I am a graduate in law of the Hebrew University of Jerusalem. I am proud to sport a Magister Juris degree *cum laude* of the 1956 class. And yet, as I pursued my career, the last years of which are public knowledge, I have so often found myself in situations which have no true legal construction or no true legal solution. I have known full well that there are times when one is left alone with just one's own conscience because one cannot legislate or adjudicate on matters of conscience.

One of the prominent characteristics of recent legislation in so many countries round the world is the rush to promulgate laws designed to provide legal frameworks for combatting terrorism. The pure physical challenges of terrorism have compelled free societies to run to protect themselves. This is nothing new in world history. During World War Two, large numbers of American citizens were detained because of their Japanese origin. The enormity of Pearl Harbor, the shock of the Japanese onslaught

virtually swept away so many of the basic tenets of the American political culture. When virtual survival was at stake, the law of the land was capable of effecting lightening adjustments.

I do not believe that we have reached the peak of the international terrorist challenge, and in this context I do not feel that as Israelis and Jews we have broken the world cycle of Muslim terrorism aimed directly at us. Let us not delude ourselves. Much of the present relatively low level of terrorism must be attributed to the relative success of security services of Israel and other countries in foiling such acts. But there is a limit to their capabilities and I do not wish to say more than this in order not to give room to self-fulfilling prophecies.

There is a very fundamental aspect of the current issue that I feel obliged to emphasize. The international terrorist effort is not globally organized and coordinated; the various movements do not have structured organizational charts. In very many of them there is no central command in which authority resides. They have an amoebic character and as such if one element is destroyed or damaged, all others can continue to function without any real problem. Needless to say, these groups do not consider themselves duty-bound in any way to conform to the laws of war or to any other form of international convention. They are "above the law" or "beyond the law". However, the aims of these groups are not confined to gaining "victory" against their opponents. Rather they wish to effect the utter and complete destruction of society as practiced by their adversaries.

In circumstances, as just described, it is obvious that normal arguments and conventional reasoning will have little if no effect. Since our adversary is not interested simply in a portion of territory or an advantage of one type or another, there can be no "compromise" with him until he realizes that he is losing heavily and is on the verge of virtual destruction. Only then will our adversary enter into a meaningful negotiation designed to guarantee his survival. Everything I have just said only goes to show that we are in the midst of a very long haul the end of which is hardly in sight.

But let us look at some more promising and optimistic aspects arising out of the current situation. The fact is that in the world of 2003, "the law" is prepared to accept forms of action that it would have rejected only two or three years ago. The more the enemy raises not only the level of its activities but also the quality of its operations, the more the defending world will up the ante. In 1998, two American Embassies were blown up in Nairobi and in Dar Es Salaam. Scores of Americans were killed. The United

States responded by sending cruise missiles into Afghanistan and bombing a chemical plant in Khartoum. In the year 2001, the *Al Qaida* attacked a series of targets in the U.S.A. on 11th September. The U.S. responded by invading Afghanistan, and by carrying out operations, including targeting individuals in the Yemen.

What next? I know not, but I venture the view that if terrorism will escalate, so will the response and as the response escalates, so will "the law" - international and national law - be hard pressed to create solutions, novel solutions to the challenges of the day. May I venture the thought that at such a time, a few answers will be fashioned for the questions I have mentioned here. I believe we must all be ready to act precipitously at such a time.

In my previous incarnation, I was often confronted with the dilemma of having to take operational decisions for which I could find no precedent or parallel. I think that the dilemmas we face, to some of which I alluded today, are indeed *sui generis* issues. We will find no conventional answers to these questions but we will, I believe, all be motivated by a great single message of our not too distant past. Two words - in Hebrew and in English - לא עוד - never again. If and when Israel will have to face these enormous existential challenges I have not a shadow of a doubt that we will meet them head on. And we will not be alone because you and we will be at each others' side.

Respecting Human Rights in the War against Terror: The American Perspective

Ruth Wedgwood

For the past two years I have been quite involuntarily spanning two different worlds. I was reared as a lawyer from a social democratic background; all the values of justiciability and transparency are deep in my marrow. Almost at the same time I have become immersed in defence issues, including the ways that one may need to adapt the law to the particular exigencies of present circumstances. Frankly, I share the view that in a sense Israel has not yet been forced to come to grips with the hardest decisions, because when one thinks about terrorism there are distinctions to be made. In the United States we have a homicide rate of fifty thousand people a year. We put up with a great deal to maintain our own traditions of due process and defendants' rights, such as the unpredictability of jury trials and the limitations on the admissibility of evidence, in order to dissuade police from violating the law. We suffer a personal cost in order to maintain



civil liberties, for example, women cannot walk at night in the United States. But, at the same time, what is different about the present moment, at least in the U.S. cognition, is that it is not just ordinary terrorism that we may ultimately be facing, it is catastrophic terrorism.

No one should ever make light of a suicide bombing. In my view it is wholly illegal under international law. But nonetheless, there is a difference between the death of a quarter of a million people and thirty people. So, I think the hardest issues that are going to be before both Israel and the U.S., and ultimately

Europe, will deal with what a democratic society should do in the face of the possible use of weapons of mass destruction and the diffusion of technology, or, against groups that say that they are willing to use them against civilian targets and countries that say that they would heedlessly sell their technology to anybody who is willing to buy it, whether it be North Korea, Iran or Pakistan. I think that we haven't really yet begun to talk about terrorism and the role of a democratic security service.

International law is a very different regime now than it was before 11th September. One extraordinarily important change came at the hands of the Security Council. The two votes after 11th September, Resolutions 1368 and 1373, said basically that there is a new standard for state responsibility; that the old days of the Cold War where states could have their surrogates and still walk away to try and avoid escalation of the conflict are over.

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In the words of the Security Council in 1373, any assistance to international terrorism, whether through logistics, intelligence or asylum, or even passive assistance, is forbidden and implicates the state itself in the action. That is a huge change. Under the old ruling of the International Court of Justice, in the *Nicaragua case*, unless the state was effectively controlling the group that infiltrated and caused death, it was not responsible as a state. Even in the Yugoslav tribunal, in the *Tadisch decision* (Tadisch was a camp guard in a camp in Bosnia), it was held that unless the state was in control of the group that caused the harm to civilians, it was not implicated. But now there is a new regime. You cannot be the landlord, you cannot be the supply house, you cannot beckon or nod. This is an extraordinarily important change which I think, along with the occupation of Iraq, will account for some of the changes of behaviour, if we should see any, in Saudi Arabia or in Syria.

The second change is the greater acceptance of the view that terrorism can amount to a state of war. This was a view from which people previously shrank, possibly for fear that they might endow their adversary with a kind of dignity, as if he were a state, or with a kind of immunity, as if he were the ordinary soldier of an ordinary state. But now we see a private, non-state actor able to destroy thousands of lives, able to attempt the decapitation of a government. Indeed, the September 11th strike was intended to hit the Congress or the White House as well as the Pentagon. It was supposed to be the decapitation of operational command in the U.S. government. When a group can do that, it does indeed amount to a state-like act, and certainly an act of the war. This has actually been recognized by the Security Council in its authorization of the American response in Afghanistan, recognized by NATO under Article 5 of the North Atlantic Treaty (the first time in the history of NATO that NATO has authorized a joint response), and recognized, of course, by the U.S. Congress that authorized the use of force against *Al Qaida* wherever it would be found. Terrorism can be a state of war. It does not mean you necessarily endow the combatants on the other side with immunity from criminal liability, but it does mean that you can counter hostile forces as well as hostile acts and hostile intent. In a war you can destroy the enemy's infrastructure, you can destroy his forces. You do not have to wait for him to get up one morning and engage in a particular foray. This is the where the difference lies.

The third change, and this is quite disputed, concerns the traditional laws of war. There is less of a Nietzsche black hole amongst international lawyers because international lawyers

are reared to suppose that specification of the law is always incomplete. Clarification happens very slowly. Whenever a dispute arises in a meeting it is simply prorogued. The gap is then filled in other ways. For example, back in 1907, the Czar's legal adviser, Fredrik Martens, included within the early Hague Conventions a proviso, rather like the 9th Amendment of the American Constitution, which said that failure there to create a common text - a common set of rules to regulate a particular situation - did not mean free season. Rather it meant that reference had to be made to the principles of common conscience, the opinion of mankind or what countries used to call civilized states. This did not mean a free fall in which countries were devoid of any duty to make analogies to existing rules, or to refer to conscience. So I believe that the third change that has occurred is recognition of the fact that while the older conventions which were drafted for interstate wars - the 1949 Geneva Conventions and the 1907 Hague Conventions - certainly reflect principles that have to be applied in new situation, these rules may not be well adapted to the particular problems of fighting a non-state actor who fights in a guerilla fashion, blends into a civilian population and uses catastrophic means.

The belief that one will have to adapt the existing law is also impelled by the fact that much of what has happened in the law of armed conflict as codified represents political compromise. Like Israel, the U.S. did not ratify the First Geneva Protocol of 1977 for fear that it would dignify guerilla warfare. The Geneva Protocol was reached at a time when national liberation movements felt that they had achieved success and wanted some mark of honour for their battle against colonialism; they were given an unhappy indulgence in the sense of no longer having to distinguish themselves from civilian populations when they fought in those kinds of battles. This was a blow for those attempting to protect civilians in any kind of conflict.

In the U.S., which is a civil liberties culture through and through, the battle has been uphill. I think the fear often is that we are so American, so convinced that life is sumptuous and bountiful, that we believe that we can have it all - the full throttle war in court as well as complete protection. My fear has often been that we would simply suppose in that sense of luxury that one could do things exactly as one did them before and suffer no danger. Consequently, I think it worth recalling that human rights enters on both sides of the equation in all of these debates.

In a very important opinion of the Inter-American Court for Human Rights, the *Velasquez Rodriguez case*, the Court told the

government of Honduras that whether or not its contention was true that it had no knowledge of the Honduran death squads, it had an affirmative responsibility to police private violence. And if it failed to protect any portion of the population from privately commissioned violence, it was as if it had committed the violence itself. This is a signal reminder that human rights rhetoric has largely been seen as an opposition to government. But nonetheless government should see itself as protecting its citizens and non-citizens' human rights by protecting them from private violence. Accordingly, I believe that in the balancing test of human rights versus security, these factors actually express two different manifestations of the same norms of human rights.

Our task is made much more difficult because very little has been written on states of emergency. It is a subject that lawyers avoid. Most academics shy away from it as do most human rights lawyers. The only learning that one will find is the statement that some rights cannot be suspended, including physical integrity and racial neutrality, but that those which can be suspended, which include an extraordinary numbers of important rights, locomotion, free association, free speech and liberty of the person, should be suspended only in a necessary and proportionate way. This does not say very much, even to a judge, so that in fact we have almost no reference point, apart perhaps from several cases faced by the British in the European Court of Justice when emergency measures applied in Northern Ireland - the well-named *Lawless case* and *Ireland v. U.K.*

In the U.S. there has been an almost unconscious philosophical choice not to declare a state of emergency and not to declare that *habeus corpus* is suspended. Rather, I think the law of war is used as a metaphor, and even more than a metaphor, in the sense of providing some vigor in responding to a non-state network, and yet also providing some discipline. The law of armed conflict can only be invoked in circumstances that can be characterized as armed conflict. Not every act of ordinary terrorism would qualify, only the kinds of acts that rise to the level of something similar to 11th September or a concerted campaign that has killed hundreds of people.

Consequently, there seems to be a recognition that the ordinary premise of criminal law, namely, that one can simply react rather than anticipate, that one can simply rely upon deterrence, no longer applies and that the kind of adversary we have may not be subject to deterrence. He is certainly not a member of our civil polity, he does not even have the same kind of commitment that the Mafia would have to our own polity, and therefore we must

call upon government to take very different kind of action.

The crime model rather than the war model was followed through the 1990s: through the period of the first World Trade Center bombing, the attack on the training centre in Riyadh in 1995, the Khobar Towers attack in 1996, the attack on the U.S. Embassies in Africa in 1998, the 2000 attack on the *USS Cole* in Yemen, up until the time of the second attack on the World Trade Center in 2001. People openly acknowledged that there was a failure to take the adversary seriously, he was thought to be rather amusing in his foibles, picking up truck deposits after the first World Trade Center attack that led to the identity of those actors. But what is now recognized is that *Al Qaida* had a very sophisticated learning curve, and that its ambition to use weapons of mass destruction simply changes the paradigm that is applicable. One cannot afford a 1% failure rate if one has a group that wants to use nuclear weapons or even perhaps chemical or biological weapons.

So far we have invoked the law of armed conflict as more than a metaphor in the case of people who were caught in Afghanistan. We have used it in the case of *Al Qaida* members picked up in Bosnia and elsewhere, with some grumbling from the world community, and held them in Guantanamo Bay. We have used the prerogative, a traditional prerogative, of the law of war to hold people as interned combatants for the duration of the conflict, and we are getting a lot of quarrels from the Red Cross and others in Europe on when the conflict should be seen to be over. We style it the conflict against *Al Qaida*, they style it the conflict in Afghanistan. But the older rule of the law of war, that one can hold a combatant, was actually once seen as a humanitarian rule; to allow combatants to surrender safely, because no one would take a surrender in the old days when it was felt that the man would just return to the battlefield the next morning.

We have been enforcing immigration law with a vigor we never showed before. It is actually quite harmful to our society in many ways. I have a student who could not return for his second year of graduate school because he had a technical violation. The fear was that if one forgave anybody's technical violation, then the technical violation could not be used to exclude someone suspected of participation in terrorism. Therefore, everybody has to live with a draconian immigration law.

We have used material witness warrants to ask people to appear before Grand Juries and kept them in custody if they were not willing to appear voluntarily. We have defined a new set of substantive crimes that are much further upstream than

a libertarian society would ordinarily like. We have defined it as a felony to be trained by *Al Qaida*, as it is important to catch people when they are making themselves available. One of the responses of the criminal law has often been to point out that, just as with criminalizing burglars' tools, it is possible to criminalize the preparatory acts that indicate that a person will be taking part in terrorism. Likewise, the financing of terrorism has now been made subject to transparency and to criminal sanction in a way that it never was before.

We have had a host of problems because this is untested ground, because all our instincts are to push back and to make things as liberal as we possibly can. In the *Moussaoui case*, concerning the twentieth hijacker, the challenge related to the fact that a democratic criminal justice system likes to make available to the defendant almost everything in the government's file, certainly all directly exculpatory information. Yet in a wartime situation there may be ongoing interrogations that one does not want to interrupt for psychological reasons or even a false flag interrogation where one pretends to be Egyptian or pretends to be Saudi. If a Federal District Court judge takes one's deposition in the middle of all this, it is hard to maintain the fiction. The military commissions are not an easy answer to this problem because even there the rules are drafted so as to provide a right of access to exculpatory evidence.

On the investigative side of the house, we have taken down the fire wall that used to exist between criminal justice information and intelligence information. This is seen as dangerous by some people, as potentially returning us to the days of the CIA and to the days of political spying. My answer simply is that I rank the order of evils in the context of the time. My softer answer says that the guidelines that I wrote as a young lawyer in the seventies and early eighties for the FBI, which were suitable at the time, are now dysfunctional. If one has a network that operates onshore and offshore in real time, one cannot afford to have a lobotomized government whose on shore brain and off shore brain cannot talk to each other. The CIA and the FBI have to be able to share criminal and intelligence information in real time. In theory, this has finally become easy post 11th September. In practice the institutional cultures that resist sharing are so profoundly ingrained that even now it is hard to get adequate sharing.

We have had debates about interrogation methods. It is a non-derogable right in international law to be free of torture. There is no right, no excuse, no mitigation in international law or in the American Constitution for engaging in torture. When pressed

about stress and duress, forms of sleep deprivation or awkward positions, things that may or may not be true, questions that were floated by the *Washington Post*, it led to a very significant flurry of activity around Washington. The human rights groups, Human Rights Watch, Freedom House and Sergio Vieira de Mello, UN High Commissioner for Human Rights, asked the President to reaffirm his commitment to banning torture, which he did. Other groups then asked for a reaffirmation of the commitment not to engage in degrading or inhumane treatment, and the General Counsel of the Defense Department did that as well. This means in a democracy that no agents will willingly take any chances.

Israeli Supreme Court President Aharon Barak's opinion on 'no torture' shows that there is no easy way to deal with this. He suggested that in criminal law there might be a defence of necessity, a series of guidelines issued by the Attorney General specified what would constitute necessity, and this was followed by a significant number of rulings of non-prosecution. In most countries it would be asking a lot of an agent to put his honour and career on the line, they will not agree. So in fact the law has to openly address what it wishes to have done. It cannot expect people to be legally heroic in breaking the law and take the entire burden of the society upon themselves.

At the same time one does not want to coarsen sensibilities. The very reason for the law of war is that when in combat there are often feelings of emotion and vengeance and anger. How can these be assimilated? There are some things that are almost unfit for a court to say. That is why, I think, courts often indulge in these passive ways of avoiding issues, because they do not want to affirm them but neither do they necessarily feel that they can interrupt them.

We have also had the problem of citizen combatants. I like to tell the story of the time I asked a legislative assistant, in November of 2001: "What is going to happen when we catch an American citizen?" I hoped it would not be an African American because I am so deeply committed to the civil rights movement. But we caught Jose Padia, a Latino who had been to Afghanistan and Pakistan, talking to Abu Ziyad about a dirty bomb plot. He came back. We had good intelligence on him that he had intended to place a radiological bomb somewhere in the U.S. It was a high level of confirmation, of corroboration of intelligence, but almost nothing that is admissible evidence. What do you do with a citizen whom you cannot try in your ordinary common law court system with its limitations on hearsay? One answer is, let him run around, while you gather more evidence. The practical person's answer

is that this does not work. If it is a close enough surveillance not to lose him he will know that he is being watched and therefore will do nothing more to implicate himself. Ultimately, he was remanded as a combatant, which shocked a lot of people. It is almost a declaration of civil war - for a citizen to fight against his own government.

Then came the question of *habeas corpus*. The question put before the judges in our Article 3 courts was: how much should the court defer to the executive branch in the finding that somebody is a combatant, particularly if it involves sensitive means? Ordinarily *habeas corpus* only looks at jurisdiction to act, not the *de novo* merits of the case. But we have had a very lively conversation between the 4th Circuit and the 2nd Circuit on what to do. The 4th Circuit ruled that a responsible court had to ask the executive: is there some evidence to justify what you are doing? Should there be right to counsel? There, the 4th Circuit said 'no' on the facts of *Yasser Hamdi*, a Saudi American who was caught on the battlefield. The 2nd Circuit District Court said there should be right to counsel, even at the cost of interrupting the interrogations.

That is still in review. It is problematic. The concern is that in an effective fight against future actions, the one good source of intelligence that we do have, human intelligence, comes from captured combatants. And *Al Qaida*, particularly as a group, has shown a great interest in repetitive scenarios. They try it again until they get it right. Accordingly, even knowing historical information about what they have planned is highly useful and the idea of shutting down an interrogation because it makes a

federal judge feel more comfortable, as an Article 3 feature, is not necessarily the right answer.

My concern is that if you live in a deeply law-laden culture you can have the Weimar problem. You can be so deeply civilized that you don't in fact want to sully your own sensibility and your own reputation with the things that it takes to defend democracy. You can make some intelligent choices. You could say, for example, that intrusion into privacy is to be preferred to ethnic profiling. You could ask the legislator to ratify it, but parliaments are notoriously slow to act.

Nonetheless, I think one must fill the hole that Justice Jackson of Nuremberg dodged in *Kuramatzu*, in the Japanese relocation case during the war. Jackson said the law is silent; the law cannot deal with certain things. Military commanders will do what they will. Then he went to Nuremberg and said: the law governs all. This is a deeply contradictory position. I vote for the later Jackson, but that in turn means that judges in democratic societies may be put to embracing worlds that they have never been asked to understand; where they don't have much life experience, where they can't make the predictions necessary about what is sufficient but not too much to prevent an act of terrorism, and where, frankly, they may have to take on their own shoulders some of the moral derision that is ordinarily and willingly allotted to members of intelligence services. This kind of morally complex personality is something that is going to be part of judging in any democratic society that faces this kind of terrorism.



At the Paris Conference, Palais de Justice: Session II on Racism and Anti-Semitism was chaired by Daniel Lack (center); from L. to R.: Joseph Roubache, Prof. Irwin Cotler, Prof. Anne Bayefsky, M. Yves Bot and M. Olivier Pardo

“We Must Gear Up to Win the War against the Terrorist Threat”

Dominique Perben

As Minister of Justice in France, a political officer and also as an individual citizen, I would certainly support the relevance and the concerns which will be discussed in this symposium. Racism, anti-Semitism and terrorism, are challenges weighing on the rule of law, to which all democracies must rise. In the area of anti-Semitism and racism we must continue to implement a policy based on republican principles of secularity, education, legality, integration and respect for others. All these values have been forcefully voiced by our President, Jacques Chirac, and must drive our future action. Racism and xenophobia generally, are radically opposed to our republican values. Legally and historically, the first phrase of our 1946 Constitution is a seminal phrase and it reads thus: “On the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France declare that each human being without distinction of race, religion or creed possesses sacred and inalienable rights”. On that basis our legal system in France is stamping out discrimination and racism and has become tighter. Recent laws illustrate the government’s commitment across the country.



In terms of our aims and objectives, we have moved forward. I supported the draft law to more severely punish xenophobia, terrorist attacks and racism when those acts are perpetrated wittingly. I have asked that our prosecutors prosecute those criminals tirelessly. In our draft law that has now been endorsed by the Senate and will be reviewed again by the Parliament in France soon, I will be amending and tightening prosecution procedures for these criminals. The present republic has asked that our legal system be supplemented by an independent legislative authority that will

be responsible for detecting any discriminatory behaviour more effectively.

Let us turn to the reasons for this development in our legal system. Violence and anti-Semitism surely give us cause for greater concern. The figures are worrying. Eighty-four surveys are underway, sixteen investigations are also underway. The involvement of minors in these cases compounds the concern for the future development of our society. In 2002, 221 sentences were imposed for racial discrimination. That includes discriminations based on the press. Our politicians, legal experts and civilian interested parties must remain vigilant. Personally I am committed to taking action where necessary. There may be differences between public institutions and Jewish entities on the ways and means, but fortunately we meet each other more and more often. I have asked the Prosecutor’s Office to report all acts to the Chancellery that are considered to be anti-Semitic.

We must not shy away from language. Anti-Semitism is a fact of our society that we need to fight and clamp down on through education. Our legal system does not always understand the best

M. Dominique Perben is the Minister of Justice of France. The above extracts are taken from his welcoming address, delivered in French, during the Opening Session of the International Conference held by the Association in Paris on 15-17 October, 2003.

procedure to follow to prosecute the perpetrators of these crimes. With a view to upholding the independence of our judges, and with a view to bringing about greater consistency in the rule of law, I will ask the Prosecutor's Office to use the best resources to this end and make sure that channels of recourse and appeal are invoked where necessary. Ongoing channels between these bodies and offices must support and explain our work and not allow victims of anti-Semitic or racist acts to remain ignorant, doubtful and uncertain as to the fulfillment and performance of our legal procedures. We need to break through the reluctance people feel to come forward and report these acts whether because of fear or because they feel discouraged or disheartened. Therefore, NGOs and Jewish bodies and other bodies that aim to stamp out racism must rally round and meet with us more closely and more frequently.

I hope that we can take this a stage further and that we can now establish greater dialogue asking our General Prosecutor in our thirty-five Courts of Appeal to devote more time and energy to anti-Semitic and racist acts. Those magistrates can then work locally and more directly with the Prosecutor's Office as well as the Chancellery. In each area of jurisdiction I hope that our directions and instructions to the Prosecutor's Office will be taken a stage further and will be acted upon through different legal offices, so that these offices and partners work closely with us, with a view to making our public legal system more operational, bridging the gap between our different departments within the country. Stamping out anti-Semitism and racism can be more adequately and effectively dealt with when those acts undermine

our republican values and principles.

Another challenge is international terrorism. France has been playing an instrumental role in detecting and clamping down on international terrorism. France and other democracies are now at war against terrorism. It is a just war based on international law. Internationally today there are some ten conventions in force. France drafted in 1986 a law that constitutionally everyone has agreed to follow, since it upholds a balance based on the principle of proportionality. That law is being reviewed regularly. The 18th of March 2003 law makes it a criminal offence for individuals to be involved with other individuals who would undertake terrorist acts. A 9th of September 2002 law will tighten sentences against terrorism, racism and criminal acts and will have a major impact on stamping out terrorism; it is now under review by our Parliament, so that our legal system can take on board the necessary resources to deal effectively with terrorism.

As Minister of Justice I must also give our legal system resources to act more effectively within the framework of the General Prosecutor's Office in Paris, tightening the laws and resources to enable those individuals to act more swiftly and effectively. The terrorist threat is shifting its lines of financing and recruitment. We must gear up to win that war. We must therefore be particularly watchful through our police forces, our legal authorities, our legal system, and through different economic partners, who must be the sentinels overseeing world terrorism. Thank you for your commitment, you can rely on my commitment.



The heads of the Supreme Courts at the Paris Conference: Justice Aharon Barak, President of Israel's Supreme Court confers with Justice Guy Canitet, Premier President de la Cour de Cassation of France

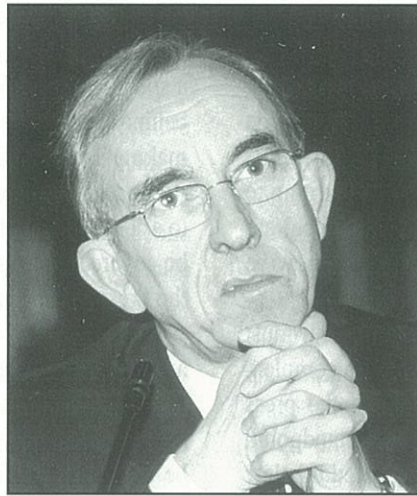
Law, Rights and the French Experience

Yves Bot

Our legal principles are clearly set out in a number of key pieces of legislation on the international and national levels. All human beings irrespective of race, religion and beliefs, have inalienable sacred rights. This is set out in our current French Constitution, and, in fact, can also be seen in the 1789 Declaration on the Rights of Man. This French Declaration was used in such international instruments as the U.N. Charter and the European Convention on Human Rights, which state that all men and women are born equal and are equal in dignity and in rights.

A few examples from my daily work tell the story of ordinary hatred. In the 4th District in the centre of Paris where I work, one - Jacques went to pick up his mail from his mailbox, was grabbed by a group of young boys, accused of belonging to a dirty race and told to leave the country. Bricks were thrown through the windows of synagogues and swastikas painted on the walls. We tried to identify the culprits. We were able to summon them to appear and they are now behind bars. I would also like to mention that a lot of propaganda is distributed about the Jewish lobby and we try to intervene in these cases as well.

What about the Internet? When one surfs the Internet one finds all kinds of scandalous statements, such as, and I quote: "A 200 kilo bomb on the Rue de Rosiere Jewish quarter in France would be necessary to save the souls of the Palestinian martyrs". Those



who are not part of the Jewish community may think that they are safe from these threats, but that is not necessarily true. On the same Internet site I also read that Christians are being manipulated by the French Jews. On the face of it this apparently means that judges, magistrates and other judicial officers are safe, yet on the same site one can read: "If you see a judge in the street regardless of where you are, beat him up and kill him to get revenge for our brothers". Naturally these are examples and may be a bit sensationalist. They do not describe the true reality of French society today. Yet it

is something that needs to be stamped out.

Anti-Semitism is in fact punishable by law in France. French law is organized and logical in this regard. In French criminal law we have several instruments that can be used in a complementary fashion. First of all, in the French criminal code there are provisions which punish general discrimination. Discrimination is defined as any distinction made between people on the ground that they belong, or supposedly belong, to a certain ethnic group, race or religion, or due to their origin, gender, family situation, morals, political beliefs or trade union activities. These provisions which punish discrimination in France can be used broadly and include boycotting.

Thus, Articles 225.1 to 225.4 of our Criminal Code establish punishable acts. This is our first legal instrument. A second legal instrument dates from 1881 when a specific law entered into force in France governing the press. The law punishes libel and insult, inciting hatred or racial discrimination. It is quite complex, but within our legislation and legislation governing the press, it affords a real sanctuary. Thus, any expression of racism or anti-Semitism, either as an insult or if it constitutes a libel or provokes

M. Yves Bot, Prosecutor at the Court of Paris. The above extracts are taken from his address, delivered in French, during the session on "Racism and Anti-Semitism" during the Paris Conference held on 15-17 October, 2003.

hatred is outlawed. The reason for this, as I mentioned earlier, is to prevent any act of discrimination. Encouraging these types of acts is also punishable.

A number of other specific provisions are complementary. For example, under the Criminal Code, recording personal data on race, public or political opinions, religion or trade union activities is outlawed. Article 225.18 makes the violation of gravesides punishable by law; this was naturally inspired by racist action taken in the past against graveyards in France. Further, a recent law dated 2nd February 2003 has made racism or racist motives for acting an aggravating circumstance in connection with crime. This will be strengthened even further with a bill currently being debated by Parliament. Likewise, penalties for discrimination will be strengthened, with the statute of limitation actually being increased in respect of certain crimes. In this regard, returning to the law on the Freedom of the Press where insults and libel are punishable, the extremely short statute of limitation will now be extended from three months to one year.

This was an overview of French legislation, however, it must be said that implementation of these provisions is quite complex. For example, the complicated nature of the law on the press makes it very difficult to implement from a procedural standpoint. In France it is difficult to hold the press liable. As noted this law dates back to 1881. At that time, the way people expressed their thoughts was organized through newspapers. They had a whole editorial staff. They had an ethical code. There was an organized way of explaining types of thought and there was a right to reply. It was possible to find a person liable behind that newspaper to take to court.

In France the press is also considered an indispensable part of democracy, and when it comes to applying the European Convention on Human Rights and the documents of the Council of Europe as well, the Strasbourg Court has actually stated that the press in a democracy is in reality the watchdog of that democracy.

However, does this mean that everything should be allowed? Of course not. One cannot hide behind the idea of freedom of speech and freedom of the press to make pseudo-criticisms of people by reason of their nationality, origin or religious beliefs. This infringes the heart of a person's identity. But what can democracies do against this? We can organize ourselves, and this is recognized both in the European Convention and by the Strasbourg Court of Human Rights.

As mentioned, in France we have specific regulations, we have

punishment, we have aggravating circumstances, and these will be even stronger in the future when it comes to newspapers and the press. But the question today is whether our legal system of protection should apply to other media such as the Internet. What do newspapers have in common with Internet sites? Internet sites are often just the unleashed expression of hatred of a single individual.

As far as I am concerned, I and my colleagues will naturally apply the law and the provisions of the 1881 law in spite of the difficulties we face and we are facing even more difficulties on the procedural level due to the fact that the Internet is such a specific media. We can access the Internet although the people behind the website may be located on the other side of the planet, making it very difficult to identify and catch the culprits as well as prosecute. Therefore I think that in the future we are going to have to ask ourselves whether what is happening on the Internet should be covered under specific legislation, and not by our Freedom of the Press Act in France. I personally believe so.

It is also very difficult to prosecute these cases because of a problem with definitions; definitions we thought were finally settled, definitions that are being distorted and are being used in different contexts, definitions taking on meanings that should not be appropriate. When it comes to a legal debate, certain terms, such as 'anti-Zionist', can in fact simply mean something neutral, a political criticism. That is one way of looking at it. Everyone understands that. Everyone understands that we do have a right to criticize governments. But the real problem is to ensure that legal scholars have a real understanding of the terms and that there are no hidden meanings that can be misunderstood.

Obviously, the terms 'anti-Semitism' or 'anti-Zionism' can be considered political criticism, they then become ordinary and commonplace and should supposedly fall outside of the scope of a criminal offence. In this context there are classic references which I have used and that I have verified. I would like to cite two: the *Larousse Dictionary* and the *Universalis Dictionary* published in France. I believe my sources are correct and I have seen here that the debate is not necessarily all that open. 'Zionism' is supposed to be the theoretical philosophical justification for the State of Israel. 'Anti-Zionist' activity would be the denial of such a state, the State of Israel. So the first difficulty is apparently solved here, although others could say that people have the right to think this, even though the manner of expressing their thoughts is another question. This is why I explained how difficult and complex the situation can be. Should we take into consideration all the

symbolism as well? When it comes to the Jewish soul and the State of Israel, the nostalgia and the willingness to bring together within a single state a diaspora spread throughout the world in exile, what does that represent for a culture, for example? In Jewish culture this needs to be reviewed, understood and believed. This is something I realized and that I believe explains the Jewish ritual ending the Passover activities by saying "Next year in Jerusalem".

Although this is a complex situation, we need to be very cautious about implementation. It is true and very clear that regardless what we may feel inside, when we are working on new legislation we have to be very cautious about the way we proceed. My colleagues, other French judges, who by law are responsible for determining the appropriate action, the best ways to achieve our objectives when it comes to compliance with the law, have a saying to the effect that sometimes it is better to accuse someone of the wrong type of crime than to have him acquitted, because if people are acquitted, that can encourage them to go ahead and commit further crimes.

Mistakes can be made when it comes to the assessment of judges who choose not to prosecute certain cases. However, French law and practice can remedy this. A remedy can follow by virtue of the special features of our law which allow civil parties to take action in connection with a criminal prosecution. This principle of being a civil party to a criminal action is even stronger than some of the equivalent American principles of law. A victim or an association, a non-profit organization, can take action as a civil party in connection with criminal procedures, and in such a case I will have to prosecute.

The second remedy relates to practice. Since groups exist, we need to hold discussions with them. We need to engage in dialogue with these pressure groups or what you could call the equivalent to class action suits. Here we plan to improve on our past experience. We can see what we have gained up to the present; we can see this in the decisions handed down by our courts every day. Clearly, within this restrictive legal framework and with the required caution judges need to take with regard to the merits of a case, it is still true that French case law shows that we have made an effort to adapt our decisions to the new forms of discrimination and racism we see today. There is truly no problem. We can see that the Criminal Chamber of the Court de Cassation decided very early on that one of the criminal offences under the Law on the Press is to say that the Holocaust was a fabrication, and to reproach the Jews for talking about the Holocaust.

One special type of discrimination is economic discrimination. French criminal law punishes boycotts and discrimination against businesses. We are at the very beginning of jurisprudence in this matter but decisions have been handed down punishing those organizing boycotts. I think it is worthwhile noting a recent case in which a court of first instance acquitted someone charged with this offence, the Public Prosecutor himself appealed the case, and the Court of Appeals sentenced this person to criminal sanctions. This I think proves that there is a willingness in France to help things advance, and that decisions will be handed down all along the line.

Let us talk about the future. I believe I have made it clear that in France our court system does not hesitate to prosecute persons for these types of offences which we indeed find revolting. Likewise, sometimes it is true that one needs to learn lessons from errors made in the past that certain cases of violence of a racist nature are punishable, and we need to remain active and efficient in this area. I think these crimes are being prosecuted more and more than in the past. We have a judge in charge of investigations, specializing in carrying out investigations in these types of cases. Once it might have been more usual to drop the cases because of the difficulty in finding those who are guilty. However, in the future we will make every effort to search for those guilty of these types of discriminatory offences and punish them.

We are also developing better communication and more cooperation with non-profit organizations. First, one thing needs to be settled, that is, truly understanding what is occurring today. Sometimes I believe people challenge the official figures we publish and claim that they are on a minimal basis. But I think that when we compare our figures, the official statistics from the police, to other statistics and data coming from non-profit organizations, we can see whether the police are aware of the offences that are occurring, and if they are aware of them whether these complaints have been filed properly. In the future, decisions which are handed down will be more thoroughly explained. Sometimes citizens complain that the judicial system is difficult to understand and that the courts do not pay enough attention to victims. Where a criminal offence has been committed, perhaps an anti-Semitic or racist act, the victim may naturally be in shock on a physical level, but he might also be shocked on a psychological level because, as I mentioned previously we are talking about the heart of the dignity of human kind. Therefore, we will no longer take any risk that decisions will not be understood. Victims need to understand the decisions, need to receive proper explanations.

This is absolutely fundamental.

Thus, we have appointed a special prosecutor within the Chief Prosecutor's office who will be in charge of acting as an intermediary between the court system and the victims. This special prosecutor is Ms. Natalie Bikash. Ms. Bikash is already in charge in my office on working on city policies, and it was no accident that she was also chosen to act as this intermediary. Why? Because the fight against racism, discrimination and anti-Semitism must be carried out not only by applying the law but also by working on a daily basis in the field of prevention.

It would be inconceivable to continue to hear from the mouths of young children during school recesses, serious racist and anti-Semitic insults which seem obvious and ordinary to these young people. We will not allow explanations along the lines of: 'well, that's how young people talk about it today', or 'they don't understand what they are saying'. It is our duty to explain to these young people what those words mean.

I believe in every country, and at least in France, legal scholars and judges are very interested in what is happening in our inner cities as well as in the suburbs. The Americans were quite aware of this early on. I'm referring here to city policy. We plan to integrate the fight against racism and discrimination ever more deeply into our city policies. In this field we have made close contacts with the educational authorities in Paris and are currently discussing different and quite innovative methods. I cannot say anything about this yet, it is a little too early. But I am sure that by the end of this year we shall be in a position, together with the educational authorities, to make several major announcements in this field.

We have been able to settle matters with young people and avoid exclusion and hatred through this educational effort. I think that we have taken a real step ahead together. It is hard in the initial stages to quantify the results, but we are starting now and emptying the sea with a teaspoon. It will take some time but we have decided to do so in a thorough and definitive way. We have decided to do so because we are thinking about the future, and you can only think of the future if you think about children.

In what kind of society will children live in the future? Will they have to live in fear simply because of the fact that they are the son or daughter of their parents, or because they are the end result of the normal evolution of man and humanity, or simply because they have certain beliefs? Do children have to fear because they pray or while they are praying? In that case, what kind of a society will children live in? Where is this place of freedom, security and

justice? We need to ensure these principles as a pillar to build the European Union. We need to build it together in a concrete way and on an everyday basis. That is why we plan to start out from the roots, case by case if necessary.

In this field we need to have the right European instruments to cooperate on the criminal level and to make the instruments even more effective. I mentioned the Internet and the types of websites that are organized from foreign countries. There are tools such as *Eurojust*, which can be a form of European cooperation. I will be checking *Eurojust* to see if in the future we can take more action and pursue common criminal cases. When we see the way these publications occur on the Internet and the way in which these networks are able to work, *Eurojust* needs to take action.

We have a lot of work ahead of us. Work on the Internet and work on terrorism. But, of course, all of this is interrelated. We know that in connection with racism and, of course, the perverse form of racism which is anti-Semitism, a lot of world terrorism is using the Internet to justify its crimes and ideology. We will fight against this. This is why we are so determined and why we feel the approach must be global. We will do this with the hope and the willingness that in the future all of us can meet together and agree on the principle I mentioned earlier, an ideal for all legal scholars. The ideal of course is justice.

Anti-Zionism: a Form of Anti-Semitism

Georges Elia Sarfaty

Anti-Zionism is common and part and parcel of broad public opinion. I would like to try to highlight here what makes it so efficient and explain the non-judicial reasons for this phenomenon. It exists in two possible arenas: the political arena and civil society.

Anti-Zionism has a genocidal logic; a logic of extermination. When I looked into this I was appalled to see how the mechanisms of anti-Zionism and exterminist logic exactly echo the rationale of half a century ago. First, a discriminatory definition is given to an entity - the Jews, the Jewish people, Israel. Second, Zionism as an abstract concept is demonized. The concepts are banalized and in concrete terms made the subject of cultural, scientific and economic boycott. The third step is isolation. The task is to describe a zone within which to place this entity. These three steps presage the last step, which is its destruction.

There is a focal point in this ideology which may be summed up as 'the less the Jews will be present in the world, the better mankind will feel'. This is one of the main topics of the racist discourse. The rationale of the racist discourse is to dehumanize part of mankind, to justify its eradication, its annihilation. We are living in an atmosphere that can make this kind of expectation possible. I would like to mention what is at stake here. Even if I use some notions that do not quite fit together, I will try to give them a coherency which will enable us to come up with a counter discourse. My aim is to come up with a response to anti-Zionism.

There are different things at stake. The first is culture. There must be justifications, "cultural justifications", for the propagation of such a phenomenon. I have asked myself whether its roots lie in common cultural representations, in the ways people talk, in the ways people think on a day to day basis, on the customs and morals of people. It appears to me, monitoring what has been said

about Zionism and the way that the State of Israel has been delegitimized, that one of the drivers of anti-Zionism is the common representation of what would be, from the external point of view, the Jewish identity, namely, the current idea that Judaism is solely a religion.

One can see that the religious connotations are absolutely everywhere, saturating this notion of the Jewish people and containing them within their religion. The Jewish people are the 'chosen people', with all the drawbacks this concept entails. In other words, the Jewish people are not a historic entity; they are, first and foremost, a theological entity.

It is interesting to analyze how adverse speeches and statements are being developed through the use of this narrow definition of the Jewish people. The PLO Charter which has never been abrogated spells out most of these statements. It also spells the destruction, the annihilation of the State of Israel, because of this narrow definition of the Jewish people. Judaism being a religion cannot be a nation, writes the Palestinian Charter. This is not only a statement of the enemies of Israel; it has also been picked up by general audiences.

The second issue at stake may be found in the rationale for anti-Zionism. Why has anti-Zionism proved so efficient? In fact, anti-Zionism is an ideological construction which bears on some equations. These equations have been declared in banners: Zionism equals racism, Zionism equals colonialism, Zionism



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is racism, *etc.* These equations are an ideological phenomenon. They form a mirror for public opinion. Since they address western public opinion, they remind the public of what is worst in its own collective memory. The equations have become more and more familiar since this process has been continuing for over half a century. This makes the anti-Zionist re-vindication, if we can call it that, more obvious. The aim is to recall the darkest pages of western history; assimilation of Zionism with racism revives the memory of the occupation in Europe and replaces the Jews of yesterday with the Palestinians of today. The assimilation of Zionism with colonialism in the French arena revives the image of France and its colonial presence in Algeria, with all the excesses of the war in Algeria.

Some associations and charities in France have supported this notion for over half a century, since the days of the war in Algiers. They use this rationale to make anti-Zionism their specialty, their bread and butter. They are supported by universities and by academe. Zionism equals imperialism is also a notion which relates to modern anti-Zionism and anti-Semitism. It is reminiscent of America and the image of America fighting in Vietnam. For the common conscience, Israel and the way it behaves with the Palestinians is mixed with the way South Africa behaved with the Black population. It is obvious that people who listen to these equations have no historic culture, therefore, to be anti-Zionist today means to have commonsense and even to be progressive.

The efficiency of these equations lies in the rhythm with which they are produced. They are turned into truth because they are repeated time and again. No one is really going to check the history books. It is a strategy of amalgamations which has been used for decades.

Also at stake are issues in the political field. Some analysis is possible if one steps back a little. The political aim of anti-Zionism is disqualification of the Jewish people, delegitimization of Israel and then its demonization.

'Demonization' is now being used as a buzz word qualifying this absolute hatred for Israel. Demonization is a theological idea. The synagogue in the early days of the church is the representative of Satan, and these are the roots of anti-Semitism. From this perspective we are now tackling the world of the sacred, of theology. Once delegitimization is obtained through demonization, action has to be taken against the Jewish communities themselves, causing them to become ashamed of their links with Israel. Once Israel and the Jewish people have been presented in such a

horrible way by the media, the aim is to break the symbolic unity of the Jewish people and thereby breach the solidarity between the Jews and Israel. Anti-Semitic phenomena among the Jewish people themselves are probably also the consequence of this type of action. De-Judaization, as we call it, is very sensitive to mainstream thinking.

How can someone not favour those who are presented as victims? If Zionism equals racism, be it Nazism or colonialism, then being anti-Zionist means to be progressive. We have here a total inversion of anti-racism as we have described it in past years.

Also present is the very important ideological stake. Are there analogies or similarities between anti-Semitism and the quite recent phenomenon of anti-Zionism? Is anti-Zionism anti-Semitism? I would like to escape the traps. I will state it in a different way. Anti-Zionism is the last historic expression of Judeophobia: hatred for Jews. Anti-Zionism is part and parcel of this tradition.

It should be recalled that, from the historical point of view, Judeophobia has followed two paths. The oldest one, revived today, is theological anti-Judaism. It is the religious hostility to the entity of Israel, developed during the first centuries by aggressive and derisive policies towards the Jews. Theological anti-Semitism was propagated by Christianity in all its forms as well as by Islam. In our case we are dealing with the problem of the Jew who cannot access sovereignty.

The second path is that of anti-Semitism, which has more recent roots. Its expression is socio-cultural. Anti-Semitism, at the time of the *Dreyfuss case*, was defined as the rejection of the civil emancipation of the Jews. It was followed by anti-Zionism which, from the historical point of view, had as its aim the rejection of the sovereignty of the Jewish people, rejection of the possibility that the Jewish people would become a nation and a state of law.

The vision of Judeophobia is the denial of the national emancipation of the Jewish people. In all its versions, the arguments, the mechanism and the statements are exactly the same. We have the same perspectives, the same stereotypes and the same arguments. Finally, what is the same in the three different versions of Judeophobia is the criminalization of the Jewish people. In each version of the historical Judeophobia, each step can be matched with the use of the appropriate words.

From the Vatican we saw the catechism. In contemporary society we have seen disinformation, which consists not only of manipulating and distorting information but distorting history as

well. From this standpoint I would say that there is continuity in the type of discourse we hear on Judeophobia.

Another major feature concerns the institutional and political stakes which have led to control being taken over anti-Semitic events and activities.

Today we see an anti-Zionism lobby. This lobby is structured on a worldwide level. There are now a number of organizations, trade unions and even political parties that are basing their party on a common program denigrating Israel and the Jewish people. Anti-Semitism as an ideology is an integral part of the program of these organizations just as it was a hundred years ago. This ideology even appears in the official speeches of certain political or sub-political parties and this is analogous to the fight against the Jewish race at certain times in history when anti-Semitism was very strong.

The communication and progress of this ideology could be seen, for example, in the boycotting issue last year, which evidenced the peak of the whole anti-Zionist progression. Thus, it is an ideology, a phenomenon, working through a network, using institutions, policies and politicians. This ideology stands behind terrorism; it forms a basis for terrorism - the right to take action - as well as behind social and political criticism of the situation.

Finally, I wish to make a few comments about the historical and political stakes. I would like to mention a few dates in history that are landmarks of anti-Zionist activities. It is customary to say that the *Protocols of the Elders of Zion* is really at the heart of modern anti-Semitism. This may be true but it should also be added that the very wording of the *Protocols* contains arguments and represents stereotypes and a stereotypical thesis of these policies. One can also see that anti-Zionism has been a relay to anti-Semitism because in fact the *Protocols* was circulated two years after the very first Zionist Congress was held, and represents the viewpoint of the European philosophy.

The *Protocols*, of course, depend on the theory of plot. *Mein Kampf*, as well as other bases for national socialist policies, referred to the worldwide Jewish conspiracy. I would like to quote a portion of *Mein Kampf* where this viewpoint is explained. According to Hitler, when Zionism tried to make the rest of the world believe that Jews would be satisfied with the creation of a Palestinian state, Jews and non-Jews alike said that they had no intention of agreeing. They wanted to organize a central structure with national domination, and this would be a state that would have total sovereignty and would be an asylum for all the truants of the world. This was the definition of Zionism according to

Hitler, and he only repeated what had been said approximately one generation before his time. The period 1930 -1940, was one of the major periods of reform within the Arab world and circulated a lot of the theses contained in the *Protocols*. In 1955, a conference held in Bandung, Indonesia against colonialism and leading to the organization of the non-aligned countries provided an arena for spreading anti-Semitic thoughts; notwithstanding that one-third of the planet had nothing to do with the Jewish question as stated by the Europeans. Thus, an equation was created between Third World philosophy and anti-Semitism.

Equating these different philosophies has now reached full maturity. Zionism is supposedly a political movement that is imperialistic, but what about the freedom of all progressive people in the world? Zionism is supposedly fanatical by nature, aggressive, expansionist and colonialist, as well as fascist in terms of its methods. We are talking here about the 'plot' and Zionism as a tool of world imperialism strategically placed within the Arab states. This is truly the heart of anti-Semitism and anti-Zionism. We know now that since the 1980s the Islamic Movement has used this definition of Zionism and has disseminated it with the complicity of extreme left wing parties. In 1975, the UN vote marked the institutionalization of anti-Semitism. Then the fall of the Berlin Wall and the fall of the eastern bloc led to a rewording of anti-Semitism with more national perspectives in the heart of Europe. Finally, the Durban conference brought the whole ideology to a head, ending up as an anti-Semitic, anti-tolerant forum. Jonathan Geffen in his book said 'one Jew, one bullet'. That was the motto of the Durban conference. In the last two or three years, anti-Zionism has been developed through the adoption of anti-American positions. Throughout, slogans have taken the place of the knowledge of history.

Anti-Zionism is an offence, but it has become a legitimate offence since it is expressed in the most prominent situations. The aim is to corrupt progress and to uproot criticism. We have through the various forms of anti-Zionism the ultimate expression of the totalitarianism of the 20th century.

To conclude I would say that this democratic and republican framework provides us with the weapons to react efficiently against this totalitarian ideology. The philosophical values of the republic are tolerance and freedom supported by the education of the population. From the legal point of view I think that we should regard these issues from this perspective and that all these issues should be linked.

Xenophobia, Racism and Anti-Semitism

Shmuel Trigano

The idea of anti-Semitism, which has been of concern to us over the last three years in particular, is difficult to understand because of the distinctions we have drawn between xenophobia, racism and anti-Semitism. These three categories provide different ways of rejecting people who are dissimilar. Xenophobia rejects foreigners on a national basis, racism rejects people who are physically different and anti-Semitism rejects foreigners on metaphysical grounds.

The existence of the State of Israel has led to the strange metaphysics of the Jewish people becoming accepted much more. The situation of the Jews has supposedly been normalized; like any other people they have a government, an army, an opposition party and everything else that, in the eyes of the world, a normal society should have.

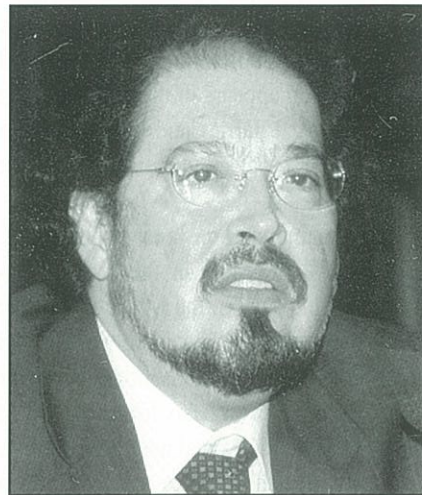
However, because the status of Jews is being increasingly normalized in the view of the world, anti-Semitism too has become increasingly normalized and evident in international politics, even if at its core it remains metaphysical. This is the reason why it can be promoted as a legitimate political cause, although *de facto* it involves the classic dimensions of anti-Semitism. This also explains why there are so many empty debates on whether anti-Zionism is anti-Semitism, whether anti-Jewishness is anti-Semitism, and other quite surprising exchanges on sociological and political as well as historical levels.

A second reason for anti-Semitism relates to the reality of the world after Communism. The post-Communist world has always

dreamed, in a very dangerous way, that humanity will become totally united. This dream opposes the idea of individual peoples and the differences between nations. This is truly paradoxical because the utopia which multi-cultural-

ism is supposed to promote can become and is in fact becoming today the worst instrument of totalitarianism, and I am referring here to democratic totalitarianism. There were democracies in the past which were totalitarian. This type of a democracy denies all differences and in fact also denies the supreme metaphysical difference, the difference that we attribute to the Jewish people and the difference advocated by political Zionism.

Based on these two facts, over the last three years we have seen three major world movements fighting for a place in history. *First*, globalization on a worldwide basis - possessing a post-modernist ideology; *second*, anti-globalization, coming from the liberal left wing parties; and *third* Islam and its desire to conquer the world. These are three different movements targeting the Jewish people, and in particular Israel, *i.e.* Jews who are searching for the conventional normalization of relations in the contemporary world and for the collective existence of their nation state. As a result of these processes, to the surprise of the Israelis, and in fact to the point where I feel Israel does not even understand what is happening, Jews and Israel have once again become the incarnation of the metaphysical foreigner.



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In Israeli society a major discussion has been taking place about the legitimacy of the national identity and even the morality of the Israeli state itself. There are pseudo-democratic movements which are really neo-leftists, neo-Marxists, trying to restructure society, ideology and politics. We are talking about the extreme Left which has re-emerged on the national and international scene. We have been able to see how anti-globalization movements have condemned Israel, saying that Israel is the symbol of capitalism, as is the United States, and that the poor Palestinians are those who suffer. The existence of Israel has become in some eyes the worst danger to the world and a counter weight to the *Shoah*. We have to understand how certain Christians have falsified the divine words of the *Koran* and the proper understanding thereof. We need to change these things. We need to understand anti-racism which is a profession of faith against globalization and against this left wing strategy that has started to fight the Jewish state and to do away with any distinction between anti-Semitism and anti-racism. We need to demystify Palestinian suffering which has been hiding anti-Semitism.

Today, this mysticism is understood as anti-racist philosophy. If we are "anti-racist", then we are anti-Zionist, and *de facto* anti-

Semitic. Being anti-Semitic does not necessarily mean criticizing the policies of a government, a natural process, especially in Israel. What it really means is denying the legitimacy of the State of Israel and promoting its destruction. I would say that anti-Zionism is an extermination ideology promoting the extermination of the Israeli people and the destruction of its institutions. Israel, is in fact, the only state on the planet which a number of people would like to see disappear. Throughout history, anti-Semitism has even existed within the Jewish world itself. So I would say that anti-Zionism is really a criminal offence on the moral level and on the level of justice.

We have observed how certain anti-racist activists who are sincere have actually adopted positions that are anti-Semitic, even if they do not realize it themselves. We have even seen a terrible convergence between the neo-Trotsky movement and the Islamic movement on the international political level as well as on the domestic political level, for example in France. It has been proven today that neo-Trotskyites and other anti-globalization movements are using the Islamic veil as an important way to debate these issues, and we have seen these post-modernist intellectuals remain silent in the face of growing anti-Semitism. This explains



Minister of Justice of France, M. Dominique Perben, addressing the Opening Session of the Conference at the Grand Salon of the Sorbonne University

why hatred is growing against the Jews: at the end of the 20th century anti-Semitism was a bridge between the extreme Right and the extreme Left parties, and in a new process, this bridge has also led to a clerical form of fundamentalism in Islam.

It is important to understand typical French anti-Semitism and 'communitarianism', meaning that a person is not part of the Republic, part of the community, but is on the fringes of society. Such accusations have been made in the immediate aftermath of anti-Semitic acts, in what is quite a paradox. Jews, who have been citizens since the French Revolution, including Jews from Algeria from the 1870s, now feel that they have once again become immigrants in their own country. The Jews feel like foreigners in their national land, whereas more recent citizens feel that they can identify with French society and are French citizens. Thus, anti-Semitism in this case has become much more normalized and is turning into xenophobia, in other words, Jews are seen as foreigners in their own country of which they are nationals.

Anti-Semitism is the background for this phenomenon: the metaphysical foreigner, the person suspected by fellow citizens, even though the fellow citizens are identical to him in almost every single aspect. We have seen to what extent modern anti-Semitism has suspected Jews, who are just like any other citizens, to be these metaphysical strangers. There are reasons for this which I have explained in my works, but in any case the great majority of French Jews cannot imagine Jewish continuity in Europe without the existence and the acknowledgement of the State of Israel. This is not typical Jewish "hysteria", nor is it atavistic sentiment. It is reality, a reality which is closely related to the history of Europe, to the history of contemporary democracy and which is an integral part of reconstituting Jewish life in Europe after the *Shoah*.

All our problems in the immediate future relate to knowing whether the metaphysical foreigner I have referred to - this basic figure in anti-Semitism - will continue to remain in people's consciousness, hiding behind this pseudo-xenophobia or pseudo anti-racist philosophy, and thereby lead to less legitimacy for the Jews in France and less equality for the Jews in France.

When we listen to the speeches of the Minister of Justice Dominique Perben, Minister of the Interior Nicolas Sarkozy as well as the Prime Minister Jean-Pierre Raffarin - we should feel reassured because we suffered during the last government, which together with the French public were quite negligent in recognizing and acknowledging anti-Semitism in France. There has been a major change but not all depends on the public authorities; public opinion also plays a role and this is something

which the public authorities cannot always control. Rumours are important as is the collective unconsciousness.

The greatest worry relates to the progress of this hidden metaphysical foreigner within the Jewish world. We are being stigmatized and excluded on an automatic basis. This exclusion is not the result of an accident. It is also the result of a real strategy being conducted by the pro-Arab camp that of course has promoted this strategy over the last three years. It is part of the attempt to dehumanize the image of Israel; to try to show that there is no difference between our leaders and, for example, Milosevic. This dehumanization in the end has also impacted persons who previously felt close to Israel, who have expressed their solidarity with Israel. I believe that the Durban conference was really the peak of this approach. Numerous NGOs and charities are continuing to promote these very dangerous policies, and this will inevitably impact Jews as well as a number of other sectors within society.

Everything that impacts Israel, in fact, leads to this supposed sacred exclusion. We must be very cautious whenever we compare Jews or talk about the Jewish community. People feel uncomfortable; they do not know how to behave. Why? Because the public has heard so much, yet does not have the necessary historical background, it does not know the reality of the situation and does not know how to act. The public is not completely guilty in this type of a situation because there is total confusion in the minds of the public; there is a lot of misunderstandings when it comes to the Jewish cause. This means that people are no longer as close to Jews. They are being excluded. Everything having to do with Jewishness is becoming taboo. This is true even if the ordinary citizen has a Jewish neighbour and even if that Jewish neighbour lives just him and meets him daily in the street.

I have talked about taboos and the sacred process which is going on here which I see as a very dangerous process which sociologists have, in fact, realized and understood to be of a religious and mystical nature, but also to have a collective character. On the one hand there is the totem, this object of compassion, of memory, of lamentation, namely, the *Shoah*, which the post-modernist world and the anti-globalization crowd grieve over. And on the other hand there is a taboo accompanying the totem: horror, desecration. What does that mean - Jewish life? Today, after the Holocaust, such a process is unbearable and terrifying: Jewish death is exalted over Jewish life.

“Freedom is an Asset that Cannot be Shared”

Joseph Roubache

There is no life without dialogue and in most of the world dialogue today is being replaced by polemical dispute. There is no life without persuasion and history today is one of intimidation. The world around us is suffering. To misname things is to add to that suffering in the world today. Albert Camou wrote this at the end of the *Shoah*. Fifty years later we note with sadness that his worlds are still topical.

After 11th September 2001 enlightened minds said that the drama of the Twin Towers was an inevitable response to the misery of the world, to the opulence, affluence and arrogance of our democracies. Three straightforward questions need to be addressed here. Why were the attacks on Jeroba, Karachi, Bali, Nairobi and Casablanca perpetrated? What was the origin of the \$60 million recently received in 129 countries from the *Al Qaida* bank accounts? Why send children and teenagers to their certain deaths, promising them Paradise at the expense of the death of their victims? There is no such thing as good or bad terrorism. There is only a dirty war, a new kind of war, a trans-national civil war conducted by an evasive and omnipresent adversary. How can we face up to him? Democracies founded on the rule of law have very often been ensnared and entrapped by their own principles. One journalist wrote: “After the 11th September law seems to be in a state of stupor, unable to name what has just happened, obeying no standard or established categorization”. That lawyer



searched his toolbox, but found nothing suitable there. Mario Britache then said: “A toolbox is the handyman’s stock in trade, but since the 11th September they tinker and potter about giving words more or less clear, more or less vague, juggling with such phrases as legitimate defence, reprisal action, counter measures, terms and language to fit these circumstance.”

I would like to make two observations. First, terrorism is the most serious threat hanging over peace and security that the world has ever known. And second, faced with an active terrorism all states have a natural and legitimate right to protect their

nationals. The United Nations Security Council has recognized the threat and the right on many occasions, but what conclusions has it drawn? The international community has expressed many pious hopes and made many rhetorical declarations.

Our first aim surely is to ask that hypocrisy, falsehood and selfish interest cease within states so that finally we can lay down and chart a new strategy geared to and in line with this new type of war. Secondly, we must set up an international legal system or network so that we can cooperate between police forces and between legal authorities in a meaningful way and hunt down dirty money hiding in tax havens.

In this regard let me issue this caveat: the International Criminal Court now being set up must not be used by the enemies of freedom and tolerance as a platform serving their own ends. The Durban conference has given us a sad example of this. To say that we did not know that would be missing the point.

Finally, a few words on racism and anti-Semitism. France is not a racist country. France is not anti-Semitic. It has a long tradition of republicanism that it honours. The French Government, its Prime Minister Mr. Jean-Pierre Raffarin, its Minister of Justice

Dr. Joseph Roubache, President of the French Committee of the Association. The above extracts are taken from his address, delivered in French, during the Opening Session of the International Conference held by the Association in Paris on 15-17 October, 2003.

Dominique Perben and its Minister of the Interior Nicolas Sarkozy, have all taken a strong and uncompromising stand condemning racism and anti-Semitism. We are aware of the fact that they are totally sincere in their statements. And yet we are worried and concerned. 2002 was a year in which there was a major increase in acts of violence and racist threats on a scale unprecedented in the last ten years. The reports of our Human Rights Advisory National Commissions have used these very words. We are worried and concerned because 62% of these threats and acts of violence have been directed against Jews, because they were Jews.

We are concerned further because unfortunately today in France an African may be refused accommodation or a job because he is an African. How is it conceivable that fifty years later it is still impossible to serenely teach about the Holocaust in French schools? Can we accept the fact that today Jewish cemeteries are desecrated, synagogues are set on fire, people are molested and insulted simply because they wear a skull cap? Indeed today above and beyond these misgivings and concerns we must report on two real dangers. The first is the fact that the general public is relatively indifferent to these events. In a recent poll racism and anti-Semitism as issues were ranked only seventh amongst the concerns that French people feel.

The second danger is to admit to the perversity that the victim is ordered to justify himself and the guilty party withdraws behind an inverted argument. The racist withdraws or hides behind the fear of job insecurity, unemployment and illegal clandestine

immigration. The anti-Semite hides beyond anti-Zionism, of course, anti-Zionism as an attempt to remove the very legitimacy of the State of Israel. The ultimate was reached when peace lovers demonstrated in Paris and in other European capitals. In their demonstrations these pacifists, most of whom were Left wing or extreme Left wing militants, brandished Israeli flags with swastika painted on them.

What can we do? Of course, first of all, raise awareness. Rally people, marshal people. Second, we must ask the media to report objectively and in a balanced way on the Middle East. The media has a heavy responsibility in their statements and in the pictures that they relay. They must be very careful about the potential impact that articles or pictures may have on minds that are ill informed.

Finally, we must ask that public prosecutors process and follow petitions tenaciously, rigorously, and that where necessary they commence prosecution proceedings against racism and anti-Semitic violence. I would say to the judges to be aware of the fact that to say today "dirty Jew" is not an ordinary petty crime. It is a special type of crime and we know today, fifty years after the Holocaust, the extremes to which such language has led.

As René Cassin, our founder, said: freedom is an asset that cannot be shared. It is our fight, a fight each and every one of us must wage.



At the Paris Conference, Palais de Justice: The session on "International Terrorism", was chaired by Joseph Roubache (center); from L. to R: Prof. Ruth Wedgwood, Justice Aharon Barak, President Hadassa Ben-Itto, M. Guy de Vel.

“A Box of Creeping Creatures”: The removal of public office holders as a result of unseemly behaviour

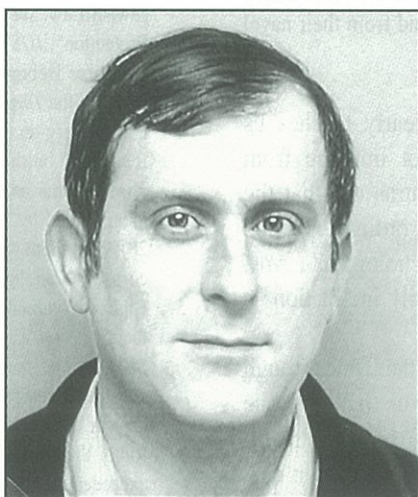
Aviad Hacoen

The *Torah* passage that tells of the twelve spies sent by Moses, and the outcome of their mission, describes one of the most traumatic events in the history of the Israelite people in Biblical times. As a result of their sin, the whole of that generation,¹ with the exception of Joshua and Caleb, were doomed to remain in the desert, there to die.

The beginning of the passage tells of the selection of the “men” who were charged with “scouting the land.”² The Bible does not spell out the specific qualities that the spies were to possess.³ However, it does emphasize, repeatedly, that they were all “men”, leaders of the people, and “chieftains” of the tribes:

Send **one man** from each of their ancestral tribes, each one a **chieftain** among them (*Num.* 13:2).

The *Torah* goes on to stress “**all the men** being leaders of the Israelites” (13:3). However, one might ask: what type of people were they, and were they elected or appointed to this task? And,



if so, who selected them, and how? These questions, fundamental to any process of leadership selection, remain unanswered in the biblical text.

The Sages and the commentators, however, attempted to make up for this deficiency. Rashi (*ibid.*) comments: “‘All the men’ - **every use of the term ‘men’ (anashim) in the Torah implies men of stature.**”⁴ And, at that time, they were still righteous.”

Ibn Ezra offers a similar explanation: “And the reason for the use of the term ‘men,’ is that they were **well known, men of valor.** Similarly: ‘all the men’

(verse 3), ‘be strong and show yourself a man’” (1 *Kings* 2:2). Rabbi Ovadiah Sforno comments likewise: “‘All the men’ - men of valor.”

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1. The various Rabbinic sources point out that this penalty was applied to those aged twenty and above. This is deemed the age at which the individual becomes legally “responsible” for all his actions, including criminal acts, as opposed to other ages (6 or 13 for males, 12 for females) which apply in other contexts. This issue arises in an interesting debate in the Knesset, during its deliberations on the Capacity and Guardianship Law, which set 18 as the age of majority for civil legal purposes. See M. Elon, *HaMishpat Halvri* [published in English as *The Principles of Jewish Law*] (Jerusalem 1988), pp. 1396-1397 (Heb.); N. Rakover, *HaMishpat Halvri beHakikat HaKnesset* [Jewish Law in the Debates of the Knesset] (Jerusalem, 1989), pp. 336-339 (Heb.).

The passage then goes on to recount that it was precisely those leaders who failed so grievously, and with such far-reaching consequences. Furthermore, as a result of the calumnies they spread about the Land of Israel,⁵ they were condemned to suffer a unique punishment:⁶

Now those men, that brought up the evil report upon the land, died by the **plague** before the Lord (14:37).

The Sages went even further, expanding on the exact nature of their punishment:

R. Simeon b. Lakish said: They died an unnatural death. R. Hanina b. Papa said: R. Shila of Kefar Temartah had expounded: It teaches that their tongue stretched down to their navel, and worms issued from their tongue and penetrated their navel and from their navel they penetrated their tongue (*Sotah* 35a).

Whatever their punishment, this passage clearly teaches us that even the “leaders of the people” are not immune from transgression. On the contrary: it sometimes turns out that the sins of the leaders are greater than those of the ordinary people. The Sages express this thought in social/psychological terms: “Whoever is greater than his fellow, his [evil] inclination is greater.”

An examination of Jewish legal sources, from the Bible through to contemporary *responsa* literature, introduces us to a long line of public figures and leaders who deviated from the straight and narrow path. Contrary to common practice in our own day, the scholars of Jewish Law were not afraid to deal with this phenomenon openly, although at times they did try to offer some justification or defence for those individuals’ actions. Indeed, we shall see from our study just how wise King Solomon was when he said that there is nothing new under the sun.

Lest they become arrogant

Examination of the sources draws our attention to an interesting point. Unlike contemporary law, which demands certain objective qualifications, for the most part professional, as prerequisites for appointment or election to public office,⁷ Jewish Law focused more on the candidate’s personality and moral qualities, and less on his professional abilities. Thus, for example, Jethro proposes to Moses the appointment as judges of people who were “capable men who fear God, trustworthy men who spurn ill-gotten gain” (*Ex.* 18:21). That is, the emphasis is on their honesty, fear of God

and resolute character, and less on their legal knowledge.⁸ This is particularly clear when we look at the qualities required of candidates who were examined by the “Judicial Appointments Committee,” as described in the *Tosefta* (*Hagiga* 2:9):

2. Contrary to what is implied by our text, that it was God who commanded Moses, “Send men,” the beginning of *Deuteronomy* indicates that it was the Israelites who prompted the mission, and that Moses acquiesced to their request: “Then all of you came to me and said, ‘Let us send men ahead’” (*Deut.* 1:22). This apparent inconsistency prompted the commentators to suggest various explanations to resolve it.
3. For a discussion of the qualities required of holders of public office under Jewish Law, see: Aviad Hachohen, “Qualifications, Not Connections, Nor Protection”, *JUSTICE*, 28, Summer 2001.
4. The three Hebrew words, “*kol anashim bamikra*” (“every use of the term ‘men’ in the *Torah*”), do not appear in the early printed editions of Rashi’s commentary on the *Torah*. An examination of the Biblical text (even if we focus only on the narrative portions; see, for example. *Exodus* 21:18, 22) raises doubts as to whether this “rule” is accurate. For example: “Then there passed by Midianites (*anashim Midianim*), merchants...” (*Gen.* 37: 28); “But there were some men (*anashim*) who were unclean by reason of a corpse” (*Num.* 9:6), etc.
5. Biblical commentators debated the nature of the spies’ transgression, since their mission was, after all, to report on what they themselves had seen. Some of the commentators hold that their sin lay primarily in the fact that they attempted to add a subjective “interpretation” to their objective “report”: “**However**, the people who inhabit the country are powerful.” Rabbi Yitzhak Arama, however, holds that their sin lay in the fact that they exceeded their authority: “They removed themselves from being spies, taking on instead the role of advisors, and this made their sin exceedingly great” (*Akedat Yitzhak*, 77; quoted by Nechama Leibowitz, *Studies in Bamidbar*, Jerusalem, 1996, p.169 [Hebrew]).
6. By comparison, the rest of the people were condemned to a “normal” death: “How long will this people spurn Me... Nevertheless, none of the men who have seen My Presence... shall see the land that I promised on oath to their fathers; none of those who spurn Me shall see it... In this very wilderness shall your carcasses drop. Of all of you who were recorded in your various lists from the age of twenty years up, you who have muttered against Me” (*Num.* 14:11, 22-23, 29).
7. It goes without saying that we must distinguish here between offices filled by appointment and those filled by election; and, in the case of appointment, between appointment to a professional position (judge, city engineer, attorney-general, etc.) and appointment to a purely “technical” role, one which does not require any particular professional qualifications.
8. Even in this case, there is a difference between the qualifications required of a judge, and those required from one holding an executive, non-judicial position. Cf.: “Pick from each of your tribes men who are wise, discerning, and experienced...” (*Deut.* 1:13).

They would examine them: Anyone who was wise, humble, clear-headed, and fearful of sin; whose youth was of unblemished repute; and who was well-liked by his fellows - he would be made **a judge in his city**.

Maimonides writes, in a similar vein:

A Beth Din of three judges... each one must have the following virtues: Wisdom, humility, awe, disdain for wealth, love of truth, public esteem, and a good reputation... How will they earn public esteem? When they will be generous, humble, keeping good company, speaking quietly with the people... Included in the category of "men of caliber" are those who are brave enough to save the oppressed from the hands of their oppressor... (*Mishneh Torah, Laws of Sanhedrin, 2:7*).

A "good name," therefore, seems to be an essential prerequisite for a candidate for judicial office. However, elsewhere in the *Talmud* we find a significantly different approach:⁹

Rav Yehuda said in the name of Samuel: Why did the kingdom of Saul not endure? Because no flaw rested on him,¹⁰ for R. Yochanan had said in the name of R. Simeon b. Yehozadak: One should not appoint any one administrator of a community, unless he has a 'box of creeping creatures' hanging behind him, so that if he became arrogant, we could say to him: Turn around and see what is behind you!

If we take these statements at face value the *Talmud* is not offering *post facto* approval for a community leader¹¹ in whom some past flaw was identified. Rather, the *Talmud* seems to be making this a preliminary condition for appointment: one should not appoint any one administrator of a community, **unless** he has a 'box of creeping creatures' hanging behind him.

The commentators felt that these statements required some interpretation. This is how the issue was summarized by Rabbi Menachem Hameiri (Provence, 14th century):

It is inappropriate¹² to appoint a person to serve as a communal leader [*parnas*] unless he is known for his character, humility and tolerance, since he has to deal with different kinds of people in many different ways - this one thus and that one like so - and to make himself beloved among all of them in line with his own character.

And, should they be in a place where such men are not to be found, and they need to appoint people who are somewhat forceful or disrespectful, they should at least take care not to appoint people who are so arrogant in regard to all matters that they come to believe that they are appointed to the position for life, and that, by

virtue of their power, they are more suited to the position than any of their compatriots.

The Sages said, in a rather humorous and overstated way: one should not appoint any one administrator of a community, unless he has a 'box of creeping creatures' hanging behind him. That is, even though he himself is fit and appropriate [for the position], nonetheless, if he becomes arrogant and lords it over the community unreasonably, one can tell him: look to your own background, and then judge yourself.

Thus, in the Meiri's opinion, the *Gemara's* statement is not to be taken literally, but, rather, as an exaggeration. Nonetheless, we still need to consider the following: is someone appointed or elected to public office, but who has a tainted past, fit to hold that office? Should the later discovery of a flaw in that individual's past, or misconduct by him after his appointment, serve as grounds for his removal from office? In the following discussion, we will examine the conditions and proofs that would permit, or require, the removal of someone from public office.

9. *Yoma*, 22b. As noted previously, there may be some distinction between a judge and a community leader (*parnas*), although the commonly accepted view today is that both need the public's confidence. See *infra*.

10. See Rashi's comments, *ibid.*, in which he holds that the flaw is not in the leader himself, but in his lineage: "'Because no flaw rested on him' - in his **family**, and thus the kings who descend from him will lord it over Israel. **However, regarding David - he was descended from Ruth the Moabitess.**" Compare this with the commentary of Rabbi Elyakim ben Rabbi Meshulam Halevi, one of the scholars in Mainz, Germany, in the 11th century: "Because no flaw rested on him" - neither a flaw in his lineage **nor in himself**. "Box of creeping creatures" - the slightest hint of a flaw **in his family**.

11. Note that here we are no longer speaking specifically about a judge, but rather about a "community leader" [*parnas*], which term applies to a broader group of public office holders. Since the earliest development of Jewish communities, the term *parnas* has come to be synonymous with the communal leadership in general. In *Talmudic* terminology, the word has two meanings: a) one who is appointed to look after the interests of and provide for another person (*Ketubot*, 7a), and b) communal leader (see, for example, *Tosefta Rosh Hashanah*, 2:3).

12. Note: while the *Talmud's* requirement is formulated in normative terms ("One should not appoint"), the Meiri moderates the force of the *Talmud's* statement, and uses the expression "it is inappropriate," an expression more suited to a system of ethical, as opposed to legal, principles.

There is no smoke without fire

According to one approach, even the slightest suspicion of wrongdoing is sufficient to spoil a person's presumption of innocence. In the words of the *Talmud*:

No one is suspected of having done something (wrong), unless he has really done it; and if he has not done it all, he has done part of it; and if not even that much, he at least had in mind to do it; and if not even that much, he probably approved of it when it was done by others.

Now, it is clear that this passage does not refer explicitly or solely to those holding public office. It applies equally to all. It also may be interpreted as an ethical teaching or "psychological" observation, one which has no legal consequences. Moreover, the *Talmud* is well aware of the possibility that the community may unjustly accuse its leaders, and demonstrates this in the case of Moses and Aaron:

Come and hear: "Moreover, they envied Moses in the camp and Aaron the holy one of the Lord" (*Psalms*, 106:16). And R. Samuel bar Yitzhak said: "From this it is inferred that **every one** suspected his own wife of having relations with Moses!"¹³ [However, the *Talmud* concludes:] In that case it was different, for it was done out of hatred.

In contrast to this approach, the *Talmud* presents a completely different approach, one that suggests the "idealization of the suspect": R. Jose said: "May my share in the world to come be with those who were groundlessly suspected." The *Talmud* goes on to quote a statement by the *amora* Rav Pappa, who notes that he was unjustly suspected of wrongdoing.

To resolve these two contradictory approaches, the *Talmud* distinguishes between two situations: one, where the rumor or suspicion dies down after a short while, a day and a half at most from when the rumor first surfaced, and the other, where the rumor continues to circulate. A further distinction is whether there exists a motive, on the part of those spreading the report that would explain how the suspicion got started. For example, where it is known that there is ill feeling between the one spreading the rumor and the subject of that rumor, this would suggest that the rumor is, in fact, untrue.

It is not a good report

Apart from this source, there are other sources that indicate that, at times, a strong "rumor" is sufficient to have someone punished.

This can be seen from the Sages' comments on the actions of Eli's sons:

Now Eli's sons were scoundrels; they paid no heed to the Lord. This is how the priests used to deal with the people: When anyone brought a sacrifice, the priest's boy would come along with a three-pronged fork while the meat was boiling, and he would thrust it into the cauldron, or the kettle, or the great pot, or the small cooking-pot; and whatever the fork brought up, the priest would take away on it. This was the practice at Shiloh with all the Israelites who came there. Even before the fat [of the offering] was burned, the priest's boy would come and say to the man who was sacrificing, "Hand over some meat to roast for the priest; for he won't accept boiled meat from you, only raw." And if the man said to him, "Let them first burn the fat [of the offering], and then take as much as you want," he would reply, "No, hand it over at once or I'll take it by force." The sin of the young men against the Lord was very great, for the men treated the Lord's offerings impiously...

Now Eli was very old. When he heard all that his sons were doing to all Israel, and how they lay with the women who assembled at the entrance of the Tent of Meeting, he said to them, "Why do you do such things? I get evil reports about you from the people on all hands. Don't, my sons! **It is not a good report I hear** the people of the Lord spreading about. If a man sins against a man, the judge judges him; but if a man offends against God, who can intercede for him?" But they ignored their father's plea; for the Lord was resolved that they should die (1 *Sam.* 2: 12-17, 22-25).

The biblical text describes here the immoral behavior of the sons of the High Priest. Instead of serving those who came to the Tabernacle at Shiloh, they terrorized the people, taking their share of the sacrificial meat by force, and in disregard of the applicable laws and rituals. Not only that, but they added to their sin by having illicit relations with the women who gathered at the Temple.¹⁴ Even though the text itself tells us that Eli did no more than rebuke his sons, the *Talmud* learns from this a rule regarding

13. The use of the term "envy" (*kin'ah*) here is unclear. However, parallel usages, such as in the case of the *sotah* (*Num.* 5:14) indicate that the context is jealousy aroused as a result of suspected illicit sexual relations. Here, Moses, who had removed his tent to outside the camp, is suspected of illicit relations with those women who came to ask his counsel.

14. As we commonly find, there were some Sages who attempted to defend the actions of Eli's sons, and argued that they did not, in fact, "lie" with those women. See *Talmud Bavli*, *Yoma*, 9b.

actual punishment: One may impose lashes **on the basis of a negative report**, as it says: "Don't, my sons! It is not a good report."¹⁵

This source served as the foundation for punishing someone who has a well-known negative reputation. However, it does not prove that unbecoming behaviour can serve as justification for removing a public figure from office. In this regard, there are various factors that could influence the final judicial outcome: the distinction between appointing someone to office and removing someone who already holds a particular office; the type of position (judge, President of the State, Chief of Staff, elected official as opposed to a public servant); the type of offence (whether it is intimately connected with the function carried out by the public figure - such as suspicion of electoral fraud or embezzlement of public funds - or less clearly related); the severity of the offence (felony vs. misdemeanor); the accuracy of the evidence and its credibility; the timing of the removal from office (before the commencement of formal proceedings, after being charged, after conviction); *etc.*

Jewish legal thought and in particular the *responsa* literature,¹⁶ is full of cases that describe accusations made against public figures for various offences, which led to discussion of whether the fact that they were suspected of wrongdoing was sufficient to remove them from office, or, at a minimum, to suspend them.

We will limit ourselves to two examples. The first is a *responsum* of the Rambam regarding the official community *shochet* who was derelict in his duties in two ways: he stole meat, and also disregarded the instructions of the local rabbis:¹⁷

Please instruct us regarding the man who holds the appointment as official community *shochet*, but it is well known that he steals meat from the butcher shops. And, in addition, there are people who testify regarding his disregard for the [laws of] slaughter and inspection, and that he relies on rulings, in regard to *terefot*, that have not been agreed to by the Sages of our people, nor have such been relied upon previously in our place. And the butchers constantly catch him in possession of stolen meat, in the presence of Jews and others, and this has led to an outcry and a *hillul hashem* (desecration of the Holy Name). Is it permitted for him to remain in his official position or not? Let our Master instruct us, and may his recompense be doubled.

Response: It is already well known among the [non-Jewish] nations, that we will only appoint a *shochet*, or a judge or community leader, from those among us who are suitable, and for this [the non-Jews] respect and honor us; indeed, they are envious of us for this. But, regarding such a person, it is forbidden for one who believes in the *Torah* of our Teacher, Moshe, and is concerned for the honour of his Maker, to allow him to carry out shehitah for

the public, even were he to repent wholeheartedly, because of the *hillul hashem* involved. However, he may slaughter privately for any individual who so desires, in his own home.

Thus, where there is a well-founded suspicion, a public official can and should be removed from office (and this case deals with someone who was appointed, not elected, to office). This is certainly the case where *hillul hashem* is involved

Heaven forbid that we should soil our hands with the blood of another

This is not so, however, when the rumor is not so well founded. A *responsum* written by Rabbi Aharon Walkin,¹⁸ one of the great *halachic* scholars in Eastern Europe in the 20th century, offers us an in-depth view at the way in which this Elder approaches the task of deciding the law in a particular case, and reveals to us the considerations and personal qualms that come into play. Here is the case:

Regarding the *shochet*, about whom the women of the neighbourhood have spread an ugly report, that they had seen him leaving and entering the home of a loose woman suspected of harlotry.

Firstly, Rabbi Walkin begins with an analysis of the law:

Now, by law, even if there were two valid witnesses who saw him do shameful acts such as these, one cannot disqualify him from being *shochet*. And it is not even necessary to require him to submit his knife for examination [by another, in order to ensure that he is slaughtering in accordance with the law], since his wrongdoing is in another matter... and one who is suspected in regard to sexual misconduct is not [thereby] suspect in regard to his slaughtering, since it is clear that [in this matter] he is overcome by his [evil] inclination. Now, how much more so in the present case, where there are no valid witnesses, only a hearsay report being passed from one woman to another. Here, too, they did not testify to an actual act of adultery, only that they saw him

15. *Kiddushin*, 61a.

16. See, for example, *Responsa* of the Geonim, *Sha'arei Teshuvah*, No. 179; *Responsa* of R'I Migash, No. 95; *Responsa* of the Rambam, Blau ed., No. 111.

17. *Responsa* of the Rambam, Blau ed., No. 173.

18. As noted at the head of the *responsum*, it was written on *Rosh Chodesh* Av, 5694 (1934) to his brother-in-law, Rabbi Zalman Sorotzkin, who later became *dayan* of the *yeshivot* in Eretz Yisrael.

at times entering and leaving the house of a harlot, and this is pure slander, for which one ought not disqualify him.

After ruling that there is insufficient evidentiary basis for disqualification, he goes on, in an extraordinarily powerful affirmation, to describe his qualms regarding the possibility of removing the *shochet* from his position:

Now, this matter is grievously repulsive, and I, although far from there, was shocked to hear such things about someone who holds religious office and who ought to be more God fearing than ordinary men. However, when it comes to making a ruling against him, I am myself afraid to pour out all of my anger upon him, and to remove that man's livelihood. After all, his children depend on him! Indeed, my whole body recoils at the thought that I might play the role of executioner and slay a father and husband on the basis of such baseless rumors.

Indeed, I applied a *kal vachomer* to myself from this very individual. Now, in the case of a *shochet*, who [only] slaughters animals, should his hands shake his slaughtering is invalid. How much more so in my own case, coming to slay human souls. And it is not only my hands, but all my body that trembles! How can I slay him when, according to *Torah* law, there is no basis for doing so?

Should I be more pious than the *Torah* itself? And if the *Torah* takes pains to find some merit in one suspected of sexual misconduct, to say that he is not suspected of impropriety in his slaughtering, is it my place to forbid it? Can that be appropriate?

On this basis, he proposes the following interim solution:

Therefore, I think that Your Honour should form a court, together with two of the most prominent scholars of the town; this *shochet* should come before you, and take an oath that from that day forward he will avoid any conduct that might lead to gossip, and distance himself from any ugly behaviour, making sure to avoid that house of impurity. Also, that for a full year, he obligates himself to present his slaughtering knife to Your Honour for inspection twice a week, and thus he may remove his sin and atone for his transgression. And [if he does so], let the humble eat and be satiated from that which he has slaughtered.

Finally, he concludes with a statement that casts light on his approach in rendering *halachic* decisions:

I suspect that this decision may not satisfy certain zealous individuals who might say that I was too lenient in regard to his punishment. However, I know of Your Honour's goodhearted

nature and desire for justice. Indeed, our forebears, who sat in judgment over many generations, were careful not to soil their hands by spilling the blood of their fellow Jews. So too we should follow in their ways, and **Heaven forbid that we should soil our hands with the blood of another.**¹⁹ Indeed, let us place ourselves in God's hands, for His mercies are abundant, but let us not fall into human hands.

This *responsum* portrays the constant tension between *halacha* and morality, between the formal law and the sense of "what is right." It is a wonderful illustration of the necessary balance between the desire, and perhaps even the need, to ensure the highest standards of integrity in public service, and the tenacious efforts required to maintain the rights of the accused, preserve the presumption of his innocence, and ensure due process before deciding his fate.

19. We can see a further example of Rabbi Walkin's sensitivity to the possibility of impairing someone's livelihood from other *responsa* relating to the dismissal of communal employees. For example, in No. 31, he discusses the case of whether a *shochet* who has developed epilepsy is fit to continue in his position. After ruling that he may, in fact, continue to slaughter animals as before, Rabbi Walkin goes on: "**And Heaven forbid that anyone should dare try to take away his livelihood or remove him from a post in which he has served for the past thirty years. And as for those individuals, who are trying so hard to find fault in that man's *shechitah*: I would advise them to look to their own 'slaughtering' first, in that they are trying, by their statements, to slaughter innocent souls. If they are so meticulous regarding the slaughtering of animals, that the knife and the act of slaughtering should be unblemished, how much more should they take care that their own knife should be unblemished, if they come to 'kill' human beings, so that the 'killing' should be fit and proper and in accordance with the law.** I would like to hope that, henceforth, when they have clearly understood what an old rabbi such as myself has said (and realizing that I have no personal interest in this matter whatsoever), there should be no doubts about the *shochet's* slaughtering, even for the most meticulous (*mehadrin*), and that the rumors should cease, and that those individuals will not again try to carry out their evil intentions."



הארגון הבינלאומי של עורכי־דין ומשפטנים יהודים
The International Association of Jewish Lawyers and Jurists

The 12th International Congress

December 23-26, 2003

on

ISRAEL 2004: DILEMMAS AND SOLUTIONS

Venue of Congress: Dan Panorama Hotel, Tel-Aviv

Venue of Opening Session: Inbal Hotel, Jerusalem

PROGRAMME

Tuesday, December 23, 2003

14:00 - 17:00 Arrival and registration at Dan Panorama Hotel, Tel-Aviv

17:00 - 18:00 Drive by buses to Inbal Hotel, Jerusalem for Opening Session

18:00 - 20:00 Buffet Supper

20:00 **OPENING SESSION**

Lighting of Hannuka Candles

OPENING REMARKS

Judge Hadassa Ben-Itto, President of the Association

KEYNOTE ADDRESS

(To be announced)

Return by buses to Dan Panorama Hotel, Tel-Aviv

Wednesday, December 24, 2003

09:00 - 11:00 **THE PALESTINIAN REFUGEE PROBLEM: POSSIBLE SOLUTIONS**

No Right - No Return

Professor Yaffa Zilbershats, Bar Ilan University, Faculty of Law

Are There Viable Solutions?

Professor Ruth Lapidot, The Hebrew University, Jerusalem, Faculty of Law

Economic Aspects of the Palestinian Refugee Problem

Professor Ephraim Kleiman, The Hebrew University, Jerusalem, Department of Economics

Coffee Break

11:00 - 11:30

11:30 - 13:30

NEW REALITIES AND OLD LAW: THE NEED TO REFORM INTERNATIONAL LAW

Colonel Daniel Reisner, Head of International Law Department, IDF (Subject to be announced)

Efforts to Formulate International Conventions against Terrorism

Ambassador Alan Baker, Legal Adviser, Foreign Ministry of Israel

Universal Jurisdiction; Unique Mix between Law and Politics

Ms. Irit Kohn, Director, Department of International Affairs, Ministry of Justice, Israel

13:30 - 15:00	LUNCH Guest of Honor: <i>Mr. Abraham H. Foxman, International Director of the Anti-Defamation League, on</i> THE THREAT OF THE NEW ANTI-SEMITISM	11:00 – 11:30	Coffee Break
		11:30 – 13:30	ISRAEL AND THE DIASPORA: MUTUAL DEPENDENCE AND RESPONSIBILITY Who Speaks for the Jewish People? <i>Professor Shlomo Avineri, The Hebrew University, Jerusalem, Department of Political Science</i> The Jewish People: Must We Choose between Geography and History? <i>Mr. Efraim Halevy, former National Security Adviser to the Prime Minister of Israel</i> Knowing our Partners: Realism versus Illusionism <i>Professor Howard Sachar, George Washington University, Washington D.C.</i>
15:00 – 17:00	THE FUTURE OF JERUSALEM: JEWISH, MOSLEM AND CHRISTIAN PERSPECTIVES The Jewish Perspective <i>Rabbi David Rosen, International Director of Interreligious Affairs, American Jewish Committee</i> The Christian Perspective <i>Archbishop of Constantina Aristarchos Chief Secretary of the Greek Orthodox Patriarchate</i> The Moslem Perspective <i>Dr. Mithkal Natour, Professor of Islamic Law, Religious College, Baqa El Garbiya</i>		
	FREE EVENING Afternoon: Walking Tour of Neve Tzedek Quarter, Nachlat Binyamin Street, old quarters of Tel-Aviv Evening: FAREWELL DINNER		

Thursday, December 25, 2003

09:00 – 11:00	THE IMPACT OF THE CURRENT SECURITY SITUATION ON CIVIL LEGAL PRACTICE Litigation <i>Mr. Alex Hertman, Attorney</i> Real Estate <i>Mr. Zeev Hartavi, Attorney</i> Hi-Tech <i>Mr. Ori Rosen, Attorney</i> Commercial Transactions <i>Mr. Richard Mann, Attorney</i>
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Friday, December 26, 2003

09:00 – 12:00	BUSINESS MEETING
13:00	Optional: Departure to Hyatt Hotel, Dead Sea, for weekend (3 nights) until Monday morning, December 29, 2003

Registration

For information about the 12th Congress and registration for the Congress, please contact:
The International Association of Jewish Lawyers and Jurists, 10 Daniel Frish Street,
Tel-Aviv, 64731
Telephone: (03)6910673, Fax: (03) 6953855
Or E-mail: iajlj@goldmail.net.il
Registration Forms will be e-mailed upon request

Registration Fee: US\$200 per participant

Accompanying person: US\$150

Registration fees include:

Buffet supper in Jerusalem

Lunch on Wednesday, December 24, 2003

2 coffee breaks

Farewell Dinner

Walking tour in Tel-Aviv

Kits/name tags

Transportation to and from Jerusalem for the

Opening Session

Hotel accommodation:

6 NIGHT PACKAGE:

December 23 – 26 at Dan Panorama Hotel in Tel-Aviv on

bed and breakfast basis and 3 nights at Hyatt Hotel, Dead Sea 26-29 December on half board basis (breakfast and dinner).

Free entrance to Hyatt spa.

Transfer by bus from Tel-Aviv to Dead Sea and return to Tel-Aviv.

Rate per person sharing a double room US\$430

Single room supplement US\$255

Rates per night at Dan Panorama Hotel in Tel-Aviv:

Double room on bed and breakfast basis US\$110

Single room on bed and breakfast basis US\$100

**We are pleased to advise that the
KEYNOTE ADDRESS
at the Opening Session of the Congress
will be delivered by the Minister of Justice
Mr. JOSEPH (TOMMY) LAPID**

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no text or other markings on the paper.