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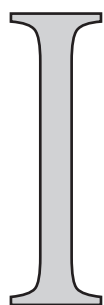
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PRESIDENT'S MESSAGE



In recent months the public has closely followed events in the United Nations. The question of Iraq has focused the public discourse on the part played by the United Nations, before, during, and most importantly after the war waged by the coalition led by the United States and Great Britain against Saddam Hussein's regime. Increasing numbers of questions are being raised as to the impartiality of the United Nations and its competence to play a leading role in world affairs.

Obviously, all eyes are turned to the Security Council, not only to the public sessions but more critically to the behind the scene dealings. For the first time, the United States, the largest contributor to the UN budget, has strongly questioned the relevancy of this international institution, which was established after the disasters of World War Two, to promote and supervise the emergence of a better world.

The Security Council is the only UN body that has a mandate to adopt resolutions which are binding on Member States yet the United Nations should not be judged solely on the performance of the Council.

Over the years the General Assembly as well as the various organs acting under the umbrella of the UN have served as a forum for international discourse. Although their resolutions do not possess binding power they have been instrumental in influencing public opinion and presenting a distorted picture of the world, which may be far more dangerous than any resolution of the Security Council.

NGOs, long ignored, have become a powerful tool feeding information to international organizations, which are assuming more and more power. Many organizations base their agendas on distorted and unfair resolutions of UN bodies, thus creating a powerful tool for influencing world opinion.

One of these UN bodies, which by name and definition purports to serve as the moral front of the international community, is the Commission on Human Rights in Geneva. The person who, by his title, has been mandated to watch over the behaviour and performance of all Member States, is the High Commissioner of Human Rights, whose seat is also in Geneva.

The status of our Association as a Non Governmental Organization (Category II), allows us to participate in the deliberations of the various UN bodies. As Human Rights are central on our agenda, we have naturally chosen to be most active in the Human Rights bodies in Geneva.

Unfortunately, we were compelled in the past to publicly criticize the performance of the former High Commissioner of Human Rights, Mrs. Mary Robinson, who had consistently shown bias towards Israel and towards Jewish matters. Her attitude was prominently exposed in her leading role in the famous, or rather infamous, Durban Conference, which was supposed to deal with the abolition of racism, but instead turned into a public forum for promoting anti-Semitism and creating a pogrom atmosphere both in the halls of the conference and in the streets of Durban.

In Issue no. 29 of *JUSTICE* we published the reports of our representatives to the Durban Conference, Advocate Daniel Lack and Professor Anne Bayefsky.

After the public uproar condemning the fiasco of the Durban Conference, we had great hopes, and even promises, that the Human Rights bodies had learnt their lesson. After the appointment of the new High Commissioner of Human Rights, Mr. Vieira de Mello, with whom our representative established what seemed to be a positive dialogue, we were looking forward to the annual session of the Commission on Human Rights, hoping for a more balanced approach and for a more impartial atmosphere. At this year's conference the ILJLJ was represented by Daniel Lack, Professor Ann Bayefsky, Maya Ben-Haim Rosen and David Goldberg.

Professor Anne Bayefsky, an expert in the field of Human Rights, has closely followed the deliberations of the Commission throughout the whole session and has reported her findings in a series of articles published in the press (*Chicago Sun Times*, *Wall Street Journal* and the *Jerusalem Post*).

As we cannot publish the full report of our representatives, for lack of space, we have chosen to list here just some of the facts reported by them and to publish their oral and written interventions at the session (see pp. 31-36).

Here are some relevant facts:

Israel is barred from membership in the Commission on Human Rights, presently chaired by Libya, and counting among its members: Algeria, Bahrain, China, Cuba, Saudi Arabia, Sudan, Syria, and Zimbabwe.

Last year the Human Rights Commission adopted a resolution affirming the legitimacy of armed struggle by all available means - meaning suicide bombings - against Israel. France, Russia and China all voted affirmatively, along with commission members that are on the US State Department's list of state sponsors of terrorism: Cuba, Libya, Sudan and Syria.

During the present session the question of the relevancy of the United Nations was extended beyond the UN Security Council to the UN Commission on Human Rights. The British Minister Bill Rammell went so far as to state that "the credibility of the Commission is now in question."

In summing up 30 years of the work of the Commission, it should be noted that:

- Israel is the only state which has been subject to an entire agenda item every year.
- The Commission on Human Rights has spent more time on Israel than on any other country.
- 11 percent of its total substantive deliberations have been on Israel alone, only 24 percent of its time has been spent on all other Member States combined.
- 27 percent of its country-specific resolutions critical of a state have been on Israel alone.
- In all its history, the Commission has never passed a resolution on states such as Syria, China, Saudi Arabia or Zimbabwe.

Over the years thousands of victims have complained to the UN about gross and systematic human rights abuses in countries such as Bahrain, Chad, Liberia, Malawi, Mali, Pakistan, Saudi Arabia and Syria. Under a special complaints procedure the Commission on Human Rights holds closed-door meetings in which it buries these complaints and refuses to subject these states to the public condemnation of resolutions.

Language which would not have been suffered in relation to other Member States is

accepted without protest against Israel and Zionism. One of the most poisonous forms of racism - anti-Semitism - is systematically excluded from relevant resolutions.

Here are some examples:

At the present session the Palestinian representative, Nabil Ramlawi, said:

“The world condemned the old Nazism in the past... during the Second World War... The world also condemned Zionist Israel for the same criminal crimes it has been perpetrating against the Palestinian people... for over 50 years now, starting... in 1948... The world... has not yet eliminated the New Zionist Nazism” and “Israel was created through crimes against humanity it perpetrated and which continue today”.

In another address the Saudi Arabian representative complained about “exploitation of the events of 11 September”. The Palestinian spokesperson Nabil Ramlawi described September 11 as a failure to heed Palestinian “warnings” that their demands come first.

At the plenary session of the Commission, the Algerian delegate told delegates: “*Kristallnacht* repeats itself daily... Israeli soldiers are the true disciples of Goebbels and of Himmler, who strip Palestinian prisoners and inscribe numbers on their bodies... Must we wait in silence until new death camps are built, new massacres like at Babi Yar?... The Israeli war machine has been trying for five decades to arrive at a final solution.”

When Israeli and American delegates tried to call the speaker to order, the Libyan ambassador who was in the chair refused to interrupt or control the language of the delegate and ensure that the Commission itself not be a platform for racial hatred.

The Syrian delegate called Israel “a cancer”.

The Commission does not even try to disguise its blatant discrimination and double standard in singling out one Member State for censure, while turning a blind eye to the most virulent transgressions on Human Rights in other countries. This phenomenon became obvious when the Commission started to consider human rights violations in states other than Israel. “The hue and cry from the violators was deafening”, according to Anne Bayefsky.

The South African ambassador, on behalf of the African regional group, objected to the “politicization of the Commission”. The ambassador and the members of the African group supported at least five resolutions condemning Israel at the current session, but this did not prevent the ambassador from proclaiming with great indignation: “It has become clear over the years that the country-specific resolutions do not serve their intended purpose... This exercise of ‘naming and shaming’ is an embarrassment to the credibility and dignity of this Commission and should be discontinued forthwith. Dialogue should prevail over condemnation”.

The Syrians objected to the lack of objectivity in targeting the “Third World”; the Pakistani ambassador requested the Commission “not to engage in finger-pointing” and “selectivity”. The Organization of Islamic Conference decided to complain about the “exploitation” of Sept. 11. For the first time in 17 years the Commission has no report on human rights violations in Iran, as the post of special representative on Iran was abolished in April 2002.

The last week of the Commission’s six-week annual session was marked by a shameful event. On a resolution concerning follow-up to the 2001 UN Durban World Conference on Racism, Commission members argued for two hours about the inclusion of “anti-

Semitism” as a form of racism. Procedural maneuvers, led by South Africa and the African group, with the support of 28 of the 53 members of the Commission, resulted in the deletion of “anti-Semitism” from the resolution on racism, xenophobia and related intolerance. New Zealand, Norway and Switzerland refused to withdraw as co-sponsors of the African-led resolution, after anti-Semitism was deleted.

Later that day, at the suggestion of representatives of the IAJLJ, the U.S. delegation moved to mention “anti-Semitism” in the preamble of a resolution on religious intolerance. Even this minor gesture was not acceptable to 27 Member States, which registered their opposition by either voting against or abstaining. The debate featured Ireland, prominently standing in the way of including anti-Semitism; Pakistan stating that anti-Semitism had nothing to do with religious intolerance and applied also to Muslims and Christians, and Cuba accusing the United States of acting under intimidation from Jews. Though the US amendment was ultimately approved, it is this kind of “victory” that shows up this august body for what it really is.

In a letter to the High Commissioner of Human Rights, and later in a face to face meeting, our representatives presented our view that we expect the High Commissioner to openly denounce the fact that statements were made at the annual session of the Commission calling for the elimination of a Member State, describing Israel as a “cancer” and other discriminatory statements and resolutions concerning Israel, Jews, anti-Semitism, and Holocaust denial. Mr. de Mello assured us that he had already voiced his displeasure in meetings with relevant representatives, but in a later letter we were compelled to protest the fact that our repeated requests for a clear public denunciation by the High Commissioner of these outrageous statements and resolutions were not satisfied.

This issue of *JUSTICE* is also dedicated in large part (pp. 20-30) to the developing legal events in Belgium - a country that has been attempting to try leaders of foreign governments for acts unconnected to Belgium, committed outside its jurisdiction. As the Belgian parliament has recently enacted new legislation, following a number of court decisions, we have decided to deal with various aspects of this intricate issue in articles prepared for *JUSTICE* by Israeli as well as Belgian experts.

Since we published our last issue of *JUSTICE*, two important events have occurred which may bring about great changes in the Middle East: the fall of Saddam Hussein’s regime in Iraq, and the appointment of a new Palestinian leadership headed by Mahmoud Abbas (Abu Mazen).

Both events are of great interest to us, as they may directly or indirectly affect the complex relationships in this region.

Terror is still reigning in the streets of Israel. Innocent men, women and children are being blown up by suicide bombers. Schools, media and mosques incite daily to more terror. Yet, these recent events have created a glimmer of hope that the long-awaited peace might turn from a distant dream to a foreseeable reality.

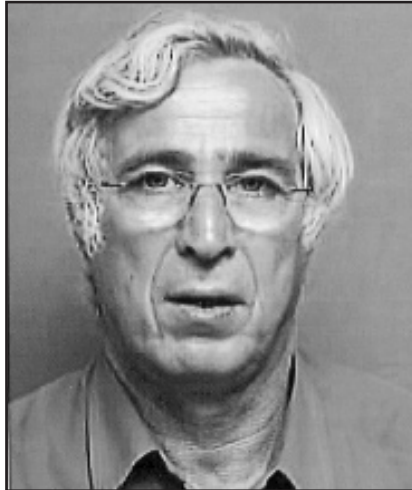
Hadassa Ben - Yitvo

Revoking Citizenship, Deporting and Negating the Civil Rights of Terrorists

Emanuel Gross

A democracy's war against terrorism leads it to face intricate moral and legal dilemmas. The dilemmas ensue from the fact that a country made up of citizens and residents who respect the law is waging a war against an opponent who brutally and callously breaches that law. In this article I shall focus on the situation in which a democratic country discovers that one (or more) of its citizens has failed to comply with the law and unite with the state in its struggle against terrorism but instead has joined forces with the terrorists to fight the state. Where a democratic society discovers that one of its members has betrayed it and has become an enemy willing to harm the state and his fellow citizens, can one say that such a person - whether a permanent resident or a citizen - is entitled to continue to be a member of that society? The answer to this question must be drawn from our understanding of the concept of citizenship. What is the significance of the right to be a citizen or a resident of a state? Is that right absolute - once it has inhered - or is it relative, like every constitutional right, subject to revocation by "due process" of law?

Yet, even if we reach the conclusion that as part of its defensive strategy, a democratic country may revoke the citizenship of a person who has betrayed it and terrorized it, is it inevitable, or even possible, for that person to be deported? Is the deportation a punitive measure which complements the revocation of a person's citizenship, bearing in mind that the revocation of the citizenship



of a person who assists terrorist organizations and is thereby himself transformed into a terrorist, cannot by itself negate the danger posed by the particular person to the security of the state and its citizens? Only deportation of this person from the territory of the state and distancing him from his fellow citizens will reduce the risk of his assisting terrorists to harm the citizens of the state of which he is a national and in which he resides. However, this is not the only issue. If we conclude that it is proper to equip the competent authorities with this punitive measure, a practical question

arises - to what location should this person be deported? Colonial settlements have become a feature of the past and in order to deport a person to a foreign sovereign country the consent of that foreign power is required. What will happen if the foreign country withholds its consent?

Moreover, is it really appropriate for a democratic country to make use of the sanction of deportation? There are those who argue that this measure is overly harsh and cruel and excessively infringes a person's most basic rights; it is asserted that a person should not be deprived of his home even if he has betrayed and injured the citizens of that place. Is this indeed true?

The premise of this article is that the fundamental characteristic of a democracy's struggle against terrorism is that the struggle is waged within the boundaries of the law; that it is conducted in accordance with the norms of law and is tested in the courts.

In a democratic country, a citizen who has contravened the law is placed on trial and his punishment is decided by a court. It is a primary function of the court to draw a balance between two competing sets of principles or values which inform the

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democracy's struggle against terrorism: on one hand, principles and values connected to the security of the state and its citizens and on the other hand principles and values connected to human rights. No value is absolute: human rights are not a platform for national destruction and can never justify harm to national security. On the other hand, national security does not confer unlimited authority to harm the individual. As noted, a balance is required between these values and principles. The point of balance is not fixed. It changes from one issue to the next. The nature of terrorist harm to national security and the state's response both have ramifications for the nature of the protection conferred on human rights.

The right to citizenship: its nature and scope

The classic concept of citizenship was born in a particular historical context in the Europe of the 18th and 19th centuries and it cannot be severed from the processes of industrialization, secularization and urbanization spurred by industrializing economies, or from the expansion of political participation. In other words, the development of this concept was rooted in historical, economic, cultural and social contexts. It reflected an historical attempt to create one all encompassing arena of collective life, while other fairly limited areas of life were collapsing.

The modern transformation, first in Europe and later in other places, ended with the creation of the national state which was not always democratic in character. Citizenship was the concept which distinguished between those national states which established themselves as democratic regimes and those which did not. In places where the concept of citizenship was founded on a narrow ethnic or religious cultural base or on a particular ideological identity, the democratic regime was extremely weak or failed to develop at all. Accordingly, the concept of citizenship must be seen as one of the pillars of modern democracy.

Common to the various philosophical approaches dealing with the history of the political ideal is the fact that from the perspective of the state, citizenship embodied a social charter between the state and the citizen. From the perspective of the democratic state, this was the basis of the demand for loyalty on the part of the citizen.

Philosophical concepts found a solution to the natural order - the pre-state situation - which entailed unrestricted freedom leading to anarchic competition and a moral vacuum - by the establishment of a political body under a social charter. According

to Hobbes' theory, the solution to a natural order of this type was the establishment of a state - a body politic which would ensure that people would not live a life of fear and danger, guarantee security and provide means for judging human actions. The social charter, according to Hobbes, reflected an agreement to waive all rights for the sake of life itself. In other words, according to Hobbes, the legitimacy of a regime ensued from its very existence, from its ability to govern and to impose peace and order. Opposition to the regime could not be justified, save in exceptional cases where a successful revolution justified it. The inevitable conclusion was that members of society who endangered public order and safety thereby also endangered the continued viability of the solution to the natural order; they undermined the existence of the state and civil society and constituted a serious obstacle to the fulfillment of the state's duty to protect the rights of its citizens. Consequently, it was necessary to take steps to remove these dangerous persons from the group and deprive them of their citizenship.

According to John Locke (who represented the beginnings of the liberal school) the natural order was an order in which people were equal, free and prudent; a social state in which there was a rule under which natural rights were preserved and respected. A problem arose because a few people would always be found who sought to violate the natural rights of others and who would not abide by the law of nature. The social charter reflected a prudent and deliberate consent of men to waive the right to implement natural law. In other words, the legitimacy of the regime ensued from the free consent of the citizens to establish that regime with the purpose of preserving their rights. This too was the basis of the obligation to obey. The relations between the citizens and the government were based on trust. A citizen would only be able to act against the state when substantive harm had been caused to his natural rights or where the regime had acted *ultra vires* the powers granted to it by the citizens. Such an act on the part of the regime was a breach of faith and therefore society was entitled to empower a different regime by virtue of the charter. Locke's approach gave rise to a theory of trust whereby a breach of trust led to the possibility of a justified revolution. In my opinion, the theory of trust should be understood as dealing with reciprocal relations. In other words, in the same way as a regime's breach of trust towards its citizens justifies the negation of the legitimacy and existence of that regime, so too a breach of trust on the part of the citizen towards the regime justifies the negation of the legitimacy of the award of citizenship. Such a person cannot be permitted to remain a member of the community. His breach of the most basic

right of his fellow citizens, the right to life, seriously impairs the functioning of the regime, which was created in order to preserve the rights of the citizens, including the right to life.

An examination of the notion of state and civil society according to John Rawls' theory leads to a similar conclusion. The way to arrive at a social charter is with the help of a background of ignorance which will return us to the primordial natural order in which man has no knowledge of his status in civil society, and where, therefore, the conditions for reaching agreement are objectivity and equality. In such circumstances we can agree with Rawls' principles of justice at the basis of which lies the desire to secure the majority of fundamental rights. The right to life and security is a basic right and whoever breaches this right undermines the social charter and cannot conceivably be regarded as a rational citizen. Breach of the law according to Rawls is only justified if its purpose is to return the democracy to its correct and proper course. Harm to the security of its citizens can never be seen as harm which aims to hold the democracy on its true course. On the contrary, it is harm to the most basic value which a democracy is designed to protect - life itself!

John Stewart Mill was one of the most prominent philosophers dealing with issues of citizenship: who is a good citizen? How should he conduct himself? What are the boundaries of state intervention in the liberties of a citizen? The liberty in Mill's theory is the right of every citizen to do as he pleases so long as he causes no harm to another. In other words, the basic purpose of the government is to protect the freedom of its citizens and prevent harm to them. This is a minimalist approach as the state does not interfere in the life of an individual but guarantees a framework in which others will not harm him. The questions that arise are: against which injuries (physical, economic, emotional) is the state obliged to offer protection and when must it offer that protection? There is no dispute that the state is under an obligation to prohibit physical harm to its citizens. In a democratic society the tendency is to enforce fewer laws which retrospectively prohibit acts, and provide greater enforcement to laws where the threshold of injury is lower. In other words, where there is a certainty of harm, the authorities will find it easier to enforce the prohibition, as in such a case their intervention in the freedom of the individual is not aimed at limiting that freedom but at securing the framework in which all the other individuals live; limiting the freedom of the offender is a by-product.

Yet, placing the lives of civilians in real danger, for example from a terrorist attack, is a prohibited act for which the perpetrators

must answer. Further, it follows from all the theories that I have referred to so far, that such an act, which places civil society as a whole in existential danger, is an act which contravenes the social charter created by the citizens and accordingly it is inconceivable that a person committing such an act will remain a citizen. A rational citizen would not endanger the lives of his group, a danger which terrorism, its supporters and abettors represent.

From the perspective of civil society, there is a form of social charter which is entered into between the state and the individual. From the point of view of the democratic state this is the basis of the demand for loyalty from the citizen. It follows therefore, that in practice citizenship expresses the special *nexus* between a person and the state, which is expressed by the fact that the citizen is entitled to all the rights which the state grants and is subject to all the duties which it imposes. Superceding all of these is the duty of loyalty on the part of the citizen towards his state and the right and duty of the state to protect him.

Citizenship creates a persisting legal bond between a person and his state. This bond is of importance in a number of legal fields, both from the point of view of international law and from the point of view of domestic law. Citizenship can impose obligations upon the state in terms of its foreign relations. From the perspective of the citizen himself, it can accord him rights, grant him powers, impose obligations and recognize his immunity in a variety of circumstances. Citizenship is linked to the right to vote, the capacity to hold various public offices, the jurisdiction of the courts, issues of extradition and a range of other matters. Citizenship entails loyalty and applies within and outside the state. In other words, the principal factors for the grant of the right to citizenship are a real bond between the person and the state which is primarily expressed by it becoming his principal place of residence and his loyalty towards the state and willingness to become integrated in the fabric of life there. In consideration for the grant of rights and entitlements it is possible to compel the loyalty of the citizen of the democratic state. From the point of view of the individual, this arrangement solves one of the biggest problems of the modern framework: from the moment a person became a citizen - whether he is born into it or acquires it through naturalization - the question of his identity is no longer in dispute.

Establishing the right to citizenship focuses on two main points: *nexus* to the past and *nexus* to the present and future. When citizenship is founded on *nexus* to the past it emphasizes the national or tribal idea as the basis of membership of the state. The national idea is based on the fact that there is a common history;

a uniform language, culture and on occasion religion which form a basis for a bond between people. According to this approach, only a person who has a connection to the nation by reason of the fact that he is the offspring of people who shared common historical experiences, who lived in accordance with a common culture and religion and who fought for their preservation, is entitled to be a full member, *i.e.*, citizen, of the state.

A shared past as the basis for acquiring citizenship strengthens the feeling of belonging, unity, solidarity and loyalty towards the state.

In contrast, there are states in which the award of citizenship is based upon links to a shared fate. In these states, it is the willingness of the members of the state to live according to defined principles established by the founders of the state and generally contained in a constitution, which forms the basis for citizenship. There is a belief that life lived in accordance with these principles is the basis for a desirable present and future existence. The state admits members who are willing to satisfy predetermined requirements which are intended to enable the state to exist and fulfill its objectives.

It follows that the central factor common to the two points of *nexus* is the requirement of loyalty. Every potential recipient of citizenship must be loyal to the state in its existing format. Loyalty is the junction at which the two paths meet and loyalty circumscribes the scope of the right to citizenship.

However, if disloyalty is the principal ground for revoking citizenship it is not the only one. There are those who believe that there are three rationales for revoking citizenship: disloyalty, punishment and public order.

In my opinion, disloyalty embraces the two additional rationales for revoking citizenship. I am referring here to the disloyalty of a citizen towards his state, expressed by his membership of a terrorist organization or by his giving assistance to terrorists to carry out attacks against innocent civilians. Such assistance poses a danger to public order and to the security of the population in general. Likewise, the revocation of his citizenship expresses a form of punishment - as there is no reason to allow the person to enjoy the rights of a citizen and the state's protection of those rights so long as he breaches the right to life of the other citizens of his state. Accordingly, I shall focus on loyalty as the central basis for the conferral of citizenship and as the rationale for revoking citizenship.

I have shown that according to the various philosophical theories it is difficult to regard the right to citizenship as an absolute right.

The right to citizenship cannot apply to circumstances in which the citizen does not fulfill his primary obligation towards the state and towards its members - the obligation of loyalty. We must recall that citizenship is not the right of a person towards his state but it is the term for describing the relations between that person and his state and the other members of it. Accordingly, it would be a mistake to conclude that citizenship is an absolute right which cannot be revoked save by voluntary renunciation on the part of the citizen himself.

In practice, the philosophical approaches base the right to citizenship upon the theory of an agreement between the state and the citizens or the theory of a contract between the citizens *inter se*. The agreement and contract are breached when a citizen displays disloyalty. The remedy for this breach is rescission - to take from the offender what he received under the contract, namely, his citizenship.

It may be argued that one cannot speak of revocation of citizenship as citizenship is a component of the identity of a person. Revocation of his citizenship would be a serious impairment of his "self", and as such is inconceivable.

In my opinion, this argument has little validity. We are concerned with revocation of citizenship by reason of the disloyalty of an individual towards his state, and his loyalty towards terrorism. By choosing this path, the individual in practice opts to declare war against his state and his fellow citizens. Therefore, the revocation of his citizenship will not comprise an injury to his "self", as he is fighting against this component of his identity; he is disloyal to it and by his actions expresses his desire to replace this element with another - terrorism.

The right to citizenship in international law

The International Court has proposed an interesting definition of citizenship which integrates the legal aspect of the concept with its political, social and cultural aspects:

"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."

It is important to distinguish between citizenship in domestic law and the right to citizenship in international law. Citizenship is a right which arises and acquires meaning in accordance with domestic law and accordingly its nature and scope differ from one country to another.

Historically, it was popularly accepted that:

“It is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national.”

This was because the guiding norms of international law, such as the Hague Regulations, provided that:

“It is for each state to determine under its own laws who are its nationals.”

In any event, international law does not leave the right to citizenship in the hands of a state’s domestic law alone. The classification of a person as a citizen of a particular state is a critical classification for the purposes of international law. The reason for this lies in the fact that a stateless person cannot enjoy the rights and protections which international law makes available. Thus, for example, international law protects the sovereignty of the state and within this context, its jurisdiction over the citizens of the state. In the absence of the grant of citizenship, a situation could arise whereby states would seek to gain jurisdiction over a variety of populations. Citizenship circumscribes the power and jurisdiction of states over the individuals who compose the world community as a whole. It is not for nothing that international law provides that in a situation where the citizen of a state has breached an international norm which attracts legal proceedings and the state has taken legal steps which are within its competence against the citizen, that citizen shall not be made subject to an additional trial on the international level.

True, this right is still not commonly seen as part of customary international law, but in international treaty law citizenship is customarily regarded as a basic right. Article 15 of the United Nations Universal Declaration of Human Rights of 1948, provides that every person is entitled to citizenship:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

In other words, in international law as in the philosophical approaches to the right to citizenship, the right to citizenship is not an absolute right. A person may be deprived of his citizenship provided that the deprivation is not arbitrary. However, the Universal Declaration does not specify the circumstances in which a state is obliged to grant citizenship or in the alternative the circumstances in which the state is entitled to deprive a person of his right to citizenship. Moreover, the International Covenant on Civil and Political Rights, the purpose of which is to give legal

substance to the Universal Declaration, does not refer to the right to citizenship other than in Article 24 which deals with the right of children to acquire citizenship.

We find additional support for the position that the right to citizenship is not absolute in international law in the UN Convention on the Reduction of Statelessness, 1961. Article 1(1) of this Convention provides:

“A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”

Article 4 adds:

“A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that State.”

Article 8 of the Convention prohibits the deprivation of a person’s citizenship if this will make him completely stateless. However, this prohibition is not absolute and the Convention provides a number of exceptions - some say too many and overly broad exceptions:

“Unfortunately, however, this provision [Article 8(1)] was made subject to a number of exceptions, some of them quite broad. It would for example, permit a State Party to subject a naturalized citizen to statelessness if that person maintained residence abroad for a period of time as specified by the state’s nationality law, but not less than seven consecutive years [...]. **The Convention permits a state to subject a national to statelessness in various instances of failure to show proper allegiance:** such as if the person rendered services to or received payments from another state in disregard of an express prohibition by the state of nationality; or has ‘conducted himself in a manner seriously prejudicial to the vital interests’ of the state; or has ‘taken an oath, or made a formal declaration, of allegiance to another state, or given definite evidence of his determination to repudiate his allegiance to the Contracting State’”. (Emphasis added).

Accordingly, in international law too, loyalty is the principal element in the right to citizenship. Disloyalty can justify denaturalization even if in consequence thereof the person concerned becomes stateless. One must conclude that according to international law the right to citizenship is acknowledged to be one of the basic rights of man, but it is not an absolute right. Rights are not absolute. They are constructed on the basis of a balance between rights, the needs of all the individuals who compose society and the right of existence of the state and society as a whole.

Revocation of citizenship and deportation or deprivation of civil rights

The existence of the legal possibility of revoking the citizenship of terrorist nationals and thereafter deporting them from the country does not put an end to our discussion. We must examine whether in practical terms it is possible to combine revocation of citizenship with deportation. In other words, the punishment of deportation is dependent on its enforcement. Thus, it is not possible to limit ourselves to an examination of the legal issues. In order to combine the sanctions, it is necessary for us to examine their implementation in practice. How should a country which revoked the citizenship of one of its nationals and now wishes to deport him act? Is it entitled to deport him to any country? Is it subject to any restrictions? We have seen that in international practice it is customary for all states to admit their own nationals in the event that they are deported by other states in which they were present. However, the opposite question must now be considered - must a country admit a "former citizen" of another state? The deportation of a citizen is possible only if another state consents to open its doors to the deportee. Clearly, the obligation to admit citizens does not relate to former citizens, but only to current citizens who must or wish to return home. A country which is asked to admit a person, whose state of nationality has revoked his citizenship, is in practice being asked to admit an alien to its territory. In practice, there is no international provision which requires states to permit aliens to enter their territory. The explanation for this lies in the principle of sovereignty, from which ensues the right of every state to decide on the admission of aliens into its territory, the amount of time they are permitted to stay, their rights and obligations. The concept of cooperation between states gives rise to the arrangement accepted in this matter in international relations. In other words, the general principle is that an alien cannot enter the territory of a state save with the state's consent. That consent is expressed by stamping a visa upon a foreign passport. However, a state is not obliged to grant visas to aliens; it is entitled to shut its gates before aliens in general and specific aliens in particular in accordance with its absolute discretion.

In our case it is possible to point to two exceptions to this rule. The first exception concerns special agreements between states in which a state party to the agreement undertakes to admit a citizen whose citizenship has been revoked by another state which is party to the agreement. This exception is artificial. The principle of sovereignty which establishes the right of a state to refuse to admit an alien to its territory is also the principle which now

obliges it to admit him. This is because states which undertake obligations by way of treaties express their sovereignty thereby.

The second exception, which too is only *prima facie* an exception, occurs in circumstances where the state which revoked the terrorist national's citizenship now wishes to deport him to a state which supports terrorism, and for the benefit of which that terrorist acted. In such a situation it is difficult to talk of the second state's right to object to his admission. On the contrary, as the terrorist acted in that second state's name and in order to promote its interests, it impliedly agrees to open its gates to him. I have explained the importance of the element of loyalty in the relations between a man and his state which is expressed by citizenship. Such a terrorist is not loyal to his country of nationality but to another entity. This loyalty and his activities on behalf of the second state point to the existence of mutual relations and an implied agreement on the part of the state activating him to admit him into its territory.

It follows that the two exceptions presented above are artificial. Neither offers a solution to the situation in which a state revokes a terrorist national's citizenship but that national does not operate on behalf of a state sponsoring terrorism, instead he operates in the name of terrorism as an international phenomenon. Neither of the exceptions undermines the principle of state sovereignty - and there is good reason for this. No arrangement exists in international law for special cases in which a person is sought to be deported from one state but there is no other place to which he can be deported. Such an arrangement would have to contain an element of coercion against the state, and this is the reason for the great difficulty in reaching international regulation of this matter. It should be noted that as a result of this *lacuna* in international law, the Supreme Court of the United States has held that an alien unlawfully present in the United States, against whom a deportation order has been made and who is held in detention whilst a search is made for a state which will agree to accept him, can only be held in detention for a period of time which is reasonable. If during a reasonable period of time no state is found which is willing to admit him, the person must be released from detention. It follows that in the absence of a solution in international law, the alien will remain in the territory of the state in which he is present.

Accordingly, in my opinion, in the absence of a special written law, this matter must be regulated by domestic - state law. The law must provide an answer to the situation where the state on one hand revokes the citizenship of a person, and on the other hand no

place is available to which he can be deported. Domestic law must adapt its provisions to circumstances of this type and regulate the continued detention of persons who no longer hold the status of citizen. It is possible to do so by granting the person a permit to temporarily stay in the state which can be extended from time to time subject to the necessary security restrictions. However, this permit to stay must also be compatible with the requirements of international law in relation to human rights. In other words, even if the person concerned is no longer a citizen of the state, the state must enable him to live in conditions of minimal dignity. We should recall that a state must behave towards aliens in its territory in accordance with the International Minimum Standard, under which aliens must be treated in a manner customary in civilized societies. This is a vague principle. However, it is customary to read into it on one hand the duty of humanitarian behavior, and on the other hand assurance of the aliens' ability to apply to the local courts, and protection of their life, freedom and property so long as these are not contrary to the domestic public order.

It follows, *a fortiori*, that a state is obliged to behave in accordance with the principle of minimum standards in relation to someone who in the past was a citizen of the state but is now denaturalized, though still present within the territory. This is a principle which imposes an international obligation on every state, including one in which a former citizen, now an alien, is present. However, we should emphasize that this does not mean that a duty is imposed on a state to behave towards the former citizen in the same way as it behaves towards its current citizens. If this were the case, there would be no reason to suggest the revocation of the citizenship of a terrorist in relation to whom there is no place to which he can be deported; as this would lead to the result that the state would be obliged to continue to hold him and treat him as if it had not deprived him of his citizenship - as if he was still a citizen. A state is entitled to discriminate against such persons compared to its own citizens so long as the discrimination is relevant and for a proper purpose. Thus, for example, the state is entitled to prevent the person from becoming involved in certain matters which have security implications. The restriction must be proportional; the state is not entitled to completely deprive

a person of his right to work and support himself. The state is entitled to prevent him from obtaining certain social benefits (such as free education) and to participate in the state's political life. It is not entitled to prevent him from living in accordance with the minimum standard.

Another solution for the situation where there is no place to deport a terrorist who has been deprived of his citizenship, is the solution offered by US law. In the United States a person who is convicted of certain criminal offences, is not merely subject to a period of imprisonment. After completing his prison sentence he is subject to collateral sanctions which in practice result in the deprivation of his civil and political rights.

Thus, for example, in the 1980s limitations were imposed on the right of offenders to bear personal arms, restrictions were imposed on parental rights and offenders were deprived of the right to government benefits.

The law must provide an answer to the situation where the state on one hand revokes the citizenship of a person, and on the other hand no place is available to which he can be deported. Domestic law must adapt its provisions to circumstances of this type and regulate the continued detention of persons who no longer hold the status of citizen.

The most significant right revoked is the entitlement to vote, without which it is difficult to regard the citizen as a true member of the democratic community in his state.

Offenders who have been convicted of offences of treason are generally deprived of the right to vote in the United States. In Europe too, treason is one of the offences for which a person may be deprived of his basic political right

to vote. *Prima facie*, such a restriction is contrary to international law. Article 25 of the International Convention on Civil and Political Rights guarantees citizens their right to vote and be elected to public office. However, the first clause of the article does not refer to an absolute right which can never be restricted. The article requires states not to impose restrictions which are not reasonable.

It follows that restricting the right to vote and to be elected may be reasonable in certain circumstances.

I too am of the opinion that the circumstances in which a citizen may be deprived of the right to vote must be limited to cases in which the citizen by his actions has contravened the purposes of the political rights; in other words, where he has expressed disloyalty towards his state and an unwillingness to be part of the community and by his acts has posed a threat to that community.

In my opinion, a citizen who has been convicted of terrorist activities also falls within the class of cases in which the restriction of political rights is reasonable. Accordingly, in cases where there is no place to which one can deport a citizen who has been convicted of terrorist activities - and has thereby displayed blatant disloyalty to his state with the *prima facie* inescapable consequence that his citizenship must be revoked - it is nonetheless possible to avoid revoking that citizenship and be satisfied with negating the concerned person's civil and political rights, to a degree corresponding to the gravity of his terrorist activities.

We must recall that the purpose of the revocation of citizenship is to enable the deportation of the terrorist citizen from the state against which he has acted. However, in circumstances where the case does not fall within the exceptions enumerated above, the citizen cannot be deported and therefore there is also no practical significance to depriving him of his citizenship. The person must remain in his country. The state must create legal norms which deal with a citizen who through his terrorist criminal activities has expressed a clear unwillingness to be part of the state. These norms must provide for the revocation of the civil and political rights of a citizen who has been convicted of terrorist activities, in such a way as to prevent him from returning to society and the community untouched, *i.e.* as if he had never attempted to demolish the infrastructure of that community by collaborating with its greatest enemy - terrorism.

The laws must prevent the possibility of the citizen participating in government elections by depriving him of the right to vote. Likewise, he must be deprived of the right to be elected or hold public office. It is also possible to deprive him of other social or economic benefits which are granted by the government to its citizens for their welfare. In my opinion, it would be proper for the court, when sentencing an accused, to specify the sanctions ancillary to his primary punishment. The reason for this is twofold. First is the fact that the term 'terrorism' has yet to acquire an agreed international definition. Different activities may be deemed to be terrorist acts. The law cannot foresee the entire dynamic range of conduct which may at one time or another be considered terrorist in character. Thus, it would be appropriate for the court to exercise its discretion in every case in accordance with the particular circumstances in which the citizen was convicted of terrorist activities, when deciding whether to impose the ancillary sanctions made available by statute. Second, in my opinion, this

revocation of rights must be regarded as a form of punishment, and as such it must be left within the competence of the court and not within any other body's power. The Supreme Court of the United States defined the revocation of rights as a punishment as early as in 1866:

"The theory upon which our institutions rest is, that all men have certain inalienable rights - that among them there are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in protection of these rights all are equal before the law. And deprivation or suspension of these rights for past conduct is punishment, and can in no otherwise be defined."

Likewise, I do not believe that it would be appropriate for the various laws which are to establish the range of ancillary sanctions to speak in absolute terms. There is no room for a total negation of all rights following completion of a prison sentence. To deprive the terrorist citizen absolutely of the right to work, and not only to sit in a public office, would prevent him from exercising the right to live with minimum dignity. In my opinion, it is proper to learn from the international law norm which applies to aliens present in a state's territory and which obliges the state to treat the aliens in accordance with the principle of minimum rights. A state which sees fit to amend its laws in such a way as to impose additional penal sanctions on a terrorist citizen who has been convicted of terrorist activities and who has served his sentence, must relate to the principle of minimum rights as a threshold principle and only deprive the citizen of the various civil and political rights which fall above the threshold. In every case of a state caused injury to rights we must act in accordance with the principle of proportionality. We are concerned with a democratic state which seeks to defend itself against those living in its midst who were once its citizens and owed it a duty of loyalty, and who have now been exposed as having breached this duty in the gravest possible manner by having cooperated with terrorism which poses an existential threat to democracy. A democratic state which has revoked the citizenship of such a person and is unable to deport him from its territory, must continue to hold him and must continue to adhere to minimum principles of morality as it does in relation to every other person present in its territory. Compromising on such minimum requirements would only serve to erode the democratic nature of the state thereby surrendering to terrorism and the certain victory of terrorism over democracy.

Conclusion

The global reality of the development of a far reaching and intricate network of terrorism which constitutes an existential threat to all the countries of the free world is a reality which domestic and international law cannot ignore. A democratic state fights terrorism through the legal system and while complying with the law. A democratic state cannot deviate from this course:

“The moral strength and the material justification for the authorities’ fight are completely dependent on preserving the laws of the state: by waiving this strength and this justification for its war, the authorities serve the objectives of the enemy. The moral weapon is not less important than any other weapon and perhaps supercedes it - and there is no more efficient weapon than the rule of law.”

In this article I presented deportation and the revocation of citizenship as legitimate devices for the preservation of national security. These devices are necessitated by the harsh reality of terrorism in the countries of the free world, including the inhuman phenomenon of “human bombs”. At the same time, I am of the opinion that the present manner in which the measures of deportation and revocation of citizenship are implemented does not adequately preserve the constitutional safeguards and human rights of the candidate for deportation or revocation of citizenship. Accordingly, I have proposed that the sanctions of deportation and deprivation of citizenship be added to the array of punishments available to a court when sentencing a person convicted in an appropriate criminal trial of terrorist activities. In this way we shall remove these sanctions from the competence of the administrative authority and better protect those basic human rights which can be impaired by these sanctions.

Democracy places human rights at the heart of its philosophy, however, all would agree that without security there can be no rights. I do not seek to argue that we should move from one extreme to another and work only to preserve national security in disregard of human rights. A balance must be drawn between the two, a balance which reflects the reality in which we live. This is a reality in which changes have occurred which require a reassessment of the weight which must be accorded to the interests standing in the balance. Within the framework of this balancing process we must act proportionately.

There must be compatibility between the objective of preventing the materialization of the dangers posed by a person whose citizenship we seek to revoke or whom we wish to deport,

and the danger which he would pose if these measures were not taken against him. Likewise, it is necessary that the harm caused by the measures we adopt be low and proportionate to the benefit which will accrue in terms of guaranteeing the security of the region.

Therefore, I have explained that in cases where it is not possible to deport the terrorist civilian, there is no relevant purpose for employing the sanction of revocation of citizenship, and no real benefit will ensue from such a step. In such a case, as part of its sentencing procedure and in accordance with the circumstances of the matter, the court must weigh the possibility of depriving the defendant of his civil rights.

Generally, a democratic state should give priority to the rights of the individual, however, it also cannot allow the public interest to be trampled. The latter is not only the interest of the entire community as a complete and powerful organized framework but it also represents the interests of multiple individuals who make up the public.

The purpose of preserving the public interest in national security and the security of the citizens of the state in the face of the terrorist threat is a proper purpose. However, the true test of every legal system and in particular that operated in a democratic state is in the choice of the permitted measures for achieving proper purposes. Deprivation of citizenship and deportation are indeed proper measures within the context of the democratic country’s fight against terrorism, but it is not possible to use these devices as they stand today. This is because a measure is not tested solely in the light of its efficacy. It must also satisfy a value test, namely, that it is appropriate from a moral point of view. When the powers to deprive a person of his citizenship and deport him lie in the hands of a political or military entity, the measure - even if efficient - is not moral in terms of the manner of its implementation. The fear of severe and unnecessary harm to human rights becomes a real fear which a democratic state cannot ignore. A change in the legal situation and transfer of these powers to the judicial authority can signal the ability of a democracy to meet the extremely difficult challenges posed to it by terrorism without legitimizing flawed measures in the name of the proper purpose or, indeed, sacrificing the state on the altar of human rights.

Universal Jurisdiction: The Waking Giant

Yaffa Zilbershats

Currently, the State of Israel is facing problems regarding universal jurisdiction as a result of the efforts to bring Prime Minister Ariel Sharon and a number of high ranking IDF officers to trial in Belgium on charges of war crimes. The allegations concern these commanders' alleged responsibility for the massacres which took place at the Sabra and Shatila refugee camps in Lebanon. It is feared that these allegations only form the tip of the iceberg and in the future other IDF soldiers and officers as well as their political superiors will be subject to trials in various countries around the world in respect of their activities in the "occupied territories" of the West Bank and Gaza Strip. Countries instituting such charges will rely on universal jurisdiction.

Universal jurisdiction is an issue which is not clearly regulated by international law - either in relation to its precise content or in connection with its implementation in the various countries. There is no international treaty dealing with universal jurisdiction nor are there any customary rules of international law which regulate it in an orderly manner. Since this is an open issue in the arena of international law, Israel has to understand that difficulties relating to universal jurisdiction are not linked specifically to it.

In this article I shall try to explain the problems of universal jurisdiction existing today in international law. This discussion which focuses on problems relating to the exercise and



implementation of this jurisdiction, in my view constitutes an important starting point for dealing with this issue on an international level as well as from the point of view of the State of Israel.

Universal jurisdiction means: the power of a state to legislate, prosecute, convict and punish a person for crimes committed beyond the borders of the trial state, even if those crimes were not directed against the trial state or its citizens and even where the accused is not a citizen of the trial state. Put differently, universal jurisdiction means - the authority to judge a person even when the jurisdictional links

of territory and citizenship accepted by customary international law are absent.

The scope of universal jurisdiction

Prior to the Second World War, universal jurisdiction was recognized in relation to two crimes, in the following chronological order: **piracy** - harming persons or property on the open seas and different facets of **slavery**. The establishment of universal jurisdiction with respect to these two categories historically fell within the ambit of customary international law. With respect to piracy, universal jurisdiction is currently clearly regulated by international treaties. Universal jurisdiction is not so clearly established or apparent in the treaties which deal with the various facets of slavery.

The Second World War was an enormous catalyst for expanding universal jurisdiction. This expansion took place through four different channels which were not necessarily coordinated:

a. *The Nuremberg Channel*

The Nuremberg channel includes the principles which were

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established in a treaty regarding the trial of Nazi war criminals which was signed in London by the USA, the USSR, France and England. These principles decreed that persons charged with crimes against the peace, war crimes and crimes against humanity perpetrated during the Second World War, would be judged by a joint international military tribunal set up by the USA, USSR, France and England which would operate in Nuremberg. The Charter of London also decreed that these criminals could be tried in the countries which had established the tribunal and not solely before the special international court founded by them. The Charter of London was ratified by nineteen additional countries and in 1946 the General Assembly of the UN unanimously adopted its principles as interpreted by the international military tribunal in Nuremberg. Hence, it was resolved that crimes against the peace, war crimes and crimes against humanity were in practice crimes against the laws of all nations, and as with piracy each nation could prosecute criminals perpetrating the offences. In fact, in consequence of this step, Nazi war criminals were put

on trial in a variety of countries around the world. Concurrently with the Nuremberg trials, a similar process operated in relation to Japanese war criminals in the Tokyo trials.

b. The channel developed by international law dealing with the laws of war in times of combat: jus in bellum

After the Second World War, in 1949, the international laws of war were expanded by the four Geneva Conventions. These conventions dictated what was permitted and what prohibited during warfare. They established two levels of prohibition: a level of ordinary violations, and a level of gross violations of the conventions. With respect to gross violations, which were expressly specified in each of the four Geneva Conventions, a duty was imposed on each country to find the offenders and put them on trial even if they had not committed the crime in the trial state or had targeted the trial state or were citizens of the trial state.

The description of the gross violations set out in the four Geneva



Aerial view of the Knesset Building in Jerusalem (courtesy of the Israel Government Press Office)

Conventions expanded the definition of war crimes beyond the definition provided by the Nuremberg laws, and subjected them to universal jurisdiction.

The First Protocol which supplemented the four Geneva Conventions in 1977 broadened the definition of war crimes in two respects:

1. Applying the prohibitions set out in the four Geneva Conventions not only to wars between states but also to wars between nations asserting the right to self determination against the powers occupying them.
2. Enlarging the list of violations, including the list of gross violations of the Geneva Convention. Thus, the transfer by an occupying power of its population into the occupied land was turned into a gross violation of the Geneva Convention.

From that point on, a judicial reality was created whereby any state party to the Geneva Conventions and the First 1977 Protocol could exercise universal jurisdiction regarding any of the gross violations specified in these instruments when conventional wars or wars seeking self determination, had taken place.

The State of Israel is party to the Geneva Conventions but is not party to its Protocols; this however does not deter the majority of the nations of the world which are parties to both the convention and the Protocols from exercising the wide universal jurisdiction described above against Israel.

c. The channel of human rights treaties

Crimes against humanity fell within the jurisdiction of the Nuremberg tribunal, but solely in connection with acts which had taken place during the war period and which had been carried out in an extensive and systematic manner.

War crimes are defined as crimes perpetrated in times of war only. The difference between war crimes and crimes against humanity is that historically the former were defined as crimes committed in times of war against the citizens of the enemy state, whereas crimes against humanity were defined as crimes

committed in times of war against the citizens of the war criminal's own state and citizens.

The first crime which was separated from the reality of war was genocide. Following the Second World War, criminals were convicted of genocide as a component of their crimes against humanity. However, in 1948 a treaty was signed for the prevention and punishment of the crime of genocide which turned it into a discrete crime with elements which differ from the elements constituting crimes against humanity. The Genocide Convention stated explicitly that a person could be charged with having committed the crime of genocide regardless of whether or not it had been committed during wartime.

The treaty did not establish universal jurisdiction with respect to genocide, however, such a jurisdiction is acknowledged today by virtue of customary international law. Other crimes in respect of which universal jurisdiction has been conferred by specific treaties without making these crimes contingent on the existence of a state of war, are: apartheid (1973) and torture (1984). With respect to these crimes states are under a duty to bring the offender to trial or to extradite him to any country which wishes to bring him to trial, even if there is no linkage between the offender and the prospective trial state.

The credit for the boom in the implementation of universal jurisdiction can perhaps also be attributed to the fall of the communist bloc and the ending of the Cold War, which heightened awareness in the world that it was now possible to enforce human rights within the international framework, without fear of undermining the international balance. International criminal law is a very strong tool for enforcing human rights, and universal jurisdiction, as noted, is part of that mechanism.

d. The channel of treaties for the prevention of terror

These treaties prohibit specific terrorist acts such as: hijacking airplanes, taking hostages, harming diplomatic personnel and heads of state, terror bombings (1998), and funding terrorist groups (2000); drug trafficking may also be included in this category.

In these treaties which were signed from the end of the sixties it was provided that each state which holds such an offender is under a duty to bring him to trial or extradite him to a country which wishes to try him. Such jurisdiction very closely resembles universal jurisdiction, since the criminal may be brought to justice

in a country with which he has no relationship.

It should be added that during the nineties the scope of the first channel, the Nuremberg channel, was significantly expanded as a result of the Security Council's establishment of international criminal tribunals for the former Yugoslavia and Rwanda. The statutes of the Yugoslavian Tribunal (1993) and Rwandan Tribunal (1994) adopted the structure of the Nuremberg Statute and established the jurisdiction of the international courts which were formed *ad hoc* in order to try the crimes of genocide, violations of the laws and customs governing war, gross violations of the Geneva Conventions 1949 (without the Protocols) and crimes against humanity. These courts had the authority to try crimes which were perpetrated during the wars in Yugoslavia and in Rwanda; additionally, the constituting documents established universal jurisdiction over the above-mentioned crimes which had taken place in Rwanda and Yugoslavia. The court extended its authority over **internal conflicts** in addition to international and colonial wars. At the same time, universal jurisdiction was developed over these conflicts even though such jurisdiction had not previously been recognized, either in the Geneva Convention of 1949, or at its supplementary protocols of 1977.

The ICC Statute signed in Rome in 1998 took another step forward in this connection. For the purpose of the Court's jurisdiction, its statute defines crimes as - genocide, crimes against humanity and war crimes carried out during internal conflicts and international wars. The innovation here is that the detailed list of crimes against humanity is expanded by the ICC beyond what was acknowledged by the Nuremberg principles and the principles enumerated in the Yugoslavian and Rwandan Statutes. In addition, it is no longer necessary for the crimes to have taken place within the context of war in order for them to be regarded as crimes against humanity.

The ICC Statute does not provide explicitly for universal jurisdiction; rather, it states that the jurisdiction of the international court is complementary to the jurisdiction of the nations. Are we consequently to infer that for all the offences listed under the Treaty of Rome in respect of which the ICC has jurisdiction, universal jurisdiction also exists? There is no clear answer yet in international law to this question. But there is also no rule which prohibits countries from applying universal jurisdiction to the full gamut of criminal offences enumerated in the ICC Statute. If a country chooses to act in this way, one cannot claim that it is in violation of international law.

Not only did the process of Rwanda - Yugoslavia in the early nineties and Rome in the late nineties potentially broaden the spectrum of crimes for which countries can bring offenders to trial on the basis of universal jurisdiction, in fact, countries actually started to legislate laws which vest universal jurisdiction and instituted proceedings on the basis of these laws. Even though this jurisdiction existed in the past on the basis of the Nuremberg laws as jurisdiction which related to war crimes, crimes against the peace and crimes against humanity without relationship to the Second World War, it was enforced only with regard to events which had taken place during the period of the Second World War. The statutes of Rwanda, Yugoslavia and Rome which provided explicitly that international criminal law applied not only to the events of the Second World War, led to extensive use of universal jurisdiction by a wide range of countries. This is how Yugoslavian criminals were brought to trial in Germany and Switzerland.

The credit for the boom in the implementation of universal jurisdiction can perhaps also be attributed to the fall of the communist bloc and the ending of the Cold War, which heightened awareness in the world that it was now possible to enforce human rights within the international framework, without fear of undermining the international balance. International criminal law is a very strong tool for enforcing human rights, and universal jurisdiction, as noted, is part of that mechanism.

Rules for applying universal jurisdiction

Beyond the fact that the range of crimes which can be included within the framework of universal jurisdiction has grown extensively within the framework of the four channels mentioned above, and that this happened without prior planning or thought about the desired scope of this jurisdiction, the fact that universal jurisdiction developed in such a prosaic manner yielded dissonance with respect to its orderly application in many key issues:

1. It is not clear as a matter of international law whether universal jurisdiction is an end in itself or a default situation. This is to say, the jurisdiction to bring an offender to trial for his crimes is based upon international law, and requires a certain link between the criminal and the crime. In order for a state to have jurisdiction the wrongdoing must have taken place on its soil, or outside its territory against the interests of that state or against its citizens or by its citizens. This required linkage principle is subject to an exception, namely, that unlawful activities which come within universal

jurisdiction do not require a linkage to the trial state.

Let us assume that a citizen of State A has committed a serious crime in State B under the laws of nations. State C has the right to bring that person to trial on the basis of universal jurisdiction. Does State C have the right to bring that person to trial in every situation? Or may State C only become involved if States A or B fail to put that person on trial? International law does not have an answer to these questions. To reach an adequate answer one has to investigate in depth whether the rationale behind universal jurisdiction is global justice, in which case it is not superior to local justice, or whether the basis is local justice with the result that the universal jurisdiction steps in only where local justice has failed. An answer to these questions is also essential in cases where one has to decide which state has jurisdiction where all three states - A, B and C, seek to bring the same person to trial. International law has no clear solution for such a situation.

2. Another question which is related somewhat to the previous one concerns the existence of the defence of "double jeopardy" in relation to universal jurisdiction. On the assumption that every country is vested with universal jurisdiction, does it follow that all the nations of the world can judge a person who has committed a crime in relation to which there is universal jurisdiction? When a trial is conducted in one country, does this obviate the possibility of trial in another country? If it does, in which circumstances? In this context too, international law does not have answers.
3. Universal jurisdiction means that each state can conduct trials by virtue of that jurisdiction. Does this also include non-democratic states? To what degree is universal jurisdiction subject to the principle of procedural due process? International law lacks answers to these questions as well.
4. Can a state try or judge a person who is not present in the country? International law does not supply a definitive answer to this key question. When universal jurisdiction relies upon the fourth channel of treaties for the prevention of terror which confer universal jurisdiction on the basis of the principle of a state's jurisdiction to prosecute a person or extradite him, the premise is that the offender is present in the trial state, and it is necessary to decide whether that person should be tried in the country in which he is present or extradited to another country. However, in the Nuremberg and Geneva laws provision is made for every country to try persons and no mention is made of the requirement that the

person concerned be present. Therefore it is not clear whether taking proceedings against an offender without the offender being present or conducting a trial *in absentia* constitutes a violation of international law.

5. Immunity is another dilemma. Here international law pulls in two diametrically opposing directions and there is no clear verdict which of the two rules supercedes when applying universal jurisdiction. To explain:

According to the principles of Nuremberg, Rwanda - Yugoslavia and Rome, which as noted comprise the basis for the law in respect of which there is universal jurisdiction, heads of state, leaders and high ranking officers cannot hide behind their immunity based upon their position and appointments in order to avoid trial. In other words, they do not have substantive immunity.

On the other hand, as a matter of international law, there are clear rules regarding procedural immunity for acting diplomats, ministers and heads of state while holding office. Does procedural immunity override substantive immunity when it comes to the implementation of universal jurisdiction? Again, there is no clear answer in international law. The answer seems to be affirmative, based on a judgment recently delivered by the ICJ in the case of *Congo v. Belgium*. Universal jurisdiction cannot be applied as long as ministers and heads of state hold actual office. But, as we know, the decisions of the ICJ act as guidelines, they are used as aids for formulating international law and therefore are not binding as law in future cases. Hence, a state which nonetheless decides to bring to trial an acting prime minister on charges of war crimes, possibly would not be breaching international law notwithstanding the judgment of the ICJ.

Conclusion

I have shown thus far that universal jurisdiction is actually a waking giant which has no clear boundaries within the ambit of international law, either with respect to the scope of the crimes to which universal jurisdiction applies or with respect to the rules for applying it. The significance of this for the State of Israel is that there are many countries which might legislate laws implementing universal jurisdiction which would be far reaching in relation to their scope, content and application.

It is time to formulate clear and organized rules of international law for governing this currently unregulated subject. The giant has risen and we need to ensure that it does not wreak havoc on human society.

The Belgian Law of Universal Jurisdiction Put to the Test

Michèle Hirsch and Nathalie Kumps

The Belgian law dated 16th June 1993, as amended by the law dated 10th February 1999, relating to the prosecution of gross violations of international humanitarian law, establishes the universal jurisdiction of the Belgian courts.

This jurisdiction applies to crimes under international law irrespective of the location of the criminal act or the citizenship of the accused or the victim.

The law provides that the “immunity attaching to the official capacity of a person does not prevent the application of the law”. This provision is understood to allow prosecutions against persons enjoying immunity under international law. Under Belgian procedures a victim may initiate a prosecution by applying to an examining magistrate. This procedure has also been made available to offences under international law.

The law was passed unanimously, without taking into account the serious issues entailed by the enactment of the law and its application. The purpose of this article is to clarify the reasons which led the Belgian legislature, on 5th April 2003, to enact a law amending the Belgian law of universal jurisdiction. At this date, the law has not yet been published in the Official Gazette.

The aftermath of the Second World War saw the adoption of four conventions relating to the international criminal law of armed conflicts.

Belgium, by signing these conventions, undertook to “take any legal measures necessary in order to establish criminal sanctions to be applied to persons who have committed or have ordered the



commission of severe offences” as defined in the conventions.

Nevertheless, it took 45 years for Belgium to enact a law proscribing gross violations of humanitarian law and establishing a set of rules regulating the prosecution in Belgium of the perpetrators of such crimes.

Initially, the law of 16th June 1993 referred only to war crimes committed during an armed conflict, whether international or local. In 1999, the scope of the law was extended to the crime of genocide as well as to crimes against humanity.

One trial

The 1993 law was applied to Rwandan citizens who had taken refuge in Belgium following the 1994 genocide in which close to one million Tutsis were exterminated. The Rwandan criminals thought they could remain unpunished in Belgium.

But victims and survivors who came across the criminals in the streets of Brussels filed complaints before the Belgian authorities, starting in July 1994 as the massacres were about to end.

In June 2001, four Rwandan defendants, two religious women, including the Mother Superior of a convent, a professor and

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a businessman were found guilty by a jury of participating in the 1994 genocide and sentenced to a maximum of 20 years imprisonment.

This extraordinary trial was considered to reflect the strict application by Belgium of its international undertakings. If Belgium had not tried the accused, they would have remained unpunished. Rwanda, where more than 100,000 prisoners awaited trial, did not apply for their extradition (there is no treaty between Rwanda and Belgium in this respect). Further, the International Criminal Court for Rwanda established in Arusha (Tanzania) handled the cases of the main perpetrators of the genocide (less than one hundred persons) and did not invite Belgium to extradite the four defendants.

This trial was a watershed for victims of crimes against humanitarian law, who understood that they could initiate legal proceedings in Belgium.

Yet, although the law of universal jurisdiction allowed for the initiation of proceedings against foreign government officials, the complaints filed against Belgian Ministers for their participation in the events which had taken place in Rwanda in 1994, were dismissed.

A stream of complaints

In 1998, Chileans residing in Belgium filed complaints before the examining magistrate against Mr. Augusto Pinochet, who was living in exile in the United Kingdom. The examining magistrate, who acknowledged the jurisdiction of Belgian judicial authorities on the basis of international custom rather than on the basis of the 1993 law, as asserted by the plaintiffs, issued an international warrant against the former Chilean dictator.

Other complaints were then filed on the basis of the Belgian law of universal jurisdiction, including a complaint against Mr. Hissene Habre whose immunity was removed by Chad.

Additionally, a complaint, accompanied by a civil action, was filed by Belgian and Congolese citizens residing in Belgium against the leaders of the Democratic Republic of Congo. The Belgian judge issued an international warrant against the incumbent Foreign Minister of the D.R.C., Mr. Yerodia Ndombasi. Consequently, the D.R.C. applied to the International Court of Justice, arguing that the principle of sovereign equality between states made such a warrant unlawful.

Criminal proceedings were initiated against former leaders of the Red Khmers, a former Minister of Morocco, a former Iranian President, Ivory Coast's President, Mr. Gbagbo, Rwanda's President, Mr. Kagame, Messrs. Yasser Arafat and Fidel Castro, Saddam Hussein and President Paul Biya of Cameroon, as well as others.

De facto, the above cases were characterized by a link to Belgium: either the suspect or the victim lived in Belgium.

Afterwards, complaints were filed which did not possess even this link. In fact, universal jurisdiction was understood to be unlimited.

Following this stream of complaints, well known lawyers, politicians and law professors asked for a definition of the link in order to regulate the law of universal jurisdiction. The law also required amendment in view of the jurisdiction of the International Criminal Court, the Statute of which came into effect on 1st July 2002.

Drafting efforts were initiated aimed at limiting the jurisdiction of Belgian authorities in respect of international law crimes. However, the complaint filed against Israeli Prime Minister Sharon and the ensuing decisions of the magistrates provoked the opposite reaction - a harsher stance on the part of the political world in favour of an extension of Belgium's jurisdiction in this matter, notably in the Sharon case.

The Law of Universal Jurisdiction and the Sharon Case

On 18th June 2001, 24 persons of Palestinian or Lebanese origin, none of them residing in Belgium, filed a complaint, accompanied by a civil action, through two Belgian lawyers and a Lebanese lawyer against the Prime Minister of the State of Israel, Mr. Ariel Sharon and Mr. Amos Yaron, Director General of the Ministry of Defence, for genocide, war crimes and crimes against humanity.

Messrs. Sharon and Yaron were accused of responsibility for the Sabra and Shatila massacres. None of the Lebanese citizens responsible for the massacres were mentioned. The examining magistrate, Collignon, handled the case. The prosecution decided, on 28th June, that the complaint could be examined. The judge could start the examining proceedings.

The political nature of the complaint

The political aspect of the complaint was obvious. The complaint was filed against a specific political background, both in Israel and in Belgium. The complaint was not filed by chance, 19 years after the events concerned. Mr. Sharon had been elected as Prime Minister of the State of Israel in March 2001 and Belgium was to be President of the European Union from July to December 2001. It was not coincidental that no complaint was initiated against the Lebanese citizens involved in the massacres and that the plaintiffs highlighted the crime of genocide. The filing of the complaint was supported by a well-organized press

campaign. The plaintiffs and their lawyers enjoyed massive financial support and the active assistance of some of the most prominent non-governmental organizations.

Nevertheless, the State of Israel decided to question the legality of such a procedure under international law as well as Belgian law.

The order of Examining Magistrate Collignon

During the summer of 2001, the State of Israel, through its Belgian attorney, presented legal arguments to the judge, asserting that the complaint should be dismissed and that Belgium had no jurisdiction over the case. The State of Israel argued that the examination of the complaint would affect the political sovereignty of the State of Israel through the proceedings conducted against the incumbent Prime Minister. Judicial sovereignty would also be affected since the Kahan Commission had rendered a judicial decision. The State of Israel also argued that the law was not applicable under Belgian law since there was no link to Belgium.

In an order issued on 7th September 2001, the examining magistrate acknowledged the right of the State of Israel to be a party to the proceedings and agreed that it was a precondition to the universal jurisdiction of the Belgian judges that the accused be present in its territory. In this case, this condition had not been met. The magistrate also decided that according to international law, jurisdiction should be limited to cases where a link exists.

This decision diverged from all the previous decisions, which had refused to dismiss the complaints on the ground that the accused was not resident in Belgium.

Following the decision of Examining Magistrate Collignon, other examining magistrates suspended proceedings based on the law of universal jurisdiction in cases where the accused was not resident in Belgian territory, and waited to see whether the Court of Appeal in Brussels would reverse the decision in the Sharon case.

Other proceedings related to the assassination of ten Belgian blue helmets during the genocide of the Tutsis of Rwanda in 1994, a very sensitive matter in Belgium.

The Prosecutor's opinion

For the first time in the history of the law of universal jurisdiction, the General Prosecutor attached to the Court of Appeal decided to apply to the Prosecution Chamber of the Court of Appeal of Brussels and request that the issue of the validity of the complaint against Messrs. Sharon and Yaron be examined by the Court (the Prosecution Chamber has jurisdiction over issues related to the criminal procedure). In order to enable the Court

to set a precedent, the General Prosecutor also asked the Court of Appeal to examine the validity of complaints filed against the leaders of the Democratic Republic of Congo and against Mr. Gbagbo, President of the Ivory Coast.

Like the plaintiffs' attorneys, the General Prosecutor argued that the complaints were valid and that the Belgian courts had jurisdiction to examine the acts allegedly committed by Messrs. Sharon and Yaron, even in the absence of a link to Belgium. He also argued that the immunity enjoyed by Mr. Sharon in his capacity as Prime Minister did not constitute an obstacle to the criminal proceedings initiated against him.

On 14th February 2002, while the Sharon case was pending before the Prosecution Chamber, the International Court of Justice rendered a decision whereby the issuance of an international warrant against the Foreign Minister of the D.R.C, by a Belgian judge, based on an alleged crime against international humanitarian law, violated the immunity from criminal jurisdiction of an incumbent foreign minister, recognized by international custom. This decision of an international court set the first limits to the Belgian law of universal jurisdiction.

The Court of Appeal studied the ramifications of this decision for the validity of the proceedings initiated in Belgium against Mr. Ariel Sharon.

In the light of this decision and the immunity enjoyed by the Prime Minister of the State of Israel, the General Prosecutor amended his summing-up of the case. He concurred with the State of Israel, arguing that the indictment against Mr. Sharon should be quashed because of the latter's immunity although such an argument was not applicable in respect of Mr. Amos Yaron.

The decisions of the Court of Appeal of Brussels

In the three above-mentioned cases submitted to the Court of Appeal by the General Prosecutor, the Chamber of Accusation, the composition of which was different in each of the three cases, decided to quash the indictments since the accused were not resident in Belgium on the filing date of the complaints. The Court of Appeal of Brussels therefore confirmed the decision rendered by Examining Magistrate Collignon in the Sharon case.

The first decision was given in April 2002 in the Democratic Republic of Congo case; the two others were given on 26th June 2002.

The plaintiffs appealed to the Supreme Court.

Attitude and reactions of politicians

The Belgian government argued that in June 2001, at the time when the complaint was filed, as well as during the subsequent proceedings, the principle of the separation of powers had

prevented it from intervening in the pending proceedings and that the judiciary had the authority to decide the fate of the complaints filed against Prime Minister Ariel Sharon ad Mr. Amos Yaron.

In practice, politicians were strongly involved in the judicial proceedings.

Intervention by a group of senators and of non-governmental organizations

A group of senators intervened on several occasions in the proceedings before the Prosecution Chamber. Several of the senators met in Lebanon with Mr. Elie Hobeika, a major figure of the massacres of Sabra and Shatila. A meeting with victims of Sabra and Shatila was organized at the Senate on the day following a hearing before the Prosecution Chamber. During the hearing, a senator even distributed invitations to journalists to attend a press conference scheduled at the Senate. Some politicians clearly voiced their support for the continuation of the proceedings in the Sharon case.

On the day following the decision of the Prosecution Chamber, these senators filed two draft bills for urgent adoption in September 2002.

The first bill was aimed at interpreting the intent of the legislature with respect to the 1993 law. The second bill was designed to amend the law of 16th June 1993.

A group of six non-governmental organizations was established and participated very closely in the drafting of the two bills and ensuing legislative efforts to extend the scope of the law of universal jurisdiction.

The bills

The first interpretative bill was clearly meant to counter the decision of the Court of Appeal in the Sharon case. It provided that the universal jurisdiction established by the 1993 law was applicable even if the alleged offender did not reside in Belgium. Its effect would have been to inform the Belgian courts that they erred when they held that the 1993 law did not apply if the accused was not in Belgian territory. The interpretative law would have had retroactive effect, and would have validated all the pending criminal proceedings.

The second amendment bill was designed to amend the 1993 law, following the coming into force, on 1st July 2002, of the Statue of Rome creating the International Criminal Court and the decision of the International Court of Justice dated 14th February 2002.

In its wording of July 2002, the bill reaffirmed the principle of the absolute universal jurisdiction of the Belgian courts, in response to the decisions of the Court of Appeal of Brussels.

The bill stipulated that Belgium would remain the judge of all the crimes of the world, of the past and of the future, even in the absence of a link to Belgium. The only exception to the jurisdiction of the Belgian courts was a screening process in respect of acts committed after 1st July 2002: only the General Prosecution would be allowed to initiate proceedings concerning offences which could be tried by the International Court of Justice when there was no link to Belgium. The drafters of the bill wished to secure the jurisdiction of the Belgian courts over acts which did not come under the jurisdiction of the International Court of Justice, as well as over offences committed by citizens of a state which was not a party to the Statute of Rome, in a state, which was not a party to the said Statue, or offences committed before the Statue came into force.

The two bills received the support of the governmental majority as well as the public support of the Prime Minister. The laws were scheduled to pass urgently, before the Supreme Court would give its decision in the Sharon case.

On 30th January 2003, the Senate passed the interpretative bill and the bill amending the Belgian law of universal jurisdiction. The latter bill was amended in order to establish the screening process of the General Prosecution for offences committed after 30th June 2002 even if such offences did not come within the jurisdiction of the International Criminal Court and to provide recourse to victims in the event that the General Prosecution refused to initiate proceedings. This would have prevented the use of the screening process of the General Prosecution in the pending cases, as well as in the Sharon case.

On 12th February 2003, the Supreme Court reversed the decision of the Prosecution Chamber and affirmed that the Belgian courts enjoyed universal jurisdiction even when the accused did not reside in Belgium. Nevertheless, the Supreme Court decided that Mr. Sharon, in his capacity as an incumbent Prime Minister, was entitled to immunity from criminal proceedings.

The bills were then presented to the Chamber of Representatives.

The law of universal jurisdiction put to the test in the complaint against President George Bush and others

The situation was reversed on the eve of the passing of the amendment bill, in the wake of the filing of a complaint by two Iraqi citizens against President George Bush, Secretary of State Colin Powell, Secretary of State Dick Cheney and General Schwarzkopf and the veiled threats, by the American authorities, of the negative consequences of the law of universal jurisdiction for a country which aspires to play a central role on

the international scene (the headquarters of several international organizations).

Following the acknowledgement by the Belgian authorities that the filing of a complaint against American leaders and high-ranking military officials might bring about severe economic, political and institutional consequences, several amendments were introduced in order to limit proceedings against citizens of democratic countries.

The discussions concerning the amendments to the law dated 16th June 1993 split the government majority.

The new law of universal jurisdiction

The new law is very complex and will certainly invite diverging interpretations, or even further amendments during the forthcoming legislative session. The new law fuses the judicial and executive powers. It is highly likely that petitions to annul provisions of the new law will be brought before the Constitutional Court.

Briefly, the new law reaffirms the principle of universal jurisdiction, tempered by the right of the Federal Prosecutor to intervene in the criminal proceedings in the event that there is no link to Belgium.

Nevertheless, the law stipulates that the government may and is not obliged to protest the facts which are the subject of the complaint, to the foreign state, in certain circumstances. This procedure is also applicable in respect of pending cases. In the event that the accused person is a citizen of a democratic state¹, the Belgian courts will be deprived of their jurisdiction, irrespective of the fate of the protest made by the Belgian government.

Conclusion

The tribulations of the Belgian law of universal jurisdiction are certainly not over.

The law, enacted with major amendments on 5th April 2003, empowers the government to sidestep the Belgian courts in favour of a foreign state, in the context of a complaint filed under the law of universal jurisdiction.

Unfortunately, the new law abandons certain positive aspects of the former text. The new rules do not ensure that Belgium will fulfill its obligation to prosecute or extradite criminals who have committed offences against international humanitarian law and who have taken refuge in its territory.

The Sharon case showed the extent to which a complaint could be used by the media, with the support of non-governmental organizations; how victims could be manipulated and exhibited for political aims, and how the law could be exploited and diverted from its true objectives.

In the past year, several judges decided that universal jurisdiction was not applicable in the absence of a link to Belgium. In response to these decisions, certain political representatives tried to strengthen the supremacy of the Belgian courts in the world, whether in respect of past or future acts, and even in relation to states which had not ratified the Statute of the International Criminal Court (amongst them, the USA).

The initial version of the law was designed to grant Belgium virtual and surrealistic jurisdiction over all offences against international humanitarian law in the world. This text had to be revised urgently. The complaint filed in Brussels against the former President of the USA, two incumbent Secretaries of State and a high ranking military official, the existence of which was disclosed to the public on the eve of the second war against Iraq, created a shock wave and led part of the political world in Belgium to understand the far-reaching consequences of such a law on the foreign policy of Belgium.

Failing to amend this draft of the law would have left Belgium helpless in the face of these highly political complaints. Arguing the need to maintain the separation of powers and the independence of the judiciary from the political world was no longer sufficient.

Moreover, on the eve of the war waged by the USA against Iraq and in the well-known European context, the future seemed rather dim.

By voting in the new law of universal jurisdiction, the Belgian legislature of April 2003 decided to grant the government power to control Belgium's criminal policy in respect of universal jurisdiction over offences against international humanitarian law, committed anywhere in the world.

The future will tell if the Belgian law of universal jurisdiction will become an instrument of justice instead of a tool for propaganda.

¹ Being defined, by the law, as a state punishing severe infringements of international humanitarian law and securing the rights of plaintiffs and defendants to a fair trial.

The Lawsuit Submitted against Ariel Sharon in Belgium: Historical Background

Yoav Gelber

The beginning of Israel's involvement in Lebanon dates back to the 1930s. The Arab rebels in Palestine looked for guidance to their leader, the Mufti of Jerusalem Hajj Amin al-Hussayni, who found refuge in a Lebanese village and from this secure shelter directed the rebellion in Palestine and provided the Palestinian gangs with munitions, provisions and funds. Jewish officials bribed Lebanese politicians and officers to hinder his activities. They also dispatched Arab and Druze agents to Lebanon to assassinate the Mufti, but these attempts failed. Politically, the Jewish Agency cherished hopes of forming a "block of minorities" to balance the Muslim majority in the region. Lebanon's Christians of all denominations were especially significant for implementing this ambitious goal. Hence, the Jews cultivated relations with various Christian factions, though not yet with the Phalanges of Pierre Jumayil who at that time adopted a fascist orientation.

The rapprochement between the Jews of Palestine and the Christian Arabs of Lebanon reached its peak in the summer of 1947. Ben-Gurion and the 93 year old Maronite Patriarch Anton Arida agreed on cooperation and friendship. Having in mind a future Christian state in Lebanon, Bishop Mubarak of Beirut



declared before UNSCOP the Maronites' support for partition and the establishment of a Jewish state in Palestine. Lebanon belonged to the political Arab coalition that invaded Palestine in May 1948, but owing to the Christians' influence and reluctance to take part in the adventure the Lebanese army did not join the military enterprise. The Lebanese army did not cross the border, and gave only token artillery and logistic assistance to the Arab League's troops that penetrated from South Lebanon into Galilee.

In a manner reminiscent of years to come, in 1948 Lebanon allowed various foreign military forces to use its territory as a base for launching operations against Israel thereby losing its own authority in the southern part of the country. At the end of the war, the IDF, the Syrian army, remnants of the League's army, North African volunteers and Palestinian gangs, as well as Lebanese regular units deployed in South Lebanon were all facing each other.

Earlier in the war, Israel and the Phalanges made their first mutual contacts - directly as well as through Jews and Maronites in the United States. Israel cherished hopes of a Maronite *putsch* that would cause Lebanon to quit the war. These hopes proved abortive as the Christians of Lebanon were too weak and apprehensive of the Muslims and Syria. Nonetheless, contacts with the Phalanges persisted after the war and intensified in the 1960s. Israel also had traditional connections with the Shi'ite local leader of Jabal Amal in South Lebanon, Ahmad al-As'ad, a

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minister of the government in Beirut. Israeli Druze endeavoured to cultivate similar bonds with the Lebanese Druze leader Kemal Junbalat, but the amalgamation of Lebanese Maronites and Druze - traditional adversaries - into a block of minorities allied with Israel proved an impossible task.

After the armistice agreement in 1949, Israel was only indirectly and clandestinely involved in Lebanon's politics. Aware of the risks and determined to maintain a low profile, Prime Minister Ben-Gurion and Foreign Minister Sharett vetoed suggestions to interfere in Lebanese affairs in times of crisis such as the civil war in 1958. The attitude towards Lebanon held by Ben-Gurion's successor, Levy Eshkol, was even more prudent and suspicious. The arena of Lebanese politics was dominated by Muslim-Christian tension, by the presence of Palestinian refugees who were not admitted into Lebanese society (they did not have citizenship, could not work and lived in UNRWA-supported camps along the Mediterranean coast and in the Bq'a), and by Syria's indirect interference.

Until the Six Day war in 1967, the Israeli-Lebanese border was relatively quiet, though not as peaceful as one would like to believe. In the wake of that war, however, the Palestinians re-emerged on the scene of the Arab-Israeli conflict as an independent factor. The PLO, established in 1964, now came to the fore and in the beginning of 1965 started a terror campaign against Israel. Palestinian refugee camps in Lebanon provided recruiting grounds, training depots and logistic and operational bases for the PLO's para-military organizations and their world wide terrorist actions against international aviation and Israeli targets abroad.

Israel repressed resistance in the West Bank and Gaza, and effectively blocked the Jordan valley against infiltration from Jordan into the West Bank. In September 1970, King Hussein forcefully eliminated the PLO from the Hashemite Kingdom. The fugitives flocked to Lebanon, and with the Lebanese government turning a blind eye to the creation of "a Palestinian state within a state" on Lebanese land, in the early 1970s the country became the Palestinians' principal stronghold and they enjoyed practical autonomy and immunity.

From their relatively secure shelters among the Palestinian civilian population in the refugee camps of Lebanon and the crowded neighbourhoods of West Beirut, throughout the 1970s the Palestinians para-military organizations waged guerrilla and terror warfare against Israel - across the mountainous land border, along the Israeli coast and against Israelis all over the world

- such as the Israeli expedition to the Olympic Games in Munich in the summer of 1972. The authority of Lebanon's government in its own country became nominal and chaos prevailed in most regions, particularly in the south. Israeli reprisals - air bombings and commando raids - increasingly harmed both Palestinians and Lebanese.

The irritation of the Lebanese, particularly the Christians and the Shi'ites in the southern part of the country, grew as the price of this warfare became heavier. The Christians feared for what remained of their hegemony and, furthermore, for the very independence of Lebanon. The Shi'ites bore the main burden of the skirmishes along the border. In 1975/6, the irritation exploded and a civil war broke out between the Christians and the Palestinians and continued intermittently for 14 years, until the Ta'if agreement in 1989.

As states bordering on Lebanon, influenced by and interested in its fate, both Israel and Syria played their parts behind the curtains of this civil war and sometimes in front of them. In the beginning, the Christian leadership turned to Syria for help and invited the Syrian army into the country. Syrian intervention tipped the scales in favour of the Christians, but then Syria switched sides and backed the Palestinians and deployed its army permanently in West Beirut, along the Beirut-Damascus road, and in the southern approaches to the Bq'a. This array should have defended the Palestinians in Beirut and blocked an IDF attempt to outflank the Golan Heights and attack the main positions of the Syrian army around Damascus through Lebanon.

At the same time, under the guidance and with the approval of Prime Minister Itzhak Rabin, Israel strengthened its ties with the Christian militia - the Phalanges. The IDF trained them, supplied them and assisted them and the military bond developed into a political one as well. The Phalanges' leaders visited Israel and Israeli leaders, including Rabin, met with the Christians either on boats off the Lebanese coast or in the harbor of Junia, the Christian "capital". On 11 March 1978, Palestinian terrorists landed on Israel's coast, hijacked a bus and massacred commuters on board. Israel launched a large-scale operation in South Lebanon, Operation Litani, and occupied a strip along the border 10 kilometers deep. After withdrawing, the IDF created a buffer zone in the evacuated area, held by a Christian and Shi'ite militia commanded by a Lebanese regular officer - Major Hadad.

The civil war in Lebanon provided the background for several of the biggest massacres that had ever taken place in the Middle East, matched only by Hafiz Assad's outrageous bombardment

of the Muslim Brethren in Hama in 1982. The most bloody and famous of these atrocities were the massacres of the Palestinians in the Beirut quarter of Tel Za'atar in 1976 and of the Christians in the small town of Damur by the Palestinians in 1978, each inflicting several thousand non-combatant casualties. Mass killings on smaller scale were committed by the belligerents elsewhere, opening or continuing chains of revenge according to Middle Eastern tradition.

Skirmishing, shelling, terrorist acts and retaliation raids along the Israel-Lebanon border persisted after Operation Litani. In May 1981, the continuing involvement of Syria and Israel in Lebanon led to clashes between Israeli and Syrian aircraft and to the deployment of Syrian AA missiles on Lebanon's territory designed to protect not only the Syrian troops in Lebanon but also the PLO bases from Israeli air attacks.

In July 1981, the IDF launched a major air operation against the Palestinian organizations which responded with massive shelling of Kiryat Shmona and other settlements in the Galilee. An American-mediated cease-fire ended this skirmish after ten days. Subsequently, the Palestinians suspended actions against Israel from Lebanon and began consolidating their power inside the country, either in preparation for the resumption of fighting after achieving proper responses to Israeli reprisals (*i.e.* by shelling targets deeper inside Israel) or with the aim of assuming power in Lebanon or both. Watching the build-up of Palestinian power on its northern border, Israel was determined to eliminate the threat and waited for a proper opportunity to destroy the developing Palestinian infrastructure.

An attempt on the life of Shlomo Argov - Israel's ambassador to London who died a few weeks ago - provided Israel's government with the excuse it was looking for. On 5 June 1982 the IDF invaded Lebanon and moved northwards to the Beirut-Damascus road. The three goals of this invasion were: (1) destroying the Palestinian organizations' bases and war materials and eliminating their threat to the Galilee settlements; (2) joining hands with Israel's allies, the Phalanges, and enthroning them in Beirut as a preparatory step to signing a peace between Israel and Christian Lebanon; (3) removing the Syrian army from Lebanon.

The military success of this campaign was partial, much below expectations. Palestinian and Syrian resistance was stiffer than predicted and the scale of IDF casualties was larger than anticipated. The advancing troops failed to reach the Beirut-Damascus road in time (*i.e.* before the imposition of a cease-fire). Many Palestinian combatants managed to withdraw to Beirut and

the IDF had to besiege the city for three months before they left by agreement to Tunisia. The Syrian army remained in the Bq'a and in Beirut, though communications between the two regions were disrupted when the IDF took over a small sector of the Beirut-Damascus road.

The indecisive outcome and the vagueness of the war goals gradually changed the Israeli public's attitude towards the war. Initially, the government enjoyed the support of the main opposition party - the Labor party. However, the protracted siege on Beirut, the early resistance actions of the Palestinians and later the Shi'ites, sponsored by Iran and directed by Iranian revolutionary guardsmen who were dispatched to the Bq'a, and the growing number of casualties - all fostered opposition to the war and to the continuation of the IDF presence deep in Lebanon. Consequently, the Labor party jumped on the anti-war wagon.

Growing disenchantment with the war notwithstanding, politically Israel succeeded in forcing the Lebanese Parliament to elect its ally - the Phalanges' leader Bashir Jumayil - as Lebanon's next president. His election was supposed to be a first step on the road to a peace agreement between Israel and Lebanon. At the beginning of September 1982, with Bashir as elected-president, another peace treaty with an Arab state looming and Arafat on his way to Tunis - Israel appeared victorious and successful.

This apparently promising picture changed abruptly on 14 September 1982. A car bomb exploded beneath the Phalanges headquarters in Beirut killing Bashir and much of his entourage. The Phalanges suffered this heavy blow precisely when they were on the verge of attaining their long cherished target of a Christian-dominated Lebanon. The IDF, which hitherto had been satisfied with holding the upper ground of mainly Christian East Beirut, and besieging the lower and crowded western quarters inhabited by Palestinian and Shi'ites, promptly moved into West Beirut. As part of this move, the local IDF commander in Beirut, General Amos Yaron, assigned the Phalanges the task of clearing the Palestinian neighborhoods (or refugee camps) of Sabra, Shatila and Burj al-Barajna.

The IDF abstained from dispatching any Israeli troops into the densely populated camps, but Israeli outposts observed it from the outside. A few hours after the Phalanges entered the camps on 16 September, suspicions began to emerge that they were executing people indiscriminately. Indeed, the hard core of the Phalanges, Elie Hubeika's special security troops, slaughtered hundreds of Palestinians in revenge for previous massacres and the assassination of their leader Bashir. This was a typical

Lebanese way of settling old scores that had many precedents in the near and distant past. By no means was it more cruel or bloody than Damur, Tel al-Za'atar, several events that accompanied the civil war of 1958 in Lebanon or the persecution of Anton Sa'ada's "Syrian National Party" (one of the members of which planted the bomb that killed Bashir Jumayil) in 1949. Israel involvement, however, lent the massacre of Palestinians by Christian Lebanese a novel and special significance.

This involvement necessitated clarification. Israelis demanded to know what had happened and what the government and the army's roles had been in the outrages. The scene was confused. Initially, the government avoided explanations or gave unconvincing accounts that only increased the confusion and further reduced the government's credibility, already shaken since the cease-fire that had not ended the fighting. Rumors spread about dissent within the army ranks and some of them proved true. The opposition to the war, led by Peace Now movement, gained immense popularity and a wave of protests and demonstrations erupted, culminating in a mass gathering - probably one of the biggest ever held in Israel - in Tel Aviv on Saturday, 25 September 1982. Losing confidence in its government's integrity in this and other matters pertaining to the war, the public insisted on the appointment of a State Commission of Inquiry chaired by a Supreme Court judge to investigate what had really taken place in Sabra and Shatila.

At this point, I would like to introduce a personal vantage point on the events of September 1982. In the wake of the war in 1973, I served as a Scientific Assistant to the Agranat Commission that investigated the war. A few months before the Lebanon war, Justice Moshe Landau, then President of the Supreme Court, appointed me a member of a State Commission of Inquiry that should have investigated the assassination in 1933 of Chaim Arlosoroff, head of the Jewish Agency's political department. Prime Minister Menachem Begin wished to acquit the Zionist-Revisionist movement retroactively of charges concerning its involvement in the murder of Arlosoroff. I was the historian on that commission that was supposed to examine a historical case of interest to only a few Israelis.

I had no political affiliation at that time, but the government's initial refusal to investigate the massacre at Sabra and Shatila irritated me. The evasive answers given by Begin and his ministers to the media and the public made me feel cheated. In my eyes, it was inconceivable that the same government that had initiated an investigation into a 50 years old murder would not grasp its

moral obligation to conduct a proper inquiry into deeds to which it was a party, albeit indirectly. I submitted my resignation from the Arlosoroff Commission to the new President of the Supreme Court, Justice Yitzhak Kahan, and from his office went straight to the hill opposite Begin's office to start a sit-in strike in protest. I sat there several days and nights until the government changed its position.

Let us go back to the main story. Within a week, the government succumbed to public pressure and appointed a commission, chaired by Justice Kahan, to investigate the events in Sabra and Shatila and Israel's role in them if any. After a few months of thorough investigation, the commission did not find any of the office holders whose conduct had been questioned after the massacre directly responsible. Nonetheless, the commissioners criticized several of them, beginning with Begin and ending with Amos Yaron, for not being sufficiently aware of the implications of the Phalanges' advance into Sabra and Shatila. Beyond verbal criticism, Minister of Defence Sharon was required to resign from his post.

The massacre in Sabra and Shatila was the turning point of the Lebanon war. Under increasing international pressure, the IDF withdrew from West Beirut by the end of September 1982. A year later the IDF withdrew to the Awali line south of the Shuf Mountains and early in 1985 it withdrew to a narrow security zone north of the Israeli-Lebanon border where it stayed until May 2000. The source of resistance to Israel's occupation of Lebanese territory changed and the Shi'ite Hizbullah replaced the Palestinians in carrying the main burden of fighting against the IDF.

For all practical purposes, the Palestinian refugees in Lebanon receded from the picture. Arafat abandoned them when he entered into the Oslo agreement with Israel. Lebanon still refuses to admit them completely. Their conditions have not changed, though the Israelis have long disappeared from their camps. The Phalanges came to terms with the Syrians and Elie Hubeika - the arch-murderer - received immunity and served them loyally to his last day. The lawsuit submitted in Belgium is no more than a propagandist attempt - using a very peculiar situation that Belgian law has created - to blame Israel for a domestic Lebanese act of revenge and to remind a forgetful world of their continued existence in their camps.

The Supreme Court of Belgium Puts an End to the Prosecution of Sharon

Adrien Masset

The judgment rendered by the Supreme Court of Belgium on 12th February 2003 was delivered against a specific procedural background.

In this case, the appellants - 24 persons claiming to be victims of the Sabra and Shatila massacres - appealed to the Supreme Court against a judgment rendered on 26th June 2002 by the Prosecution Chamber of the Court of Appeal of Brussels, which had dismissed legal proceedings instituted against Prime Minister Sharon, former Defence Minister, and Major General (Ret.) Amos Yaron, Commander of the Israeli forces in the Beirut area at the time of the massacres.

This decision of the Prosecution Chamber of Brussels had been given following a criminal action filed against Messrs Sharon and Yaron, after a complaint was lodged before the examining magistrate, accompanied by a civil action filed by the 24 complainants and following the summing up of the case by the General Prosecutor of the King of Brussels.

The Prosecution Chamber of Brussels had to address several issues. First, the court had to decide whether the Belgian courts had jurisdiction to judge such a complaint, and second, whether the indictment would be quashed since neither Mr. Sharon nor Mr. Yaron, resided in Belgian territory. Thereafter, on the assumption that the Belgian judicial authorities had jurisdiction and the case could be tried, the Prosecution Chamber of Brussels had to assess the legal implication of Mr. Sharon being the incumbent Prime



Minister of the State of Israel. Other legal issues were also debated before the court.

The Prosecution Chamber did not have the opportunity to address all these legal issues. Although the court did implicitly conclude that Belgium could lawfully extend its jurisdiction over acts performed outside Belgium by foreign persons, without infringing international law, the court held that the criminal action should be dismissed. It reached this decision on the basis of the Preliminary Part of the Criminal Procedure Code which requires a strong link to Belgium. This section specifies that criminal acts committed

outside Belgium by a foreign person may not be prosecuted in Belgium unless the suspected person resides in Belgian territory. The Prosecution Chamber of Brussels held that this rule must also be applied when the criminal action is based on the law dated 16th June 1993, amended by the law dated 10th February 1999, concerning the repression of severe infringements of international humanitarian law.

The appellants criticized this decision before the Supreme Court, contending that the Prosecution Chamber had misapplied the general rule set out in Section 12 of the Preliminary Part, to the Special Law 1993-1999.

The parties to the procedure before the Supreme Court did not debate other legal issues: the only issue before the Supreme Court was whether the Prosecution Chamber of Brussels had properly applied Section 12 of the Preliminary Chapter and the Law 1993-1999.

The appellants, namely, the alleged victims, and the respondents, namely, Messrs Sharon and Yaron, argued contrary positions.

The General Prosecutor advocated an intermediate position, to

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the effect that the special regime established by the Law 1993-1999 excluded the application of Section 12 of the Preliminary Part. This argument should have led the court to reverse the judgment of the Prosecution Chamber and sustain the appellants' contentions, but the General Prosecutor added that the spirit and the construction of the Law 1993-1999, required the existence of a strong link between the acts and Belgium, this link being that the indicted person should reside in Belgian territory.

The summation, written by the General Prosecutor **in person**, led to the same result - that the suspected person should reside in Belgian territory - through a different legal path, *i.e.*, the spirit and the construction of the Law 1993-99 and not Section 12 of the Preliminary Part. His summation invited the Supreme Court to give a new legal basis to the judgment of the Prosecution Chamber.

Accordingly, the Supreme Court was invited not to nullify the judgment, stressing that doing so would make the 1993-1999 Law *"an imperfect tool for a theoretical and therefore purely symbolic repression, which would lead to virtual more than real trials"*.

The judgment of the Supreme Court dated 12th February 2003 did not take into account the legal arguments put by the General Prosecutor, did not refer to them and did not answer them.

The judgment dated 12th February 2003 holds that Section 12 of the Preliminary Part is not applicable in respect of the Special Law 1993-1999. This supports the position of the appellants.

The judgment adds that neither Sections V and VI of the Convention for the Prevention of the Crime of Genocide, nor the Statue of Rome, nor Sections 49-50-129-146 of the four Geneva Conventions dated 12th August 1949, establish legal rules extending jurisdiction and derogating from the principle of territoriality of criminal law, which together with Section 12*bis* of the Preliminary Part, specify that the indicted person should reside in Belgium.

This legal ratio, which alongside the final outcome of the appeal rejects the legal argumentation of the appellants, is important in terms of international law. It means that the above international treaties cannot be a source of a general and universal jurisdiction derogating from the principle of territoriality of criminal law with respect to international humanitarian law crimes.

The Supreme Court could have stopped there but it decided to analyze a legal argument, which had not been debated before the Court. The Supreme Court addressed the legal consequences attached to Mr. Sharon being an incumbent Prime Minister of a foreign country.

On this question, the judgment rendered on 12th February 2003 follows the decision of the International Court of Justice dated 14th February 2002, which, in the case *Congo vs. Belgium*, confirmed the international custom asserting the immunity of heads of state and governments, and high ranking foreign officials, from criminal proceedings. The Supreme Court of Belgium had no need to examine the scope of this immunity since the said immunity was sufficient to quash the indictment against Mr. Sharon. On this ground, the Supreme Court did not reverse the decision of the Prosecution Chamber of Brussels concerning the incumbent Prime Minister.

The decision adds that Sections IV and VI of the Convention for the Prevention and the Repression of the Crime of Genocide, Section 27/2 of the Statute of Rome, the Geneva Convention 12th August 1949 and their additional Protocols I and II do not exclude this immunity when the criminal prosecutions are filed before the local courts of a state claiming universal jurisdiction by default. Section 5 par. 3 of the Belgian Law 16th June 1993 sets out a contrary provision but this rule belongs to local law and cannot be interpreted as contradicting a principle of international criminal law in matters of immunity.

In quashing the indictment against Mr. Sharon, the Supreme Court therefore used the legal technique of substitution of arguments, suggested by the General Prosecutor, on another issue.

As far as Mr. Sharon is concerned, the judgment puts an end to the criminal prosecution against him in Belgium.

As far as Mr. Yaron is concerned, the result of the judgment is to refer the case back to the Prosecution Chamber of Brussels, under a different bench of magistrates. This new Prosecution Chamber shall not be bound by the Supreme Court decision. It shall address arguments already discussed and numerous other arguments, including the scope of the immunity, the application of the *non bis in idem* principle due to the absence of criminal proceedings in Israel after the publication of the Kahan Commission report and the amnesty granted by the Lebanese authorities to the perpetrators of the massacres. This new Prosecution Chamber will also apply the new Belgian legislation, which may be in force and may specify, for example, new grounds for the absence of jurisdiction or triability of the initial complaints.

The new legislation is due to come into effect in the near future. The new Prosecution Chamber has yet to be established.

Three statements by the Association at the annual session of the UN Human Rights Commission

“Our worst fears were confirmed and even exceeded”

1

Written Statement on agenda item No. 6 - Racism, Racial Discrimination and Related Intolerance, submitted to the 59th Session of Human Rights Commission by Daniel Lack, the representative of The International Association of Jewish Lawyers and Jurists to the UN, Geneva

The following written statement submitted by IAJLJ together with the World Jewish Congress (WJC) was intended to confront several human rights crises with regard to discrimination against Jewish minority communities and in the treatment of Israel as the State of the Jews at the Human Rights Commission itself.

The unprecedented incident of the screening on an Egyptian TV channel of the series *A Knight Without a Horse* promoting racism in the form of the most extreme example of anti-Semitism epitomised in the *Protocols of the Elders of Zion*, was paralleled by the recrudescence of anti-Semitism in the aftermath of the Durban World Conference Against Racism. Likewise, renewed anti-Semitic violence, fanned by the Intifada, against individual Jews and Jewish institutions, notably in France, also had its counterpart in hostile UN fora.

The attempt to downgrade any reporting on anti-Semitism in the UN, already signalled after Durban, at the last session of the UN's General Assembly in New York seemed to prefigure what was likely to occur at the recently concluded 59th session of the Commission on Human Rights.

Our worst fears were confirmed and even exceeded. The following written statement should be understood in this context.

This written statement is submitted by the IAJLJ, a non-governmental organisation with special consultative status with ECOSOC, under Item 6 of the Provisional Agenda of the fifty-ninth session of the Commission of Human Rights, on racism, racial discrimination and all forms of discrimination

1. *The High Commissioner for Human Rights has been informed of the television broadcast by the Egyptian state television station also transmitted by other Arab TV stations on at least 22 successive evenings as part of a 41 instalment series entitled Knight Without a Horse during November 2002 and subsequently.*

2. *It consists of a blatantly racist production in preparation for eighteen months, transmitted on Egyptian state television as well as on other TV channels in Arab countries, featuring the notorious Protocols of the Elders of Zion, (“Protocols”). It is common knowledge that this is a forged document purporting to reveal a Jewish plot for world domination concocted by the Tsarist secret police the Okhrana. The Protocols, was adapted by Dream TV a private Egyptian TV Channel to fit into a contemporary Middle East scenario. Thus, the world conspiracy theory is transplanted from a secret cabal of Jews meeting at midnight in cemeteries in Eastern Europe, to a Zionist plot to conquer the whole region. This is presented as a stepping stone to world domination by control of the media and other conspiratorial machinations as an insidious means of acquiring a monopoly of political, economic and financial influence throughout the region.*

At this year's conference the IAJLJ representatives were: Daniel Lack, Prof. Ann Bayefsky, Maya Ben-Haim Rosen, and David Goldberg.

3. *All the characters portrayed in this TV production are taken straight out of the repugnant caricatures in the Stürmer and Völkischer Beobachter of sinister Nazi memory.*
4. *In order to ensure maximum impact in terms of incitement to hatred and racist opprobrium against Jews, Israel and Zionism, the televising of the Knight Without a Horse series was timed after a sustained publicity campaign, to coincide with the Moslem festival of Ramadan at a time when a captive audience would be imbued with intense religious fervour.*
5. *The televising of such appallingly racist material gives rise to fundamentally important issues. The genocidal character of the Protocols has been tragically proved by the use for which it was designed, namely as a means of incitement to hatred and violence against Jews in the pogroms claiming the lives of tens of thousands of victims prior to and during the Russian revolution. However the use to which it was later to be put by Adolf Hitler as his anti-Semitic credo in Mein Kampf resulting in the deliberate policy of extermination of six million European Jews during the Second World War, could leave no one in doubt as to the incendiary nature of this material.*
6. *For these reasons and for the purpose of establishing clearly the nature, origins and history of the Protocols, the IAJLJ has devoted a special issue of its periodical JUSTICE entitled "Anti-Semitism Then and Now" (No. 34 Winter 2002). The continued publication of the Protocols in several million copies, despite incontrovertible proof that it is one of the most notorious forgeries to have been disseminated over the last one hundred years throughout the world in all languages, has been augmented by its promotion on the Internet. These and other burning questions have featured in a history of the Protocols researched for over six years by Judge Hadassa Ben-Itto, President of the IAJLJ, in her book "The Lie That Wouldn't Die" published in seven languages summarised key sections of which appear in the special issue of JUSTICE.*
7. *Given the role the Protocols have repeatedly played throughout the last century as a source for promoting racism and incitement to hatred followed by resort to public encouragement to perpetrate genocidal killing, it is no longer acceptable for this Commission of Human Rights to refrain from condemning these manifestations in the severest terms. A failure to do so will be faced with incomprehension by public opinion in all democratic states. It is incontrovertibly established that copies of the Protocols are frequently carried by suicide bombers and members of other Palestinian terrorist organisation such as Hamas and Islamic Jihad on their missions of death and destruction aimed at exclusively civilian targets in Israeli population centres on buses, in restaurants, shopping malls, pizza parlours and food markets, killing and maiming indiscriminately Arab and Jewish citizens of Israel and foreign workers.*
8. *Against this background, Egypt assumes a heavy responsibility in promoting in its state controlled television the presentation of the instalments of Knight Without a Horse constituting clear promotion of the Protocols and their deadly exhortation to racist hatred and violence. Egypt, as a state party to the International Covenant on Civil and Political Rights is thus in clear breach of its undertaking to respect Article 20 paragraph 2 of the Covenant which provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.*
9. *Equally by permitting the televising of this series on its state TV channels, Egypt is also in violation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and specifically paragraph (c) of this provision requiring in particular that States Parties shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*
10. *It is also undoubtedly the case that the same strictures apply to all other State Parties to the above conventions who have also transmitted the instalments of this program on their national television channels.*
11. *The IAJLJ calls upon the Commission at its fifty-ninth session to condemn these grave violations of basic human rights provisions and the particularly serious consequences to which such conduct gives rise in the present climate of incitement to hatred and violence which characterises the hostility to Israel and the Jewish people throughout the Middle East and elsewhere.*
12. *At the same time the IAJLJ wishes to draw the attention of the Human Rights Commission to the continuation of the regrettable policy of certain states at the Durban World Conference Against Racism (WCAR) of September 2001, whose total failure during the adoption of the Declaration*

and Program of Action at the conclusion of its final session, was saved by a last minute political compromise. In the light of the above mentioned widespread continued publication of the Protocols as one of the key factors for measuring the increase of anti-Semitism throughout the world, particularly in Arab and Moslem countries as well as in Europe, notably in France, it is particularly alarming and a cause for dismay that instead of giving heightened attention to the dramatic increase in this, the oldest and most lethal form of racism, the UN General Assembly has adopted Resolution A/RES57/195 on December 18 2002.

13. Under the terms of this resolution, the ground is being prepared for the reduction of the reporting on anti-Semitism by the Special Rapporteur on contemporary forms of racism. While in its Article 45 under Section V. dealing with the functions of the new Special Rapporteur, there is recognition of the increase of "anti-Semitism and Islamophobia in various parts of the world", the explicit customary language in previous General Assembly resolutions on this subject has been deliberately omitted at the initiative of the same states which side-tracked the WCAR by insisting on the introduction of the Middle East conflict. Thus for comparison, under the previous equivalent Resolution A/RES56/287 adopted on 27 March 2002, the corresponding wording stated in Article 34:

"Urges all Governments to co-operate fully with the Special Rapporteur with a view to enabling him to fulfil his mandate, including the examination of contemporary forms of racism and racial discrimination, inter alia, against blacks, Arabs and Muslims, xenophobia, Negrophobia, anti-Semitism and related intolerance."

In the prior GA Resolution A/RES/55/83 adopted on 4 December 2000, there was the same corresponding text in Article 22 in almost identical language. In the two preceding years in GA Resolution A/RES/54/153 of 1999 and A/RES/53/153 of 1998 the reference to including the examination of anti-Semitism was also featured. Thus the omission in the latest December 18 2002 GA resolution is all the more significant.

14. The latter most recent GA text on this subject also contains in its Article 25 the curious statement

"Acknowledges that the World Conference Against Racism ...is on an equal footing with those of all the major United Nations conferences, summits and special sessions;"

It would appear that the States voting in favour of this resolution implicitly acknowledge thereby, that the Durban WCAR requires special promotion in order to rescue it from the political controversy and criticism surrounding its outcome.

15. All the above resolutions dealing with the Special Rapporteur in this context to except for the 2002 GA Resolution in which as noted, the corresponding provision has been omitted, reflect the original language in almost exact terms contained in Resolution 94/64 of the Commission on Human Rights under which the Special Rapporteur on contemporary forms of racism was appointed in 1994. Since the new Special Rapporteur's reporting responsibilities are due to be established by the Commission at its forthcoming 59th session, the acid test with respect to determining whether the Commission will itself also decide to exclude future reporting on anti-Semitism as part of the same negative political outcome of the Durban 2001 WCAR or on the contrary, in a forward looking and more positive attitude the Commission will not permit such a deplorable omission to be repeated, will be carefully followed by all supporters of human rights who are concerned with the Commission's reputation and credibility.

16. Regrettably however, the outcome of the meeting of the Intergovernmental Working Group meeting in Geneva on 31 January last, leaves little hope that such a positive result will be forthcoming. The Working Group's new draft proposal introduced by Egypt with the support of the representatives of other Arab and Moslem states at this meeting and their supporters, would "reaffirm and emphasise the importance of the effective implementation of and follow-up to all paragraphs of the Durban Declaration and Program of Action concerning the situation in the Middle East". This paragraph was approved in the final part of the meeting, whereas human rights issues not connected with this political dispute and more appropriately concerned issues of racism and racial discrimination were left unresolved for subsequent negotiation. As at Durban, those who seek to give priority to their own political agendas at the expense of advancing progress in combating racism and racial discrimination, won the day. The results of the Commission's deliberations on this critical issue at its 59th session will thus be followed with close attention and heightened concern.

(Submitted on February 9, 2003)

“The report seeks to convert a flawed mandate into a sham indictment”

2

Oral Statement on agenda item No. 8 - Question of the violation of human rights in the occupied Arab territories, including Palestine, made by the International Association of Jewish Lawyers and Jurists and the World Jewish Congress at the 59th Session of the Commission on Human Rights, delivered by Maya Ben-Haim Rosen

The following oral statement within the prescribed time limit of 3.5 minutes speaking time accorded to Non Governmental Organisations, deals with some of the major omissions of the current Special Rapporteur's ritualistic and totally one-sided denunciation of Israel's presence in the territories to eradicate the successive waves of terrorist suicide bombing and other terror attacks against exclusively Israeli civilian targets. As can be seen from this highly provocative official wording of the agenda item, its very title assumes the conclusions even before the submission of what is intended to pass as evidence in this highly objectionable report.

The report submitted by Mr. John Dugard to this session of the Commission is flawed in many respects and devoid of validity. The basic defects noted last year, apply even more forcefully this year.

The distorted character of the mandate is patent. It is one-sided, open-ended and its title assumes proof of false conclusions. The latter are based on misconceptions of basic legal concepts. The disputed territories are not 'occupied'. Article 2 of the IVth Geneva Convention does not apply and under its Article 6 any occupation would have long been regarded as ended.

The territories' character was redefined by the 25 September 1995 Washington Interim and subsequent agreements. Their entire validity was brought into question by Arafat's wholesale rejection of the Camp David proposals.

Further, the report contains the following glaring defects:

- *It equates terrorist suicide bombings with remedial military preventive action against terrorist groups and their bases;*

- *It makes a moral equation between terrorism and its victims;*
- *It fails to mention the sequence of the events in March 2002 leading to military action against their terrorist perpetrators. Thus operation Defensive Shield was the response to repeated daily terrorist attacks against solely civilian targets culminating in the Passover massacre. All the above was simply omitted as the reason for the military operation;*
- *Such repeated omissions establish the striking one-sidedness of the entire report.*
- *Similarly, Mr. Dugard cites delays caused by search of vehicles carrying humanitarian aid, omitting to mention recurring incidents, recorded in the presence of Red Cross authorities of Palestinians driving ambulances concealing terrorist passengers carrying explosive belts and other arms, in flagrant violation of humanitarian law.*
- *The report also fails to mention systematic inculcation of hatred in the educational curriculum of Palestinian children encouraged to participate actively in combat.*
- *Children are constantly subjected to TV programs at school, in youth movements and youth camps to brainwashing inciting them to become suicide martyrs.*
- *The report says nothing of widespread grave violations of Palestinians' Human Rights by the Palestinian Authority, such as false imprisonment, denial of due process, torture and arbitrary execution.*
- *More fundamentally, the report fails to make mention of the abandonment both by the terrorist groups and the Palestinians leadership of any pretence to distinguish between combatants and the civilian population. It is simply*

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“It is incomprehensible that the Rapporteur omits to mention the atrocious Al-Qaida terrorist attack on the Djerba synagogue in Tunisia”

3

Joint oral statement made by the World Jewish Congress and the International Association of Jewish Lawyers and Jurists at the 59th Session of the Commission on Human Rights on Item 11 of the Agenda: Civil and political rights (e) - Religious intolerance, delivered by Maya Ben-Haim Rosen

The following oral statement is yet a further example of the deterioration of the climate at this year's session of the Commission on Human Rights especially when dealing with racism and religious intolerance.

It is a further illustration of the deliberate policy of the same coalition of hostile state members of the Commission of Human Rights, notably those from the Arab League and the Organisation of the Islamic Conference. Even though a passing reference was subsequently included in a preambular paragraph of the Commission resolution on this subject, as a result of an initiative taking by the delegation of the IAJLJ urging the US delegation to actively promote this proposal, it was so watered down in the negotiations for an acceptable form of language, as to make the reference almost meaningless. Any reference to anti-Semitism where it would have been more appropriate in the resolution on contemporary forms of racism, had already been suppressed by the same coalition of hostile delegations regrettably headed by the African members, no doubt as a legacy of the Durban World Conference.

WJC and the IAJLJ note the Report submitted by the Special Rapporteur on freedom of religion or belief.

- *We note with amazement that the Special Rapporteur omits any analysis and denunciation of the alarming phenomenon*

of increasing anti-Semitic manifestations throughout the world, including physical assaults on Jews. It is simply incomprehensible that the Rapporteur omits to mention, for example, the atrocious Al-Qaida terrorist attack on the

Continued from p. 34

- claimed that all Israelis, men, women and children, old and young, are legitimate targets.*
- *While accusing Israel of curtailing humanitarian aid, it fails to mention that funds reaching the Palestinian Authority sent by the European Union and by the UN earmarked for humanitarian programs are constantly diverted to finance terrorist activities now the subject of investigation by a special European Commission of Enquiry. This is exemplified by the notorious Karin A armaments shipment from Iran as established by incontrovertible documentary proof seized at*

Arafat's headquarters involving his closest associates

- *In conclusion, the entire ethos of the report is itself an exercise in gross disproportionality. It seeks to convert a flawed mandate into a sham indictment. The Special Rapporteur's defective functioning is a serious obstacle to any involvement of the UN in the peace Quartet. His function should be terminated forthwith. The UN's role is to persuade the Palestinian leadership to abandon terrorism and return to the negotiating table.*

(Delivered in March 28, 2003)

Djerba synagogue in Tunisia in April 2002. Twenty people were killed in the attack, amongst them German tourists and locals.

The Special Rapporteur is aware of the phenomenon, as he quotes from the report of the European Monitoring Centre for Racism and Xenophobia, referring to "repeated...acts of vandalism in synagogues and verbal and physical attacks on Jews".

But from the point of view of this Commission, the failure is even worse. The combined effect of the Special Rapporteur on contemporary forms of racism etc., no longer being enjoined to report on anti-Semitism precisely when it is having a major recrudescence in Arab and Islamic countries as well as in Europe and the failure at the same time of the Special Rapporteur on freedom of religion or belief to deal with major expressions of and incitement to intolerance, hatred and violence emanating from extremist Islamic elements towards Jews and Jewish communities in precisely the same countries, gives rise to the gravest concern at the Commission's indifference. This could be interpreted by the international community as the Commission giving encouragement to this discriminatory attitude.

- *We agree with the Special Rapporteur's warning against the dangers of generalisation and identification of the Muslim faith with religious extremism (point 93). A clear distinction must be made between Islam and those who call for violence against Jews and Christians in the name of Islam. In particular, the Rapporteur must condemn the anti-Christian and anti-Jewish rhetoric uttered during religious sermons*

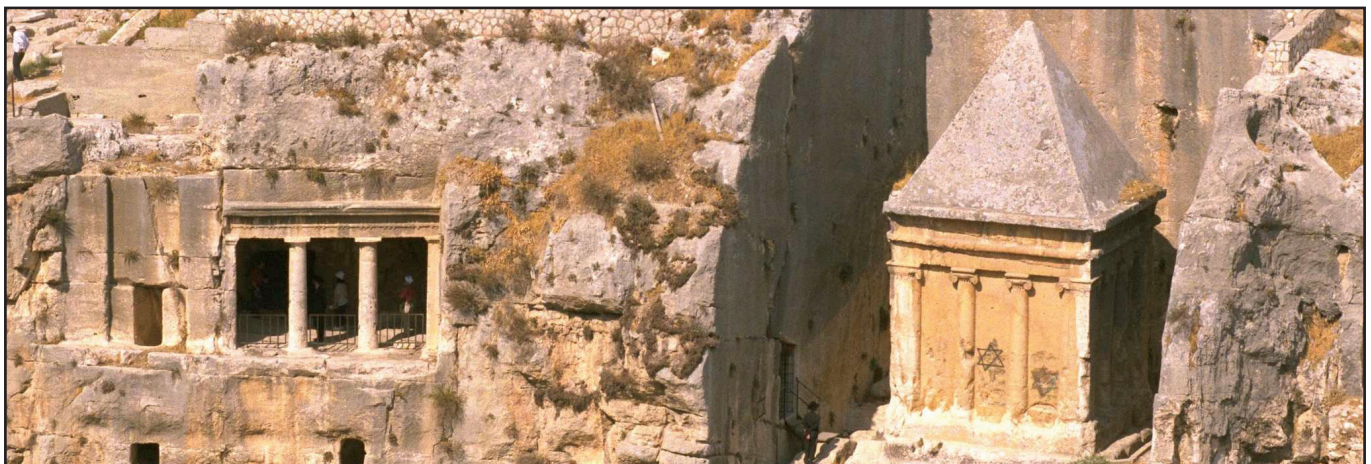
and broadcast by some Arab countries' state controlled television. One example is that of the preacher of the grand Mosque in Sanaa, Yemen, which is similar to others made in Qatar, Saudi Arabia and elsewhere:

"O Allah, destroy the Jews and their supporters and the Christians and their supporters and followers. O Allah, destroy the ground under their feet, install fear in their hearts, and freeze the blood in their veins".

(August 23rd 2002)

- *We note with approval the Special Rapporteur's conclusion, para 142, regarding the use of education to promote the protection and respect for freedom of religion, the essential component of which should be school curricula and textbooks on education for tolerance. But, we urge him in the strongest possible terms to examine and report on the content of those textbooks that are being used around the world in Muslim schools which inculcate hatred against Jews. Further, we urge that this practice be condemned at the forthcoming UNESCO International Conference on Textbooks.*
- *We wish to commend the Special Rapporteur's emphasis on the importance of interreligious dialogue, whose contribution to the fostering of human rights cannot be underestimated.*
- *In conclusion, given the alarming extent to which religious intolerance has increased in the last period under review, we, once again, urge the international community to use the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief as a basis for a binding International Convention.*

(Delivered on April 9. 2003)



Absalom's Tomb, near the Mount of Olives (courtesy of the Israel Government Press Office)

“Powerful in Kingship, Truly Chosen”

Aviad Hacoen

In the Jewish legal tradition, sources relevant to constitutional and administrative law are scattered over hundreds of works, throughout the Diaspora, and written over a period of hundreds of years. The characters who people this literature constitute a veritable parade of communal figures: stern *kahal* leaders, attempting to impose their authority on the community; paupers, widows and orphans, begging for the right to have some little say in the election of the community's leadership, or pleading for some small relief from the burden of taxes which oppresses them; magnates who crave the opportunity to control the communal purse strings, or to influence elections for the benefit of their close associates; violent men who take the law into their own hands and terrorize the communal leadership into bowing to their demands; humble men who are totally dedicated to the service of their communities, though their own families have precious little - these and others like them are the characters whose lives are reflected in the Jewish texts touching on constitutional and administrative law.

In this article, I would like to discuss a number of contemporary issues relating to electoral law, as reflected in Jewish legal sources and in comparison with the modern legal framework.¹

One of the pitfalls in any analysis of this type is that of anachronism. In the early days of Jewish law, democratic systems were not the norm. The fundamental values of our own times,



such as the principle of equality in the electoral process, and the acceptance of the right to vote and to be elected as fundamental rights that, as much as possible, ought not be violated, had not yet come into existence, certainly not in their modern formulation.

A major change, however, took place with the crystallization of the Jewish community in the Middle Ages. As the community's institutions became more formalized, a need arose for a comprehensive system of rules that would determine the electoral system,² the methods for funding elections,³ and

the eligibility to vote and to be elected to office.

Nonetheless, a study of Jewish legal sources will show that many of these principles already existed in earlier times, and that the Sages of Jewish law were involved in their formulation, development and enhancement, while adapting them to the changing realities of their times.

1 Regarding the right to vote and to be elected in Israeli law, see A. Rubinstein, *HaMishpat HaKonstitutzioni shel Medinat Yisrael* [The Constitutional Law of the State of Israel] (Jerusalem-Tel Aviv, 5757), 520-566.

2 While fascinating, this subject is not relevant to our present discussion. See M. Elon, *Democratia, zechuyot yesod u-minhal takin bifsikatom shel hachmei hamizrach bemotz'aei gerush sefarad* [Democracy, basic rights, and proper administration in the *Halachic* rulings of the Sages of the East following the Expulsion from Spain], *Jewish Law Annual*, 18-19 (5752-5754), pp. 9-63.

3 See, for example, the regulation established in the town of Sniadowo, in Poland, which provides that “those who supervise the elections may draw not more than six gold pieces from the communal funds for election expenses.” The regulation was published by S. Eidelberg, *Pinkas Sniadowo*, Gilad 3 (5736), 304, No. 30.

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If we look at the Bible and *Talmudic* sources, we will see that, in those times, there were no “electors” or “elected” in the modern sense. Those who were described as “elected” were, in fact, “appointed.”

The passage in *Deuteronomy* that deals with the appointment of a king offers no description of the selection process. The simple meaning of the text suggests that the king is selected by the people: “You shall surely set upon yourselves a king.” However, the text then goes on to state, “Whom the Lord your God shall choose,” and follows this with the words, “From among your brethren shall you appoint a king over yourselves” (*Deut.* 17:15). Thus, the selection is not made by the nation as a whole. Rather, the choice is a Divine one, brought to the people by word of a prophet. Yet, in order to maintain the involvement of the people in the process, or perhaps to ensure a sort of “judicial review” - and not merely to act as a mark of the honour due to the king - the law acquired the following formulation:

A king may only be appointed by the authority of a Court of seventy-one elders and a prophet. Such is the case of Joshua, who was appointed by Moshe and his Court, and Saul and David, who were appointed by Samuel and his Court.⁴

The right and the obligation to vote

Under Israeli law, “every Israeli national of or over the age of eighteen years shall have the right to vote in elections to the Knesset, unless a court has deprived him of that right by virtue of any law” (Section 5 of Basic Law: The Knesset).

However, a number of Jewish legal sources placed limitations on the voting rights of one who does not bear his share of the communal burden, or who does not fulfill his obligations toward the community. Thus, for example, we find in the communal regulations of Frankfurt, dating from 1774:

One who has not paid his communal dues may not participate in the elections [for the *parnasim* of the community]. That is, if he was not able to pay anything, then he is disqualified from voting. Similarly, one who has been married for less than two years [may also not vote].⁵

Similar restrictions applied in Mantua, where eligibility to vote depended on having paid communal taxes and on having lived in the community for an extended period (initially, this was five years; later this was changed to ten years, and even to twenty-five years).⁶

The right and the obligation to accept election

In Israel, the right to be elected to the Knesset is also quite far-reaching. In this regard, Section 6 of Basic Law: The Knesset provides that:

Every Israeli national who, on the day of the submission of a candidates list containing his name, is twenty-one years of age or over shall have the right to be elected to the Knesset, unless a court has deprived him of that right by virtue of any law.

In contrast, certain Jewish legal sources restrict this right. For example, in a number of European communities, a surgeon or middleman was not permitted to serve as a *ne'eman* (public trustee) in the community, since these occupations were deemed so unbecoming as to prevent their holders from having a place in the communal leadership.⁷ An interesting restriction can be found in the communal regulations of Frankfurt, which were mentioned previously.

No person may be elected as a *parnas* unless he has been married for at least nine years, nor as a *tov* - for six years, nor as a *gabbai* - for three years.⁸

A further restriction on the right to be elected comes from the *Pinkas* (communal register) of the community of Tiktin, in Poland:

4 Maimonides, *Mishneh Torah*, Laws of Kings, 1:3. Compare this with the Tannaitic *Midrash Halacha*, the *Sifrei* on *Deuteronomy*, *Shoftim*, 147.

5 See Rabbi R. D. Dessler, *Shnot Dor Vador - Asufat Genazim* [Through the Generations - Collected Writings] (Jerusalem, 5760), p. 413.

6 S. Simonson, *Toldot haYehudim beDuchsot Mantova* [History of the Jews in the Duchy of Mantua] (Jerusalem 5723-2725), p. 240.

7 See Y. Baer, *Toldot haYehudim biSefarad haNotzrit* [History of the Jews in Christian Spain] (Tel Aviv, 5725), p. 256.

8 *Shnot Dor Vador* (above, note 5), page 413. See also Y. Heilperin, “*Machloket al breirat hakahal beFrankfurt deMain vehedeha bePolin uveBehm*” [The Dispute over the Election of the *Kahal* in Frankfurt am Main and its Echoes in Poland and Bohemia], *Zion* 21 (5716), pp. 64-91. Heilperin quotes a communal regulation which provides that only a wealthy person can be elected to office. It would seem that this requirement derived both from the need for those elected to be sufficiently experienced in finance to handle the financial and administrative needs of the communal funds, and from the fact that those elected were not paid for their services,

One who has not been a resident of our community for four consecutive years may not be appointed to any position in the *kahal*.⁹

Similarly, the regulations of the Livorno (Leghorn) in Italy contain detailed provisions that limit the right of certain members of the community to be elected, among them: bankrupts, middlemen, those who lack proper residence permits, and those who had not lived there for at least two years.¹⁰

Under Israeli law, the right to be elected does not imply an obligation to actually carry out the task for which one has been elected. Elected officials may resign their positions at any time they choose. This is not the case in Jewish law. In the bulk of cases, those who held public office did so voluntarily, and were therefore quick to rid themselves of their responsibilities if they were elected against their will. Moreover, in many cases such positions carried with them the obligation to carry out “unpleasant” tasks, such as imposing fines or collecting taxes, and there were those who tried to avoid serving. Therefore, some communities made it mandatory to serve in public office, and those who attempted to shirk this responsibility were liable to a fine or some other punishment. Thus, for example, we find in the communal regulations of Frankfurt:

One who is elected as *parnas* or *tov* or collector or *gabbai*, and refuses to serve in the position to which he is elected, shall pay a fine to charity of 50 reichsthalers, otherwise he may never be appointed to any office for the rest of his life; [also,] another person shall immediately be elected in his place.¹¹

Disqualification from voting as a result of criminal activity

One of the more interesting aspects of this issue is the question of the participation of criminals in the elections, whether as voters or as candidates. The laws of the State of Israel provide that this elementary right may not be denied to a criminal, and he is entitled both to vote and to be elected.¹²

This was not the case in the various Jewish communities. Over the centuries, Jewish legal decisions created a long list of those disqualified from voting or being elected. For example, one of the community regulations of Moravia provides as follows:

In regard to transgressors,¹³ whether a young man or a young woman, who have already transgressed or who may (God forbid) transgress in the future - they are not to be appointed to any official or religious position, **whether to be appointed or to be**

part of the communal meetings [*i.e.* voters], nor for anything that members of our community are traditionally entitled to... they are disqualified **from any appointment and from [participation in] the communal assemblies**.¹⁴

and the lack of independent wealth would prevent them from dedicating their time to the needs of their position. Yom Tov Assis, who discusses the electoral procedures in the Jewish communities of Christian Spain, refers us to a communal regulation that sets a minimum level of taxes paid as a prerequisite for being elected. This regulation was the result of a ruling by the local governor, which had been issued at the request of the leaders of the community. See his article: “*Hayehudim bemalchut Aragonia uve-ezorei hasuta*” [The Jews in the Kingdom of Aragon and its dominions] in *Moreshet Sefarad* [The Sefardi Legacy] (H. Beinart, ed., Jerusalem, 5752), p. 62 and note 115 there.

- 9 *Pinkas Tiktin*, p. 239. A similar regulation existed in the community of Buda (now Budapest), which was aimed at preventing new immigrants from being elected to any communal post before the lapse of ten years from when they settled in the city. See *Responsa Torat Hayyim* by Rabbi Hayyim Shabbetai (Salonika, 17th century), chapter 39 (127b-c).
- 10 Devorah Hachohen, “*Hakehilah beLivorno uMosdotiha (Bameah ha-17)*” [The Livorno Community and its Institutions (in the 17th century)], S. A. Nahon Memorial Volume (Jerusalem, 5738), p. 112. As noted there, given the fact that Livorno was a major port city, this requirement was aimed at restricting the many Jewish traders who settled there temporarily for commercial reasons, but who did not really settle there permanently. A similar arrangement was established in the communal regulations in Mantua; this provided that only those born in the city could hold elected leadership positions. See Simonson (above, note 6), *ibid*.
- 11 *Shnot Dor Vador* (above, note 5), p. 413. Note also the communal regulation from 14th century Spain, published by M. Ben-Sasson, “*Mekorot letoldot kehilot Yisrael biSefarad bameah ha-14*” [Sources for the History of the Jewish Communities of Spain in the 14th Century], in *Galut ahar Golah* [Exile and Diaspora] - H. Beinart Jubilee Volume (Jerusalem, 5748), pp. 332-333.
- 12 This issue was dealt with at length in H CJ 337/84 *Hukama v. Minister of the Interior*, 38(2) P.D. 826. In the opinion of Justice Elon, the right of prisoners to vote is based on the Jewish legal principle, “Once he has been punished, he is your brother” (*Mishnah, Makkot*, 3:15), which he explains as a prohibition against depriving a criminal of his fundamental rights, not only after he has completed his sentence, but even while he is serving it.
- 13 As can be seen from the context, the main transgressions to which this regulation is directed are those involving sexual or moral impropriety.
- 14 See: Y. Z. Kahana, “*Sheloshah keruzim mipinkas dek”k Trebitsch*” [Three Proclamations from the Communal Register of Trebitsch], *Kovetz al Yad*, 14 (5708), p. 187. Trebitsch was one of the oldest and most important communities in Moravia. The communal register (*pinkas*) which has been preserved contains a wealth of material describing the relations between the community and its leaders, Jews and Christians, and the internal life of the community. The regulations were written in a mixture of Hebrew and Yiddish.

The negation of the right to vote or to be elected was, therefore, an additional sanction applied to offenders, in order to make a clear example of them. However, not all authorities agreed with this approach. In this regard, we find a fascinating *halachic responsum* issued by Rabbi Moshe Sofer (the Chatam Sofer), the leader of German and Hungarian Orthodoxy in the 19th century. The case related to a member of the community whose wife had been found guilty of a certain offence. In addition to the monetary fine imposed on her, it was decided to record her name and the nature of the offence in the communal register, as a permanent mark of shame.¹⁵ Some time later, that man was appointed to the communal leadership, upon which he took the law into his own hands and ripped the page, on which his wife's offence was recorded, from the register.

The other leaders of the community decided to punish him. Moreover, they disqualified him from voting or being elected to communal office for a period of ten years.¹⁶ The Chatam Sofer sharply criticizes their decision, since, in his view, it contravened the community's own regulations. Furthermore, he writes:

And moreover, the fact that they disqualified him from voting and from holding office for a period is against the regulations of their community... **for a householder may not be disqualified from voting or from being elected without the acquiescence of the Rabbi and the Rabbinical Court**, and in this case the Rabbi and the Rabbinical Court were not involved. **And even if this regulation did not exist, it would be the appropriate thing according to our Holy Torah.**

In other words, the disqualification of a person from voting or being elected may not be carried out arbitrarily - such a decision needs to withstand the test of judicial review by the rabbinic court and the local rabbi.

However, this was not the end of the matter. The man who had been disqualified demanded that the elections, which had taken place in the meantime, be annulled - both because he had been prevented from exercising his rights, and because of other flaws in the electoral process¹⁷ - and that new elections be held. Here, however, the Chatam Sofer strove to establish a balance between the applicable law and the needs of the specific case. This is his ruling:

And, as regards his claim that, since he had been unjustly disqualified from voting, the current year's elections are thus invalidated, and he desires that the communal elections be carried out again... **here too, the law is on his side [and it would be**

appropriate to annul the elections]. And such cases have arisen in previous generations, [yet] the Sages ruled: "Once he has been elevated, he may not now be brought down."¹⁸ **Yet, from now on, such a thing should not be done.**

That is, even if the election process was flawed, once the elections were over, one may not do anything against the candidates who have been elected or remove them from office. Therefore, the elections should not be annulled.¹⁹

Electoral bribery and its legal consequences

Israeli law is particularly severe with those involved in electoral bribery, and establishes a *lex specialis* in regard to this offence, in addition to the regular crime of bribery that already exists in the criminal code and that applies to public officials. Section 28 of the Political Parties Law, 5752-1992, sets a punishment of one year's imprisonment for anyone involved in bribery in the internal elections of a political party, or who tries to influence a voter to vote in a particular way by promising him some material benefit, or by giving him a bribe, or even by offering a bribe. The same punishment applies to anyone who votes more than once.

A study of Jewish legal sources shows that, in the past too, there were many cases of candidates for positions paying bribes in order to tilt the results of the elections or to gain some

15 Rabbi Moshe Sofer, *Likutei Shu"t Chatam Sofer* [Collected Responsa of the Chatam Sofer], *Yoreh Deah*, chapter 38.

16 As described in the question put to the Chatam Sofer, this ruling was made in the man's absence. A major part of the discussion turns on the question of voiding such a procedure, which is a severe infringement of the principles of natural justice.

17 The man claimed that two brothers-in-law had been elected. Because of the danger of a conflict of interests, they could not serve together in the communal leadership.

18 Jewish law is particularly cognizant of the respect due to those who have already been elected. It may be that these individuals had nothing to do with the original offence against the questioner, and therefore the Chatam Sofer rules that, since they have already been elected, they should not be embarrassed by being removed from office. The expression used originally related to the sacrificial service in the Temple: once an animal had been brought as an offering on the altar, the subsequent finding of a blemish would not permit its removal from the altar. See also *Berakhot* 57a, *Yoma* 40b.

19 See also *Responsa Zichron Yehudah*, by Rabbi Yehudah, the son of Rabbenu Asher (Spain, 14th century), chapter 42. He writes there that a flaw in some aspect of the electoral process should not serve to invalidate the whole process. Only the specific flaw needs to be rectified.

official appointment. In Second Temple times, there were High Priests who purchased their position, something that the Sages severely condemned.²⁰ This was also the case in regard to judicial appointments, on which the *Talmud* comments:

“You shall not make with me gods of silver, and gods of gold you shall not make for yourselves” (*Ex.* 20:20) - a god [*i.e.*, judge] who [acquires his position] by silver, and one who [acquires his position] by gold.²¹

A picturesque description of this can be found in the trenchant criticism expressed by Rabbi Yaakov Sasportas, regarding the methods of appointment that were customary in his own time:²²

And were [the leaders of the community] appointed from among the community, as is the norm, I would have been silent, so as not to reduce the honor [due to them]. But they take power for themselves **by means of their wealth** and their might, and **send messengers bearing silver**, to propitiate the lords of the land and to have themselves appointed for the past then years,²³ filling vacancies but not on the basis of ability, **since money overrides all**,²⁴ and that which is lacking can be counted,²⁵ and they call them substitutes, and **almost all of them [are appointed] in this way**.²⁶

Sometimes these activities were not motivated by the candidates themselves, but rather by the various “agents” or middlemen, who aimed to profit from the transaction. This can be seen in a passage written by Rabbi Aviezri Zelig Margaliot, who wrote some three hundred years ago:

Sometimes the leaders themselves turn down the gifts. Even those who give them would not initially have thought to do so, were it not for the middlemen [*“machers”*], agents of sin who seek to benefit themselves, inveigling and enticing them to transgress in this way.²⁷

The Chatam Sofer was also called upon to deal with a similar case, when he was asked to rule on the election of a rabbi in one of the communities.²⁸ In this election there were four candidates, and one of them received a majority of votes. Some time later, “there was a great hubbub, since many of the community had received monetary bribes from associates of that rabbi, to ensure his appointment.” The rumors soon turned into solid evidence:

Afterwards a signed letter was found, that had been sent by one of the members of the community to his brother, who lived in

the [elected] rabbi’s town. And since the members of the *kahal* suspected that it might contain a secret message from this person, they opened it²⁹ and found written therein that this person asked the brother who was from the rabbi’s town to receive [as his agent] his share of the bribe money for the appointment of the rabbi. Also he [reminded him] to take care to send each of the voters their proper share, as arranged with them. For, if it were not for this, the candidate would not have been appointed as rabbi, as they had agreed initially.

That is, the voters who were involved in the bribery wanted to collect the bribe money that had been promised to them, and

20 See: G. Alon, “*Eilin demitmanin bekeseif*” [Leaders Appointed through Money], *Mechkarim Betoldot Yisrael*, 2 (Tel-Aviv, 5718), pp. 15-57.

21 Babylonian *Talmud*, *Sanhedrin* 7b; Jerusalem *Talmud*, *Bikkurim* 3:1 (65d). According to various sources, some appointees would continue to take bribes even when serving in the judiciary, until it could be said of them that they would not walk four cubits without “putting out their hands.” [The text uses the term *Netilat Yadayim* (“lifting of the hands”), which normally refers to the ritual washing before meals. Here, the term *Netila* is given its other meaning, “taking,” in the sense of “taking with their hands.”]

22 Rabbi Yaakov Sasportas (1610-1698) was born in Algeria. He was among the most vociferous opponents of Sabbateanism. He served as rabbi in Tlemcen. After being deposed from his position, he wandered through Europe, taking part in many debates on Sabbateanism. His book, *Tzitzat Nobel Tzevi*, was a biting attack on the movement.

23 In Livorno (Leghorn) the communal leadership comprised twelve members, in line with a directive issued by the Grand Duke on 15.8.1667. Initially, the members of the community board elected the members of the committee, and the latter, together with the community leadership, would then elect additional members to make up their numbers. For more on Rabbi Yaakov Sasportas’ criticism of the antidemocratic leadership in Livorno, see: S. Toaff, “*Machloket Rabbi Yaakov Sasportas uParnasei Livorno*” [The Dispute Between Rabbi Yaakov Sasportas and the Communal Leaders of Livorno], *Sefunot*, 9 (5725), p. 169.

24 Based on the verse, “And money answers every need” (*Eccl.* 10:19).

25 Based on the verse, “A twisted thing cannot be made straight, a lack cannot be made good” (*Eccl.* 1:15).

26 *Kovetz Al Yad*, 4 (5706), p. 157.

27 In his work *Hiburei Likutim*, quoted in *Responsa Minchat Elazar*, part 1, chapter 6.

28 *Responsa Chatam Sofer, Hoshen Mishpat*, chapter 160.

29 At the end of his *responsum*, the Chatam Sofer relates to this evidence, which was obtained by infringing the writer’s privacy, and in contravention of the *herem* (ban) attributed to Rabbenu Gershom, which forbids the opening of mail by anyone other than the addressee. In this case the Chatam Sofer condemned their actions.

the question was, obviously: what are the legal implications of an election tainted by corruption? Is it void *ab initio*?³⁰

The Chatam Sofer emphasizes in his *responsum* that mere suspicion of corruption is not sufficient, and that solid proof that bribes had been paid needs to be produced. If such proofs can be produced, then it is clear that the appointment of that rabbi is null and void. He goes on to say that, “even if there were only a few who received bribes, and apart from them the rabbi would still have had a majority of votes,” nonetheless the whole election should be annulled.³¹ Moreover, he says that, if there are competent witnesses who can testify that the elected rabbi himself was involved in the bribery, then this rabbi is disqualified from serving in any rabbinic position “until he repents completely of this.” In any case, “those who received bribes may not be included in the assembly [the electoral body] at all, even after they return the bribe, and they must accept upon themselves by means of an oath that they will never again accept bribes in such a case. Nonetheless, they may not be involved in the present appointment at all, and it may be that they are disqualified from holding office unless they repent. But for this election they are permanently disqualified; since their opinions have already been inclined towards this person,³² they cannot undo this, and they are thus, for ever more, in the category of interested parties.”

And, as *Kohelet* tells us: One generation goes, another comes,

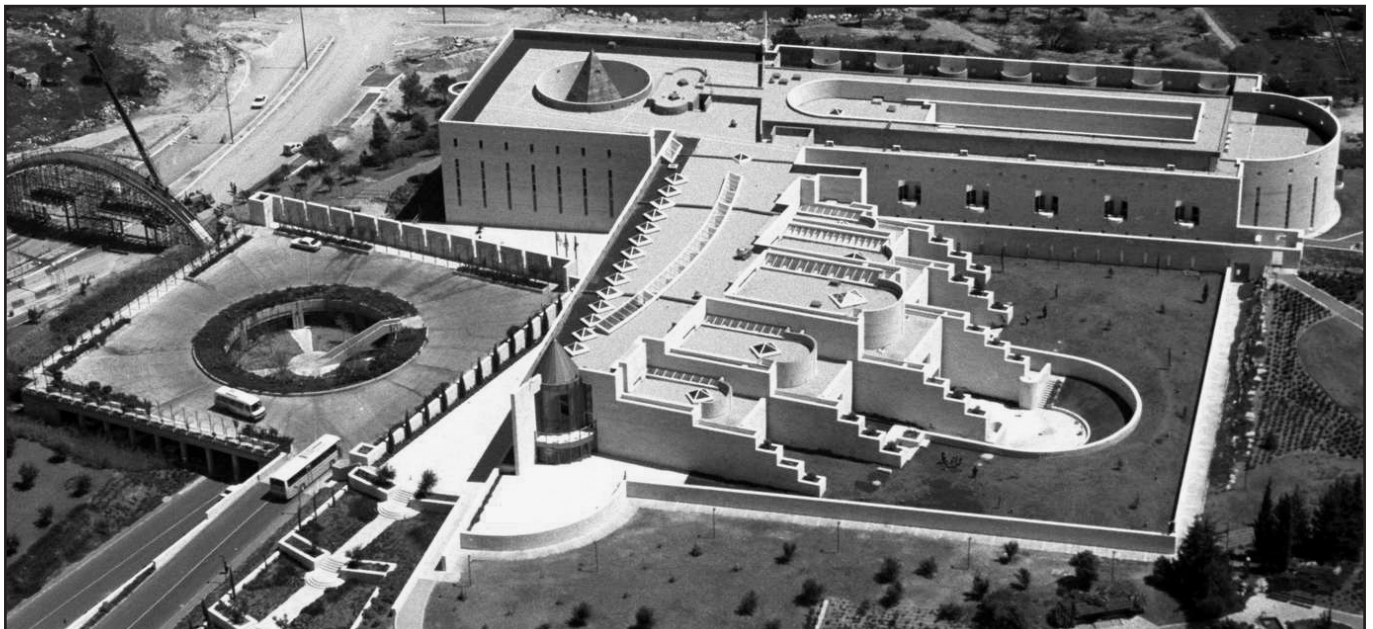
and there is nothing new under the sun. Should someone say: “Look, this is a new thing” - it has long since occurred. And after all, money answers every need.

In summary: it is not enough for a public figure to be “powerful in kingship”. He must also be, perhaps even primarily, “truly (or honestly) chosen”.

30 This question has been dealt with at length, both in legislation and in judicial decisions. See, for example, Section 72(a)(3) of the Local Authorities (Elections) Law, 5725-1965; Civil Appeals by Leave 83/94 *Harzallah v. Election Officer for the Zemer Local Council*, 49(3) P.D. 793; Civil Causes (Haifa) 10531/96 *Habib v. Hilana* (not published), comments by Justice Bein. Another question touches on the validity of an agreement between the person paying the bribe and the recipient. In this regard, Israeli law holds that such a contract is illegal, and thus void. Jewish law, on the other hand, tends to see such an agreement as valid, under certain circumstances. See E. Shochetman, *Maaseh Haba BaAvera* [Contracts Tainted by Illegality] (Jerusalem 5741), p. 172ff.

31 The Chatam Sofer comes to this conclusion by comparing it with the case of a judge who accepts bribes. In such a case all of his decisions are voided. For use of the analogy between public officials and members of the judiciary, see, for example, Rema, *Hoshen Mishpat*, end of chapter 37.

32 That is, their impartiality is affected. Since they are “bound” to their original choice, they can no longer consider the matter “willingly and with an open mind.”



Aerial view of the Supreme Court Building in Jerusalem (courtesy of the Israel Government Press Office)

Normative Framework for Detentions in Times of War

H.C. 3239/02

Before President Aharon Barak, Justice Dalia Dorner,
Justice Itzhak Englund

Iyyad Ashak Mahmud Marav *et al v. Commander of IDF Forces in Judea and Samaria and the Commander of the Judea and Samaria Battalion*

Judgment delivered on 5.2.2003

Precis

his case concerned the legal basis for detentions carried out by the IDF within the context of Operation Defensive Shield in order to screen large numbers of Palestinians suspected of involvement in terrorist activities. Initially, the detentions were carried out under the ordinary criminal arrest regulations applicable to Judea and Samaria but on 5th April 2002, the Commander of IDF Forces in Judea and Samaria issued an Order Concerning Detentions During Times of Warfare (Temporary Provisions) (Judea and Samaria) (No. 1500 - 2002) (hereinafter: "Military Order No. 1500"). This order established a special normative framework for detentions in times of war. It applied to "detainees" defined as follows:

"A detainee" is a person detained during the course of combat activities in the area, effective from 29th March 2002), where the circumstances of his detention give cause to suspect that he is endangering or may endanger the security of the area, the safety of IDF Forces or public safety".

The Military Order for the first time enabled an officer, as opposed to a legally qualified judge, to issue a written order for the detention of a person for a period not exceeding 18 days. It also enabled judicial review to be precluded during this period. Detentions for longer periods of time were made subject to authorization by a legally qualified judge. The Military Order

further allowed a detainee to be refused access to his attorneys during the initial 18 day period of detention; thereafter, he was entitled to meet an attorney unless prevented from doing so by a competent authority under the previously applicable defence regulations. Finally, the Military Order provided that a detainee had to be given the opportunity to be heard within 8 days of the date of his detention. The period of validity of Military Order No. 1500 was set at two months.

Military Order No. 1502 subsequently provided that persons who had not been brought before a judge within 18 days should be brought before a judge by 10th May 2002 or released, save if there was other cause for holding him under the defence regulations.

A further Military Order No. 1505 subsequently extended the validity of Military Order No. 1500; redefined a detainee as someone detained during anti-terror operations; shortened the detention period from 18 days to 12 days and shortened the timeframe in which the detainee could be refused access to his attorney from 8 to 4 days from the date of detention. These periods were shortened even further by later Military Orders.

The Petitioners argued against the validity of all these provisions. President Barak delivered the unanimous opinion of the High Court of Justice. The Court held that the initial investigative periods were overly long and did not allow for "prompt" judicial review and therefore had to be invalidated, the same result was obtained in relation to the appropriate time for the commencement of investigations. The petition was dismissed, however, in so far as concerned the actual power to detain under the Military Orders and in relation to the prevention of access to attorneys.

Judgment Petitioners' contentions

The Petitioners contended that Military Order No. 1500 was unlawful and enabled mass detentions without requiring each individual case to be examined on the merits, clear cause or judicial review, contrary to Basic Law: Human Dignity and Liberty. The Petitioners also argued that Orders Nos. 1500 and

1502 were contrary to international humanitarian law and relied for this purpose on Article 9 of the International Covenant on Social and Political Rights, 1966 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949. In their view, international law only recognized two forms of detention - ordinary "criminal" detention and preventive or administrative "internments". Military Order No. 1500 created a third unrecognized and unlawful form of detention, namely, prolonged mass detentions for screening purposes. The Petitioners argued that these detentions were collective, arbitrary and violated the basic human rights of the detainees.

The response of the State

The State responded that Palestinian terrorists deliberately operated from the midst of population centers and routinely wore civilian clothes and therefore it was very difficult to distinguish, in real time, between terrorists and innocent members of the Palestinian population who had been caught up in the fighting. Accordingly, people had been detained who had been captured in areas where terrorist activities had taken place and who were suspected of having been involved in such activities. Approximately 7,000 people had been detained from the beginning of the operation to the date of the filing of the response. The ordinary criminal legislation could not deal with such numbers of detainees in the time needed to question them and accordingly the new military orders had been issued. On 5.5.2002, about 1,600 people were still in detention. The State further contended that the orders complied with the provisions of international law, were reasonable and proportional. Military Order No. 1500 depended on the existence of cause in relation to particular individuals and could not be regarded as a third category of detention; the detentions were intended to enable a preliminary criminal investigation to be conducted.

The issues

The petition raised four issues: (a) the power to detain - whether a new unlawful category of collective detention had been created by Military Order No. 1500; (b) whether detention excluding judicial involvement for this length of time was disproportional and therefore unlawful; (c) whether preventing access to attorneys for this length of time was disproportional and therefore unlawful; (d) whether preventing the detainee from being heard by a competent authority, initially for 8 days subsequently amended to 4 days, was lawful.

Power to detain for investigative purposes

President Barak commenced by stating that the detention of a person for investigative purposes infringed that person's freedom. A delicate balance therefore had to be drawn between the freedom of the individual (who was presumed innocent) and the peace and security of the public. This was true inside the country (in the relations between the citizen and the State) and outside the State in the relations between detainees in occupied territory and the Occupying Power.

The International Covenant on Civil and Political Rights only prohibited arbitrary detentions, not detentions in general. Under Israeli law too, the liberty of the individual was a constitutional right underlying Israel's values as a Jewish and democratic State. Yet, it was not an absolute right. It could be restricted for investigative purposes to prevent danger to the public from the detainee, where the detaining authority had evidence founding individual suspicions against the detainee. Freedom was the rule; detention was an exception to that rule. The power to detain was a power to detain lawfully not arbitrarily; in this context, domestic Israeli rules corresponded completely to the principles of international law. The commanders in the territories were subject to the basic principles of Israeli administrative law, and in particular the duty to act reasonably and proportionately, drawing a proper balance between the freedom of the individual and the needs of the public.

Under Rule 43 of the Hague Rules, 1907 the military commander had to preserve public safety and security in the occupied territory. He could also issue regulations designed to protect the safety of the Occupying Power and its soldiers.

True, the Fourth Geneva Convention did not contain a special provision empowering a commander to order detentions for investigative purposes, but this power was derived from the local law and was contained in the general power of the commander of the area to maintain public peace and safety. The balance between the freedom of the individual and security needs was reflected in Article 27 of the Fourth Geneva Convention. The possibility of detaining a person for investigative purposes could also be learned from Article 78 of the Fourth Geneva Convention which referred to the power to intern a local resident or assign his residence.

President Barak accepted that a person could not be detained "without cause", since such a detention would be arbitrary; however all the military orders under consideration required cause for suspicion of involvement in terrorist activities - which inevitably endangered public safety. Suspicions could arise in

relation to an individual or in relation to a group, but this did not mean that the military orders enabled “collective detentions”. The only power established by the military orders was to detain persons where there was individual cause for detaining the particular detainee, and it was immaterial whether the person was alone or part of a larger group.

Consequently, President Barak held that Military Order 1500 as amended belonged to the “family” of detentions for investigative purposes. It was intended to prevent interference in investigations which might be caused by the detainee escaping. It could only be applied where there was cause to suspect that the detainee posed a danger to the public. It only differed from ordinary criminal detentions in relation to the circumstances which gave rise to it, namely, warfare as opposed to police operations. The first ground of the petition therefore had to be dismissed.

Detention without judicial involvement

With regard to the Petitioner’s contention that the period of time between the date of detention and the first judicial review - 18 days - was overly long, President Barak noted that judicial involvement in cases of detention was essential and a barrier to arbitrariness. Judicial review was derived from the principle of the rule of law. There were clear rules governing this issue within the ordinary “criminal” legislation and in respect of “administrative” detentions, as well as in respect of soldiers detained under military justice legislation.

International law did not set a determinate period of time in which a person could be detained without judicial involvement; however, the general principle of international law was that a decision had to be brought “promptly” before a judge. Thus, Article 9(3) of the International Covenant on Civil and Political Rights provided that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...”.

This provision was regarded as having the force of a customary rule of international law. A similar provision could be found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988 and in Article 5(3) of the European Convention on Human Rights which stated that:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(C) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.”

The European Court of Human Rights had interpreted this provision as follows:

“[T]he degree of flexibility attaching to the notion of ‘promptness’ is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority” (*Brogan v. United Kingdom* (1988),¹¹ EHRR 117, 134).

The Fourth Geneva Convention too was silent as to the dates for judicial involvement. Article 43 merely provided that:

“Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose”.

Whereas Article 78 stated that:

“Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be *prescribed* by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.”

President Barak reviewed the normative framework of Israeli defence legislation which also provided for *prompt* judicial review and proceeded to consider whether the Military Orders under consideration met this criterion. He noted that account had to be taken of the special circumstances of the detention. A police detention did not resemble a detention conducted during “combat activities” or during “anti-terror operations”. Investigators could not be expected to conduct their preliminary investigation in combat conditions nor could a judge be expected to accompany the fighting units. The Court accepted that it was necessary to defer the investigation and consequently the judicial review until the detainees had been brought to a location outside the combat zone.

The State had argued that initially 18 and later 12 days were needed to screen and identify the thousands of people who had been captured in circumstances where they were suspected of

having been engaged in terrorist activities and who, contrary to international law, had intermingled with the civilian population without carrying any mark indicating that they belonged to combatant forces. The State had further argued that there was no point in bringing people before a judge before they were identified and before initial questioning and cross-checking had taken place. Such investigations were time consuming because of the lack of cooperation on the part of the detainees; the latter's attempts to conceal their identities and hostile attitude towards the investigating officers; the fact that much of the investigation was based on secret intelligence which could not be revealed to the detainee; difficulties in reaching witnesses and the like.

The Petitioners, on the other hand, had argued that the State's approach was contrary to the fundamental approach of both Israeli and international law. That fundamental approach was *not* that the investigative authorities should be given sufficient time to complete their investigations, and only at the end of that time should judicial review take place. Rather, the fundamental approach was that judicial review was an *inherent part* of the detention process. Underlying this approach was the constitutional perception that judicial review over the detention process was an essential component of the protection of the individual's liberty.

President Barak noted that in these types of cases it was only natural that the initial arrests would not be ordered under judicial warrants but that the initial investigation would be carried out under Military Order No.1500, as amended. Judicial involvement would come subsequently but as soon as possible. Judicial detentions were the rule, and non-judicial detentions the exception, but it was the exception that applied here and the power to detain under the military orders were not special but belonged to the "family" of ordinary police powers.

President Barak explained that judicial involvement naturally took into account the circumstances of the case. When deciding whether to extend the detention for investigative purposes the judge did not ask himself whether sufficient *prima facie* evidence existed to prove the guilt of the detainee. He merely examined the existence of reasonable cause for suspecting that the detainee had committed a security offence and reasonable cause for believing that his release would harm the investigation or public safety. President Barak described the factors taken into account by the judge when making this decision and when drawing a balance in each particular case between security needs and the individual's freedom.

Against this background, President Barak stated the opinion of

the Court that a fixed detention period of 18 days, subsequently amended to 12 days, was excessive. This period of time was intended to ensure that the initial investigation would be completed, but that was not its proper function. The normative framework required that shortly after initial detention by a competent officer the detention process had to be shifted on to the judicial track. The investigators could not wait for the completion of their investigation before going to a judge but the need to complete their investigations could be explained to the judge, who would decide if there was reasonable cause for suspicion against the detainee, which would justify his continued detention. The Military Orders under discussion therefore eroded the powers of detention of the judge and consequently the freedom of the individual, who the normative framework was designed to protect.

President Barak concluded that the way to rectify this problem was not by setting a shorter time period for the initial detention. Since one could not foresee all contingencies in these types of circumstances there was justification for the approach taken by international law which refrained from setting determinate periods of time but merely established an obligation to promptly bring the matter for judicial review. In any event this was a matter for the State and not for the Court and the State would be given time to reconsider. Accordingly, the period of 18 days as amended would be invalidated; the declaration of invalidity would enter into effect within six months of the Court judgment which would allow the State to organize itself anew in accordance with the principles of international and domestic law.

Preventing access to attorneys

Under the criminal and defence regulations which prevailed prior to the Military Orders under discussion - in relation to preventing meetings between the detainee and his attorney - such access could be prevented for a maximum of 96 hours under the criminal regulations and 15 days under the defence regulations, with the possibility of a further extension of 15 days in the latter case if authorized by a competent authority.

Under Military Order No. 1500, the detaining officer could prevent the detainee from meeting with his attorney during the initial period of the investigation - 18 days followed by a further 15 days if authorized by a competent authority under the ordinary defence regulations - leading to a maximum of 33 days.

Military Order No. 1505 had reduced the initial period to 4 days, but then applied the entirety of the ordinary defence

legislation with its period of 15 days and possibility of further extension - leading to a maximum of 34 days. This maximum period was subsequently reduced to 32 days under Military Order No. 1518.

President Barak considered whether any of these arrangements were compatible with international law. He noted that the International Covenant on Civil and Political Rights did not contain any explicit provisions in this regard. The most relevant provision in this connection was Principle 18(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which stated as follows:

“A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel”.

Principle 18(3) provided an important exception to this rule:

“The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.”

The Fourth Geneva Convention did not contain explicit provision relating to meetings with attorneys. Article 27 protected the dignity and liberty of residents of the occupied territory but also provided that the Occupying Power could take the necessary measures to guarantee security. Article 113 in turn provided that:

“The Detaining Powers shall provide all reasonable execution facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or dispatched by them. In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.”

This right was subject to security arrangements, as was explained by Pictet in his *Commentary*:

“It was important, however, that these facilities for the transmission of documents should not serve as a pretext for the giving of information for subversive purposes; hence the wording ‘all reasonable facilities’, which enables suspicious correspondence to be eliminated” (J. S. Pictet, *Commentary: IV*

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 471-472).

Article 72 of the Fourth Geneva Convention which dealt with the indictment of detainees provided:

“Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.”

In view of the normative framework of international law and the fundamental principles of Israeli law, President Barak held that as a rule, meetings had to be allowed between the detainee and his attorney. This rule was derived from the right of every person to personal freedom. However, the right to meet was not an absolute right and could be restricted if important considerations relating to the security of the area justified preventing such meetings; international law did not set a maximum time during which access could be prevented but left this to be determined by tests of reasonableness and proportionality.

Accordingly, President Barak held that so long as the fighting continued it was not possible to allow the detainee access to persons who might themselves pose a danger to the security of the area. Where, however, the detainee was located in a facility in which his individual circumstances could be considered - his basic right to meet with an attorney had to be realized, save if important security reasons justified preventing such meetings. One example of an important security consideration given by the State, with which President Barak agreed, was where there was a danger of messages being transmitted by the detainee to his attorney which might endanger the lives of the security forces. On the other hand, it was not sufficient to show that preventing the meeting might be helpful to the investigation; the emphasis had to be on the harm which might be caused to the safety of the State if such a meeting was to be allowed.

In view of all the foregoing, President Barak held that no defect had been shown in the arrangements established by Military Orders Nos. 1500, 1505 and 1518 in relation to the prevention of meetings with attorneys. The Petitioners’ claim that these Military Orders left them “incommunicado” for a period of 18 days (amended to 4 and then 2 days) had to be dismissed. The detainees were brought to the detention facility within 48 hours

of being detained in the combat arena, and they were entitled to immediate visitation by the Red Cross; notice of their detention was sent to their families, and they could petition the High Court of Justice at any time in respect of their detention (Section 15(d)(1) of Basic Law: Adjudication). Such a petition could be submitted by the detainee or by a member of his family, and in view of the Court's approach to issues of *locus standi*, also by any person or association interested in the fate of the detainee. Indeed, the petition at bar had been brought, *inter alia*, by seven human rights associations without the problem of *locus standi* arising at all. There was no basis, whatsoever, therefore for asserting that the detainees were being held incommunicado under these Military Orders.

Detention without investigation

Military Order No. 1500 had provided that a detainee would be given an opportunity to be heard no later than 8 days following his detention. This provision had been left unchanged by Military Order No. 1505 and shortened to 4 days by Military Order No. 1518. The Petitioners had argued that these provisions deprived the right to liberty of any meaning and precluded due process. The State, on the other hand, had argued that it forced them to question the detainee within a determinate period of time and that period could not be shortened in view of the large numbers of detainees and small number of professional investigators involved in the process.

President Barak accepted that a detainee could not be investigated and certainly could not expect to be heard during the course of the fighting or other combat operations. He could only be investigated - upon an individual suspicion arising in respect of him - once he was brought to a proper facility. President Barak also accepted that where a large number of detainees were involved it might take some time to organize the preliminary investigations, although these had to be conducted as soon as possible. It was particularly important to start the investigation swiftly in view of the possibility of revealing simple facts which might be relevant to the continued detention of the particular detainee. President Barak held that the State's argument that it lacked sufficient professional investigators was not persuasive. Competing security needs and the right to liberty of the individual required that the number of investigators be increased, particularly as the State could have foreseen that the number of detainees would rise following the launching of Operation Defensive Shield.

Basic rights carried a price. Society which sought security on

one hand and freedom on the other had to pay the price. It was not possible to justify the prevention of investigations merely because of the lack of investigators. Everything possible had to be done to increase the number of investigators. Moreover, the Court's finding of invalidity in relation to the arrangements allowing a detainee to be held for up to 18 days (as amended) before being brought before a judge, had an impact on the commencement of the investigation, as the detainee's petition to be brought before a judge would require an investigation to be launched more swiftly.

Accordingly, President Barak held that the State had to establish new arrangements for the commencement of investigations, and for this purpose the Court's finding of invalidity in relation to the relevant clauses in the Military Orders would be suspended for six months.

The result of this judgment was that the Petition was dismissed in relation to the power to detain under the Military Orders and in relation to the prevention of access to attorneys but upheld in so far as concerned the length of time during which a person could be held prior to being brought before a judge and the time for the commencement of investigations.

Justices Dornier and England concurred.

Abstract prepared by Dr. Rahel Rimón, Adv.

THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

International Conference in Paris, France

October 15 - 19, 2003

on

Terrorism, Racism, Anti-Semitism: What Response to Evil?

VENUE of the Conference: Palais de Justice, Paris

The Conference will be held under the auspices of
Premier President de la Cour de Cassation, Justice Guy Canivet
President of the Supreme Court of Israel, Justice Aharon Barak

TENTATIVE PROGRAMME

Wednesday, October 15, 2003

Evening **Welcome Reception and Opening Session**

Thursday, October 16, 2003

09:00 - 11:00 Panel One:
The Tools of International Terrorism:
1. Exploiting Religion
2. Teaching Hatred
3. Financing Terrorism

11:00 - 11:30 Coffee Break

11:30 - 13:30 Panel Two:
Anti-Zionism - A New Form of Anti-Semitism
1. The Protocols of The Elders of Zion:
An Old Libel, a New Weapon
2. Anti-Zionism - A Revival of Anti-Semitism

Afternoon and evening free.

Friday, October 17, 2003

09:00 - 11:00 Panel Three:
**The International Community -
A Record of Failure**

1. The United Nations - An Exercise in Double Standards
2. The Inadequacy of International Law

11:00 - 11:30

Coffee Break

11:30 - 13:30

Panel Four:

What Should Be Done?

1. The International Media -
Setting the Record Straight
2. Involving the Law: Promises and Pitfalls
3. Promoting Universal Tolerance

Afternoon: Free

Evening: Optional: Shabbat Dinner

Saturday, October 18, 2003

Day free. Optional: Join services for Simchat Tora at
synagogue.

Optional: Shabbat Lunch

Evening: Farewell Party

Sunday, October 19, 2003

Optional Tours to be announced.

Further details on hotel prices, flights, etc. will follow.

*Rooms for participants have been reserved at the Concorde
Lafayette Hotel.*

*Details will be published in JUSTICE and information will also
be mailed to those who will complete the enclosed INTENTION
FORM.*

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