LCrimA 7669/15

Applicant: Ra'ed Salah Mahajna

v.

Respondent: State of Israel

Attorneys for the Applicant: Avigdor Feldman, Adv., Omar Khamaisi, Adv., Khaled Azbarga, Adv., Ariel Piechotka, Adv.
Attorneys for the Respondent: Dafna Finkelstein, Adv., Shlomi Abramson, Adv.

The Supreme Court

Application for leave to appeal the judgment of the Jerusalem District Court of November 10, 2015, in CrimA 30980-04-14 delivered by Judges A. Romanoff, D. Mintz and E. Nachlieli-Khayat

16 Shvat 5776 (January 26, 2016)

Before Deputy President E. Rubenstein, Justice S. Joubran, and Justice A. Baron

J U D G M E N T

Deputy President E. Rubinstein:

1. This case concerns the interpretation of the offenses of inciting racism and inciting violence. It is an application for leave to appeal the judgment of the Jerusalem District Court (Judges Romanoff, Mintz and Nachlieli- Khayat) in CrimA 30980-04-14 and CrimA 31172-04-14, delivered on November 10, 2014, which granted the Respondent's appeal of the judgment of the Jerusalem Magistrates Court (Judge Lomp) in CrimC 5425/08, delivered on March 4, 2014. The application for leave to appeal is also directed at the judgment of the Jerusalem District Court (Judges Carmel, Mossek and Renner) in Criminal Sentencing Appeal 15799-05-15 and in Criminal Sentencing Appeal 16604-05-15, delivered on October 27, 2015, which denied the Respondent's appeal and the Applicant's appeal as to the leniency of the sentence and the severity of the sentence, respectively, in the judgment of the Jerusalem Magistrates Court (Judge Lomp) issued on March 26, 2015, which sentenced the Applicant to 11 months imprisonment and an eight-month suspended sentence. The application for leave to appeal focuses on the conviction of the Applicant, born in 1958, who is the leader of the Northern Faction of the Islamic Movement in Israel, of the offense of

inciting racism, pursuant to sec. 144B(a) of the Penal Law, 5737-1977 (hereinafter: the offense of inciting racism), and of the offense of inciting violence or terror, pursuant to sec. 144D2(a) of the Penal Law (hereinafter: the offense of inciting violence).

Background

2. In February 2007, Israeli authorities carried out archeological work in the area of the Mughrabi Ascent, at the entrance to the Temple Mount (the Mughrabi Ascent is a dirt berm that leads to the Mughrabi Gate, a gate to the Temple Mount complex, which is located on the south side of the Western Wall), prior to construction work on the berm. These actions were met by riots among the Arab public that falsely claimed that the Israeli authorities were attempting to sabotage the holy sites.

3. As alleged in the indictment, on Friday, February 16, 2007, at around 10:00 AM, the Applicant arrived in Jerusalem, along with hundreds of supporters from the Northern region. Due to police instructions which restricted the worshipers' entrance to the Temple Mount, and in light of a restraining order issued in the framework of MApp 2181/07, which barred the Applicant from entering or approaching within 150 meters of the Old City for 60 days, the Applicant and his supporters congregated in the Wadi al-Joz neighborhood to hear a sermon delivered by the Applicant, and for Friday prayers. A makeshift stage was set up from which the Applicant, using loudspeakers, spoke to approximately one thousand people who had congregated, and to a number of media outlets. It is undisputed that among other things, the Applicant said the following:

> **Now we are in this blessed, pure place, a place of blessing and purity, if not for the disturbances and obstructions that have befallen us by the Israeli occupation, which will be removed, please God, just as other like it were removed in the past.**
>
> **Following the Rafah camp crime, you are being told that the Israeli establishment wants to build a temple that shall serve as a house of worship to God. How impertinent and dishonest, it is inconceivable that one who wants to build a house for God would build a house for God while our blood is still on its clothes, our blood is still on its doors and our blood is in its food, and our blood is in its drink, and our blood moves from one terrorist general to another terrorist general.**
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> **Thus we continue on our path and fear none but God, praised his name. We fear none but God. This is why I say that those who think that they have a bleeding history, they have generals of killing and of massacres. They who think that by inciting against us on Channel One, and on Channel Two, those who thought that they were inciting against us on Channel Ten or on the Army Radio, we fear none but God. The most beautiful moments in our destiny are when we will meet God as martyrs [*shahids*] in the area of the Al Aqsa mosque.**
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> **This is why I say this clearly and without hesitation: You who incite against us, do not be lured by the ranks on your shoulders. Those ranks and stars placed on your shoulders were made of the skulls of our**

martyrs. These are ranks of shame and not ranks of splendor. These are ranks of disgrace and not ranks of honor. You surprise me. Those of you who kill more of us, get promoted to higher ranks.

While we are here, preparing for prayer in the area of the blessed Al Aqsa mosque. Here is where all of the clouds of deprivation shall be removed from the skies of holy Jerusalem. On that day, all of the streets of holy Jerusalem will be cleansed of the blood of the innocents whose blood and souls were taken by the soldiers of the Israeli occupation, who are occupying the blessed Al Aqsa mosque. Indeed, that is when the Jerusalem almond trees will renew their blossom and the leaves of the olive trees will be green again, and dignity shall be returned to the Church of the Holy Sepulchre, and dignity shall be returned to all of the mosques and churches. Furthermore, we are not malicious and we shall not be malicious, and we shall also preserve the dignity of the synagogues of the Jews. We are not a nation that is based on values of jealousy. We are not a nation that is based on values of revenge. ***We have never allowed ourselves, and listen well, we have never allowed ourselves to knead the bread of the meal that breaks the blessed Ramadan fast with the blood of children. And those of you who want a more detailed explanation, ask what happened to some of Europe's children whose blood was mixed in the holy bread's dough. Good God, is that religion? Is that what God wants? God will yet deal with you for what you do…"***

We are not alone in this struggle. It is possible that they will come to me and tell me you are inciting. They want to destroy our Al Aqsa, and they are coming and telling me you are inciting. So, my brothers, I am telling you, and I am saying that we are not alone in this struggle. I want to tell every sane person. I want to say this to every sane person, that the battle that the forces of the Israeli occupation started against holy Jerusalem and against the blessed Al Aqsa mosque, is not over yet. Indeed, the sights of this campaign officially started in 1948 CE. Since that year, the Israeli establishment continues in its war against holy Jerusalem and in the blessed Al Aqsa mosque. During the years that have passed there was a bloody scene there, in 1967 CE. There was a battle that the Israeli occupation establishment, which is occupying holy Jerusalem and the blessed Al Aqsa mosque, is still continuing. It is still continuing the battle. The battle is still continuing... but we are emphasizing that, God willing, we are not alone in this battle. ***We are asking each Muslim and Arab in the Islamic and Arab present, be it a judge or a scientist or a party or a public institution or factions or nations, we aspire from them now*** (sic.– E.R.)***, it is now their duty to assist the Palestinian nation. It is now their duty to instigate an Islamic Arab Intifada from ocean to ocean, in support of holy Jerusalem and the blessed Al Aqsa' mosque*** (emphasis added; the parts that were emphasized are those on which the charges focused, the first in the matter of racism and the second in the matter of vinolence).

As alleged, the Applicant's sermon was interrupted from time to time by the audience, that called out "God is great" and "In blood and fire we shall redeem you, Al Aqsa". As alleged, at the end of the sermon and the prayers, the audience present

began to riot and hurl rocks at the police forces that were nearby. During the riots, three Border Policemen were injured.

4. Following the above, the Applicant, as noted, was charged with the offense of inciting racism and the offense of inciting violence.

The Magistrates Court's Judgment

5. The Respondent sought to establish the Applicant's conviction of the offense of inciting racism on the Applicant's following words, alleging that these words referred to the famous blood libels that led to antisemitism throughout history: "We have never allowed ourselves, and listen well, we have never allowed ourselves to knead the bread of the meal that breaks the blessed Ramadan fast with the blood of children. And those of you who want a more detailed explanation, ask what happened to some of Europe's children whose blood was mixed in the holy bread's dough. Good God. Is that religion? Is that what God wants? God will yet deal with you for what you do…". The Magistrates Court did not accept the State's position, ruling that the Applicant's words regarding the blood libels are not sufficiently clear, and that there is confusion between two different terms, and between different religions – and this is what happened when the Applicant stated that children's blood is mixed with holy bread, and not with Passover matzah. It was noted that the Applicant's explanations and the lack of clarity of his words left doubt whether he was aware of the nature of the act and of the possibility that his words would lead to inciting racism. The Applicant was acquitted of committing this offense.

6. However, the Magistrates Court did convict the Applicant of the offense of inciting violence. It ruled that his words: "It is now your duty to instigate an Islamic Arab *intifada* from ocean to ocean", constituted a call for a violent uprising. It was noted that given the general context of the Applicant's sermon, the repeated use of the word "blood" and the words "we will meet God as martyrs [*shahids*] in the area of the Al Aqsa mosque", the call for an *Intifada* cannot be understood other than as a violent civil uprising. The "circumstances of time and place" were emphasized in this context: these were tense times, the streets of Jerusalem were roiled and stormy, the Applicant is a well-known, influential figure in the Arab public and he spoke before an angry, frustrated crowd that had, under the circumstances, been prevented from entering the Temple Mount for Friday prayers. It was finally explained that in order to fulfill the elements of the offense it is not necessary that the incitement actually lead to violence, and it is sufficient that there be a real possibility that the publication will lead to an act of violence being committed. However, the court examined the causal connection between the incitement and the actual violence as an aggravating circumstance, and after reviewing the testimony of the policemen who were on the scene and the defense testimony, it ruled that there was no causal connection between the Applicant's sermon and the riot that occurred shortly thereafter.

The Original Sentence (original – since a more severe sentence was subsequently imposed on appeal)

7. The court discussed the social value embedded in the offense of inciting violence – maintaining public safety and protecting against its potential endangerment – as well as the prevailing punitive policy. The court further expressed its opinion

regarding the circumstances related to committing the offense and the extent of the Applicant's guilt. It was noted that the Applicant is a respected public figure, that his speech was delivered to a large audience and was broadcasted by the media. It was also emphasized that the Applicant spoke in the framework of Friday prayers before a "charged" audience that had come from afar, and that had been prevented from entering the Al Aqsa mosque to pray. The court added that this case is at the more severe end of the scale compared to other incitement cases decided by the Israeli courts, in light of the speaker's prominent status, his audience, the circumstances in which the speech was delivered, the severity of the expressions and the infinite potential damage they posed. On the other hand, the court took into consideration the fact that no direct damage was caused by the Applicant's speech.

8. In light of the above, the range of punishment was set at 3-18 months of imprisonment. In determining the punishment from within that range, the court considered the Applicant's criminal record, which includes security offenses, considerations of deterrence, and the fact that the Applicant did not take responsibility for his actions, while also considering the fact that – at the time – he had not committed additional offenses since perpetrating the offenses that are the subject of the Application. It was also noted that the conduct of the trial and the Applicant's multiple absences led to a prolonging of the proceedings, and that the Applicant's personal circumstances, other than his age and status, had not been presented to the court. The Applicant was thus sentenced to eight months of custodial imprisonment and an eight-month suspended sentence for a period of three years.

The District Court's Judgment

9. Both the Respondent and the Applicant filed appeals on the judgment. The District Court (Judges Romanoff, Mintz and Nachlieli-Khayat) granted the Respondent's appeal, ruling that the Applicant should also be convicted of the offense of inciting racism. It was noted that the Applicant's speech was not delivered in a void, but rather in the clear context of the protest that arose among parts of the Muslim public following works that were performed by Israeli authorities in the area of the Mughrabi Ascent. The court noted that this protest did not arise in a vacuum but rather was an outgrowth of the conflict that has existed in our region for many years, and that "this is not a detached, intellectual, theological discussion, but rather a statement in which the ‘blood motif’ is repeatedly emphasized, in a clear context concerning an identifiable entity…". The court added that "resurrecting a blood libel accusing Jews of murdering children in order to use their blood to bake special food for their holidays is not legitimate, even where there are deep disputes, profound differences, anger and hatred… it is intended to intensify hate, deepen the chasm, increase the gaps and trigger conflicts.". In response to the defense’s argument that the Applicant's use of the expression "holy bread", which in Christianity is known as "sacramental bread", and not the expression "Passover matzah", testifies that he did not direct his words at the Jewish public, the court explained that what emerges from the Applicant's words is that he wanted to state that the bread referred to is special bread that is eaten on a holiday, and that the sermon he delivered did not address the relationship between Islam and Christianity, but rather the relationship between Muslims and Jews. The court thus ruled that given what was said, its context, the Applicant's status, and the identity of his audience, there can be no doubt that what was said was intended to incite racism.

10. The court was divided as to convicting the Applicant of the offense of inciting violence. Judge Romanoff was of the opinion that the Applicant should be acquitted of this offense. In his opinion, one could not dismiss the Applicant's explanation that his words did not incite to violent action or acts of terror, but rather constituted a call for a general, not necessarily violent, recruitment to protect against what appeared to him to be a violation of a holy site. It was emphasized that, in his sermon, the Applicant transcended the limits of time and place, and therefore one cannot dismiss his explanation that he was asking all Muslims to do their part, to the best of their abilities and expertise, to protect the Al Aqsa mosque. Judges Mintz and Nachlieli-Khayat, on the other hand, were of the opinion that the Applicant's words could not be understood in any manner other than as a call for violence. This was particularly the case when, a number of sentences earlier, in the context of protecting the Al Aqsa mosque, the Applicant praised martyrs. It was further noted that even if the call for an *intifada* was directed to the entire Muslim world, this does not mitigate the severity of what was said, since it is clear that to the extent the Applicant's words were directed to an audience in Israel, they constituted a call for violence, nor does it dismiss a similar call to those who are elsewhere. It was explained that the circumstances – primarily the Applicant's identity, the atmosphere among the Arab public at the time, the scope of the publication and the group that was exposed thereto, the location of the sermon, and the fact that it was a Friday sermon -- also support the conclusion that this was an act of encouraging, supporting and identifying with acts of violence. It was further noted with respect to the literal meaning of the term "*intifada*", that the Applicant's explanations that all he wanted was to call for an awakening and protest, but not for violence, cannot be reconciled with the content of the sermon, the repeated use of the word "blood" and the context.

The Magistrate Court's Supplemental Sentence

11. Following the Applicant’s conviction of the offense of inciting racism, the case was remanded to the Magistrates Court for sentencing. The court noted that in addition to the protected values regarding maintaining public safety and protecting against its potential violation, the offense of inciting racism also comprises an additional objective of protecting human dignity. The court again emphasized that the Applicant is a respected, well-known public figure, and that his words were spoken at a time when the atmosphere on the streets of Jerusalem was tense. The court also elaborated on the severity of the expressions, while also taking note of the fact that no direct damage was actually caused by the Applicant's actions. The updated range of punishment was set at 5-20 months of imprisonment "in order to express society's revulsion at racist statements and calls for violence, and due to the need to condemn those who employ such rhetoric…". The mitigating and aggravating considerations listed by the court in the original sentencing – as well as a conviction, after the original sentencing, of assaulting a policemen in order to prevent him from performing his duty while he was conducting a security check of the Applicant's wife, which did not receive significant consideration since it had a "personal background" – led the Magistrates Court to sentence the Applicant to eleven months imprisonment, as well as an eight-month suspended sentence for three years.

The Appeal on the Supplemental Sentence

12. The Respondent filed an appeal with the District Court on the leniency of the sentence, and the Applicant filed an appeal on its severity. The appeals were denied. The court explained that the Applicant did not take responsibility for his actions, did not admit to them, and did not express remorse. The court (Judges Carmel, Mossek and Renner) emphasized the severity of the offenses and the aggravating circumstances of their commission. It noted that the Applicant, under a pretense of a lesson on religion, abused his status, knowing that it grants him influence among his audience, in order to deliver his messages, and that it was not a short, spontaneous statement, but rather a planned and organized sermon in the presence of a large public that had not been allowed to enter the Temple Mount. The argument that both of the offenses of which the Applicant was convicted stem from one event, are overlapping, if not identical, was also rejected. The court explained that each offense relates to a different, significant and separate part of the sermon. Finally, with respect to the argument that this was the first time that a custodial sentence was imposed for offenses that are merely expressions, the court noted that "there is no comparison between the status, influence, prestige, public weight and significance attributed to the words of the Appellant before a large audience, and those defendants who, although they said severe words of incitement, did not have influential public significance or weight, and certainly not such a broad and significant influence as that of the Appellant" (emphases removed – E.R.). The court also considered the Applicant's criminal record, as well as the fact that from the time the offenses were committed and until the date of sentencing, approximately eight years had passed during which he had not been involved in criminal activity (other than the said conviction of assaulting a policeman after the original sentence had been issued). The court noted that the severe offenses and the circumstances in which they were committed require substantial punishment that realizes the deterrence interest. The court concluded that, in light of the above, it would be inappropriate to intervene in the severity of the punishment. The Respondent's appeal as to the leniency of the sentence was also denied. The court also took notice of the many delays in the proceedings, which were attributable to the Applicant, as well as the fact that the Applicant did not repeat his actions.

Application for Leave to Appeal

13. According to the Applicant, the application raises serious questions, among them the questions of where to draw the the line between freedom of expression and incitement, and what is the appropriate range of punishment for such offenses. As to the offense of inciting racism, the Applicant argues that his statements were not explicit, and in light of his impressive rhetorical ability, had he intended to incite racism, it is doubtful whether he would have crafted his words in such a manner. It was emphasized that there was no mention of the Jewish people or the State of Israel in his words. As to the offense of inciting violence, it was argued that in offenses of expression, the importance of examining the version of the accused party is acknowledged, yet, in the case at hand, little weight was attributed to his explanations. It was noted that the term "*intifada*" means awakening, and that the Applicant's intention was that of a global awakening of awareness and protest, but not of violent action. The universal aspect of the call was also emphasized. It was further argued that the use of the word "martyrs" [*shahids*] was not made in the context to which the majority judges referred, and that it referred to innocent people who were victims and lost their lives due to the conflict. It was explained that the use of the blood motif was merely metaphoric, and that neither it nor the other expressions used can imbue the

Applicant's words with the power to incite. As for the sentence imposed, it was argued that the penalty imposed on the Applicant set new precedent in its severity, and that this will be the first time in Israel that a person will serve an extended prison term for offenses that entirely consist of expression. The Applicant cited a number of cases that support his argument, in which the accused were convicted of offenses of incitement, and emphasized that such cases also involved known, influential figures, as in the case at hand (for example, LCrimA 9066/08 *Ben Gvir v. State of Israel* (2008) (hereinafter: the *Ben Gvir* case); CrimA (Jerusalem) 4856/09 *State of Israel v. Federman* (2010) (hereinafter: the *Federman* case)). It was further argued that the offenses of which the Applicant was convicted overlap.

14. Justice Joubran referred the application for leave to appeal for hearing by a three-judge panel, and the Applicant's sentence was ordered in abeyance until the rendering of a decision upon the application for leave to appeal (decision of Nov. 29, 2015).

The Respondent's Arguments

15. The Respondent argues that leave to appeal should not be granted since the application concerns the way that current case-law rules were applied in the matter of a specific applicant. Furthermore, the Applicant's primary arguments are directed at findings of fact of the lower courts, and the interpretation of the information filed against the Applicant, and for this reason, as well, the application raises no issue that justifies granting leave. On the merits, it was argued with respect to the offense of inciting racism, that the Applicant's words fulfill the criteria of the near-certainty test of causing a risk. The Applicant's conscious choice to intentionally mention one of the most blatant symbols of hatred of Jews in such a charged situation, and intentionally tie it to a call to protect the Al Aqsa mosque, leads to the conclusion that the purpose of his words was to incite racism. As to the offense of inciting violence, it was argued that one cannot accept the Applicant's argument that his call for an *intifada* was a call for a global, non-violent, awakening, and that the assumption that the audience understood the speech in an abstract manner, and not literally, stretches the imagination. Furthermore, the context, taken together with statements relating to terrorism and murder committed by the Israeli government, while highlighting the "Al Aqsa", creates, under the circumstances, incitement to violence. It was further noted that the combination of the content along with the circumstances fulfill the offense's probability element that there be a real possibility that the words will lead to violence or terrorism. This is, *inter alia*, in light of the speaker's prominent status, the audience, the scope of the publicity, the public atmosphere, and the location and subject of the sermon.

16. As to the sentence, it was argued that the Applicant's punishment directly derives from the extraordinary combination of aggravating circumstances in which his actions were committed, and from the blatant violation of the protected values for which the incitement offenses were enacted. It was further argued that the claim of selective enforcement is unbefitting, since the Applicant's matter was treated severely due to his status and the other circumstances of the matter. It was further noted that this is not a precedent-setting punishment, and even if it were, it would not constitute grounds for granting leave to appeal. The Applicant's sentence is measured and precise given the circumstances, and the punishment imposed is very far from the maximum

punishment prescribed for each of the offenses of which he was convicted.

As to the argument that the offenses, in their essence, overlap and justify one penalty, it was noted that each offense relates to a different part of the sermon and violates a different protected value.

The Hearing before the Court

17. In the hearing on January 26, 2016, the Applicant's attorney referred to HCJ 2684/12 *Movement to Strengthen Tolerance in Religious Education et. al. v. Attorney General* (2015) (hereinafter: the *Torat Hamelech* case), and emphasized that in that matter it was ruled that in order to maintain a conviction for inciting racism, the racist statements must be clear, unequivocal and easily understood by those hearing them, which is not so in the case at bar. It was emphasized that the blood-libel narrative is not known to everyone, and that we must ask ourselves whether we are dealing only with a racist opinion or with inciting racism. It is to be noted that, as argued, the law does not prohibit *maintaining* a racist *opinion*, but rather prohibits racist *practices*. As to the offense of inciting violence, it was argued that, in the matter at hand, there was no real possibility of violence. Furthermore, the meaning of the term "*intifada*" – as noted – is the transfer from a state of passiveness to a state of awakening. Additionally, it was argued that the Applicant's call was addressed to the entire Arab nation and to a non-specific public, and therefore, it is certainly not a call that could lead to a real possibility of violence. As to the matter of punishment, it was noted that the Applicant was judged more severely than a Jewish person accused of committing similar offenses.

18. The attorneys for the Respondent replied that the test in the offenses of inciting racism and inciting violence is always an integrated test of content and circumstances. They explained that we are concerned with a respected leader who, just the day before, was prohibited from entering the Temple Mount, who stood before a frustrated audience that was not permitted, under the circumstances, to enter the Al Aqsa mosque for Friday prayers, and who delivered a carefully planned sermon. His words fired the unrest and included motifs of blood, war, and battles. He called for praising martyrs, and at the end of the sermon, he made a clear call for an *intifada*. If that were not enough, the Applicant himself stated, in real time, that he knows that he is inciting. As for the *Torat Hamelech* case, it was argued that that case addressed a religious text as opposed to a political one, and that in the case at hand there is no value that the text wishes to protect, and that understanding the text and drawing proper conclusions do not demand extraordinary sophistication from the reader. As to the punishment, it was argued that it is not unduly severe and that we are currently witnessing the devastating force of incitement more than ever. Therefore, the court's clear voice should be heard not only on a punitive level, but also as a deterrent, both for the masses and for individuals.

Discussion and Decision

19. In light of the questions of interpretation raised by the case, and especially the broad implications of the matter, we have decided to grant leave to appeal and to hear the application as though an appeal was filed pursuant to the leave granted. I shall recommend to my colleagues that we not grant the appeal on the decision, and that we

grant the appeal, in part, in regard to the sentence, as shall be explained.

The Offense of Inciting Racism

20. The offense of inciting racism is to be found in sec. 144B of the Penal Law:

> (a) If a person publishes anything in order to incite racism, he is liable to five years imprisonment.
> (b) For the purposes of this section, it does not matter whether the publication did cause racism, and whether or not it is true.

Racism is defined in Section 144A of the law:

> In this Article, "racism" – persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their color, racial affiliation or national ethnic origin.

An extensive discussion of the elements of the offense of inciting racism was presented in CrimA 2831/95 *Rabbi Ido Elba v. State of Israel*, IsrSC 50 (5), 221 (1996) (hereinafter: the *Elba* case). The case was heard by a bench of seven justices, and the majority was divided on a number of matters (see Y. Nehushtan "Finding the *Ratio Decidendi* in Cases of Plurality Decision," 50 (2) *HaPraklit* 631, 638(5770)). In the *Torat Hamelech* case, it was explained that in the *Elba* case the Court was required to first address the question whether the "anything" published pursuant to the language of Section 144B must be inherently racist in order for the offense to materialize. Second, there was a disagreement regarding the need for a near certainty of actual incitement in order for the offense to materialize. According to President Barak's opinion, near certainty is necessary; according to Justice Mazza, it is not necessary. A third disagreement that arose in the *Elba* case related to the "foreseeability rule" [*dolus indirectus*] under sec. 20(b) of the Penal Law – whether the rule applies only to result crimes, or also to conduct crimes that comprise an element of purpose. In the *Torat Hamelech* case, we did not find those questions relevant to the matter (it should be noted that Justice Joubran, dissenting, discussed the matter of the "foreseeability rule" at length, due to the importance he attributed to applying the rule in offenses of inciting racism), and it appears that these questions are not germane to this application either, since the racist nature of the words or the degree of certainty that the Applicant's words would indeed incite are not at issue, but rather proving the element of a purpose of inciting. There is also no need to rule on the matter of the "foreseeability rule", in light of the Applicant's clear intention, which emerges from his words, as shall be explained below.

21. I will first briefly address the historical aspect of the "blood libel" narrative. Unfortunately, since the dawn of history, since the days of Haman in the Book of Esther (3:8), Jews have been, and continue to be, the subject of racial persecution all over the world, culminating in the Holocaust of our people in Europe (see my articles: "The State of Israel, the Memory of the Holocaust and the Battle against Antisemitism," in my book *Paths of Government and Law: Issues in Israeli Public*

Law (5736) 463 (Hebrew); and "Remember what Amalek did unto Thee," *ibid*., 471 (Hebrew); "On Antisemitism, and the Place and Role of the State of Israel in the War against Antisemitism," 31 *Mesua* 55-65 (5763) (Hebrew); as well as the pamphlet *On Antisemitism* (Israel Information Center, 5748) (Hebrew)). The various stories regarding Jews that were disseminated around the world and throughout history are too numerous to count. The best known and prominent is the story of using the blood of Christian children in order to bake Passover matzah. This led to all of the libelous stories about Jews being named "blood libels", an expression that, even today, is used when a person wishes to express strong offense at an accusation. The essence of the matter, obviously without a pretense of exhausting or presenting it as historical research, is presented below.

22. The libel began in England. In 1144, the Jews were accused of killing a Christian child who was thereafter acclaimed as St. William of Norwich. A converted Jew named Theobald of Cambridge testified before the monk Thomas of Monmouth, who had examined the case, that the Jews of Europe conspired to draw a lot each year to determine where a Christian boy would be sacrificed for Passover. Not even one Jew was tried for the accusation, and no one was punished for the murder, but the convert's testimony was perceived as convincing by the masses, and it became the basis for libels in other cities in the decades that followed, which were used to transform those "murdered by the Jews" into saints, to increase the number of churchgoers, and to increase the churches' revenues. The libels moved from England to Germany, to France, and so on, and from the seventeenth century, also to Eastern Europe – Poland and Lithuania -- to Russia, to Muslim countries, and of course, to Nazi propaganda, and was a tool in the hands of antisemites; also see Prof. I. Gutman, "Antisemitism," *The Holocaust Encyclopedia*, vol. 1, 98, 104-105 (5750) (Hebrew). As Prof. Gutman writes, even when a blood libeler such as August Rolling in Prague withdraws "as happens in the cases of libel, the sensational rumor is stronger than the truth that denies it"; see , "Blood Libel," *HaEncyclopea HaIvrit*, vol. 26 (5734), 857 (Hebrew) written in part by Prof. Y. Slutsky. Prof. Slutsky also contributed the article on the "Blood Libel" in *Encyclopedia Judaica*, vol. 4, 1120 (1972); Prof. S. Simonson, "Blood Libel," 17 (2) *Etmol* 100 (1991) (*Matach* Technological Educational Center website). This may have been the beginning, but it was not the end, and blood libels spread across Europe and eventually also to Muslim countries. A blood libel that occurred in Damascus in 1840, following the disappearance of a Christian priest and his Muslim servant, achieved special notoriety. Central figures in the Jewish community in Damascus were accused of abducting and murdering the two in order to use their blood to bake matzah. In an investigation that was conducted by the Governor of Syria, and that was exacerbated by the French Consul, the persons investigated were jailed and tortured, and one of them admitted to the act. Bloody riots broke out in Damascus, which only eventually ended thanks to the intervention of politicians and Jewish public figures from Western Europe. Indeed, blood libels did not cease even in modern times. Even in the last century, Jewish communities were horrified by blood libels in various countries – the Tisza-Eslar blood libel in Hungary and the Mendel Beilis trial in Russia (see in this regard, Dr. M. Kutik, *The Beilis Trial: A Blood Libel in the Twentieth Century* (5739) (Hebrew)); the Beilis trial was so shocking to Russian Jewry that in a greeting sent by a yeshiva student (N.Z Getzel) to his friend Y.E. Botschko, in honor of the latter's wedding, the writer dates the letter as in the "year of the Menachem Beilis Trial", which, in Hebrew *gematriya* (numerology), adds up to 5674 (the end of 1913); a letter dated 10th of Cheshvan 5764,

in H. Shalem, *From Novardok Through Montreux to Jerusalem*, about the life of Rabbi Y.E. Botschko, page 33 (5776) (Hebrew)). The blood libel in Nazi Nuremberg also merits mention, and in the early 1950's the Jewish world was shaken by information from the former Soviet Union regarding the dissemination of blood libels.

23. Renowned author Ahad Ha'am (Asher Zvi Ginsberg) (19th-20th centuries), addressed the blood libels in his article "Some Consolation," *HaMelitz* 14 Tishrei 5653 (1892), reproduced in *Complete Writings of Ahad Ha'am* (5719) (Hebrew), writing that it "is the solitary case among all cases in which the acceptance [the general acceptance with respect to the characteristics of the Jewish people – E.R] does not make us also doubt… it is completely based on an absolute lie… Every Jew who has been brought up among Jews knows unambiguously that throughout the *entire* Jewish people there is not even a single *individual* who eats human blood for heavenly purposes" (p. 71, emphasis original). According to him there is "some consolation" in the lesson that the renewal of the blood libel allows the Jews not to surrender to the allegations and to the "general consensus" regarding the characteristics of Judaism "…*and the blood libel shall prove*. Here, you see, the Jews are right and perfectly innocent. A Jew and blood – could there be two things more completely opposite? ..."

24. My former teacher General (res.) Prof. Yehoshafat Harkabi, in his important book *The Arab Position in the Israeli-Arab Conflict* (5728) (Hebrew), addressed the matter of the blood libel and describes (p. 250) – among seven reviewed books – a book published under official Egyptian auspices in 1962, titled *Talmudic Human Sacrifices*, a reprint of a book from 1890, which speaks of "… an indictment … relying on clear-cut evidence … that this nation allows bloodshed and makes this a religious obligation which was prescribed by the Talmud …". That same book addressed the Damascus Libel of 1890 (preceded by the more famous libel of 1840), regarding a young man "who was slaughtered by the Jews in Damascus and whose blood was sucked to be mixed in the Passover matzah dough". Harkabi presents additional books that were published in Egypt during the 1950's and 1960's, and one of which states (1964 – official publication): "The God of the Jews does not suffice with animal sacrifices, but rather it is necessary to appease him with human sacrifices. Thus the Jewish custom of slaughtering children and sucking their blood to mix it in the Passover matzah" (*ibid.*, p. 252). Harkabi ends on an optimistic note (254): "The blood libel as presented in these seven books is terrifying, but the blood libel is not common in the literature regarding the conflict, and it should not be assumed that it was assimilated by the Arab public. It is also possible that it is foreign to the Arabs' basic attitude towards the Jews, since in the Muslim countries the Jews were not accused of atrocities such as blood libels, poisoning wells and dispersing plagues, as in Christian Europe, and therefore, perhaps one can hope that these ideas will not be accepted. The value of this story is as a symptom, as to what lengths hatred towards Israel can go"; see also note 31 on p. 455 on the historical dimension; and additionally, in another place the Jews are described in Arab literature regarding the conflict, *inter alia*, as "blood suckers" (p. 315).

25. Some researchers have theorized that the blood libels developed in light of the Christians' erroneous understanding of Jewish customs. Thus, contrary to the customary approach, it has been suggested that the blood libels flourished during the period of the Crusades, based on the Jews' choice to commit suicide and kill their children and their loved ones "for the sake of sanctifying God" so that they would not

be forced to convert to Christianity. An event in which dozens of Jews died "for the sake of sanctifying God" occurred in York, England, on March 16, 1190 (I. Yuval "Vengeance and Damnation, Blood and Defamation: From Jewish Martyrdom to Blood Libel Accusation," 58 *Zion* 33 (5753) (Hebrew)). According to Prof. Yuval, the Christians interpreted the parents' sacrifice of their children for the sake of sanctifying God as lust for murder that was also directed towards Christian children. There were also writings about the connection between the customs of the Purim holiday, and particularly the hanging or burning of Haman and the drawing of lots, and the stories of blood libels (these led to serious controversy; see E. Fleischer's incisive critique "Christian-Jewish Relations in the Middle Ages – Distorted," 59 *Zion* 267 (5754) (Hebrew), and Yuval's response *ibid.*, and in Yuval's book *Two Nations in Your Womb: Jews and Christians – Mutual Perceptions* (5760); G. Mentgen "The Creation of the Fiction of the Blood Libel," 59 *Zion* 343 (5754) (Hebrew); Cecil Roth "The Feast of Purim and the Origins of the Blood Accusation: 8.04 *Speculum* 520-526 (1933).)

26. In this context, it is difficult not to mention a later incarnation of blood libels – the *Protocols of the Elders of Zion*. This publication included alleged discussions from confidential meetings held by the elders of the Jewish people during the First Zionist Congress in 1897 conspiring to constitute a world Jewish kingdom that would control the gentiles. The version that was common around the world was written by a Russian priest, Sergei Nilus, and first appeared in 1905 in his book "The Great within the Small". After the Russian revolution and Germany's defeat in the First World War, this essay was distributed widely and translated into many languages (see the article by S. Laskov, "Who Wrote the Protocols of the Elders of Zion," in 18 (6) *Et Mol: Iton Letoldot Eretz Yisrael Ve'am Yisrael* 110 (1993) (Hebrew)). See also N. Cohn, *Warrant for Genocide, The History of the "Protocols of the Elders of Zion"* (1971) (Hebrew); see also Judge H. Ben-Itto's important book *The Lie that Wouldn't Die: The Protocols of the Elders of Zion* (5758) (Hebrew) (English edition: 2005); my essay "'The Protocols of the Elders of Zion' in the Arab-Israeli Conflict in the Land of Israel in the 1920's," 25 *Hamizrach Hachadash* 37-42 (5737) (Hebrew), reprinted in 3 *Biruach Mizrachit* 54-58 (Israel Oriental Society, 2006); and Harkabi, *ibid*., 212-219).

27. Returning to the case at hand: There is little doubt as to the racist views of the Applicant himself, and upon reading the entire sermon that is the subject of the case, it cannot be viewed as other than racist. However, as was noted in the *Torat Hamelech* case (para. 32), and as the Applicant's attorney repeatedly emphasized, the question is not the racism of the speaker, but whether the elements of the offense were fulfilled. Before us is a text that the Applicant tried to paint in subdued colors, and that the Respondent tried to paint in vibrant colors, and we must examine its contents and circumstances as a whole. In the case before us, I am of the opinion, like the District Court, that an examination of the statement, and particularly the part upon which the Respondent grounds its arguments, indicates that it is directed at the State of Israel and the Jewish public *per se*, and that it is extremely difficult to perceive it as directed at another public – Crusaders, Bosnians, Chechens – as the Applicant argues. It appears to me that the matters are as clear as the noon-day sun, and the Applicant's intention comes through loud and clear. A straightforward reading of the part to which the Respondent referred, along with the Applicant's other statements in the sermon, does not leave room for doubt that the intention was not criticism or aspirations regarding the "Israeli occupation" in Jerusalem. In one breath, the sermon includes statements

regarding the Israeli establishment, according to which "our blood is in its food, our blood is in its drink, and our blood moves from one terrorist general to another terrorist general". This was the preface, and then it continues with a description of the blood of children mixing in the dough of the holy bread, stated as an antithesis to the behavior of the Muslim public which will preserve the "honor of the synagogues of the Jews". The reference to the kneading of the dough of the holy bread was mentioned in the same breath, as stated by the District Court, with the "children of Europe", in a sermon that in its entirety referred to the relationship between Muslims and Jews. To this one must add the circumstances of the sermon, and not ignore common sense. "We (the Muslims whom the Applicant leads – E.R.) have never allowed ourselves to knead the bread of the meal that breaks the blessed Ramadan fast with the blood of children (we don't – but who does? Here is the answer – E.R.) "and those of you who want a more detailed explanation, ask what happened to some of Europe's children whose blood was mixed in the holy bread's dough (meaning – there are European children whose blood was used to knead the holy bread – E.R.). And now come the rhetorical questions, "Good God. Is that religion? Is that what God wants?" The Applicant is a well-known figure in the Arab world and in Israel. He is one of the religious leaders of the Muslims in Israel. He was tried for security offenses and harming security forces, and was imprisoned therefor. His speech was delivered before a large, angry, emotional crowd near the Temple Mount. It is clear that the sermon was organized and planned, and that the public atmosphere was explosive in light of a claim of harming the Al Aqsa mosque. There is no need for sophistry to understand the essence of the matter. Furthermore, it is clear that one cannot view what was said in a manner that is detached from the broad context – the Israeli-Palestinian conflict, in general, and the Temple Mount conflict, in particular. As the Respondent well stated, the Applicant's choice to mention one of the most blatant symbols of hatred of Jews, in that charged situation, and to tie it to the call to protect the Al Aqsa mosque, leads to the inevitable conclusion that the purpose of his words was to incite racism. I listened carefully to the words of the learned defense counsel, who in his interpretation attempted to present the story differently. Unfortunately, however, a proper look at what was said, in the entire context, does not support that attempt.

28. As to the argument that the Applicant did not intend to refer to the famous blood libels, and that this is evidenced by the fact that he referred to the "holy bread" which is attributed to Christianity, and not to Passover matzah – we should clarify that the holy bread is part of the Christian Eucharistic ceremony called the "liturgy" (the meaning of the word "liturgy" in Greek" is "public worship"). In this ceremony, the priest breaks the bread and pours the wine, symbolizing the body and blood of Jesus, and according to Christian tradition, while their appearance does not change, their substance changes in a process referred to as transubstantiation. The ceremony mentions the last supper of Jesus and his disciples, those who spread his Gospel. In Arabic, the holy bread of the Christian ceremony is called خبز القربان or القربان (*Khubz al-Qurban* or *Al-Qurban*) – the bread of the sacrifice, while the Applicant employed the term الخبز المقدس (Al *Khubz al-Muqaddas*) – the *holy bread***.** This distinction reinforces, but does not in and of itself determine, the position that the Applicant did not refer to the Christian holy bread, but rather to special bread eaten on a Jewish holiday. As mentioned, the Applicant stated, while contrasting to Jews, that "We have never allowed ourselves to knead the bread of the meal that breaks the blessed Ramadan fast with the blood of children". We learn from these words, as well, that his intention was to compare the Ramadan holiday to another holiday (the Passover

holiday), and not to a routinely occurring ceremony (the Liturgy ceremony). Ultimately, there is nothing else left to be said, and it is clear to me that anyone who showers a riled up audience with strong words to the effect that the Jews knead dough with children's blood – and this doesn't require much sophistication – is simply inciting racism.

29. As noted, the Applicant relies on the *Torat Hamelech* case, which addressed a petition against the Attorney General's decision not to lay charges, *inter alia*, for inciting racism and inciting violence against the authors of the *Torat Hamelech* book due to insufficient evidence;. It would not be superfluous to note that the *Torat Hamelech* case concerned *administrative* review of the Attorney General's decision. The Court's role in such a case, and the scope of its intervention, are materially different than those in criminal law, after an information was filed and evidentiary proceedings were held.

30. Moreover, in the *Torat Hamelech* case the reader of the essay which was the subject of that case must apply punctilious Talmudic logic to a religious-halachic text in order to understand its intention. It is not clear whether the book specifically incites against the Arab public; whether the violent norms described therein apply exclusively to the State and the security forces, or to private people as well; or whether or not it constitutes a "*halachic* examination" that is relevant primarily to times of war. In the case at hand, there is no need to be an especially "learned scholar" to understand what the Applicant meant. The issues were placed "on the table", and do not require discussion. It should be added that in the *Torat Hamelech* case, my colleague Justice Joubran was of the minority opinion that in light of the reality of our times and the social climate upon which he elaborated, it is necessary to lower the bar for filing charges in regard to the offense of inciting racism, which, in his opinion, was too high. In his view, the excessively high bar that the Attorney General set was expressed in a number of points in his decision in that case, including narrowly interpreting the element of the purpose element in the offense of inciting racism, and the lack of reference to the “foreseeability rule”; analyzing content in a manner that was lenient with the authors; and a faulty comparison to the *Elba* case. Examining the Applicant's words in accordance with the criteria upon which my colleague Justice Joubran elaborated in the *Torat Hamelech* case would, *a fortiori*, indicate that the Applicant's words, which, as mentioned, do not require deep interpretation as was necessary in regard to the "*Torat Hamelech*" halakhic text, amount to incitement.

31. In summary, we do not grant the appeal on the conviction of the offense of inciting racism.

The Offense of Inciting Violence

32. I am of the opinion that it is also inappropriate to grant the appeal with respect to the conviction for inciting violence. This offense is grounded in Section 144D2 of the Penal Law:

> (a) If a person publishes a call to commit an act of violence or terror, or praise, words of approval, encouragement, support or identification with an act of violence or terror (in this section: an inciting publication) and if – because of the

> inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, he is liable to five years imprisonment.
> (b) In this section, "act of violence or terror" – an offense that causes a person bodily injury or places a person in danger of death or of severe injury.
> (c) The publication of a true and fair report about the publication prohibited under subsections (a) and (b) does not constitute an offense under this section.

As noted, the Respondent wished to ground the Applicant's conviction of this offense on his words: "It is now your duty to instigate an Islamic Arab *intifada* from ocean to ocean".

According to the Applicant, the term "*intifada*" means awakening, and his entire intention was a global awakening of awareness and protest, but not of violent acts. It is very difficult to accept this argument. This term, which has become as customary and common as if it has been here forever, referred, in day-to-day discourse at the relevant time, to two periods of uprisings that were characterized by acts of terror – 1987-1991 and 2000-2005. The first period was particularly, but not only, characterized by rock throwing; the second period was particularly, but not only, characterized by suicide bombers and numerous casualties. This term became a "generic name" for a violent Palestinian uprising. To clarify, see the definition of the term "*Intifada*" in the *Even Shoshan Dictionary* (Updated and Revised for the Millennium) (2007)): "The name of the uprising of the Arab population in the areas of Judea, Samaria and the Gaza Strip, against the Israeli control thereof". It is easy to understand that this is how the term is perceived by all, and perhaps *a fortiori*, by those listening to the words of the well-known Applicant from whom there is no reason to understand them other than literally. It is inappropriate to be disingenuous and to use "classical dictionary" terminology, i.e., *intifada* in the basic dictionary sense of "awakening". Furthermore, the argument that the sermon was aimed at a universal and not a particular audience does not change the state of affairs. Nor does it transform the Applicant's words into a theoretical, abstract approach, lacking any practical content in Israel or abroad.

33. Indeed the Applicant's learned counsel claimed that mentioning a "judge or a scientist" as the audience of the call indicates that it was not violent by its nature. This argument is captivating, but given the meaning of the term that has already been established and is deemed a matter of judicial notice, it is difficult to accept.

34. In LCrimA 2533/10 *State of Israel et. al. v. Michael Ben Horin* (2011) (hereinafter: the *Ben Horin* case), upon which the parties and the lower courts elaborated, it was ruled that the offense of inciting violence is conditioned upon the fact that the publication, by its contents and circumstances, shall, with a probability of a real possibility, cause an act of violence to be committed. It was explained that it is necessary for there to be a linkage between the publication and the actual outcome in accordance with the real possibility criterion "not more than that but not less than that" (para. 6, *per* Hendel J.), and that the Court must examine the case in its entirety, without determining primary criteria in advance. It was ruled that, *inter alia*,

consideration shall be given to the identity of the publisher and to the public atmosphere, to the type of violence at hand, to the scope of the group exposed to such violence, to the scope of the publication and its target audience, to the context, the location and the media of the publication: "One must ask, *inter alia*, who said, what was said, where it was said, in what manner it was said, to whom it was said and in what framework it was said" (para. 7). The Combating Terrorism Bill, 5775-2015 (Government Bills 5775, 1067), is interesting in this context, as it draws a distinction between "calling to commit an act of terror", for which it is not necessary that the call result in an act of terror being committed in order for the elements of the offense to be fulfilled, as opposed to the alternative of "publishing words of praise, identification, support, approval or encouragement, with respect to an act of terror", which includes a probability criterion, which is different than the existing one ("reasonable possibility… of committing an act of terror or committing an offense of violence") (sec. 27). It was noted in the Explanatory Notes of the bill that the "proposed probability criterion strikes a proper balance between the need to prevent an infringement of the values protected by the prohibition, and the protection of the principle of freedom of expression, as opposed to the real possibility criterion, which is difficult to assess and prove, and therefore, does not allow sufficient protection of the values that are protected by the prohibition, considering the anticipated damage from the mere inciting publication" (p. 1096); regarding the matter of the legislative chain of events that led to the current draft of the law, see also the *Torat Hamelech* case, paras 75-77.

35. As noted, the Applicant is a well-known, influential figure among the Arab public, who delivered a speech to an angry crowd, near the Temple Mount at Friday prayers, the Muslim's holy prayers, during a period in which the streets of Jerusalem, and particularly in the areas populated by Arabs, were roiled. As was also explained by the lower courts, the general context of the sermon delivered by the Applicant, the repeated use of the word "blood" and his words "we will meet God as martyrs in the area of the Al Aqsa mosque", make it difficult to err as to the meaning of his words. It appears to me that it is evident to any reasonable person that we are not dealing with a theoretical discussion, but rather with a practical call. And in order to remove any doubt, the Applicant's words in real time testify as to his intentions: "It is possible that they will come to me and tell me you are inciting. They want to destroy our Al Aqsa and they are coming and telling me you are inciting. So, my brothers, I am telling you, and I am saying that we are not alone in this struggle." The combination of the content of the words and the circumstances indeed fulfills the requirement of a real possibility that the Applicant's words would lead to violence, sufficient to ground the elements of the offense. The conviction of the offense of inciting violence is upheld.

36. Last, but not of least importance, I would note that we are cognizant of the status of freedom of expression in our system, the importance of its reinforcement, and the restraint required in applying criminal law in such contexts. However, as has also been emphasized on more than one occasion, freedom of expression does not stand alone (LCA 10520/03 *Ben Gvir v. Dankner* (2006); and see my dissenting opinion in CFH 2121/12 *Anonymous v. Dr. Ilana Dayan*, (2014), paras. 27-40), and there are exceptions that are worthy of criminal investigation. In the *Torat Hamelech* case, I referred (para. 58) to the caution of the Attorney Generals in exercising their authority to approve an information in the matter of inciting racism and inciting violence. I shall stress that in making such a decision there is even some room for consideration of the possibility that filing an information actually affords exposure and publicity to deviant,

hateful expressions, and thus somewhat rewards the person wishing to incite. I am of the opinion that the case at bar clearly crossed the limits of legitimate, even if harsh and outrageous, freedom of expression. The Applicant's words went far too far.

37. Having said that, it is important to emphasize loudly and clearly, one cannot but be outraged by expressions of hatred that are directed towards *any* person or public whose only sin is their religious affiliation, their national origin, race or color, and we must all, and certainly the courts, take a stand against such expressions of hate, and must unequivocally denounce them. This is the long and short of the matter. Our ruling does not derogate in any manner from the obligation to act for equality for Arabs in Israel (and see my article "On Equality for Arabs in Israel," in my book *Paths of Government and Law: Issues in Israeli Public Law*, 276 (5763) (Hebrew)), since "I have had the opportunity on more than one occasion to repeat such words regarding equality for Arabs… out of deep conviction – that it can be different – in a state that not only by its definition is Jewish and democratic, and whose the Declaration of Independence speaks of equality, but which has a historical ethos of the persecution of our people throughout its history as victims of racism, we are commanded to treat minorities equally" (the *Torat Hamelech* case, para. 37), and nothing more need be said.

38. In conclusion: the appeal of the decision is denied.

The Sentence

39. As to the punishment, both parties addressed the forces pulling in each direction – the extraordinary severity of the words that were spoken by the Applicant, on the one hand, and the fact that he was not convicted of other offenses, as well as the prevailing punitive policy, on the other hand. The normative issue in the case at hand concerns the severity of the act, and it is here that I agree with the position of the Respondent, in principle. I am of the opinion that the range of punishment that the Magistrates Court proposed is appropriate, considering the interests and values concerned. As for the punishment itself, the case law varies; see the *Ben Gvir* case, which imposed community service and a suspended sentence for offenses of inciting racism and supporting a terrorist organization, and the *Federman* case, which imposed community service and a suspended sentence for offenses of inciting racism, inciting violence and criminal attempt; as opposed to CrimC (Jerusalem) 44725-12-14 *State of Israel v. Shalabi* (2015) which imposed a nine-month custodial sentence, as well as a suspended sentence for offenses of inciting violence and supporting a terrorist organization, and CrimC (Jerusalem) 44930-21-14 *State of Israel v. Aabdin* (2015), which, *inter alia*, imposed a ten-month custodial sentence and a suspended sentence for offenses of inciting violence and supporting a terrorist organization. However, no single case is similar to another. Indeed, in the *Federman* and *Ben Gvir* cases, in 2008 and 2010, respectively, actual imprisonment was not imposed, as it was in other cases (see for example CrimA 71624/04 *Paniri v. The State of Israel* (2007), in which the defendants were convicted of offenses of defacing real estate and inciting racism), but given the increasingly widespread expressions of ideologically-based violence and hatred, the case-law trend has been increasingly strict, both to deter and as an expression of deep contempt for and revulsion at such statements and actions (see the recent decision in CrimA 5794/15 *State of Israel v. Tuito* (January 31, 2016), in which the punishment of the perpetrators of the arson of the Bilingual School in Jerusalem

was increased). Additionally, the Applicant's attorney argued that the cases he cited, like the case at hand, concerned influential personages, and as noted, custodial sentences were not imposed. However, the cases would not appear comparable. In the case at bar we are faced with a person who is a very influential religious and spiritual leader, as opposed to the figures the Applicant's attorney mentioned who are not clergymen, and whose influence extends only to limited publics.

40. Lastly, I am not persuaded by the argument that since we are addressing two offenses that relate to the same act, and in light of their nature, it was inappropriate to increase the Applicant's punishment following his conviction for the offense of inciting racism. Section 186 of the Criminal Procedure (Consolidated Version) Law, 5742-1982, prescribes: "The court may convict a defendant for each of the offenses for which his guilt is supported by the facts proven before it, but it will not punish him more than once for the same act." In CrimA 9826/05 *Jamal Mahajna v. State of Israel* (2008), this Court addressed the interpretation of the phrase "the same act" and the criteria therefor, stating that "the factual-typological test analyzes the entire set of facts composing the criminal event, and examines whether the defendant's criminal conduct constitutes a single, indivisible physical act, or a series of acts that can be divided and distinguished. The substantive-moral test examines the nature of the harm the specific offense caused, the nature of the interests protected by the offense, the importance of the value that was infringed, and the nature of the moral considerations that underlie the protection of the victim of the offense. In the said framework, considerations of deterrence are also taken into consideration, which concern granting due weight to the severity of the offense in the framework of punishing the offender, in order to send a deterrent message to potential criminals" (para. 18, *per* Beinisch P.). It is only natural that there is a partial overlap of the protected values that underlie each of the offenses that are the subject of the application, such as protecting public safety – and this is true with respect to many other offenses that are not related to expression and incitement – however each of them comprises additional protected values. Moreover, and of no less importance, as has already been noted, we are addressing different and separate parts of the Applicant's sermon, each of which, in and of itself, fulfills the elements of the relevant offense.

41. Nevertheless, and not without some hesitation, I am of the opinion that a degree of leniency would be in order. The lower courts gave appropriate thought to the various considerations and concrete circumstances, however in light of the fact that in the nine years that have passed since the event, the Applicant has not committed additional, similar offenses, and in light of the punitive policy that prevailed at the time, it would appear just to show some leniency. The Applicant's sentence shall, thus, be set at nine months of imprisonment, and the suspended sentence shall remain unchanged.

42. Conclusion and summary: I propose that we deny the appeal of the District Court judgment, and uphold that decision. As for the sentence, I propose that the Applicant's sentence be reduced as stated in paragraph 41. The Applicant shall report to the Nitsan Detention Center on May 8, 2016 by 10:00, to begin serving his sentence. The terms of release shall remain unchanged until that time.

Deputy President

Justice S. Joubran:

I have read the opinion of my colleague Deputy President E. Rubinstein, and while I concur with the conclusion that the Applicant's conviction of the offense of inciting racism should be upheld, I am not of the opinion that it was appropriate to convict him of the offense of inciting violence. Were my opinion heard, I would recommend acquitting the Applicant of that offense, and accordingly reducing his punishment such that he would serve his sentence by way of community service.

The District Court unanimously convicted the Applicant of the offense of inciting racism, and convicted him of the offense of inciting violence by a majority opinion of Judges D. Mintz and E. Nachlieli-Khayat, with Judge A. Romanoff dissenting. My opinion is as that of the dissenting Judge Romanoff, as I shall explain below.

As noted in my colleague's opinion, the Applicant's conviction on the offense of inciting violence is based on the following words in the sermon he delivered in Jerusalem:

> We are asking each Muslim and Arab in the Islamic and Arab present, be it a judge or a scientist or a party or a public institution or factions or nations, we aspire from them now, it is now their duty to assist the Palestinian nation. It is now their duty instigate an Islamic Arab *intifada* from ocean to ocean, in support of holy Jerusalem and the blessed Al Aqsa mosque.

As opposed to the offense of inciting racism, in order to convict of the offense of inciting violence it is not sufficient to say things of an inciting content. Rather, one must examine whether the content and the circumstances of the publication present a *real possibility* of resulting in terror or a violent act (HCJ 2684/12 *The 12th of Cheshvan, The Movement for the Strengthening of Tolerance in Religious Education v. Attorney General*, para. 9 of my opinion (December 9, 2015); LCrimA 2533/10 *State of Israel v. Ben Horin* (December 26, 2011)).

The Applicant argues that he did not mean to arouse a violent *intifada*, and during his interrogation by the police, he explained his intentions as follows:

> I said that we covet all of the elements of the Arab and Islamic heritage – its leaders, clergymen, media, parties and family and non-family institutions and nations to instigate an *intifada* that supports holy Jerusalem and the blessed Al Aqsa mosque. *And the meaning is completely clear – it is an invitation to devote our best efforts in order to preserve their duty to protect holy Jerusalem and the blessed Al Aqsa mosque.* And this is the leaders' role, which is expressed in a political role, and this is also the same role of clergymen to make people fond of the Al Aqsa mosque. And this also relates to the media that need to emphasize the problem in Jerusalem and at the blessed Al Aqsa mosque. This is also expressed in the parties and the family institutions and the

> nations that *need to emphasize and apply pressure on their leaders to take a political initiative to support holy Jerusalem and the blessed Al Aqsa mosque* (*ibid.*, lines 86-95; emphasis added – S.J.).

In his testimony before the Magistrates Court, the Applicant testified as follows:

> I am not exaggerating that the specific word *intifada* is an international word, and the Jews also use this word. Shulamit Aloni also used this word, and it is also in all languages.
> […]
> Its origin is awakening. *Intifada* means that a person was sleeping and suddenly awoke, and its meaning is that I want to do something, meaning that I am giving all I have to this thing, and therefore *now they say an economic or political or educational intifada, today the whole world uses this word*. While I say we are calling the governor, the scientist, the parties, the media or the nation to do an *intifada*, before that I say to them, before I spoke about *intifada*, I say they should help. After that I say that there will be an *intifada*. I am calling on them to help the Palestinian people as much as they can, certainly, while I am speaking these words, I certainly, I am not waiting for the governor to do an *intifada* or how the media will do an *intifada*, *I certainly mean a cultural, political and media intifada*" (protocol of the hearing, pp. 26-17; emphasis added – S.J.).

I reread both the Applicant's words and the opinion of my colleague the Deputy President over and over again, and I still have doubt whether the content and circumstances of the words amount to a *real possibility* of leading to an act of violence.

My colleague is of the opinion that the combination of the words' content and circumstances fulfills the requirement of a real possibility that the Applicant's words would lead to violence (see para. 35 of his opinion). However, my opinion is different. Indeed the term "*intifada*" (انتفاضة) generally refers to violent action, but I am of the opinion that in the context in which the words were spoken – upon which I shall immediately elaborate – we cannot dismiss the Applicant's explanation that it was not incitement to violent action, but rather a call for a general, not necessarily violent, recruitment to protect what appeared to the Applicant as a violation of a holy site.

We should bear in mind that the sermon that was delivered by the Applicant was made against the background of a claim raised among some of the Muslim public regarding the Israeli authorities' intention to harm one of the holy sites of the Muslim religion – the Al Aqsa mosque. This is evident from the Applicant's repeated emphasis in his sermon that the matter at hand is not a local matter that relates only to local residents, but rather a matter that concerns *all* the members of the Islamic faith *per se*.

This background must be considered in the framework of examining the

circumstances of the publication, in order to reach a conclusion regarding the real possibility of matters leading to violence. In my opinion, there is signal importance to the *universality* of the audience addressed in the sermon in understanding the meaning of all of the words stated above. It is my opinion that the fact that the Applicant was not speaking to a specific, energized, political audience, but rather to a general audience all around the world, reduces the specificity of the call, and consequently reduces the possibility that such a call would, as a real possibility, lead to committing an act of violence. By a gross analogy – just as the universality of the common calls for "world peace" reduce the probable influence of the call on bringing peace, I am also of the opinion that general calls for a "world *intifada*" do not have a real potential of resulting in violence.

Under these circumstances, I doubt whether the Applicant's sermon could create such "real possibility" of the commission of a violent act, as required by the law, and therefore, it is my view, as noted at the outset, that the Applicant should be acquitted of the offense of inciting violence.

As for the punishment, since I believe that the Applicant should be acquitted of the offense of inciting violence, and since a considerable period of time has elapsed since the event which is the subject of this case, during which time he did not commit additional, similar offenses, I recommend to my colleagues that the Applicant's punishment be set at six months of imprisonment to be served by community service.

JUSTICE

Justice A. Baron:

1. The principle of freedom of expression is one of the cornerstones of a democratic regime. Infringing freedom of expression "is like harming the soul of democracy" (CrimA 255/68 *State of Israel v. Moshe* IsrSC 22 (2) 427, 435 (1968)). In the words of Justice N. Hendel, "The test of freedom of expression is not when its content is on the straight and narrow, but rather when it is on the margins of its margins. As has been held: Freedom of expression is not only the freedom to express or to hear things that are acceptable by all. Freedom of expression is also the freedom to express dangerous, infuriating and deviant opinions that disgust the public and that it hates' (HCJ 399/85 *Kahane v. Managing Board of the Israeli Broadcasting Authority*, IsrSC 41(3) 255) " (LCrimA 2533/10 *State of Israel v. Ben Horin*, para. 5 (December 26, 2011); hereinafter: the *Ben Horin* case). However, as any other constitutional right in Israeli law, the right to freedom of expression is not absolute, and it may retreat before other important interests and principles. The criminal prohibitions of inciting racism and violence were meant to protect the existence of the State of Israel as a Jewish and democratic state, human dignity and equality among people, social order and public safety (see: the opinion of President A. Barak in CrimA 2831/95 *Elba v. State of Israel* IsrSC 50 (5) 221, 285-286 (1996); hereinafter: the *Elba* case). Indeed, these offenses naturally infringe freedom of expression to a certain degree. However, there is no doubt that such infringement serves a proper purpose. The proportionality of the infringement depends upon the interpretation given to the offenses of inciting racism and violence.

In all that regards Ra’ed Salah's sermon, the essentials of which were cited by

my colleague Deputy President E. Rubinstein, I am of the opinion that there is no difficulty drawing the line between words that are protected by the principle of freedom of expression and statements that amount to a call for racism, violence and even terror, and which constitute a real danger to public safety and are therefore prohibited. The speaker's words shout. The speech was charged and provocative, it was delivered during tense times and in a tempestuous atmosphere as a result of the prohibition of prayers at the Al Aqsa mosque, and the speaker explicitly calls for violent action against the State of Israel and the Jewish people. Therefore, I concur in the opinion of my colleague the Deputy President that the appeal on the ruling should be denied and that the District Court's judgment should be upheld.

2. The Applicant, Sheikh Ra'ed Salah, is a public and religious leader, a person of standing among Muslim Israeli Arabs. He served in the past as the mayor of Umm-Al-Fahm (1989-2001), and since his retirement from that position, has served as the head of the Northern Faction of the Islamic Movement in Israel – the same faction that was recently designated by the Government as an "unlawful association" (Decision of the Political-Security Cabinet of November 17, 2015). The event being addressed occurred in 2007, and the background was archeological digs that the State was conducting near the Temple Mount, in preparation for restoring the bridge at the Mughrabi Gate in the Old City of Jerusalem. Severe accusations against the State of Israel began to be heard on the Arab street – that it is intentionally destroying archeological findings from various Islamic periods that were found in the area of the dig. Concurrently, prayers at the Al Aqsa mosque were also prohibited. At that point in time, the relationship between Israeli Arabs and the Israeli establishment were particularly charged, and even explosive. This is the setting of the event that is the subject of the appeal, in which Ra'ed Salah was a main actor.

On Friday, February 16, 2007, Ra'ed Salah stood on a stage that was set up in the Wadi al-Joz neighborhood in Jerusalem, and delivered a speech. In front of him was a large audience of approximately 1,000 people, including hundreds of Ra'ed Salah's supporters who had arrived from the Northern region, as well as many media outlets. As mentioned, the crowds gathered there after they were prohibited entry to the Al Aqsa Mosque for the purpose of Friday prayers and a sermon by Ra'ed Salah. The sermon that he delivered was tempestuous, full of expressions of hatred towards Israel and the Jewish people, and its clear message was that they should be expelled from Jerusalem and from the Al Aqsa mosque. In his speech, Ra'ed Salah repeatedly presented the State of Israel as conducting a *bloody battle* against the Palestinian people over holy Jerusalem and the Al Aqsa mosque. The speech repeatedly used the words "*blood*" and "*martyrs*", and *inter alia*, Ra'ed Salah accused the Israeli establishment of wanting to build the Temple in Jerusalem "*while our blood (the blood of the Palestinian people - A.B.) is still on its clothes, our blood is still on its doors and our blood is in its food, and our blood in its drink and our blood moves from one terrorist general to another terrorist general*". It was also stated that the ranks of such Israeli "generals" "*were made of the skulls of our martyrs*". Ra'ed Salah repeatedly emphasized that the battle for Jerusalem is a bloody battle that is still continuing, and that "We (the Palestinian people – A.B) do not fear other than God. *The most beautiful moments in our destiny are when we will meet God as martyrs in the area of the Al Aqsa mosque*". Ra'ed Salah was charged with the offenses of inciting racism and violence for these two specific expressions in the sermon, which I shall now address.

3. While describing the day after Jerusalem shall be freed from the yoke of the Jewish occupation, Ra'ed Salah explains to his listeners that the Palestinian people will not take revenge on the Jews, since Palestinians are not child murderers like the Jews, as is told in the famous blood libel:

> We are not malicious and we shall not be malicious, and we shall also preserve the dignity of the synagogues of the Jews. We are not a nation that is based on values of revenge. We have never allowed ourselves, and listen well, *we have never allowed ourselves to knead the bread of the meal that breaks the blessed Ramadan fast with the blood of children. And those of you who want a more detailed explanation, ask what happened to some of Europe's children whose blood was mixed in the holy bread's dough.* Good God, is that religion? Is that what God wants? God will yet deal with you for what you do…

For these words, Ra'ed Salah was charged and convicted of inciting racism. Further on in his sermon, Ra'ed Salah called upon his listeners to instigate an *intifada* to free Jerusalem and the Al Aqsa mosque.

> We are asking each Muslim and Arab in the Islamic and Arab present, be it a judge or a scientist or a party or a public institution or factions or nations, we aspire from them now, it is now their duty to assist the Palestinian nation. *It is now their duty to instigate an Islamic Arab Intifada from ocean to ocean, in support of holy Jerusalem and the blessed Al Aqsa' mosque*.

For this call for an *intifada*, Ra'ed Salah was charged and convicted of inciting violence.

4. Section 144B(a) of the Penal Law, which addresses the prohibition of inciting racism, instructs that "*If a person publishes anything in order to incite racism, he is liable to five years imprisonment*". This is a conduct crime: the "publication" is the *actus reus*; the "anything" is the circumstance; and "in order to incite" is the *mens rea*. A number of questions have arisen in case law regarding the manner of proving these elements, and *inter alia*, there is a view that the "anything" that is published must comprise a racist message which could, with near certainty, harm public safety (see: the *Elba* case, pp. 290-291, *per* Barak P.; and HCJ 2684/12 *The 12th of Cheshvan the Movement for the Strengthening of Tolerance in Religious Education v. Attorney General*, para. 9, *per* S. Joubran J. (December 9, 2015); hereinafter: the *Torat Hamelech* case). In the *Torat Hamelech* case, my colleagues Justice E. Rubinstein and Justice S. Joubran disagreed on the question whether one can use the "foreseeability rule" to prove the "purpose" in the offense of inciting racism. However, the case at hand does require that we rule on these weighty questions, since the fulfillment of the *actus reus*, *mens rea* ("purpose") and even the probability test ("near certainty") is entirely clear from the sermon itself and the circumstances in which it was delivered.

Section 144D2(a) of the Penal Law, which addresses the prohibition of inciting

violence or terror, provides that "*If a person publishes a call to commit an act of violence or terror, or praise, words of approval, encouragement, support or identification with an act of violence (in this section: an inciting publication) and if – because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, he is liable to five years imprisonment.*" The level of proof prescribed for this offense, which is also a conduct crime, is lower than the level of proof for the offense of inciting racism. While the offense of inciting racism requires a special mental element of "purpose", the mental element required for the offense of inciting violence is only awareness. The bar of the probability element in the offense of inciting violence ("real possibility") was also explicitly set lower than the probability criterion set by case law for the offense of inciting racism ("near certainty") (see: the *Torat Hamelech* case, paras. 75-76, *per* Rubinstein J. (December 9, 2015)). The elements of the offense of inciting violence are also entirely met by Ra'ed Salah's sermon, as I shall explain:

The incitement offenses are based on *expressions* – on *words*. As such, the fulfillment of the elements of the offenses – including the meaning of the words, the extent of the attendant damage, and the intention of the speaker – are deduced from the content of the inciting publication and the entirety of the circumstances:

> Of course, the identity of the publication, the publisher and the public atmosphere are important facts, as noted, but they do not stand alone. Additional considerations should also be considered, such as the type of violence concerned, the scope of the group exposed to such violence, the scope of the publication and its target audience, the context, the location and the media used for the publication. One must ask, *inter alia* – who said, what was said, where it was said, in what manner it was said, to whom it was said and in what framework it was said" (the *Ben Horin* case, para. 7).

It should be noted that this was stated in the context of the offense of inciting violence, however it applies, *mutatis mutandis*, to the offense of inciting racism (see: the *Torat Hamelech* case, para. 77).

5. Ra'ed Salah argued before us that his words should not be interpreted literally – but rather the sermon should be "*read sensitively*", and his calls should be heard through a "*constitutional ear*". In brief, according to Ra'ed Salah, when he called for an *intifada* he meant the literal meaning of the word – i.e., an awakening, and the message he wished to deliver was a call for a global awakening in the Arab world, for awareness, for protest, and by no means for violent action. With respect to the mentioning of the *blood libel* in his sermon – Ra'ed Salah denies that his intention was the libel that Jews use the blood of Christian children to prepare Passover matzah. According to him, it was a general reference to crimes committed in the name of religion all over the world, including Crusades in the past, and crimes in Bosnia and Kosovo, for example, in the present. Given the above, according to Ra'ed Salah, the sermon that he delivered is protected by the constitutional protection that is granted to political expression, as part of freedom of expression, even if only by the benefit of doubt.

As has already been stated, the words of incitement in Raed Salah's sermon shout out from the page. They cannot be misunderstood. He is indeed attempting now to present the words he spoke as being ambiguous, as such that can be interpreted in a softer manner than that which is attributed to the sermon. However this is nothing more than impossible sophistry and retrospective justification. The meaning of the text is examined as it is heard in real time, by the inflamed audience – and not in "laboratory conditions" and while turning to dictionary definitions. I would reiterate that the same sermon with which we are dealing was heard against the background of a tempestuous, impassioned public atmosphere, which was created when the Al Aqsa mosque was closed to worshipers. Ra'ed Salah, who has a reputation of denying the legitimacy of the State of Israel, added fuel to the fire with his speech. He delivered a sermon full of expressions of hatred and violence against the Jewish people, woven with repeated motifs of "*blood*" and "*martyrs*". The well-known blood libel, which is mentioned in Ra'ed Salah's sermon, is a symbol of hatred of Jews. Tying it with the call for an *intifada* clarifies that the speaker is not calling for an "awakening" as he retroactively claimed – but rather for a violent uprising. It is not superfluous to state in this context that Ra'ed Salah's sermon was delivered by him after he had already been warned by the Orr Commission (Commission of Inquiry into the Clashes Between Security Forces and Israeli Citizens in October 2000), due to his responsibility for the riots that broke out. The Commission, *inter alia*, found as follows:

> As the head of the Northern branch of the Islamic Movement, the Mayor of Umm al-Fahm and a public personage, he was responsible during the period preceding the events of October 2000, including the years 1998-2000, for transmitting repeated messages encouraging the use of violence and threatening violence as a means of achieving objectives of the Arab sector in the State of Israel. These messages referred also to the purpose that was defined as freeing the Al Aqsa mosque. Additionally, he held mass meetings and employed tempestuous propaganda methods to arouse an inflamed public atmosphere around this sensitive issue. By all that is stated above, he made a substantial contribution to inflaming the atmosphere and to the violent, widespread outbreak that occurred in the Arab sector at the beginning of October 2000.

Moreover, at the time Ra'ed Salah delivered the sermon, there was a restraining order prohibiting him from being in the Old City of Jerusalem or within 150 meters therefrom – after having led an unlawful gathering of approximately 30 people at Dung Gate in Jerusalem, also related to the performance of works at the Mughrabi Gate. Ra'ed Salah was charged with having assaulted one of the policemen that had been stationed there to block the rioters from moving towards the area of the works, having spat at his face, and having muttered to him "you are racists and murderers, you have no honor". For these actions, he was convicted of offenses of participating in a riot and assaulting a police officer in order to prevent him from performing his duty, and was sentenced to imprisonment and monetary damages to the policeman.

6. Hence, the contents of the sermon and the entirety of the circumstances surrounding the situation in which it was delivered, clearly testify to the existence of the *actus reus* and the *mens rea* required for the offenses of inciting racism and inciting violence. Using words carries great, and even, at times, destructive, power; therefore it has been said: "Death and life are in the power of the tongue" {Proverbs 18:21]. Leaders and public figures have a heightened duty in this regard, and particularly in the charged climate of the Israeli-Palestinian conflict. The words of my colleague Justice S. Joubran are particularly apt:

> Ill winds of racism and hatred of the other which are blowing in our country are leading to more frequent, racist and religious-based violent outbursts. Racist expressions are expressed not only on street corners, or by speakers who represent "extreme margins", but also by public figures and politicians who are considered part of the mainstream of Israeli society (Yuval Karniel ”Racism, Media and Defamation – Can a Racist be Called is a 'Nazi'?" 11 *Hamishpat* 409, 434 (5767) (hereinafter: Karniel) (Hebrew)). In the current climate – in which inciting racism and violence has become a common sight – there is a clear need for the authorities responsible for the enforcement and implementation of the law to stand strong and assist in eradicating the phenomenon.
>
> …
>
> I am of the opinion that in this reality in which words of incitement written with a sharp pen lead, on more than one occasion, to lethal use of a sharp knife, we are obligated to consider cases such as the one before us with greater diligence, including charging and convicting in appropriate cases. (the *Torat Hamelech* case, paras. 12-13).

7. Now to the sentence. As is well known, it is not customary for an appeal instance to intervene in sentencing, except in extraordinary cases of significant deviation from proper punitive policy or a material error in the sentence. This is all the more relevant when we are concerned with a third incarnation of proceedings. I would not have intervened in the sentence imposed upon Ra’ed Salah for the offenses of which he was convicted – even though it was at the high end in comparison to other cases addressed in the case law. However, in the disagreement between my colleagues, I find it appropriate to join the position of the Deputy President that the custodial sentence be reduced from 11 to 9 months.

JUSTICE

Decided by a majority of opinions as stated in the judgment of Deputy President, E. Rubinstein.

Given today, the 10th of Nissan 5776 (April 18, 2016).

Deputy President Justice Justice