

United States Law and Israel

by Michael Curtis

“If the law supposes that,” said Mr. Bumble in Charles Dickens’ *Oliver Twist*, “the law is an ass, an idiot.” He could have been referring to U.S. court decisions that have allowed instigators or abettors of Palestinian terrorism to evade punishment for terrorist actions against the State of Israel and its citizens. The best that can be said of them is that the law on jurisdictional issues is still complicated, imprecise and open to differences of opinion.

On August 31, 2016, a three-person panel of the Federal Court of Appeals for the Second Circuit in New York by vote of 3-0 overturned a decision by a lower New York court that had imposed a \$655.5 million verdict against the Palestinian Authority and the Palestine Liberation Organization (PLO).

The case brought by a number of people, including some who had been injured by the attacks, has been going on a long time. A court has first awarded the plaintiffs the sum of \$218.5 million in damages. The plaintiffs went further on the basis of the Anti-Terrorism Act that resulted from a previous Palestinian attack, the murder in 1985 of Leon Klinghoffer on the ship *Achille Lauro*. The Act allows American citizens who are victims of international terrorism to sue in U.S. Federal Courts, and for the tripling of damages already ordered.

Ten families had sued under the U.S. Anti-Terrorism Act asking for the two organizations, PLO and PA, to be held responsible for six bombings between 2002-4 in Israel in which 33 people, including four Americans were killed and more than 450 wounded. The acts were attributed to the al-Aqsa Martyrs Brigade and Hamas. A federal jury in Manhattan awarded the families of victims \$218.5 million which was tripled automatically to \$655.5 million under the provisions of Anti-

Terrorism Act 18 U.S.C. 2333 (a).

The lower court, the Federal District Court in Manhattan under Judge George B. Daniels on March 30, 2016 ruled, in the case Sokolow et al v. Palestine Liberation Organization et al, that the two Palestinian organizations, PA and PLO, were responsible for supporting six terrorist machine-gun attacks and suicide bombings in Israel. The District Court refused the PLO request for summary judgment on the grounds that the Court lacked jurisdiction.

Judge Daniels upheld the verdict of a jury that the PA and the PLO were liable under the U.S. Anti-Terrorism Act that allows U.S. citizens injured by acts of international terrorism to pursue the issues in federal court.

However, Judge John Koeltl speaking for the Court of Appeals held otherwise. He admitted that the terror machine-gun attacks and suicide bombings that triggered the lawsuit were unquestionably horrific. Nevertheless, referring to a unanimously decided Supreme Court case, Daimler AG v. Bauman, January 14, 2014, the Court of Appeals rejected the argument that a U.S. court has jurisdiction over a foreign company because a subsidiary of the company existed in the U.S.

In that case the Supreme Court held that the U.S. Daimler Company (in California) could not be sued by Argentinian plaintiffs for injuries to union workers suspected of being agitators by its Argentinian subsidiary when that conduct took place entirely outside the U.S. The Court could not exercise personal jurisdiction over Daimler. Neither could it exercise general jurisdiction because Daimler was not "at home" in California. The Court held that general jurisdiction cannot be exercised over a foreign company when the members of a subsidiary are unrelated to the suit.

Implicitly in the Sokolow case, the Appeals Court held that an international organization, the PLO, cannot be sued for

conduct occurring outside the U.S., and American courts have no jurisdiction in the issue.

The Federal Court of Appeals said that the Federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the U.S. Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiff's claims. It held the terrorist acts against Israel were committed outside U.S. territory, and that the lower court did not have jurisdiction to hear the case according to the due process clause.

The Court also concluded that the terror attacks in Israel were not expressly aimed at the United States, or at Americans. The Court decided it had neither general nor specific personal jurisdiction over the defendants.

The Court argued that the terrorist attacks offered no basis to conclude that the defendants participated in these acts in the U.S. The plaintiffs had argued a number of points. One was that the attacks targeted U.S. citizens and they were efforts to influence U.S. policy to favor the PLO. Secondly, the Court had jurisdiction because the Palestinians had a continuing presence in the U.S. The Court did not accept these arguments. The attacks, it said, were not expressly aimed at the conduct of the U.S., but were fortuitous and random.

The fact that a US citizen was killed does not confer specific personal jurisdiction because the actions were not aimed at the U.S. They had occurred outside the U.S. territory, and the attacks were not aimed specifically at Americans. The Court held there was no connection between PLO lobbying and the terrorist attacks on foreign soil. The Court therefore held that Palestinian lobbying in the U.S. was insufficiently related to the attacks.

The Appeal's Court therefore dismissed the civil suit for lack of jurisdiction. The decision was a setback for the attempts

to hold foreign entities liable in US courts for damages for committing terrorist acts. The Court ruled that the PA was not a sovereign "state" and did not have a base in the U.S. even though it had a mission in Washington and promoted its cause in the U.S. Palestine was the central seat of government for the PA whose authority was limited to the West Bank and Gaza. By this decision the Court, rather surprisingly, provided terrorist sponsoring entities, the PA and PLO, with U.S. constitutional rights since they were not granted sovereign immunity as a state.

It is disheartening, even morally obtuse, that terrorists should have been protected by that technicality. The moral case for justice is overwhelming when one considers that the Palestinian attacks occurred in the street, inside a bus, and in a cafeteria at the Hebrew University.

In view of decisions that allow terrorists and supporters to evade punishment on the basis of the due process clause of the Constitution, either the Fifth or Fourteenth Amendments, two actions are necessary. The first immediate one is for the Sololow case to be reheard by the entire Court of Appeals and eventually appealed to the U.S. Supreme Court. The other is for Congress to pass a law that allows U.S. courts to have both general and specific jurisdiction over terrorist acts committed outside the U.S. when American citizens are killed or wounded. Standards of civilized morality must be upheld and evil terrorists must be given the punishment they deserve.