

Editorial Board:

Judge Hadassa Ben-Itto
Adv. Itzhak Nener
Adv. Myriam Abitbul
Dan Pattir
Adv. Rahel Rimon
Prof. Amos Shapira
Dr. Mala Tabory
Dr. Yaffa Zilbershats

Editor-In-Chief:

Dan Pattir

Co-ordinating Editor:

Adv. Rahel Rimon

Graphic Design:

Ruth Beth-Or

Cover:

Zavitan Falls on the Golan Heights. Photo by Doron Horovitz. Courtesy of ERETZ Magazine.

Views of individuals and organizations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association.

JUSTICE is published by:

**The International Association
of Jewish Lawyers and Jurists**

10 Daniel Frish St., Tel Aviv 64731, Israel.

Tel: 972-3-691-0673

Fax: 972-3-695-3855

© Copyright (1996) by IAJLJ

ISSN 0793-176X

Printed by Shmuel Press Ltd.

27 Shoken Street, Tel Aviv,

Tel: 972-3-682-2056.

Advertising: Haia Meshel / Meital Lehavi

Tel: 972-5287817

TABLE OF CONTENTS

PRESIDENT'S MESSAGE / Hadassa Ben-Itto - 2

THE MIDDLE EAST PEACE PROCESS

Water In The Peace Process: Israel-Syria-Palestinians / Jitzhak P. Alster - 4

The Drawbacks of Disarmament / Yoram Dinstejn - 9

Arms Control and its Political Context / Ariel Levite - 12

Confessed Nazi Murderer Released by Italian Military Court - 15

The Priebke Trial: The Association's Exchange with the President of Italy - 16-17

**First Conviction by a Swiss Court on Basis of New
Anti-racism Code** / Myriam Abitbol - 19

Anti-Semitism in France Today: An Overview / Alain Juster - 20

FROM THE SUPREME COURT OF ISRAEL

**The Israeli Constitution after Mizrahi Bank v. Migdal
(The Gal Amendment Decision)** / Yaffa Zilbershats - 22

JEWISH LAW

The Practice of Law in the Prism of Halakhah / Daniel Sinclair - 30

Restitution of Jewish Property in Hungary / Peter Segal - 35

Report on the 52nd Session of UN Commission on Human Rights / Daniel Lack - 36

W

e are preparing this issue of Justice on the eve of the high holiday season, which marks the New Year according to the Jewish calendar. We take this opportunity to wish our people everywhere, and all our members, a happy New Year. We also urge our members, on the beginning of this new year, to re-assert their commitment to the causes which we in the association have placed on our agenda.

In view of recent events in Israel, we have chosen to address ourselves in this issue to one problem in particular, which is of paramount importance to Israelis as well as to Jews everywhere, a problem which has caused much controversy in the past, and which threatens to cause an ideological and cultural rift in our society, at present.

The relationship between orthodox and secular elements in Jewish society has been much discussed in our generation within Jewish communities everywhere, but in Israel, which is by definition both a Jewish and a democratic state, it has lately emerged as a major issue on the public agenda. This issue is of special interest to those who deal in the law, as there have been some much publicized declarations from orthodox quarters, which threaten, and may even endanger, the very basis of the rule of law, the autonomy and independence of the courts, and even the personal safety of Israeli judges.

For the first time the authority of the Supreme Court, acting in its constitutional capacity, is being openly not only questioned, but even delegitimized. For the first time freedom of expression secured in Israel by the Supreme Court is being misused to launch personal and dangerous attacks against the justices and the president of the same court, attacks which have necessitated police protection. Unfortunately these irresponsible attacks have not stopped, although they have been largely condemned by most parts of the population and by political and spiritual leaders from all sides.

The limits of legitimate free speech are once again put to the test.

We in the association have always maintained that freedom of expression should be limited to exclude hate propaganda, which might, in its cumulative effect, lead to violence. This is as true on the domestic scene, when judges are being targeted and threatened by irresponsible elements, as it is true when Jews or Jewish communities are threatened in other countries.

Along with public condemnation of these outrageous utterances, there is popular demand for a dialogue and for some kind of consensus, which would assure co-existence between orthodox and secular Jews, based on mutual understanding and respect.

Indeed, the Supreme Court supports such dialogue as it has shown lately when discussing the much controversial matter of closing a busy thoroughfare on the Sabbath, demanded by the mainly orthodox inhabitants of that particular neighborhood, and opposed by other users of the road. On the advice of the court a public committee was set up, composed of both orthodox and secular participants, to try to reach an agreement on the whole problem of diverting traffic in orthodox neighborhoods on the Sabbath and on holidays, particularly during prayers.

But this is only an isolated problem. There is a general feeling that matters have gone

PRESIDENT'S MESSAGE



too far and that the time is ripe for the conduct of a meaningful and frank exchange of ideas, not only for the purpose of reaching tactical agreement on the diversion of traffic, but to define, 50 years after the establishment of the state of Israel, how it can be, in the true sense, both a Jewish and a democratic state.

Israel is indisputably a free and modern democracy, its basic democratic values safeguarded by the declaration of independence, by newly enacted basic laws on human rights, and by a body of decisions handed down by its Supreme Court for the last 50 years. It has never been easy to reconcile these values with the "Jewishness" of the state, a term which is a matter of sharp controversy.

In orthodox quarters "Jewishness" is interpreted exclusively in religious terms, with all the dictates and restrictions of Jewish Halacha.

For secular and traditional Jews, "Jewishness" means the whole fabric of the rich Jewish heritage, which can be separated, although not totally divorced, from its religious connotations. As the Supreme Court often addresses itself, in its decisions, not only to matters of law, but also to moral, social and human values, a heated public debate is currently taking place as to the court's authority and competence to decide on those values, in its present composition.

For a dialogue of this kind to be fruitful, its participants must speak a common language and agree on some ground principles, such as the acceptance of basic democratic rules, the supremacy of the laws enacted by the elected legislature, observance of human rights, and autonomy of the courts. There must also be full recognition of the fact that Israel was established as a Jewish state, and must remain so forever.

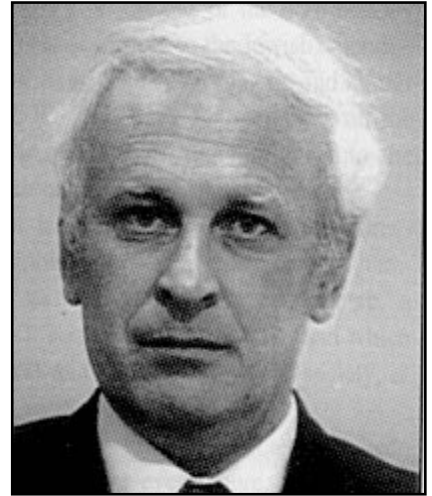
Sadly, we must admit that the widening gap between orthodox and secular Jews is largely due to ignorance on both sides. The real essence of democracy is partly, or wholly, missing from the curriculum of our schools, and the study of Jewish heritage is mostly limited to bible and Jewish feasts. Law schools teach some Jewish law, mostly in the field of personal status, which is binding in Rabbinical courts, but ignore the large body of Jewish law, which represents the collective wisdom and erudition of eminent scholars and judges whose recorded rulings in every area of the law can compare with those of any modern court. For historical reasons the study and interpretation of Jewish law has been entrusted for thousands of years to religious scholars, but there is no reason non-religious Jews should not acquaint themselves with the riches of the heritage which is rightfully theirs.

"Halacha" as such cannot replace legitimate legislation in a modern democratic state like Israel, but Jewish law, and recorded decisions of Jewish judges, can and should become a source of inspiration to people of the law everywhere and to Jewish lawyers and judges in particular. In this endeavor Jewish lawyers and jurists can make a meaningful contribution.

Hadassa Ben-Zur

Water In The Peace Process: Israel-Syria- Palestinians

Jitzchak P. Alste



Part I of this Article described the background of the issues surrounding water in the Middle East from the historical and legal perspective and portrayed in detail the provisions relating to water in the Jordan Israel Peace Treaty.

Part 2 of this Article will concentrate on the water issues between Israel and Syria and between Israel and the Palestinians.

The factor common to both situations is that no final water agreement has been reached although with respect to the Palestinians the Parties have already entered into an interim agreement.

The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the "Interim Agreement" or, as popularly known, the "Oslo 'B' Agreement") which followed in sequence the Agreement on the Gaza Strip and the Jericho Area, has transferred some of the powers and responsibilities in the sphere of water and sewage in the West Bank to the Palestinians. In addition the Agreement contains a recognition of Palestinian water rights in the West Bank which will be negotiated in the permanent status negotiations and settled in the Permanent Status

Advocate Alster is a partner in the Tel-Aviv law firm of Landau, Alster, Shimoni & Co. and is a consultant to the Water Commission, as such he serves as legal advisor to the Israeli delegation to the Israel - Jordan Joint Water Committee. Advocate Alster serves as well as the Legal Expert to the EU Water Resources Management and Agricultural Productivity (WARMAP) Program in the Central Asian Republics. The views expressed in this Article are the author's and do not necessarily represent the views of the Government of Israel. The author wishes to express his gratitude to Mr. Moshe Yizraeli for his valuable comments to a draft of this article.

Agreement relating to the various water resources. The Interim Agreement also contains specific provisions relating to the current and future uses of water by the Palestinians and established a strict enforcement mechanism over the quantum of current and future withdrawals from the groundwater aquifers.

SYRIA

Historical Background'

As described in detail in Part I of this Article, the relations between Israel and Syria in the pre-1967 era deteriorated at times because of disputes over the control and utilization of water resources. This fact should not come as a surprise, as the 1949 Armistice Line between Israel and Syria was drawn partially along the Jordan River while the 1923 International Boundary (between the then French Mandates over Syria and Lebanon on the north and the east, and the then British Mandate over Israel to the south and the west) left the water resources on the west (i.e. the Israeli) side of the boundary by drawing the line east of and at a certain distance from the River. Whereas the 1923 International Border determined that the Jordan River, its tributaries the Dan and most of the Baniyas, the Huleh Lake as well as all of Lake Tiberias were to be on the Israeli side of the border. the Armistice Agreement provided that at some places the Armistice Lines would be along the Jordan River itself. Although at some places the Armistice demarcation did not follow the 1923 International Border, no Syrian troops were permitted west of the international border and no Israeli troops

1. See also Prof. Moshe Braver, *Israel's Boundaries*, Tel Aviv 1988.

on its eastern side as the areas between the International Boundary and the Armistice Lines were designated as demilitarized zones.

Israel and Syria specifically stipulated in the Armistice Agreement that the Armistice Line should not be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting Israel and Syria. Notwithstanding the above, between 1949 and 1967 Syria claimed riparian rights wherever it had access to the water, i.e. on certain parts between its formation at the confluence of the Dan, Hazbani and Baniyas southeast from the town of Kiryat Shemona and until north of Lake Tiberias.

With respect to Lake Tiberias itself, both the 1923 International Boundary demarcation as well as the 1949 Armistice Line provided that the whole of the Lake was to be on the Israeli side of the lines and for that purpose the line was drawn 10 meters east from the high water line at the north-eastern part of the Lake from the inlet of the Jordan River to a point north of Kibbutz Ein-Gev. While at times Syrian fishermen entered the Lake with their fishing boats, Syria never had any riparian status on Lake Tiberias.

The Golan Heights

The Golan Heights, as part of the Hermon geological formation, form the basis for a significant part of the sources of the Jordan River. This includes the Baniyas (Hermon), Wazani and Hazbani Rivers as well as various smaller tributaries, both perennial as well as seasonal ones, which flow directly into the Jordan River and into the Lake Tiberias.

The sovereignty over the Golan Heights has therefore not only the much publicized military significance but determines as well the physical control over a considerable part of Israel's major surface water resources. The control over these resources has particular significance due to a number of factors. First and foremost, the physical control over these resources by Syria could enable their diversion and storage, as was indeed attempted by the Syrians in the 1960's when Syria commenced works for the diversion of the Baniyas and the Wazani.² Second, but not less important, the sovereignty over the Golan Heights determines

the river basin rights of the Upper Part of the Jordan River. With Israeli control over the Golan Heights Israel is in fact the major basin country of the Upper Jordan River with Syria having no water interests on the Upper Jordan River System.³ A Syrian controlled Golan will place it as a basin state on sources of the Jordan River as well as a direct riparian on some its eastern tributaries. A border in the thalweg of the Jordan River will have Syria as a direct riparian on the Jordan River itself.

The Yarmouk River

The Yarmouk River presents a unique situation. The River borders Syria, Jordan and Israel but has never been the subject of a signed basin agreement between all of the riparians. Absent direct relations between Israel and Syria separate agreements were concluded between Israel and Jordan on the one hand and

between Jordan and Syria on the other. Syria and Jordan concluded bilateral agreements in 1953 and in 1987 on the damming of the Yarmouk River and the utilization of the river waters stored in the dam as well as on the utilization of upstream tributaries wells and springs. The Peace Treaty between Israel and Jordan contains specific provisions on water allocations between the Parties.⁴

The sources of the Yarmouk River include a number of tributaries in Jordan and Syria with the majority of these sources located in Syria. The Yarmouk initially forms the border between Jordan and Syria until the tripartite border (Israel, Jordan, Syria) at El-Hamma

(Hamat Gader) south-east of Lake Tiberias, and forms, from that point, westward and downstream, the border between Israel and Jordan until the Yarmouk's confluence with the Jordan River at Naharayim.

The control over the Golan Heights has therefore not only the much publicized military significance but determines as well the physical control over a considerable part of Israel's major surface water resources.

2. The Syrian plan called for the diversion of these rivers across the Golan Heights into a storage dam on the Yarmouk River at Muheibe.
3. Since Syria controls a part of the catchment area of the Yarmouk River it is an upstream riparian on the Yarmouk River.
4. See part I of this Article, Justice, Issue 9, P. 11.

The El-Hamma area and westward until a point near the village of Zemach at the southern end of Lake Tiberias, also known as the El-Hamma enclave, was designated a demilitarized zone in accordance with the terms of the 1949 Armistice Agreement between Israel and Syria as it was between the Tripartite International Boundary at El-Hamma on the east and the Armistice Line on the west. No Syrian forces were permitted in this demilitarized zone and the enclave was to be under Israeli administrative control. In fact parts of the enclave were taken by force and under Syrian Army control, in contravention of the Armistice Agreement of 1949, until the six-day war of 1967 when Israel took possession of the Golan Heights.

The Syrian-Jordanian Agreement of 1953 provided in its pertinent part the framework for the construction of a dam on the Yarmouk River at a site near to Maquarin on the Jordan-Syrian border east of El-Hamma, which allows for the catching of the upstream tributaries of the Yarmouk River with the exception of the waters of the Roqad which flows into the Yarmouk River west of the proposed dam site. In addition, the 1953 agreement provided for a division of waters between Jordan and Syria for the utilization of springs and wells as well as for the construction of Syrian dams on the various upstream tributaries of the Yarmouk River. In fact the part of the Agreement relating to the construction of the Maquarin Dam was never fulfilled.

In a massive economic development plan initiated by Syria in the early 1980's a large number of dams and reservoirs were constructed by Syria on the tributaries of the Yarmouk River thereby reducing the base flow of the River, well in excess of the quantities permitted by the 1953 Agreement. As a consequence thereof the waters in the Yarmouk River available for potential downstream utilization were reduced significantly. Following contacts between the Syrians and the Jordanians a second agreement on the Yarmouk River was concluded in 1987. The second Agreement also called for the construction of a dam at Maquarin, called the Unity Dam, albeit with a reduced storage capacity resulting from the Syrian development plans. The Agreement also provided for the utilization of wells and

springs and permitted the construction of dams on the tributaries of the River. The Maquarin Dam has not been constructed inter alia for lack of international financing.⁵

The Jordan-Israel Peace Treaty makes no reference to the Syrian water uses and solely regulates the water uses between Israel and Jordan. However, any agreement between Jordan and Syria on the Yarmouk, which are the upstream users of the River, will have to take into account, at a minimum, Israel's rights as a downstream riparian on the Yarmouk River and is subject to the terms of the Jordan-Israel Peace Treaty which stipulates that artificial changes in the Yarmouk River can be made only by mutual agreement.

**Unsupervised
increase of well drill
ings and subsequent
withdrawals could
seriously jeopardize
the ability of the
downstream water
users to withdraw
water hitherto used
by them.**

THE PALESTINIANS

Factual Background

No final settlement regarding water has been reached between Israel and the Palestinians. As mentioned in the first part of this Article, the groundwater resources west of the Jordan River serve Israel as well as the Palestinian population of the West Bank. In this context two aquifers are to be mentioned:

- a. The Mountain Aquifer, also known as the Yarkon-Taninim Aquifer which extends beneath the western part of the West Bank and the Coastal Area and has its natural outlets at the Rosh Ha'ayin and Taninim Springs;
- b. The North-East (Shechem-Gilbo'a) Aquifer which extends from the Shechem (Nablus) area and north-east toward the Gilbo'a Mountain range and has its natural outlets in the Yizrael Valley.

The commonality of these two aquifers is the fact that part of their catchment areas are in the Judea-Samaria (West Bank) region and their outlets in pre-1967 Israel. Consequently any additional wells in or withdrawals from these aquifers in the mountainous regions is likely to reduce the quantity of water flowing at the natural outlets. Unsupervised increase of well

⁵ The media reported in late August 1996 that the Jordan-Syrian Water Committee had resolved to further the Unity Dam Project.

drillings and subsequent withdrawals could seriously jeopardize the ability of the downstream water users to withdraw water hitherto used by them. An arrangement had therefore to be found whereby water needs in the regions under Palestinian control would be satisfied albeit without harming the Israeli uses with the understanding that most known water resources are fully utilized. The experience in Gaza has been that numerous unauthorized water drillings have taken place since the Israeli withdrawal causing harm to the groundwater aquifer of Gaza. The difference between Gaza and the West Bank is that overutilization of the Gaza Aquifer has effects on the Gazan users only whereas overutilization of the Mountain and North-East Aquifers will harm the lower-end users in Israel.

The discussions and agreements between Israel and the Palestinians on the usage of groundwaters in the areas under control of the Palestinian Authority have to be viewed against this factual background.

The Gaza-Jericho Agreement

The Agreement regarding the Gaza Strip and the Jericho region was concluded in Cairo on May 4, 1994.

The arrangements regarding water issues in Gaza and Jericho are relatively straightforward. The Agreement provides that all water and sewage systems and resources in the Gaza Strip and the Jericho Area serving the Palestinians shall be operated, managed and developed (including drilling) by the Palestinian Authority in a manner which shall prevent any harm to the resources. The Israeli Settlements and Military Installations shall continue to be served by the Israeli water company, Mekorot. Water to be supplied by Mekorot shall be paid for by the Palestinians and specific provisions therefor were concluded.

Since utilization of the Gaza groundwaters apparently does not affect groundwaters used by Israel no specific arrangements regarding the Gaza groundwaters were required. Groundwaters in Gaza are also relatively easily accessible because of the high water tables in the region. A yielding borehole can be dug practically overnight and does not require sophisticated equipment for operation. The media has reported that since the transfer of authority in Gaza hundreds of private, unauthorized, wells have

been dug by the Palestinian population, causing thereby a reduction in the quantities of water available for consumption as well as a deterioration of the overall water quality due to the salinization of the wells.

In Jericho, the Palestinians obtained the right to utilize the local springs, conduits and wells which had also prior thereto served the town. Since these springs, like the Gaza groundwaters are at the lower end of the Aquifer, the utilization of these spring waters is likely not to affect other users.

The questions on the negotiating table apparently dealt with water rights in the West Bank as well as with satisfying additional water needs of the Palestinians.

The Interim Agreement

In the negotiations leading to the Interim Agreement (the so-called "Oslo 'B' Agreement"), the Parties sought a balance between principles and practicalities. The questions on the negotiating table apparently dealt with water rights in the West Bank as well as with the satisfying additional water needs of the Palestinians. They dealt with strictly controlling the usage of water as well as with additional quantities of drinking water to be supplied to the Palestinians. Israel was apparently also concerned that the Gaza experience of unauthorized water withdrawals should not repeat itself, since

such could affect the Israeli usage.

The result of the deliberations is recorded in the Interim Agreement.

The Principles

The arrangement regarding water in the Interim Agreement is based on the following three principles, (1) an Israeli recognition of Palestinian Water Rights in the West Bank which is to be negotiated in the permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources, (2) a joint recognition that there is a need to develop additional water for various uses and (3) an agreement to coordinate the management of water and sewage resources and systems in the West Bank with the formation of bodies to execute such coordination.

In the first principle Israel "recognizes the Palestinian water rights in the West Bank." The principle, however, continues and provides that "These will be negotiated in the

permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources." This section seems an obvious compromise between the Palestinian desire to obtain Israel's political recognition of its water rights, on the one hand, and Israel's position concerning these waters, which in addition to the general principle regarding the legal status of the groundwater, could have far-reaching practical negative effects on Israel's utilization of its groundwater resources. The first principle will, together with the recognition embodied in the second principle that there is a need to develop additional water resources for various uses, provide the framework for the permanent status negotiations in which the various water resources are likely to feature high on the priority list.

In the second principle Israel and the Palestinians recognize that additional water has to be developed for both of them. This principle recognizes that the currently available water resources are not sufficient for both parties and that additional waters for both of them are to be derived from new, hitherto undeveloped, sources.

The third principle acknowledges the interdependence of the water and sewage resources in the West Bank between Israel, Israeli users and the Palestinians and provides that coordinated management of water resources and sewage is required. The third principle further details a number of important elements of such coordination including the maintaining of existing quantities of utilization. The quantities of the existing extractions, utilizations and estimated potential of the three aquifers (Eastern Aquifer, North-Eastern Aquifer and the Yarkon-Taninim Aquifer) are specified in a separate schedule, part of the Interim Agreement.

Transfer of Authority

Israel undertook to transfer to the Palestinians the powers and responsibilities in the sphere of water and sewage related solely to the Palestinians hitherto held by the Israeli military government and the Civil Administration. These powers and responsibilities do not include issues which will be negotiated in the permanent status negotiations. It should be noted however that the powers and responsibilities are subject to the rights afforded to the Palestinians pursuant to the Interim Agreement. This will include, inter alia, the quantities which may be extracted and which are listed in a separate schedule as annual average quantities.

Additional Water

The Parties agreed that the future needs of the Palestinians in

the West Bank are estimated to be 70-80 MCM. The Parties

further agreed that the immediate need for fresh water for domestic use was 28.6 MCM and agreed to make the said quantity available during the interim period by specifying in detail the ways and means by which such be accomplished. Thus, Israel agreed, inter alia, to provide to the Palestinians additional supplies of water mainly for some of the towns in the West Bank and Gaza as well as to drill an additional well in the Jenin Area. The Palestinians took upon themselves to drill a well in the Nablus area and to develop additional resources from the Eastern Aquifer.

Any water purchased is to be paid for at the full real cost to the supplier.

Joint Water Committee

A Joint Water Committee ("JWC" entrusted with the implementation of the water provisions of the Interim Agreement was established by the Parties. The JWC deals inter alia with the coordinated management of water resources while maintaining the existing utilization of the water resources (which was specified numerically in a separate schedule), and taking into consideration the quantities of additional waters for the Palestinians as agreed. The JWC deals also with the protection of the water and sewage resources and with the overseeing of the supervision and enforcement mechanism as well as with other functions relating to water and sewage. Thus, for example, the JWC has to approve all licensing and or drilling of new wells as well as the increase of extraction from existing water resources.

Supervision and Enforcement

The enforcement of the water provisions of the Interim Agreement has been the subject of extensive provisions. Pursuant to a specific Schedule to the Interim Agreement the parties agreed to establish Joint Supervision and Enforcement Teams (JSET), each composed of at least two representatives of each side to monitor, supervise, enforce and rectify the implementation of the water provisions of the Interim Agreement concerning, inter alia, such matters as unauthorized drillings, unauthorized connections to the supply system and water uses. The JSETs were granted free and unrestricted access to all water systems, including privately owned ones, for the fulfillment of their functions.

The Drawbacks of Disarmament

Yoram Dinstein

No part of international law is as problematic as that dealing with armed conflict. And no part of international law dealing with armed conflict is as problem-...as the issue of disarmament. To explain the reasons why, I propose to trace five dichotomies followed by three brief comments.

The first dichotomy is that of total and partial disarmament. Total disarmament would mean that nowhere on this planet will any human being have access to any weapons at all. The proposition is not only utterly utopian but even dangerous. If we postulate that all States are actually to comply with such far-reaching strictures, and that all existing weapon systems are to disappear into oblivion, there is always the chance that some rogues (say, a terrorist group) will avail themselves of the resultant vacuum and - by acquiring weapons illicitly - will gain control of the whole planet (in which nobody would be able to resist them). Surely, if disarmament is to be contemplated seriously, it must also be taken with a grain of salt. Some arsenals must be kept operative if only in order to save a toothless world from potential predators.

The second, related, dichotomy is that of general and special disarmament. General disarmament would cover all types of weapons, bar none. Yet, it is not easy to define the concept of "weapons". After all, primitive man got along quite fine with just stones, flint, and pieces of wood. The Intifada showed us, if we needed a reminder, that stones can kill. Presumably, it is necessary to mark out the scope of "weapons" subjected to



conceivable disarmament as restricted to man-made armaments (manufactured with a view to being lethal or injurious to human beings). Even then, the parlance of disarmament is never general. Nobody is suggesting that governments ought to relinquish light weapons. Disarmament talks invariably encompass only selected categories of dangerous weapons.

This brings us to the third dichotomy, namely, that of conventional and unconventional weapons. The crucial question at this juncture is the disarmament of "ABC" weapons. "A" stands for atomic or, in present locution, nuclear. "B" denotes biological or bacteriological. "C"

is chemical (especially, gas warfare).

If conventional weapons are excluded from the agenda, that does not mean that we can afford to disregard or underrate them. Let us not forget that in the course of World War II, the most devastating air bombardment was that of Dresden in which only conventional weapons were used. Even in Japan, Tokyo was almost obliterated by Curtis LeMay's B-29's which turned a great metropolis into an inferno. There were more casualties in Dresden or Tokyo than in either Hiroshima or Nagasaki!

Still, it is the threat looming from unconventional weapons (especially the more sophisticated systems which have been developed since Hiroshima and Nagasaki) that is most disturbing to the public today. This is as it should be, considering that conventional weapons are apt to annihilate large numbers of human beings, but unconventional weapons are capable of exterminating mankind.

The fourth dichotomy is that of horizontal and vertical disarmament. Horizontal disarmament signifies that some countries are expected to disarm (either completely or partially), yet others are absolved from that obligation. The outlook of the Non-Proliferation Treaty (NPT) is definitely horizontal. All countries

Dr. Yoram Dinstein is Professor of International Law and President, Tel Aviv University. The text is adapted from remarks presented at the Tenth Congress of the International Association of Jewish Lawyers and Jurists, in December 1995.

other than some were denied rightful access to nuclear weapons. Who are the "some"? Those who already had nuclear weapons at the time of the conclusion of the NPT (1968). We encounter here a most discriminatory approach to disarmament, whereby the "haves" are allowed to remain "haves" and the "have-nots" are enjoined to remain "have-nots". Clearly, the underlying idea of freezing entitlements to a nuclear arsenal was doomed to failure over the years. New realities were bound to alter the perceptions of potential dangers and vital means of response. One cannot expect a "have-not" country of 1968 to desist from striving to go nuclear in 1995, if it believes that this is an existential imperative in light of recent developments.

Vertical disarmament is an entirely different proposition. It imposes a cap on the number of weapons of a particular category permissible to contracting parties. Indeed, for years the main thrust of the disarmament negotiations between the United States and the former USSR was in that direction: putting a lid on the nuclear arsenal of each. The peak number of nuclear devices in the 1980s was apparently in the neighbourhood of 50,000. The notion was to substantially reduce that figure, which was based anyhow on an overkill doomsday scenario carried to extreme lengths. I can assure you that even with 10,000 nuclear devices this whole planet can be shattered into smithereens.

The fifth and last dichotomy is that of universal and regional disarmament. Universal disarmament affects everybody everywhere. Regional disarmament is introduced only on the local level within prescribed spatial boundaries. The trouble with regional disarmament is that it cannot vouchsafe the conduct of those beyond the geographic borders of the region. Regional disarmament may work in the case of a country such as, say, Paraguay. I cannot for the life of me envisage any potential threat to Paraguay emanating from a country lying outside the South American hemisphere (although perhaps this merely exposes my ignorance in Paraguayan affairs). But for a country such as Israel, regional disarmament per se is meaningless. Even if you define the region broadly as extending from the Atlantic Ocean to the Persian Gulf, who is to

guarantee that e.g. Pakistan will not attack us? It is true that Israelis, as a rule, are paranoids. But, as you know, even paranoids have enemies. Israel indisputably has confirmed far-flung enemies, and the threats that they pose are not far-fetched.

The five dichotomies lead me to three substantive reflections. The first observation, as can be expected, is that I do not believe in disarmament which is regional, let alone bilateral or trilateral. There is simply no realistic way for a country like Israel to disarm only vis-a-vis Egypt and/or Jordan (with which we are at peace). Any such disarmament is in fact carried out also vis-a-vis Syria and Iraq (with which we are at war), not to mention Iran, Libya, etc. Disarmament by its nature applies erga omnes,

viz., towards all other countries in the world. If even one single enemy is left beyond the pale of the disarmament arrangement, you cannot afford to disarm. This is the principal problem which Israel is facing today.

The second comment concerns reciprocity. Every country is always willing to disarm in a field which is of little or no consequence to its own armed forces, but not where it would really count. Thus, Israel surely will not mind signing tomorrow a treaty that will forbid the use of aircraft carriers or nuclear submarines (of which we have none). On the other hand, if an attempt were made to disarm us and others of fighter aircraft or combat tanks, we would reject the initiative in no time at all. This is equally true, mutatis

mutandis, of other countries.

It was already the Spanish writer and diplomat Salvador de Madariaga, who used the parable of the animals and the birds getting together for a disarmament conference. The lion suggested to the eagle to dispense with talons, the eagle urged the bull to give up horns, the bull recommended to the tiger to abandon claws, and finally the bear proposed that everybody should join him in a universal hug.

The third and final reflection is that there is no disarmament - however limited - which can be instituted without inspection. Inspection is the name of the game of disarmament, for the simple reason that arms races are a progeny of mistrust. Nobody is going to trust a potential enemy to discharge its duties of

It is true that Israelis, as a rule, are paranoids. But, as you know, even paranoids have enemies. Israel indisputably has confirmed far-flung enemies, and the threats that they pose are not far-fetched.

disarmament without insisting on some verification procedure. The trouble is that, as yet, no fail-safe inspection mechanism has been developed. In Iraq we have already learnt, time and again, that - notwithstanding intensive aerial scanning supplemented by on-the-spot visitations by scrupulous and methodical inspectors - a country bent on disguising its weapon systems can do so quite effectively.

If that is the case with the most intrusive inspection in the world under the most ideal circumstances of access to suspect sites - following upon a singular victory in Operation Desert Storm - imagine how precarious ordinary inspection must be when carried out in the relations between States which must treat

each other on the basis of sovereign equality with a modicum of respect and diplomatic tact.

My conclusion is that disarmament is not a panacea. It can only be viewed as a confidence-building measure in the broader context of a peace process, a détente or any other mode of conflict resolution. Short of the millennium, when inspection will become fail-safe and it will be possible to disarm without worrying about lingering enemies far and near, I am afraid that comprehensive disarmament must remain an ideal rather than a reality.

European Council of the International Association of Jewish Lawyers and Jurists

The Presidency of the Association has decided to form a European Council of the International Association of Jewish Lawyers and Jurists to promote cooperation between its European Chapters and facilitate representation of the Association at European bodies.

In accordance with this decision, the President of the Association, Judge Hadassa Ben-Itto met in Paris, on June 17, 1996, with representatives of the European Sections of the Association from France, England, Belgium, Hungary, Switzerland, Holland, Germany, and Bulgaria. The European Council of the Association was initiated at this meeting.

The meeting was hosted by the President of the French section of the Association, Adv. Joseph Roubache, who was later appointed by the Presidency to act on behalf of the European Council.

In the evening a dinner was held in the Salons de UNESCO. The guest of honour at this dinner was Mr. Peter Lepreucht,

General Secretary of the Council of Europe and Director of the European Campaign Against Intolerance.



left to right: Mr. Peter Lepreucht, General Secretary of the Council of Europe; Judge Hadassa Ben-Itto, President of IAJLJ; Adv. Joseph Roubache (standing), President of the French section of the Association

Arms Control and its Political Context

Ariel Levite

Traditionally, there have been three goals for arms control. One, to reduce the possibility of war. The second was to reduce the cost of war, and the third was to reduce the cost in peace time. If one were to adhere to this definition of effectiveness, we cannot but come to a very sobering conclusion that arms control has had a poor track record in meeting these specific goals.

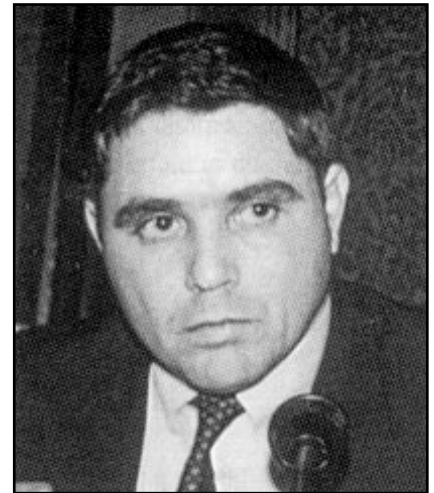
I would not agree with the cynics and critics of arms control who tend to suggest that arms control is anywhere between the irrelevant and the impossible; impossible if the political climate does not exist, and it is irrelevant if it does exist, because you in any event exceed whatever arms control commitment you have undertaken. This, for example, is currently happening in Europe where Western European countries (unlike Russia) are curtailing their militaries well beyond their CFE obligations. I would, however, concede that indeed the political context is critical for meaningful arms control.

Without the right political context, or in its absence, arms control becomes another forum or another context in which you fight each other using diplomatic means. And if you do sign agreements that purport to be meaningful, you don't necessarily live up to them, or at least some parties that count do not necessarily live up to them. Therefore the political context for arms control is the one thing that makes it possible to arrive at meaningful arrangements as well as to live by them.

One is inclined to believe now, in the aftermath of the cold war, that arms control as a process rather than as an outcome is of utmost importance precisely in the transition phases between one type of political environment (a hostile one) and another

(a friendly one) - that is, when the opportunities are opening up but have not as yet been consolidated. This is the reason we in Israel are not inclined to belittle the arms control agenda and are looking at it even, as I will point out later, more seriously than ever.

If you examine the cumulative record with arms control you will discover that there is no meaningful difference in track record between politically binding and legally binding arrangements. One often enters into politically binding arrangements as a way of side-stepping the necessity of having them ratified by the parliament. While initially there was an inclination to look at one as having inferior status, and therefore likely to be less adhered to than what is legally binding - mind you, lawyers are involved in negotiating both - if turns out that what makes the difference between these two types of agreement is the kind of a political process you undergo to make it more binding. The assessment, after a few decades of preoccupation with this agenda, is that the nature of the accession process makes virtually no significant difference, because what really counts is the political will and determination to stand by the commitment you undertake. If the political will is there you honor legally binding as well as politically binding agreements, and if it is not there you honor neither.



Dr. Ariel Levite is Deputy Director and Head of Arms Control in the Directorate of Foreign Affairs, Israel Ministry of Defense. This article is adapted from remarks presented at the Tenth International Congress of the International Association of Jewish Lawyers and Jurists, in December 1995. The views expressed here are his own.

What is also striking, if one looks at the cumulative experience, is that there is a profound difference in adherence and compliance between democracies and non-democracies. Iraq is just one case in point, but others like Iran, North Korea, the Soviet Union and later Russia, China, and so on are numerous cases where non-democracies or totalitarian regimes on the extreme do not took at their international commitments in general, and those undertaken in the context of arms control in particular, as particularly binding, perhaps not even necessarily as normatively suggestive.

Russia has been in non-compliance with the biological weapons convention on a large scale, for many years, and so has China. North Korea has been similarly behaving with respect to its nuclear non-proliferation treaty commitments, Iraq with respect to several of its commitments, and so on. I would urge you to look from time to time at the nonclassified version of the Arms Control and Disarmament Agency annual report, which the U.S. President submits to Congress on compliance with arms control obligations. Even though this is a very diplomatically and skillfully drafted document, one nevertheless can get a feel for how these treaties are indeed complied with by key partners.

One unfortunate development is that it has become increasingly apparent that we are encountering a concept of voluntary compliance. We are seeing, on the one hand, an effort to make these arms control obligations universal. And at the same time we are seeing a practice where countries actually look at them and say: Well, should I comply with this or shouldn't I? And for how long does it pay off to comply with this kind of commitment? While certain countries, which are located in more secure regions and have larger margins of security, may not look at this with as much alarm as others, countries like Israel obviously see this with a great deal of concern, particularly if they treat seriously whatever commitments they undertake upon themselves.

One could look at this even in a broader context and say that the current arms control agenda presents several very important difficulties in this domain. One I have pointed to is the selective compliance or non-reciprocal compliance. The second one is loose compliance, interpretation and reinterpretation of what this commitment actually means. The debate in the U.S. Congress over the ABM treaty is a case in point.

Another troubling aspect of the current agenda is the rewards one may receive for practicing and/or threatening noncompliance. North Korea was able to get \$4.5 billion of aid, including nuclear reactors, for not complying with the NPT. That was the only trump card it had up its sleeve, and it was able to use it rather successfully. Ukraine, another case in point, got

security assurances as well as a significant amount of money.

Another troubling aspect is the phenomenon of uncertain compliance, that is compliance for a while because the conditions are right, or the structure of incentives is right. But then the regime changes Or the structure of incentives changes and you no longer comply.

Another issue has to do with the limits on verifiability of agreements. The UNSCOM case in Iraq is Very special. It is the tightest regime ever devised by mankind, and even that, four and one-half years into the process and with Iraqi cooperation up to a point, has proven imperfect. And while it has achieved a great deal, let us concede the point that, had it not been for a few successful breaks, the last one by the defection of Hussan Kamel, that we would not have been privileged to the same amount of information, much as UNSCOM would have tried, and they have tried seriously and systematically.

Weak enforcement is also becoming apparent as a norm. We have an increasingly important effort to try to make things on a global scale, which in some ways is decoupled from the political realities in certain regions, and in fact where there are no effective deterrence mechanisms against cheating on a regional scale. Perhaps most importantly, as the agenda gets more ambitious, as you move from arms limitation all the way to disarmament, that is total elimination of certain categories of arms, the incentives for cheating are Simply rising. And that is a somewhat troubling development.

The overall Israeli approach to arms control and disarmament is determined by two principal factors. First, Israel's Jewish, western and democratic identity. And second, Israel's location in an unstable, non-democratic and mostly (still) hostile region. It is the combination of the two that produces the kind of structure in which our arms control policy has evolved.

The first consideration, that is, the Jewish, western and democratic identity, means a strong commitment to nonproliferation, trying to be part of the international community and deny others the ability to obtain weapons of mass destruction or nonstabilizing technologies. It also means that whatever commitments we undertake we are dead serious in honoring. And finally it means that we are especially sensitive to humanitarian arms control, in particular the one that is currently preoccupying the international community on anti-personnel land mines, for example, and nonhumane weapons usage.

The second consideration, that is the heavy emphasis on national security requirements, is one that has several other sources and implications. On the one hand, we are not just

finding ourselves in a precarious security situation but also taking extra risks in the course of the peace process. And there is at least a lag time, if not an uncertainty, in terms of the benefits of peace from the time you actually take the risks upon yourselves. And we are living in a volatile region. In the final analysis we have concluded that arms control arrangements, while useful, and potentially important, should not be allowed to encroach on Israel's security margins. Israel should retain and cultivate the capabilities to defend, deter and prevail, if challenged, against any adversary. It hopes to use the peace process, indeed harness the peace process, to diminish the numerous threats to its security, And it will therefore be looking at arms control as one of the dividends of the peace process and one of

the instruments to consolidate peace and reconciliation between Israel and the entire region. Still, we will never be able to take for granted Arab or Iranian compliance with whatever commitments they undertake in that process.

Therefore, while we entertain the idea of disarmament and an ambitious agenda and a comprehensive framework, we wish to pursue it on an incremental basis, in a pragmatic way, to build confidence first and then move to more ambitious undertakings. We would have to insist on openness in the process that would give us some confidence in honoring commitments, on tight mutual verification and enforcement provisions, all of which could first and foremost be attained through a regional rather than through a global process. ■

The Association Joins in Message to Srebrenica Women

The Association has joined in a message of concern and support for the women of Srebrenica, a city which lost much of its male population on one day of the civil war in Bosnia.

In response to a letter sent to Judge Hadassa Ben-Itto, President of IAJLJ,

signed by Queen Noor of Jordan, European Community Commissioner Emma Bonino, and U.S. Ambassador Swanee Hunt, the Association acknowledged its support for the Women of Srebrenica Project.

A delegation including Queen Noor,

Commissioner Bonino, and Ambassador Hunt, planned to deliver the message at an event in Tuzla commemorating the first anniversary of the fall of Srebrenica. Many of the 30,000 survivors of Srebrenica now live near Tuzla.

Some 6,000 to 8,000 Moslem men disappeared from Srebrenica on July 11, 1995, the day the city fell. Separated from the women and children, many were summarily executed and others were killed as they fled.

Two Members of the French Section Honored by Israel Universities



Two members of the French Section of the Association have received honorary doctorates from universities in Israel this year. In the photo above, Dr. Paul Fetter of Paris (right) is congratulated by Ben-Gurion University President Prof. Avishai Braverman. Mr. Feher is a member of the Board of Directors of the French Section. Mr. Jean Kahn, President of France's National Commission of Human Rights, shown in the left photo, received an honorary degree from the University of Haifa.



Confessed Nazi Murderer Released by Italian Military Court

Special Report

This special report is based on information provided to JUSTICE by Adv. Oreste Bisazza Terracini (right), Deputy President of our Association, who is representing the Jewish community of Rome in the Priebke trial.

On August 1, 1996, an Italian military court released Erich Priebke, a Nazi SS captain, who had, according to his own admission, participated in 1944 in the murder of 335 men, among them 75 Jews, at the site of the Ardeatine caves in Rome. The murder of civilians had been ordered by the Germans as an act of reprisal for the killing of German soldiers by Italian resistance fighters.

Priebke had been extradited by Argentina to stand trial in Italy (see article in Justice No. 7).

Advocate Oreste Bisazza Terracini, a Deputy President of our Association and President of the Italian section, represented the Jewish community of Rome at the trial, according to Italian law which allows civil parties to join the public prosecutor in criminal trials.

Because of the complexity of the issues raised at the trial, the court decided that the full judgment will only be published within 90 days of the acquittal, but at our request Adv. Terracini explained the legal points argued at the trial.

Issues of Jurisdiction

At the very beginning of the trial Terracini raised two preliminary arguments to the effect that the military court was not competent to try the case:

1) Priebke was extradited by Argentina to be tried for acts of genocide, crimes that lie within the jurisdiction of an ordinary criminal court, according to the law on genocide enacted in Italy in 1967. The trial had been transferred to the military court as there was an argument that Priebke cannot

be accused retroactively a crime that had not existed Italian law at the time of its commission, in 1944.

Terracini argued that the criminal court had jurisdiction as the act of murder, admitted by

Priebke, had constituted a crime under Italian law at all times, including the year 1944. The criminality of the act had not changed, only its legal definition. The court, according to this argument, should have accepted jurisdiction, and amended the charge from genocide to one of multiple murder. It was illegal and illogical, he argued, to remove Priebke from the court which had natural jurisdiction to try him for the crimes for which he had been extradited.

2) A military court was not competent to try a person who had never been a member of any military force. Terracini argued that the defendant, as an SS officer, had been part of a political police force with no connection to the German army. The function of the SS was to protect the National Socialist (Nazi) party, and a member of the SS (which was defined as a criminal organization by the court in the Nuremberg trials) was under the authority of Adolf Hitler in his capacity as party leader and not as head of the government.



The Priebke Trial: The Association's

To: Oscar Luigi Scalfaro, President of Italy

From: Judge Hadassa Ben-Itto, President of the International Association of Jewish Lawyers and Jurists

The following is the text of a letter to Oscar Luigi Scalfaro, President of Italy, from Judge Hadassa Ben-Itto, President of the International Association of Jewish Lawyers and Jurists, August 5, 1996:

As President of the International Association of Jewish Lawyers and Jurists which represents lawyers, judges and professors of law in 50 countries, I take the liberty to address your excellency on a matter which is of great concern to us.

The surprising acquittal of Erich Priebke by an Italian court has caused us profound grief and extreme shock. As jurists we respect any court decision which is based on findings of fact or on interpretation of law. Nevertheless, we do not hesitate to protest this judgment which, more than a legal decision, constitutes a moral statement.

More than 50 years after the revelation of the Nazi crimes against humanity, and particularly the extermination of 6 million Jews in the Holocaust, we would not have expected any court in a democratic country to free an admitted murderer who had,

according to his confession, participated in the brutal slaying of hundreds of innocent men, executed in cold blood, as an act of reprisal. It was not by accident that 75 Jews were among the 335 victims murdered and buried in the Ardeatine Graves in Rome.

We are aware of the fact that the full judgment of the court has not yet been published, but we have chosen to record our protest at this time, so that the Italian authorities may take it into consideration when they decide on the future treatment of this confessed criminal.

The legal community which we represent repudiates the immoral consequence of this judgment, and we believe that it would be equally repudiated by public opinion in Italy and by the responsible Italian authorities. We are confident that your country would not wish the shocking statement conveyed by this judgment to be recorded in history as the voice of Italy at the closure of the twentieth century. But this is not only an Italian matter. Erich Priebke has admittedly committed crimes against humanity - crimes condemned, prohibited and punishable by the international community under international law.

We urge your excellency and the proper authorities in Italy to act in any way compatible with both Italian and international law in order to send a clear message to the world that criminals like Priebke may never go unpunished.

In protecting human beings from the horrors of war crimes and of genocide, we must all stand up and be counted, for we are all our brothers' keepers.

Adv. Terracini has told the Association that, although the Military Court rejected both of these arguments, he is hopeful that they will be accepted on appeal.

Basis for Prescription

The basis on which the Military Court freed Priebke was the Court's ruling that the crime of which he is accused was prescribed by the passage of time.

In Italy, crimes that carry a penalty of life imprisonment are the only crimes that cannot be prescribed.

In Priebke's case, although the crime of which he was accused carries a penalty of life imprisonment, the Court ruled that he was entitled to benefit from two mitigating circumstances, which took precedence over aggravating circumstances that called for life imprisonment.

One mitigating circumstance was that, in the Military Court's view, Priebke had led an irreproachable life after the commission of the killings. Another mitigating circumstance, provided for in Italy's Military Penal Code, is that the accused obeyed an order from a superior officer, albeit an illegal order.

Exchange with the President of Italy

To: Judge Hadassa Ben-Itto, President of the International Association of Jewish Lawyers and Jurists

From: Giuseppe Panocchia, Ambassador of Italy to Israel, on behalf of Oscar Luigi Scalfaro, President of Italy

The following is a reply on behalf of the President of Italy Oscar Luigi Scalfaro, to the letter by Judge Hadassa Ben-Itto, IAJLJ President, through Giuseppe Panocchia, Ambassador of Italy to Israel, August 22, 1996:

The President of the Italian Republic, Oscar Luigi Scalfaro, to whom I transmitted your letter dated August 5, 1996, asked me to bring to your attention how himself, the Italian Government, the Parliament and the public opinion unanimately reacted to the sentence delivered by the Military Tribunal in the case of Erich Priebke.

Immediately after the verdict, President Scalfaro, although recalling the independence of the Judiciary, stressed that the massacre of the "Fosse Ardeatine" was a crime against humanity and deeply injured the Italian people as well as the conscience of all mankind.

Consequently he expressed his sorrow and bitterness together with his solidarity for the endless hardship of the families of the victims.

The President of the Republic certainly understands and respects your feelings and I wish to call your attention to the fact that, immediately after the sentencing, Priebke was re-arrested. Now he awaits the decision of the Supreme Court on the appeal for the annulment of the sentence presented by the Military Prosecutor as well as on the request for extradition presented by the German authorities.

I believe that the attitude of the Italian authorities has been of complete awareness that crimes against humanity, wherever and however perpetrated, cannot be tolerated and that those responsible must be submitted to the legal consequence of their repugnant actions.

Issues for Appeal

During the proceeding, the Public Prosecutor requested that the President of the Court be disqualified because of statements he made in the period prior to the hearing of the case. The Military Court of Appeals ruled that the Public Prosecutor's request was without basis, and it ordered the proceeding to continue.

An appeal on this point is pending before the Supreme Court of Appeals. If the Supreme Court of Appeals rules in favor of the Public Prosecutor's request for disqualification, Priebke will be retried before a new panel of judges.

After the Military Court ordered Priebke released, a further problem arose. Members of the public occupied the courthouse, preventing the judges, the accused and his lawyer from leaving the building until late in the evening. The public outcry caused the Minister of Justice to apply a temporary protective order at the request of the German Government, which was awaiting disposition of its request for extradition.

Priebke has appealed against the decision of the Minister of Justice and has petitioned to be released during the interim period.

Background: Collective Executions

On March 24, 1944, German troops occupying Rome executed 335 men, mostly Italian civilians and including 75 Jews, at a site that has become known as the Ardeatine cave or Le Fosse Ardeatine ("the Ardeatine Graves"). Fifty years later, SS Captain Erich Priebke, one of the Nazi officers responsible for organizing and carrying out the executions, was discovered in Argentina, and Italian authorities applied for his extradition to Italy to stand trial. Priebke was charged with "conspiracy in acts of violence and the aggravated murder of Italian citizens."

In statements to the media after he was apprehended, Priebke did not deny that he took part in the collective executions. He stated that his actions were lawful at the time, both as an act of reprisal and because he had not acted on his own initiative but was following orders. At the time, Germany and Italy were in a state of war.

The collective executions in which Priebke took part were in response to the killing of German soldiers by members of the Italian resistance one day earlier. On March 23, 1944, as a company of German soldiers marched by, a bomb placed by the Resistance exploded in a Rome street, killing 32 of them. Nazi occupation authorities in Rome immediately mounted a reprisal, rounding up civilians in their homes and on the streets and picking out political prisoners and Jews. For each dead German soldier, 10 Italians were to be executed.

The day after the bombing and subsequent roundup of hostages, the Italian civilians were taken out and shot to death a few kilometers outside the city walls at the Ardeatine caves, a site from which building materials were quarried.

In all, 335 hostages were executed. The total comprised 320 victims whose deaths were in reprisal for the 32 soldiers killed in Via Rasella, 10 more victims in reprisal for a soldier who had died later from injuries suffered in the explosion, and five additional victims whose presence on the death list was not attributable to the 10-for-1 reprisal ratio.

Responsibility for Executions

Two Nazi officers bore the essential responsibility for organizing and carrying out the collective executions. These officers

were Lt. Colonel Herbert Kappler, who headed the German security police command in Rome, and Priebke, who filled important executive functions in this command.

Kappler was later captured by liberation forces, convicted and sentenced to life imprisonment. Priebke was not caught at the time, nor was he tried in absentia. He vanished from Europe and, as noted, was discovered in Argentina one-half century later.

Some German defendants indicted jointly with Kappler were acquitted by the Rome Military Tribunal on July 20, 1948, on grounds that they had acted on orders from superiors. These acquitted defendants were at the bottom of the chain of command and thus not in possession of all of the facts underlying the collective punishment decreed by their superiors. Their

position cannot be likened to Priebke's, as the available evidence indicates that Priebke worked jointly with Kappler in planning the executions of 320 persons to avenge the deaths of 32 German soldiers, and that Priebke did not object to Kappler's raising the planned execution toll to 330 after the death of an additional soldier injured in the bombing.

The aggravating circumstances set forth in the indictment against Priebke were premeditation and cruelty in regard to the manner in which the collective executions were planned and carried out. As described in the verdict handed down

against Kappler, on the basis of forensic medical evidence of expert witnesses, the executions were carried out with ferocious brutality.

Victims were led to their executions in groups of five. Forced to wait outside the entrance to the cave tunnels, they heard the screams of the victims who had entered before them, punctuated by gunshots. The victims were led into the dark tunnels, where torchlight illuminated the bodies of those already dead, and they were forced to kneel with their heads bent forward to be shot in the neck. One witness testified on June 12, 1948, that the scene was so appalling that he could not muster the strength to fire his weapon. After all of the victims had been shot, mines were exploded to cut off the section of the tunnels where bodies were piled in heaps about one meter high. ■

The victims were led into the dark tunnels, where torchlight illuminated the bodies of those already dead, and they were forced to kneel with their heads bent forward to be shot in the neck.

First Conviction By A Swiss Court On Basis Of New Anti-racism Code

Myriam Abitbol

On January 1, 1995, a new anti-racist law came into force in Switzerland, after it had been approved by the Swiss Federal chambers and by a popular vote in a national referendum (see article by Philippe A. Grumbach in Justice no. 4.).

On June 25, 1996, a Swiss Police Tribunal in the district of Neuchatel applied the new law by convicting and sentencing to prison two persons for publishing a magazine which contained racist theses and articles inciting to racial hatred.

The facts of the case were not in dispute. The defendants admitted to having written and printed statements like the one frequently repeated in the magazine, that said: "We must ensure the existence of our race and the future of white children". They maintained that the statements constituted a motto for action. They admitted that the articles were racist by definition, as article 261 bis. of the Swiss penal code imposed punishment on "Whoever, publicly, incites to hatred or to discrimination against a person or a group of persons for reasons of their race or their belonging to an ethnic or religious group", as well as "Whoever publicly, through utterances, writings, images, gestures, assaults or in any other manner, lowers or discriminates in any way that breaches the human dignity of a person or a group of persons by reason of their race, of their belonging to an ethnic group, or to a religion".

The accused based their defence on the fact that the magazine was not on sale to the public at large, but was privately mailed to some 50 persons who shared their views. They contended that by doing so they had not publicly expressed their ideas, and the only public expression of racist material attributable to them was extracts of their articles reproduced by a newspaper which revealed the existence of their magazine.

The court held that these contentions of the accused reflected an incorrect interpretation of what constitutes public expression in terms of article 261 bis of the penal code.

In the judgment the court quoted a former opinion of the Swiss Federal court, which dealt with article 259 of the penal code, and held that the offense is committed when written material is commonly accessible and the possibility exists that it will be read by people beyond the limited circle of those to whom the publication was originally directed.

Under the new article 261 bis, the court said, racist propaganda is punishable when it addresses one or more persons, whether they agree or disagree with the author's opinions.

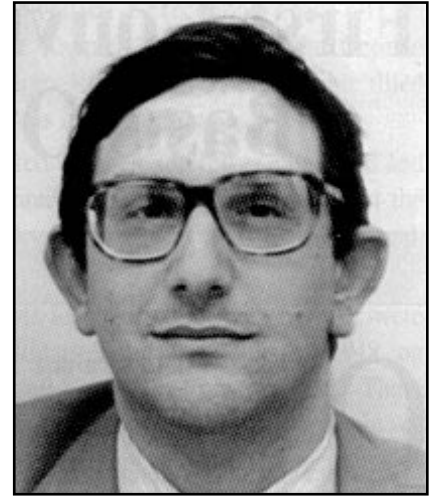
In this case, the court said, even if the accused wished to address mainly those who share their views, the method of distribution of the magazine proved that the publishers lacked control over the ultimate list of readers to whom it may be disseminated. In setting sentence the tribunal took into account, as an aggravating circumstance, the fact that in making the racist utterances the accused had acted deliberately and systematically, not in the heat of emotion.



Adv. Myriam Abitbol is a member of the Executive Committee and the Council of the Association.

Anti-Semitism in France Today: An Overview

Alain Juster



The anti-Semitism situation in France can be characterized by the three following parameters:

- 1) Revisionism as a political leverage;
- 2) The National Front in search of new respectability;
- 3) The attraction of Islamic extremism for French Arab-Muslim youth.

Revisionism as a Political Leverage

To understand the impact of revisionism today in France, it is necessary to give its political background and motivation.

First, the reality of the Holocaust is a strong argument against the ideology of those who would like a return of the extreme right on the political scene.

It is thus vital in their eyes to deny the reality of the Holocaust, because in this way the Nazi regime could be rehabilitated.

More striking is the position of some extreme left groups who hate Jews or Judaism because of an equation made between Jews and capitalism or Israel and imperialism.

This explains why revisionism was

Advocate Alain Juster is a member of the French Section of the Association.

founded by a socialist, Paul Rassinier, after the war and has been entertained by an extreme left publisher, La Vielle Taupe (the old mole).

Revisionism has become a political stake for these movements because the reality of the Holocaust is:

- an obstacle to a true revolution by giving credit to the value systems of U.S. imperialism and bureaucratic bolshevism, both winners of the war against nazism;
- political leverage for the Zionist movement to obtain a national state from the United Nations at the expense of the Palestinian people and at the service of U.S. imperialism in the Middle East.

But denial of the Holocaust can be more subtle and is all the more dangerous. It thus takes the guise of an inappropriate comparison where the Holocaust appears as no more important than other slaughters in history like those blamed on Israel at Sabra and Shatilla or at Deir Yassin.

This type of denial fulfills two more functions:

- relief from a guilt complex toward the Jews;
- justification to use anti-Semitism as a weapon against Israel's "imperialism" and "crimes."

This latest approach has been adopted by Roger Garaudy, author of a book published this year, *The Founding Myths of Israeli Policy*. Because of this book, Garaudy faces charges of "contesting the reality of crimes against humanity."

But the most striking aspect in this case has been the support Garaudy received from Abbe Pierre, a French veteran campaigner for the homeless since the 1950s and one of the most popular personalities in France. The polemic went so far that Abbe Pierre declared that he was a victim of the international Zionist lobby.

Under the pressure of the Catholic hierarchy and the charity Emmaus that he founded after World War 11, he backed off and declared he would "bow to the opinion of church experts" on the subject. Abbe Pierre's backing off seems to have been obtained, according to his own words, more by hierarchical pressure than by sincere repentance.

The fact that someone who is considered far from the extreme right (or left) gave his support to Garaudy has strengthened the revisionist movement. This

shows that revisionism has obtained a growing sympathy among the French public even though it is still a small minority.

The National Front in Search of New Respectability

During the 1980s, a strong extreme right party called the National Front emerged on the French political landscape. This party received about 15 percent of the vote in the last elections.

Its leader, Jean-Marie Le Pen, has been titillating his audience by denouncing immigration policy and its danger to France's identity.

But, at the same time, he has adopted a strategy of provocative assertions such that the Holocaust is a mere detail of World War 11, so as to draw the attention of the media and to get people used to anti-Semitic rhetoric often hidden under the terms internationalism or cosmopolitanism.

The National Front aims at reviving anti-Semitism by presenting Jews as the oppressors of the French nation. Evidently the National Front, for its members, is the only authentic nation.

The movement is so deeply rooted in anti-Semitism that the National Front took a stance of supporting Iraq during the Gulf War, favors Iran (which finances an extreme-right bookshop, in France) and gave its support to Garaudy.

Sharing the same view on Jews and Israel as the National Front, Iraq and Iran forget the little political divergence about the fate of Arabs in France.

At the same time, Le Pen has understood that he should underplay his extreme-right rhetoric in order to reinforce the political strength of the party.

One of the main themes of his last

political campaign asserts that the National Front is not an extreme-right party.

This qualification, actually, scares some voters who would otherwise vote for the National Front.

So, a few months ago, the National Front won a proceeding against the newspaper *Le Monde*, which was forced to print a written answer from Jean-Marie Le Pen, who had protested against the qualification of his party as an extreme-right party.

Despite the reaction of the press, the National Front has little by little won a kind of respectability for a certain fringe of the French population and represents a second factor in the growth of anti-Semitism.

The Attraction of Islamic Extremism for French-Arab Muslim Youth

For Islamic extremists, the "war" between Islam and the Occident has replaced the fight between capitalism and socialism prior to the end of the cold war.

These movements have succeeded in attracting fringes of French Arab-Muslim youth to take part in this grandiose fight between Israel and the Occident.

Last July, a French Arab-Muslim group placed bombs in the underground in Paris and also in front of a Jewish school near Lyon. French police subsequently found one of the criminals, Khaled Kelkal, and killed him after a televised chase.

This was apparently the first time that French Arab-Muslims have been involved in a bombing in France. This is a new danger, as the terrorism emerges

from within French territory and consequently needs less support from outside.

Even more worrying is the reaction of many members of French Arab-Muslim youth, analogous to that of Djamel Bouras.

Mr. Bouras won a gold medal in judo at the Olympics in Atlanta and is a very good example of the success of a French Arab-Muslim. In an interview, he claims to be a practicing Muslim and gives this answer to the case of Khaled Kelkal:

"Integrism, I don't want to hear this word. People mix everything: integrism, religion.... I am not qualified to talk about all that. But as for Khalid Kelkal, I can give you my personal feeling, no more. I did not like to see him killed on television. Did anybody think of the immense suffering of his mother, of his family? It is not admissible. As for the rest, I don't have to judge. I am used to say: Only God knows."

So, Mr. Bouras criticizes the way the media broadcast the killing of Khaled Kelkal but, at the same time, he does not want to utter a moral judgment on "the rest" because only God knows. Not a word of sympathy for the victims or against Kelkal's ideology.

This passive attitude is very dangerous inasmuch as it develops a kind of indifference or tacit approval toward an ideology in which anti-Semitism is one of its most essential components.

In conclusion, the greatest danger I see for the growth of anti-Semitism in France is this alliance of the three factors mentioned above. This constitutes in the political and social landscape a threat which should not be overlooked.

The Israeli Constitution after Mizrahi Bank v. Migdal (The Gal Amendment Decision)

Yaffa Zilbershats

United Mizrahi Bank v. Migdal Cooperative Village. C.A. 6821/93, 1908/94, 3363/94 (not yet published) (judgment delivered November 9, 1995) Before a panel of nine Justices of the Supreme Court



In its decision in the matter of United Mizrahi Bank v. Migdal Cooperative Village, the Supreme Court confronted for the first time what Judge Cheshin referred to as "the question of all questions ... which is a giant among giants" - that of the constitution in Israeli law. More than a single, great question, it is a braid of intertwined questions: Is there a constitution in Israeli law? Is the Knesset authorized to frame the State's constitution? Can the Knesset place limits upon its own power, and can it tie the hands of future Knessets by establishing normative arrangements that restrict its ability to enact future legislation? What is the status of laws that are incompatible with the provisions established in Basic Laws?

Since the establishment of the State, those questions have

Dr. Yaffa Zilbershats is a member of the Faculty of Law of Bar-Ilan University, Israel, specializing in Constitutional Law and International Law. Her article, "Highlighting Constitutional Changes in the Israeli Legal System," appeared in JUSTICE, Issue No. 7. Shortly before its publication, the Israel Supreme Court delivered its landmark decision on the Gal Law.

been hotly debated by legal scholars and carefully avoided by the Supreme Court. The first case in which these questions received in-depth, comprehensive examination by the Supreme Court resulted from a District Court decision to invalidate a law that it held to be repugnant to Basic Law: Human Dignity and Liberty. The law overturned by the District Court was an amendment to a law commonly referred to by the name of the Knesset member who introduced it, the "Gal Law". The Supreme Court's comprehensive decision in the matter is therefore known as "the Gal Amendment Decision".

I shall examine the decision in five stages. First, I will describe the chain of events that led up to the case. The bulk of this article will then be devoted to presenting the different approaches of the judges who grappled with the problem of the Knesset's authority to establish a state constitution, while considering the issue of whether or not the Knesset can limit its own authority. In the third part of this article, I will examine various legal aspects raised by the judges in regard to the normative relationship between Basic Laws and regular statutes. The fourth part of this article will consider the constitutional remedy of the invalidating of laws by the courts on the grounds of inconsistency with Basic Laws. Lastly, I will describe how the principles established in the decision were applied to the specific case of the invalidation of the amendment to the Gal Law,

It should be noted that due to the importance of the questions

raised by the decision. a nine-judge bench heard the appeal. Three judges - Shamgar, Barak and Cheshin - wrote lengthy, detailed opinions. The remaining Judges - Bach, Goldberg, Zamir, Tal, Levin and Matza - wrote shorter opinions, concurring with their colleagues while contributing certain important distinctions of their own. As I earlier noted, the decision is quite lengthy and detailed. It will be examined here in the five stages delineated above.

The Facts, the District Court's Decision and the Supreme Court Appeal

On 12 March 1992, the Arrangements in the Family Agricultural Sector Law, called the "Gal Law", went into effect. The law was enacted following a severe economic crisis that had befallen the agricultural sector some years previously, and after various attempted solutions failed to solve the problems of agriculture.

The purpose of the law was to rehabilitate the agricultural sector and prevent its liquidation. The method chosen for achieving this goal was not that of saddling the public treasury with the burden of rehabilitation, but rather the placing of that burden upon the creditors. The law established that creditors could recover their debts neither in the courts nor in the execution office but only by means of a special body created for the purpose, called "HaMeshakem" (meaning: the rehabilitator). HaMeshakem was granted broad powers to reschedule debts, liquidate a debtor's assets, and force creditors to forgive part of the debt.

The original Gal Law that entered into force on 12 March 1992 dealt with debts created on or before 31 December 1987. The Supreme Court's decision does not concern that law but the amendment to it that was passed on 13 August 1993. The amendment extended the original cut-off date to 31 December 1991, thus applying the arrangement to debts incurred during an additional four-year period after that established in the original law.

The reason that the Court's decision was limited to the amendment is due to sec. 10 of Basic Law: Human Dignity and Liberty. Under that section: "This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law." Inasmuch as the Gal Law went into effect on 12 March 1992, and Basic Law: Human Dignity and Liberty entered into force only some days later, on 25 March 1992, the validity-of-laws principle applied, and the constitutionality of

the original Gal Law could not be challenged under the Basic Law.

Both the District Court and the Supreme Court considered whether an amendment to the original law formed part of the pre-existing law, or whether it constituted new law that could be constitutionally reviewed. Both courts concluded that an amendment should be viewed as a new law that is not subject to the validity-of-laws principle. The District Court examined the amendment in light of the Basic Law, and found that it infringed the property rights protected under sec. 3 of Basic Law: Human Dignity and Liberty. HaMeshakem, which was responsible for carrying out the arrangements, was authorized to cancel part of a debt, to reschedule repayment of a debt over an extended period, and to order the partial realization of a debtor's property in a different manner than that employed in execution proceedings. Thus, the creditor would not recover all his money, and his property rights would suffer. The District Court examined this infringement in light of the criteria set out in sec. 8 of the Basic Law, and concluded that it did not meet the requirements of that section. According to sec. 8, rights recognized under Basic Law: Human Dignity and Liberty can be violated only "by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required". The District Court concluded that the amendment was inappropriate to the values of the State of Israel in that it violated two aspects of the equality principle: first, it placed the burden of rehabilitation exclusively upon the creditors, that is on part of the public, and second, it created arrangements only for part of the agricultural sector rather than for the entire sector. The District Court further held that the law did not serve a proper purpose. Why, it asked, was the amendment necessary, when rehabilitation of the agricultural sector could have been achieved by means of the original law. The District Court also found that it had not been proved that the amendment did not exceed what was required, as stipulated in sec. 8 of the Basic Law.

Thus, the District Court concluded that the amendment should be annulled. This conclusion constituted a new development in the Israeli legal system, and it was the focus of great interest and comment. The reason for this was that no Israeli court had ever overturned a law for the substantive reason that it was repugnant to fundamental principles. In the past, the Supreme Court had held certain laws to be void because they had been enacted in a manner inconsistent with a Basic Law. For example, sec. 4 of Basic Law: The Knesset establishes the nature of Israeli elec-

tions. Among other things, it establishes that elections will be equal", that is that they will be in accordance with the principle of equality. Section 4 further establishes that its provisions can be amended only by a majority of the members of Knesset, that is by a vote of at least sixty-one members of Knesset. When, in the past, election laws were enacted contrary to the principle of equality, the Supreme Court accepted jurisdiction to examine whether they had been passed by the required majority. When it found that they had not been enacted by that majority, the Court held that they would not be in force unless amended so as to accord with the principle of equality, or unless passed by a majority of sixty one. Once the laws garnered the necessary majority, the Court refused to annul the laws on the substantive grounds of their violating the principle of equality.

The District Court's decision on the Gal Law was the first instance of a court invalidating a law by reason of its being repugnant to a substantive provision of Basic Law: Human Dignity and Liberty. Of course, appeal was made to the Supreme Court. The entire legal community waited in expectation of the Supreme Court's ruling that would decide this weighty issue: Is an Israeli court competent to abrogate a law of the Knesset for repugnance to substantive principles established in Basic Laws?

That question confronted the Supreme Court for the first time with the need to examine the status of Basic Laws in relation to regular laws passed by the Knesset. This meant that the Court had to consider whether the Basic Laws of the State of Israel formed a constitution. Because the Basic Laws were enacted by the Knesset, the Court also had to consider whether or not the Knesset had the power to enact a constitution, and if so, on what basis.

The Knesset's Power to Enact a Constitution

Nine judges of the Supreme Court convened to hear the appeal against the District Court's decision to annul the amendment to the Gal Law. Eight of them concluded that the Knesset did indeed have the authority to frame a constitution. Only one judge, Cheshin, was of the opinion that the Knesset does not have the authority to establish Israel's constitution. In examining the opinions of the eight judges who held that the Knesset is the body authorized to institute and establish a constitution, we find two primary approaches. One is that of Judge Barak, with whom five judges concurred. The other is that of Judge Shamgar. Judge Bach agreed that the Knesset had the authority to establish a constitution, but he argued that the instant case did not require

that the Court decide upon the issue of the source of that authority. In his opinion, it was sufficient for the present to hold that the Knesset possessed the authority. According to Bach, the Court will only have to decide upon the question of the source of the Knesset's authority if the Knesset enacts a substantively or formally entrenched Basic Law and that law is challenged as unfit to be included in the framework of Basic Laws.

Judge Barak's Approach: Judge Barak bases the Knesset's authority to establish a constitution on the doctrine of constituent authority. The Knesset has two functions, or figuratively speaking, it wears two hats. In most instances, it wears its legislative hat and exercises its lawmaking power. However, it occasionally removes its legislative hat and puts on its constituent-authority hat. It then exercises its power to frame a constitution. The Knesset exercises its constituent authority when it enacts Basic Laws that form part of the State's constitution. According to Barak, the Knesset derives its constituent authority from the constitutional continuity that began with the Declaration of Independence and by virtue of the fact that the Knesset is perceived in the Israeli national consciousness (which includes the views of most legal scholars, the Supreme Court, the Knesset itself, and the general public) as having the authority to frame a constitution for the State of Israel.

Constitutional continuity began, as stated, with the Declaration of Independence. The National Assembly that proclaimed the establishment of the State of Israel in the Declaration of Independence on 14 May 1948 also established that elections would be held for a Constituent Assembly that would frame the country's constitution. According to the Declaration of Independence, elections for the Constituent Assembly were to be held on 1 October 1948. However, as the fledgling state was drawn into a war immediately upon its establishment, those elections were not held on time. In the interim, in accordance with the Declaration of Independence, the National Assembly became the Provisional Council of State. The Law and Administration Ordinance, enacted by that Provisional Council of State, established in sec. 7(a) that the Provisional Council of State would itself be the legislature. A later law enacted by the Provisional Council of State - the Constituent Assembly (Transition) Ordinance - established in sec. 3 that the Constituent Assembly would have all the powers vested by law in the Provisional Council of State. In other words, the Constituent Assembly elected in January 1949 held two powers.

It had the original power to frame a constitution granted it in the Declaration of Independence, and it had the legislative power granted it by the Constituent Assembly (Transition) Ordinance as heir to the powers of the Provisional Council of State.

Upon the election of the Constituent Assembly, the Provisional Council of State was dissolved. The Transition Law enacted less than a month after the elections for the Constituent Assembly established that Israel's legislature would be called the Knesset, and that the Constituent Assembly would be called "the first Knesset".

There is no question that the first Knesset held both constituent and legislative powers. But the first Knesset did not frame a constitution by the end of its tenure. The question open for debate is, therefore, did the constituent power pass to the second Knesset and to those convened thereafter.

Judge Barak presents arguments for and against the transfer of constituent authority to the Knessets that followed the first Knesset. The arguments for are based upon a resolution passed by the first Knesset. The "Harari Resolution" named for the member who introduced it - charged the Constitution, Law and Judiciary Committee with the task of drafting a constitution. The constitution was to be composed of chapters, each chapter being a separate Basic Law. The chapters would be brought before the Knesset, if and when the committee finished its task, and all the chapters would together form the constitution of the State. It would thus seem that by the Harari Resolution the Knesset decided to frame the constitution gradually in stages. It is therefore clear that future Knessets were authorized to realize that resolution. Moreover, the first Knesset enacted the Second Knesset (Transition) Law by which it transferred its powers to the second Knesset and to those that would follow. The argument is that the law transferred all the powers of the first Knesset, that is it transferred both legislative and constituent powers. Barak notes that the powers would have transferred even without that law inasmuch as the Knesset holds authority by virtue of its being an organ of the State, and that authority clearly transfers from one Knesset to its successor. The arguments against the Knesset's authority to frame a constitution

contend that the Knesset's constituent power must itself be established in a Basic Law and that it cannot lie in the Harari Resolution, which is not even a law, nor in the Second Knesset (Transition) Law, which is not a Basic Law. The Constituent Assembly (i.e. the first Knesset) had a popular mandate, but having been dissolved, any new constituent assembly would require an express mandate from the people. In the absence of such a mandate, there can be no constituent power. Judge Barak notes that the dilemma regarding constitutional continuity raised by the foregoing arguments was germane to the period following independence. But today, nearly fifty years later, there can be no retreat from the broad national consensus that it is the Knesset that is empowered to frame a constitution. This broad national consensus is based upon a complex of facts. First and foremost, over the years the Knesset has implemented the Harari Resolution in enacting eleven Basic Laws, and it has viewed itself as authorized to do so. The vast majority of Israel's legal academicians has viewed and continues to view the Knesset as having constituent power. and therefore, as authorized to frame a constitution. The Supreme Court, too. has held that Basic Laws have supra-constitutional standing, and the public considers the Knesset to be authorized to frame a constitution. Barak therefore concludes that, in reliance upon constitutional continuity and the national

The Supreme Court has held that Basic Laws have supra-constitutional standing, and the public considers the Knesset to be authorized to frame a constitution.

Knesset can be said to have constituent consciousness, the power.

The legal significance of this conclusion is that when the Knesset puts on its constituent-authority hat and passes a Basic Law. it can restrict the legislative powers of the Knesset. Such restriction can take the form of substantive entrenchment when a Basic Law provides that every governmental authority, including the Knesset, must abide by the principles established in the Basic Laws, or when a Basic Law provides that it cannot be varied except in accordance with the express criteria that it establishes. Entrenchment can also be of a formal nature, as when a Basic Law provides that it cannot be changed by a regular law, or that it can be amended only by a special majority (e.g. 61, 70 or 80 members of Knesset), or both formal requirements together.

Summing up his position, Barak concludes that in this decision the Supreme Court declares that the Knesset holds constituent authority, and that its constitutional enactments stand above its legislative acts. Whereas the Knesset's legislative power continues for all time, its constituent power is temporary, and it will cease when the Knesset, as constituent assembly, declares that it has completed the process of framing the constitution. The constitution itself will set forth the means for its future amendment.

As earlier stated, five judges concurred with Judge Barak in this regard. As they formed a majority of the bench, the Knesset's constituent authority can be said to be a matter of decided law. This, upon the presumption that the decision is not entirely obiter dictum, inasmuch as Judge Barak and all the concurring judges decided, for other reasons that will be presented, not to overturn the amendment to the Gal Law.

Judge Shamgar's Approach: Judge Shamgar bases the Knesset's constituent authority upon the theory of the Knesset's unlimited sovereignty. According to his approach, the Knesset is sovereign. Its sovereignty allows it to enact any law, including primary legislation, secondary legislation, and even constitutional legislation. The Knesset can enact supra-statutory laws in the form of Basic Laws and in the form of a constitution in its entirety.

Because the Knesset can establish any norm, it can establish norms that restrict its own power and that of ensuing Knessets. That is the meaning of sovereignty. The Knesset can restrict its power both substantively and formally.

The other members of the bench did not concur in Judge Shamgar's approach. As earlier stated, Judge Bach left the question open whether to adopt the approach of Shamgar or of Barak in regard to the Knesset's constituent power. All the other judges concurred with Barak's opinion, with the exception of the dissenting opinion of Judge Cheshin.

The Approach of Judge Cheshin: The presentation of Judge Cheshin's approach is best begun by quoting his opinion: "... we have heard of the issue of constitutional construction, we have heard of the issues of the Court's authority, or the lack thereof, to overturn laws repugnant to the provisions of the constitution ... but we have, to date, not heard of any debate as to whether a particular body acquired authority (historical and legal) under law to give the nation a constitution. We certainly have not

heard of this question as one of law that can be decided by the Court ... the differences of opinion on this question themselves testify to the difficulty in concluding that today's Knesset holds constituent power."

Judge Cheshin does not disagree with the position of Judges Barak and Shamgar that the first Knesset was authorized to frame a constitution. However, as opposed to them, he is of the opinion that such power did not carry over to the subsequent Knessets.

According to his approach, the transition laws established continuity only in regard to the enacting of laws. When the first Knesset dispersed without leaving a written constitution, the Knesset's right to frame a constitution ended. Why" Cheshin enumerates several reasons:

- a) The authority to frame a constitution was granted by the people in the elections for the Constituent Assembly. The Constituent Assembly that became the first Knesset ceased to exist, and in order to frame a constitution a new mandate must be obtained from the people.
- b) A regular law, like the Transition Law, cannot transfer constituent authority. In order for the first Knesset to transfer its constituent power, it had to do so as a constituent body by means of a Basic Law and not by means of regular legislation.
- c) Quotations of members of the first Knesset show that it was never intended that constituent power be transferred to subsequent Knessets.
- d) The Harari Resolution was a compromise and did not create a continuity of constituent power. The resolution established that Basic Laws would be enacted which would, in the future, become the constitution. It is not clear how this was to be achieved or when, or what the legal status of the Basic Laws would be. The answers to these questions remain unclear, they have yet to be considered. and the Harari Resolution provides no answers whatsoever.
- e) The Declaration of Independence spoke of a "constitution". But in the debates and disagreements of the first Knesset we find that even then it was unclear whether the intent of the Declaration of Independence was a formal constitution or merely a material constitution that would delineate the basic guidelines of the State. If this was already unclear to the first Knesset, it could not empower future Knessets to draft a constitution.
- f) Cheshin rejects the complex of legal circumstances - the

Knesset's view of itself, the position of legal writers and commentators, and the approach of the Supreme Court - as a basis for the Knesset's constituent power. In his opinion constituent authority must be absolutely clear and unequivocal, while Barak relies entirely upon debatable sources. Cheshin shows that there were members of the first Knesset who opposed constituent authority, there were scholars who did not agree to it, and the Supreme Court did not provide a consistent body of case law that would support such authority. When we are talking about a constitution, says Judge Cheshin, the evidence of authority to establish it must be solid.

- g) Cheshin points out that the first Knesset did not establish a constitution because it was unclear that the people wanted one. Since the first Knesset, there has been no clear statement by the public as a whole that it is ready to accept a constitution and that it grants the Knesset the authority to provide that constitution. The Basic Laws were not always passed by overwhelming consensus. Even when Basic Laws concerning such central issues as human rights were passed, attendance was sparse. Only 54 members of Knesset were present for the vote on Basic Law: Human Dignity and Liberty. Only 32 voted in favor of the Basic Law, 21 voted against it, and one abstained. Where were the other 66 members of Knesset on that momentous occasion when a central chapter on human rights was added to the State's constitution? Cheshin suggests that most members of Knesset lacked any perception of the significance of enacting that law as a central chapter of the constitution, and that in itself should be sufficient to deny it any such status. A constitution, argues Judge Cheshin is enacted with full awareness, with consent, publicly, and with a direct mandate from the people. It is not enacted like the Basic Laws concerning human rights, in haste, and with neither awareness nor appreciation of their significance and importance.

Judge Cheshin's opinion did not win the support of any of the other judges, and it stands as a one-man dissent.

Judge Cheshin goes on to present a most interesting view on the subject of the Knesset's ability to limit its own power. According to Cheshin, an absolute majority, i.e. 61 members of Knesset, is democratic as it represents a true majority. It is only by reason of convenience that the Knesset's rules establish that, unless otherwise stated, a simple majority - i.e. a majority of

those present - is sufficient. According to Cheshin, in keeping with the democratic principle of majority rule, a majority of 61 cannot restrict the powers of the Knesset. Moreover, any requirement of a law or Basic Law that amendment be made by a majority of more than 61 members of Knesset lacks force. This approach, too, remains a oneman dissent.

Basic Laws and Regular Laws - Constitutional Aspects

If the majority opinion is that Basic Laws form part of the State's constitution, and that they stand on a supreme normative plane above that of normal laws, then the legal aspects of those conclusions must be examined. Indeed, the judges who handed down the decision devoted considerable space to considering the conclusions to be drawn from the constitutional status of Basic Laws in general and of Basic Law: Human Dignity and Liberty in particular. As it is my purpose in this article to focus upon the question of the Knesset's constituent authority and its power to restrict itself, I shall not go into a lengthy discussion of this topic but rather review some of the salient points.

First, both Barak and Shamgar point out that it was previously held that a Basic Law can be amended by a regular law. In the instant case, they held that the Court must reverse that ruling, and that it must, in the future, take care that every amendment to a Basic Law be made in a Basic Law, inasmuch as the change must be consonant with the normative level of the object of that change. Just as a statute cannot be amended by a regulation, so a Basic Law cannot be changed by a normal law. This must be the rule whether the Basic Law expressly provides that it can be amended only by another Basic Law (as in sec. 7 of Basic Law: Freedom of Occupation) or whether the Basic Law is silent upon the issue of change (as in Basic Law: Human Dignity and Liberty).

The judges further ruled that a distinction must be drawn between amending a Basic Law and violating it. A Basic Law can be violated by a regular law, subject to the conditions set out in the limiting clause of the Basic Law. For example, sec. 8 of Basic Law: Human Dignity and Liberty establishes that: "There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required." Thus, if fights under the Basic Law are violated by a law that meets the conditions of sec. 8, the law is valid. However, if the violating

law does not meet one of the conditions set forth in sec. 8, the law is unconstitutional and can be declared void.

This is, in fact, another very important innovation of the decision under discussion. The Supreme Court expressly establishes that a law that is repugnant to a Basic Law in a manner inconsistent with the limiting clause will be overturned by the Court. (Judge Cheshin disagreed with this conclusion, as well. In his opinion, a regular law can violate a Basic Law even without meeting the requirements of the limiting clause if it does so expressly).

The two most recently enacted Basic Laws - Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation - comprise limiting clauses (sec. 4 of Basic Law: Freedom of Occupation and sec. 8 of Basic Law: Human Dignity and Liberty) that establish criteria for enacting a regular law in violation of a Basic Law. However, unlike these two Basic Laws, the other Basic Laws do not comprise limiting clauses. Judge Barak raises the question of the rule that would apply to a regular law that violates a Basic Law lacking a limiting clause like that in sec. 8 of Basic Law: Human Dignity and Liberty. Until the decision under discussion, the case law had held that such a law, if passed with the requisite majority, was valid. Judge Barak reopened the issue but left it in abeyance.

Judicial Review of Legislation

The Court's conclusions that Israel's Basic Laws are a constitution, and that laws that do not meet the requirements of a Basic Law and that violate it in a manner prohibited by the Basic Law will be overturned, open a new chapter in Israeli constitutional law in which the Court will develop judicial review of legislation.

Since the Harari Resolution provided for framing Israel's constitution in stages, certain basic constitutional questions have yet to be settled. For example, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty do not establish a constitutional remedy for a situation in which a law deviates from the Basic Law. Basic Law: Human Dignity and Liberty does not say what the fate of a law like the amendment to the Gal Law would be if the Court were to find that it infringed the right to property in a manner inconsistent with sec. 8. The District Court that considered the constitutionality of the amendment to the Gal Law was the pioneer. It ventured into the void and filled the lacuna in its decision to overturn the law. The

District Court thus established the constitutional remedy for a law repugnant to a Basic Law.

Judge Barak, together with the other members of the bench, held that the remedy in the event that a law be found unconstitutional is voidance. The authority to decide upon the constitutionality of laws resides in the courts. Just as the courts are authorized to declare the voidance of secondary legislation that contradicts a law, so are they authorized to declare the voidance of a law repugnant to a Basic Law.

Judge Barak and his colleagues do not expressly state whether every court could declare a law to be invalid, or whether that power resided only in the Supreme Court. Judge Cheshin points out that one may infer from their silence that every court is so authorized. In his opinion, this power should be reserved to the Supreme Court, and a procedure should be established for transferring constitutional questions from the lower courts to the Supreme Court.

In the context of nullifying laws, the judges raised the question of the burden of proof but could not arrive at a consensus, and the issue was left undecided. All the judges agreed that a party that raises the claim that a law is void must show it infringes a right. If the court accepts the claim, the question that remains is who would then shoulder the burden of proving that the law fit the values of the State of Israel, was designed for a proper purpose, and that it did not overly infringe the right. Perhaps the burden of proof should be such that it would be necessary to show not only the infringement of a right but also that the law did not meet those criteria. The judges expressed various opinions but most left the question undecided inasmuch as its answer was not necessary to deciding the instant case. They promised, however, to reconsider the matter at a later date.

The Amendment to the Gal Law - Should it be Overturned?

The judges were able to leave the question of the burden of proof, as well as other questions, in abeyance because all of them, including Judge Cheshin, concluded that the District Court had erred and that the amendment to the Gal Law should not be overturned.

The first question addressed by the judges was that of infringement of the right to property. First, they had to define the term property as used in the Basic Law. Judge Barak opted for a broad construction. In his view, the underlying foundation of the constitutional right is the protection of possessions. Therefore,

property, in the sense that it appears in the Basic Law, refers to any interest that has an economic value. A violation of property means a violation of any possession or interest that has economic value. Judge Zamir was uncertain as to whether every instance of harm to possessions should be defined as a violation of property. Such an approach would unduly broaden the definition, and the Court would find itself inundated with constitutional questions concerning laws treating of such issues as minimum wage, prenuptial agreements, alimony, and so forth. Judge Matza also favored putting off the decision as to whether to adopt Barak's broad definition. Judge Shamgar concurred with Barak, in principle, and argued that the right to property under the Basic Law is broader than the classic right to property, in the sense of a right in rem. He suggested, however, that the Court not consider the question of property, but the term that appears in the Basic Law - violation of property. In Shamgar's opinion, intervention by the courts is warranted only in regard to a clearly and obviously wrong law that presents an extreme deviation from the bounds of reasonableness, such as confiscation without compensation, or a confiscatory tax. Other than in such extreme cases, Shamgar suggests that the courts refrain from intervening in fiscal legislation.

Despite the differences of nuance in the various approaches to the question of property rights, all of the judges reached the conclusion that the amendment to the Gal Law, which caused creditors to lose part of their money as a result of the arrangement therein, violated the creditors' right to property.

Nevertheless, the judges were of the opinion that the amendment met the conditions of the limiting clause. It was in keeping with the values of the State of Israel, as it did not infringe equality, and it served the proper purpose of preventing the collapse of an important branch of the Israeli economy. The judges also concluded that the extent of the violation did not exceed what was necessary, although several of the judges considered whether it might not be more appropriate to remand the case to the District Court that it might reconsider whether the law indeed infringed the creditor's property rights to the least possible extent. Despite the doubts expressed by some of the judges, among them Judge Barak, there was unanimous agreement that the law did not violate the right to property to an extent greater than necessary. Therefore, there were no grounds for overturning the law, and the District Court's decision was reversed.

Concluding Remarks

Following the Supreme Court's decision in the matter of the amendment to the Gal Law, it may be said that the case law has expressly held that the Basic Laws of the State of Israel, which the Knesset has enacted over the years, form part of the State's as yet incomplete constitution. The Knesset is authorized to draft the constitution, and must therefore complete the task of its framing. It is the opinion of a majority of the judges that such constituent power passed from the first Knesset to its successors by virtue of constitutional continuity, and because the Knesset is apprehended in the national consciousness as having constituent power. The majority adopts Judge Barak's proposition that the Knesset fulfils two functions, as a legislature and as a constituent assembly. The Knesset's legislative function is unending, whereas its constituent function will end when the constitution has been completed.

The last two Basic Laws enacted by the Knesset, Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, differ from the other Basic Laws in that these two comprise a limiting clause that treats of the disposition of laws that violate the Basic Laws. The limiting clause constitutes substantive entrenchment. The significance of this substantive entrenchment is that a law that violates the Basic Law and that does not meet the criteria of the limiting clause will be declared void. The courts are the organ authorized to make that declaration. The decision thus establishes that the Israeli legal system recognizes the existence of judicial review of legislation repugnant to the Basic Law, even though the Basic Law does not expressly say so. It is unclear from the decision whether every court has jurisdiction to declare a law to be unconstitutional, or whether such authority is reserved to the Supreme Court.

The Gal Law, and the amendment to it that was the subject of the Court's decision, are fiscal laws. Reading the decision leads to the conclusion that the Court that held that it has the authority to overturn unconstitutional laws, will not do so lightly, particularly when the claim is that unconstitutionality derives from an infringement of property rights. It would seem that the Court endowed itself with a broad base for judicial review of legislation that it will be reticent to use. It is clear that the Court will not readily overturn fiscal legislation. Only time will tell what the Court will do when called upon to review laws outside the economic sphere, and when the claim is of an infringement of a right other than that of property.

The Practice of Law in the Prism of Halakhah

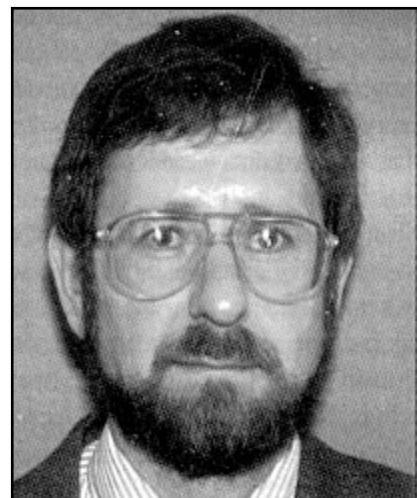
Daniel Sinclair

Naw and medicine both pose problems for the Jewish practitioner. There is, however, a fundamental difference between the two professions. In the case of medicine, halakhic problems arise in particular areas, especially in relation to the beginning of life and its end. The actual saving of human life by generally accepted medical procedures is not in question, and the practice of medicine is highly regarded in halakhic sources. This is not the case with respect to the practice of law in an adversarial setting and in the context of a non-Jewish legal system. Jewish tradition frowns upon advocacy and specifically prohibits litigation before non-Jewish tribunals. Both of these elements lie at the heart of the practice of law in the Diaspora, and it is to these two issues that the present article is devoted. The question of participating in the Israeli legal system from the perspective of Jewish law is reserved for another paper, since it raises a different set of problems which require separate treatment and analysis.

Whereas there is a vast and burgeoning body of halakhic literature devoted to medical ethics, there are far fewer works devoted to Halakha and legal ethics. [This issue has been addressed most recently in English by M. Broyde, "The Practice of Law according to the Halacha," *Journal of Halakha and Contemporary Society* 20 (1990) 5, and M. Bizer, "Can an Observant Jew Practice Law? A Look at Some Halakhic Problems," *Jewish Law Annual* 11 (1994) 101. Also see S. Krauss, "Litigation in Secular Courts," *Journal of Halakha and Contemporary Society* 2 (1982) 35; D. Frimer, "The Role of a Lawyer in Jewish Law," *Journal of Law and Religion* 1 (1983) 297. The problem of litigation before non-Jewish tribunals is discussed in M. Elon, *Jewish Law* (Philadelphia, 1984) 33 - ff.]

This is because the observant physician may safely address areas of halakhic concern secure in the knowledge that much of what he or she is doing on a daily basis is a mitzvah and above any hint of reproach. The lawyer is clearly in a different situation, since the

very basic features of the profession are highly questionable from a halakhic perspective. The aim of this article is to examine the prohibitions on advocacy and litigation before non-Jewish courts from a wide-ranging halakhic perspective and to comment upon their applicability to Jewish lawyers working in the Diaspora.



Advocacy in Jewish Law

The admonition of R. Judah b. Tabai "not to make yourself like them that influence the judges" (*ke'orkhei hada yanim*) is the major source for the rejection of advocacy in Jewish law (*Pirkei*

Avot: 1:8). Maimonides explains that R. Judah's objection is to those who teach the litigants how to reply to the questions posed by the judges and the other parties to the suit. The phrase *ke'orkhei hadayanim* is rendered as "those who arrange the judges," (*Commentary to the Mishnah, Avot*: 1:8) and the implication is that advocacy is unacceptable because it places an obstacle in the way of the judge's search for the truth. Indeed, Maimonides emphasizes that the proffering of legal advice is

Rabbi Dr. Daniel Sinclair is principal of Jews' College, London; Associate Research Fellow of the Centre for Medical Law and Ethics, Kings College, London; and assistant editor of the *Jewish Law Annual*.

prohibited "even if one knows that the litigant being advised is facing a deceitful and oppressive opponent. [It is] nevertheless forbidden to teach him arguments designed to help him win his case." Rashi uses the phrase *ke'orkhei hadayanim* in relation to those who "whisper to the judges to suggest to them an argument in favor of one side and against the other." (Sotah 47b s.v. *lohashei lehishot*)

It is noteworthy that some commentators imply that advocacy is condemned because "it will eventually lead to falsehood," but the general view is that it is simply contrary to the ethos of Jewish law, which places the judge at the center of a quest for truth which cannot be carried out properly if the litigants are schooled by advocates before the trial takes place. The Talmud raises the prohibition on advocacy in a case involving the obligation of relatives to support a widow requiring daily medical treatment. The widow was being maintained out of her deceased husband's estate, and the relatives found that the medical expenses constituted a serious drain on their assets. R. Yohanan advised them to arrange with her physician for the fee to be charged in the form of a lump sum. The effect of this would be to enable the relatives to take the money out of her *ketubah* estate and to leave their assets intact. Later, however, R. Yohanan regretted his advice and said: "I have made myself as one of the *orkhei hadayanim*." (Ketubot 52b. 86a. Yerushalmi, Ketubot 4:10.) The Talmud explains that, initially, R. Yohanan believed that he was permitted to advise his relatives on the basis of the Biblical injunction "not to hide from one's own flesh." (Isaiah 58:7) In the final analysis, however, his status as a teacher and leader obliged him to overcome the requirement of family solidarity and prefer, instead, the preservation of the unmediated approach to judicial proceedings in Jewish law. He, therefore, regretted having indulged in the art of advocacy.

At the same time, however, the inference from this Talmudic passage is that a regular person not possessing the status of R. Yohanan would be able to offer legal advice to a family member. This view is, indeed, found both among the Talmudic commentators and among the codifiers of Halakha and constitutes a fairly significant relaxation of the prohibition on advocacy in Jewish law.

Another potential inroad into the ban on advocacy is the Talmudic principle that a judge is required to help an upset or confused litigant to formulate his case. This principle, which is derived from the Biblical verse "Open your mouth for the dumb" (Proverbs 31:8), is formulated by Maimonides with reference to the obvious tension between such assistance and the ban on advocacy.

In his gloss on this ruling, R. David b. Zimra comments that Maimonides' point about the need for "due deliberation" and incisive judgment in order to strike a balance between helpfulness and advocacy is a very well-taken one. On the basis of Maimonides' formulation, which appears verbatim in the Tur and the Shulhan Arukh, it is evident that while there is a clear theoretical distinction between assisting a litigant and acting as an advocate, the line between these two functions is difficult to draw in practice. Even with respect to a judge, therefore, the ban on advocacy is not without a penumbra of uncertainty which serves to weaken any claim of an absolute prohibition on acting the part of counsel in Jewish law.

It is noteworthy that the role of advocate is positively urged upon the judge when the litigant is an orphan, since it is the role of the court to act as "the father of orphans." (Gittin 37a. Resp. Rosh 85.5. Shulhan Arukh Hoshen Mishpat 290:1-2.) A similar provision may apply, in certain circumstances, to a purchaser.

In light of all this, it is evident that R. Judah b. Tabai's admonition is not to be understood as an unqualified rejection of the spirit of advocacy in Halakha. Lay people are permitted to help their relatives by offering legal advice, and judges are permitted to assist litigants with the formulation of their claims. Indeed, they are required to do so in the case of orphans and other naturally disadvantaged groups. It is, nevertheless, true that the ethos of the judicial function in Jewish law militates against the adversarial system, and the question of a Jewish lawyer acting as a full-time advocate is, therefore, still a valid one.

One rather obvious answer to this question is that the ethos of modern non-Jewish legal systems is fundamentally different from that of the Halakha and, in such a context, the role of the advocate is pivotal, and not at all detrimental, to the quest for justice. Within such a system, therefore, the Jewish lawyer partakes in an adversarial framework precisely because this is the only way of upholding the rule of law in the society in which he or she is a member.

Moreover, it is arguable that on halakhic grounds the prohibition on advocacy is only applicable in the context of a fully fledged system of fixed Jewish courts. Once this is no longer the case, then there may be no bar to the adversarial system, provided that it does not pervert the course of justice. A case in point may very well be the method for appointing judges in a monetary dispute in a city in which there is no permanent court. In such a situation, each litigant may choose a judge who will "actively seek to promote his cause." (Sanhedrin 3.1: Sanhedrin 23a; Maimonides, *Hilkot Sanhedrin* 7: 1 : Shulhan Arukh, Hoshen Mishpat 13: 1 ; Encyclopedia Talmudit. II . 684.) A third judge is

appointed by the two parties or their judicial appointees, and his task is to act as an umpire. The psychological justification for this procedure is that it serves to ensure that both sides to the dispute will feel that the case has been "judged in accordance with the truth." (Rashi Sanhedrin 23a, s.v. yaza din; Yerushalmi, Sanhedrin 3: 1; Rosh Sanhedrin 3:2.)

At the same time, it is obvious that the appointment of judges to act on behalf of litigants who selected them poses something of a threat to the prohibition on advocacy. It is in order to deflect this threat that the method of selecting judges by litigant appointment is restricted to the cities in which there is no permanent court. Deviation from the principal of the unmediated judicial search for truth is, therefore, permitted in cases where there is no fully fledged system of Jewish courts in which the judges are competent to undertake the search for the truth in an unmediated manner. In a similar vein, the use of the adversarial system was permitted in the lay tribunals of medieval Spain, presumably because they, too, fell short of the judicial standards of a qualified Jewish tribunal. The same argument would apply, on an a fortiori basis, to a non-Jewish legal system which is based upon the adversarial method and in which lawyers play such a pivotal role.

In the light of the above, it is arguable that a Jewish lawyer working in a non-Jewish adversarial system may very well be halakhically justified in ignoring R. Judah b. Tabai's warning not to "make thyself like them that influence the judges." Nevertheless, it is incumbent upon every such lawyer to ensure that advocacy does not get in the way of the truth and to be ever-mindful of the Biblical dictum: "Justice, Justice shalt thou pursue." (Deuteronomy 16:20)

The Prohibition on Litigating in Non-Jewish Courts

The prohibition is derived from the Biblical verse: "And these are the judgments which you shalt put before them." (Exodus 21:1) According to the Rabbis, the force of the phrase "before them" is "before Jewish courts, but not before non-Jewish courts." (Gittin 88b; Rashi Gittin 88b, s.v. lifneihem; Tosafot,

Gittin 88b, s.v. lifneihem velo lifnei hedyotot; Nahmanides, Exodus, 2 1: 1)

There is, nevertheless, a Talmudic precedent for ignoring this prohibition when one of the parties refuses to appear before a Jewish tribunal. The Babylonian Gaonim gave this precedent normative form and, according to R. Paltoi Gaon, "if Reuben has a claim against Simeon, who refuses to appear before the Beth Din, then Reuben, in order to obtain what is his, may bring Simeon before the non-Jewish courts." (Ozar Haganonim, Bava Kamma, Responsa, 69.) The Gaonic ruling is incorporated into the major codes of Jewish law with the proviso that the permission of the Beth Din be obtained before proceeding with a suit before a non-Jewish court.

The exigencies of Jewish life in the Diaspora placed numerous practical obstacles in the way of maintaining the ban on non-Jewish courts, and halakhic authorities permitted recourse to such courts in matters involving special governmental interests including real estate, taxes and the preservation of public order. Permission to appear before non-Jewish tribunals was extended by R. Shabbetai Cohen to specific cases in which both parties agreed to appear before a particular gentile judge who was regarded as being trustworthy in their eyes." Clearly, if a Jewish litigant

was improperly summoned to appear in a non-Jewish court, he would be allowed to defend himself. It is also arguable that if a Jewish litigant uses the Beth Din in order to delay the proceedings, he may be regarded as a recalcitrant party and the Beth Din ought to grant permission for him to be sued before a non-Jewish court. The prohibition and its exceptions indicate the two forces operative in Jewish judicial life in the Diaspora. One is the drive to retain a national identity, which, in the pre-Emancipation period at any rate, was conceived of solely in terms of the application of Jewish law to every aspect of communal and private life. The other is the need to accommodate to and make use of the non-Jewish environment, including both the demands of the government of the day and the problems arising as a result of lack of efficient methods of law enforcement within the Jewish community.

An interesting feature of the tension between these two forces

It is obvious that the appointment of judges to act on behalf of litigants who selected them poses something of a threat to the prohibition on advocacy.

is the debate concerning the status of Jewish lay tribunals. R. Solomon b. Adret (Rashba) was asked concerning a town in which there were no expert judges, and people who were ignorant of the law were appointed to the Beth Din. The justification for such appointments was that in the absence of a lay tribunal of this type, "the people will go to the non-Jewish courts." The city elders wished to know the preferred course of action in such a case and the Rashba replied that, while in the first instance only expert judges were to be appointed to a Beth Din, the "needs of the hour," i.e. the necessity of preventing Jews from litigating before non-Jewish courts, justified the setting up of a lay tribunal provided that the appointees were "worthy God-fearing men who abhorred injustice and were capable of taking instruction in the law from a competent halakhic authority."

The constitution and scope of lay tribunals is the subject of numerous takkanot (communal ordinances), and it is noteworthy that their jurisdiction extended to criminal law as well as civil litigation.

At the same time, however, there was ongoing Rabbinical opposition to lay tribunals as a result of both the lack of any legal form and structure and the difficulty of obtaining lay judges who were truly "God-fearing individuals filled with an abhorrence of injustice." R. Ezekiel Landau, the Nodah Bi yehudah, expressed this opposition in the strongest of terms.

According to R. Landau, the decisions of lay judges "rest mainly upon bias and bribery." Indeed, so bad was the situation that the Jewish lay tribunals are "inferior to the judgments of non-Jewish courts which are based upon human reason and, as a result, possess some measure of justice." A similar point was made a century earlier by R. Judah Pohovitzer of Pinsk and for the same reason: i.e., lay judges often engage in nothing more than raw exercises of communal power, whereas non-Jewish tribunals possess some order and system which ensures a minimal level of justice.

Now, it is clear that neither R. Landau nor R. Pohovitzer was advocating the abrogation of the prohibition on litigating before non-Jewish courts. The force of their remarks was aimed at strengthening the authority of the established Batei Din and their expert da yanim who were skilled in the resolution of both the Halakha and official communal enactments. Their strong language does, however, indicate the difficulties involved in following the prohibition on going to non-Jewish courts and the tension between this prohibition and the desire to ensure that, at the end of the day, justice is indeed done. As far as a Jewish

lawyer working in the Diaspora is concerned, it would appear that he or she may represent any client who is halakhically permitted to appear before a general court. This would include non-Jews and any Jewish exceptions to the prohibition on non-Jewish courts mentioned above. It ought to be borne in mind in this context that any litigation involving government interests is included in the rubric of "the law of the land is the law" and it ought, therefore, to be potentially Justiciable before non-Jewish tribunals. The scope of this rubric is clearly a matter for discussion, but it has been applied by modern halakhic authorities to areas such as bankruptcy proceedings and rent control cases.

A more fundamental issue, however, is whether or not a lawyer, as opposed to a client, breaks the prohibition on non-Jewish courts by representing a Jewish client before a general tribunal. According to R. Menashe Klein, the answer is in the affirmative since the lawyer is, in fact, the one appearing in the court and by so doing is both breaking the law and profaning the Divine Name. R. Ovadiah Yosef, on the other hand, accepts that the force of the prohibition is directed against the litigant, i.e., the one who is being judged, rather than the lawyer. As a result, R. Yosef reduces the prohibition on the lawyer to the one of assisting a sinner, which falls under the Biblical commandment: "**Do not place a stumbling block in front of a blind man." (Leviticus 19:14) R. Yosef specifically excludes a lawyer representing a defendant being sued by a Jewish plaintiff in a general tribunal from the ambit of this prohibition. It is noteworthy that, under certain circumstances, the prohibition on assisting sinners only applies with its full force if the sinner is unable to gain assistance from any other quarter. If this is not the case, then a significant number of halakhic authorities maintain that no sin is, in fact, committed.

Clearly, the Jewish lawyer should strive to encourage Jewish litigants to go before Jewish courts and to ensure that Jewish law is applied wherever possible. At the same time, however, the exigencies of life in the Diaspora, including the principle of the applicability of the law of the land, make it difficult to adopt a clear-cut approach to this issue. The result is a complex body of Halakha, the import of which may very well be that while a lawyer representing Jewish clients in non-Jewish courts is not necessarily guilty of a direct breach of the prohibition on litigating before such tribunals, every effort should be made to encourage them to consider the option of a Jewish court before pressing on with their claims in the general judicial system.

continued on p. 34

American Section Honors Justice Breyer

The Association's American Section has conferred its fourth annual Pursuit of Justice Award on Associate Justice Stephen Breyer of the U.S. Supreme Court.

Nathan Lewin, American Section President, and Alan M. Dershowitz, Board Member, represented the Association at the presentation ceremony, which took place in a Supreme Court chamber filled with approximately 300 judges and lawyers.

In his remarks, Professor Dershowitz noted that both he and Justice Breyer had clerked years ago for Justice Arthur J. Goldberg, who served as the first President of the International

Association of Jewish Lawyers and Jurists.

Justice Breyer, in his acceptance remarks, noted the recent 50th anniversary of the Nuremberg trials and emphasized that individuals responsible for inhuman acts must be held accountable for their crimes and brought to justice.

Prior recipients of the Pursuit of Justice Award have been Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia Circuit; Chief Judge Wildred Feinberg of the United States Court of Appeals for the Second Circuit, and Associate Justice Ruth Bader Ginsburg of the Supreme Court.



Conferring the Pursuit of Justice Award (from left to right): Nathan Lewin, Justice Stephen Breyer, Alan Dershowitz, Stuart Kurlander.

continued from p. 33

Conclusion

The practice of law in a secular context is an inherently problematic enterprise from a halakhic perspective. The purpose of the present article was to point up the problem and to open the matter up for further discussion. Nothing of practical halakhic

significance may be drawn from the arguments advanced in the body of the text, and lawyers concerned with its practical ramifications should consult a competent halakhic authority on specific points.

Restitution of Jewish Property in Hungary

Peter Segal

The Hungarian Government and representatives of the World Jewish Restitution Organization (WJRO) and the Hungarian Jewish communities signed a memorandum at the end of June 1966 for restitution of Jewish property in Hungary.

The restitution deals with former Jewish community property, such as cemeteries, synagogues, community buildings, schools and public baths, and also with heirless property of victims of the Holocaust.

This memorandum could provide a model for Eastern European countries and is a milestone toward achieving similar agreements in the future with those countries.

According to this memorandum, the parties agreed to establish a Foundation which will deal with the matter of restitution. It has also been agreed to establish a curatorium of the Foundation consisting of members appointed by the Hungarian government and by representatives of the Jewish community, local and international Jewish organizations like WJRO and prominent public personalities in Hungary. The Honorary Chairman of the Foundation is Mr. Ronald Lauder, former Ambassador of the United States to

Advocate Peter Segal is a member of the Israel Bar.



Vienna, who is well-known in the Hungarian Jewish community as a donor to Jewish education and founder of the Jewish school in Budapest.

With a delay of one-half century, this agreement puts into effect Hungarian law of 1946 enacted to transfer heirless and unclaimed properties to organizations representing survivors of the Holocaust. This memorandum is a manifestation of Hungary's obligation for restitution of Jewish property based on the post-World War 11 Paris Peace Treaty of 1947.

According to the memorandum, the capital of the Foundation consists of a package of about US\$25,000,000 state bonds as a contribution of the Hungarian government from its budget, and also

some real estate and museum pieces will be transferred to the Foundation.

The primary aim of the Foundation is to help Holocaust survivors who are in financial difficulties, by means of state bonds which are convertible into life annuity to those in need, who number some 15,000 to 16,000. Also, local and international Jewish organizations will transfer to the Foundation real estate, valuables and cash contributions.

The Hungarian government has also undertaken to contribute every 10 years an amount not yet defined. The Foundation will effect payment only in Hungary.

It took 50 years and a great effort to achieve this historical justice. It now remains for the Hungarian Parliament to approve the establishment of the Foundation. It is hoped that this approval will be given by the end of this year.

Just Received

Sir Martin Gilbert, **Jerusalem in the Twentieth Century** (Chatto and Windus, London 1996; distributed in Israel by Steimatzky)

Report on the 52nd Session of UN Commission on Human Rights

Daniel Lack

This is the first session of the United Nations Commission on Human Rights at which the International Association of Jewish Lawyers and Jurists has been represented, since the grant of Consultative Status in Category 11 by the Economic and Social Council (ECOSOC) in accordance with Article 71 of the UN Charter in August 1995.

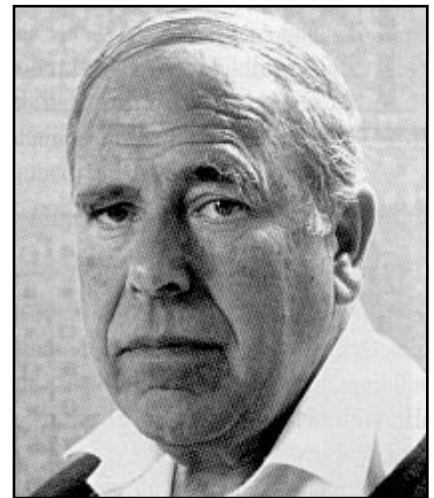
As the principal organ of the UN charged with the promotion and protection of human rights, the Commission was established as subsidiary of ECOSOC in 1946 as one of its eight functional bodies. The manner in which the responsibilities delegated to the Commission have been fulfilled in promoting encouragement for the respect of human rights, notably in accordance with Articles I and 55 of the Charter, has been the subject of increasing criticism over the years. The Commission was initially engaged in the drafting of the international bill of rights inspired by the Universal Declaration of Human Rights of 1948, of which it forms an integral part, together with the two International Covenants on Civil and Political Rights

Advocate Daniel Lack represents the International Association of Jewish Lawyers and Jurists at the United Nations Commission on Human Rights in Geneva.

and on Economic, Social and Cultural Rights. With the elaboration and adoption of the other major human rights conventions on the prevention and punishment of genocide, on the elimination of racial discrimination, the elimination of all forms of discrimination against women, against torture, and on the rights of the child, the Commission has played a significant role in the creation of the human rights corpus juris that has developed over the last 50 years.

Composed of 53 member states meeting annually for six weeks, the Commission can also be convened by decision of a majority of its members to deal with exceptional emergency situations as first occurred in connection with the Yugoslavian crisis in 1990.

While the Commission and its SubCommission on the Prevention of Discrimination and Protection of Minorities composed of 26 independent experts (whose 48th session, also attended by the IAJLJ, concluded on August 30) have in the main been the source for producing the initial texts, scrutinized and amended by the Third Committee of the General Assembly, it is the latter organ in plenary session which adopts these international multilateral human rights treaties and opens them for signature and ratification by the member states. Other international instruments for



which the Commission has been responsible, and which have set international standards in a non-binding form, are declarations finally adopted by the General Assembly by consensus. These include the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted in 1981, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992. Through a system of working groups dealing with particular problems such as Enforced or Voluntary Disappearances, the Commission has been able to focus on special thematic

issues of concern to the international community. Also the system of Special Rapporteurs and Special Representatives, investigating allegations of human rights violations in specific countries giving rise to particular concern, has in some instances proved effective in focusing international attention on country situations where a consistent pattern of human rights violations has occurred, such as in Afghanistan, Iran, Iraq and Sudan. Other Special Rapporteurs known as thematic rapporteurs have been mandated by the Commission to examine violations in countries where certain specific types of violations have been identified as being prevalent, such as torture, summary or arbitrary executions, religious intolerance violating the principles of the 1981 Declaration, the sale of children, child prostitution, child pornography and related abuses.

There is a general view shared by many human rights observers that efforts for the promotion and adoption of new human rights instruments should give place to more effective implementation of existing norms and standards.

The politicization of human rights issues has also created considerable frustration, in the main attributable in the cold war to confrontation between the Eastern bloc states and their supporters and the Western states formed by the North American and Western democracies supported by Commonwealth members. With the development of the period of "perestroika" leading to the collapse of Communist ideology in Eastern Europe, the immediate euphoria to which these developments gave rise in terms of their positive effect on the improvement of civil liberties and greater respect for human rights rapidly evaporated in the face of threats from other guises.

Thus the 1993 World Conference on Human Rights in Vienna witnessed an attack in the form of cultural relativism, i.e., that the universal values on which human right instruments were based, including the Universal Declaration and the two Covenants, allegedly reflected Judeo-Christian values imposed by Western democracies which had to be interpreted by each country and region in

norms. These theories have been espoused by certain South-East Asian and Islamic states, notably Algeria, Bangladesh, China, Cuba, India, Indonesia, Iran, Libya, Malaysia, Pakistan, Philippines, Sri Lanka, Syria, Viet Nam and others.

Issues Arising at the Commission's 52nd Session

The Commission met this year at a later date than in previous years, from March 18 to April 26, 1996. Earlier sessions in previous years, commencing shortly after the end of the General Assembly, i.e., at the end of January, and ending mid-March, were thought to have placed a strain on the UN conference, documentation and translation services which could not ensure timely preparation of documents required by the Commission.

The Chairman of the 52nd session of the Commission was Gilberto V. Saboia of Brazil, previously Chairman of the Drafting Committee of the 1993 World Conference on Human Rights in Vienna.

Decision by Consensus

An early confrontation between the universalist and relativist camps arose at an initial stage in this year's Commission discussion of its organization of work. Instead of decisions being reached by voting after a full exchange of differing views, this group of states proposed that the entire decision-making process "should be based on consensus, voting being reserved only for cases where consensus was not reached after all efforts to that end had been exhausted." (E/CN.4/1996/L.2) The purpose was to limit, to the maximum extent possible,

There is a general view shared by many human rights observers that efforts for the promotion and adoption of new human rights instruments should give place to more effective implementation of existing norms and standards.

terms of its own cultural ethos, religious values and traditions. There were thus no universal rights and obligations binding on UN member states. Each was entitled to interpret these instruments in accordance with its own heritage, moral traditions and social cultures. While the Vienna Declaration and Program of Action sought to refute this thesis, the effects of this relativist ideological challenge continue to undermine the respect for universally binding human rights

decision by majority vote, so that the minority could have the greatest weight in deliberations, by using the moral argument that putting the issue to a vote would frustrate the adoption of a consensus decision. This tactic was obviously designed to reduce all resolutions and decisions to their most watered-down effect or lowest common denominator and thereby defeat the "tyranny of democracy." Sensing their defeat on this proposal, its sponsors proposed to defer consideration of this text to the 53rd session, where doubtless it will be resubmitted.

Restructuring of the Commission's Agenda

Criticism has been consistently directed by human rights observers at the immobilism of the Commission's agenda which has continued to grow to unmanageable proportions with the passage of time. The overcrowded and outdated agenda which has failed to take account adequately, or even at all, of new and critically important human rights developments has presented difficult if not insurmountable logistic problems.

At the Commission's 50th session in 1994, the then-Chairman of the Commission took vigorous measures to reorganize the Commission's agenda by constituting an open-ended working group which was in effect a committee of the whole of the Commission. The objective was a thematic reordering of the Commission's agenda into clusters of interrelated items in order to achieve a more flexible and less cumbersome program of work. Despite wide-ranging and intensive consultations with all the regional groups of the members, whose comments and amendments were taken

into account, no consensus could be found. This was due to a manifestly clear attitude of rejection of these proposals by certain states of the relativist school, which openly stated their opposition to any changes whatever in the agenda. The upshot was that the 51st session was held with the same unwieldy agenda resulting in the same negative and unsatisfactory consequences.

The non-governmental organizations

Regrettably the "Western European and others" regional groups of states have throughout been placatory of the Arab states' political interests and economic pressures, most obviously exerted in the form of the Arab oil embargo after the Yom Kippur war.

in consultative status (NGOs) attending the Commission took a determined stand on this question, and 30 of them circulated a joint written statement to the 52nd session, urgently recommending the reconvening of the open-ended working group, this time armed with the ability to decide by majority vote if consensus could not prevail and having as its objective the reclustering of the Commission's agenda on the same thematic reordering as previously proposed.

At the 52nd session, the newly elected

Chairman undertook to achieve the same objective and the former Chairman of the 50th session turned over to him all of his working papers offering full cooperation. Unfortunately, the new Chairman, instead of following these suggestions, appointed a group of "Friends of the Chairman" purportedly representing the five regional groups of members within which the relativist school of thought was not under-represented.

The reclustered draft agenda which was proposed, while relating all items in some rational order, had one major flaw. It proposed to leave the two agenda items on the Arab-Israel conflict, whose very wording is indicative of the distorted and prejudiced manner in which they have been discussed, namely, the "Question of the violation of human rights in the occupied Arab territories, include Palestine" (usually item 4) together with the item entitled "The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation" (usually placed under item 9). For decades these two items have produced the same vituperative, one-sided and unabashedly hostile resolutions against Israel which have for the most part been adopted by the majority of the 53 member states of the Commission automatically voting In favor, at the instigation of its Arab and Islamic members. Regrettably the "Western European and others" regional groups of states have throughout been placatory of the Arab states' political interests and economic pressures, most obviously exerted in the form of the Arab oil embargo after the 1973 Egyptian-Syrian aggression against Israel in the Yom Kippur war. The political scenario has played itself out in precisely the

same form as in the General Assembly, where similar if not identical resolutions have been repetitively and predictably voted annually, irrespective of reality and the changing situation on the ground. Lip service has been paid, however, to the declaration of principles agreed on September 13, 1993, between Israel and the Palestine Liberation Organization and the subsequent achievements of the peace process.

It is particularly relevant to note that all other human rights situations were dealt with together under a collective item entitled "Question of the violation of human rights and individual freedoms in any part of the world," usually under item 12 of the agenda. Israel was alone given the questionable distinction of being pilloried under a separate agenda item. Through effective liaison between the representatives of the IAJLJ, UN Watch and the World Jewish Congress, and friendly sources, the occult attempt to pass off this restructured agenda proposal as a thematic reordering discussed in the privacy of the regional group meetings (from which Israel happens to be excluded by the added discriminatory treatment of not being a member of any UN grouping of states) was abandoned by the Chairman when challenged. In reality it intentionally maintained the flagrant discrimination of devoting the one single and separate agenda item solely to Israel's alleged conduct in the territories, while all country situations in which human rights violations occurred on a massive and incomparable scale, in some 14 countries, were dealt with under the traditional collective item of the violation of human rights and fundamental freedoms in any part of the world. The scale

of the discriminatory treatment reserved to Israel emerges from the fact that the list of countries dealt with under the collective item includes, inter alia, exYugoslavia, Rwanda (both situations having been regarded as justifying the convening of extraordinary sessions of the Commission), Afghanistan, Iran, Iraq, Myanmar, Sudan and Zaire.

The Chairman's proposal is contained in Commission document E/CN.4/1996/L. 100 of April 23, 1996. When, on the

It is particularly relevant to note that all other human rights situations were dealt with together under a collective item entitled "Question of the violation of human rights and individual freedoms in any part of the world," usually under item 12 of the agenda.

final morning of the 52nd session, the Chairman was faced with the prospect that his proposal would be challenged by a member delegation and would therefore not command a consensus, it then being evident that further amendments would be sought by other delegations, the Chairman decided to withdraw his suggestion rather than be confronted with an untenable situation. The question of the unsolved agenda crisis remains to perturb the Commission's 53rd session.

Resolutions Condemnatory of Israel

For the reasons mentioned above, the annual ritual of condemnation of Israel by resolutions for the most part sponsored by Arab states has been a regular feature of the Commission's proceedings for almost three decades. This annual performance has not been significantly affected by the peace process. The content of resolutions has slightly differed in that the peace process, reflected in the 1993 Israel-PLO accord and the subsequent arrangement concluded between the two sides of 1994 and 1995, as well as the Treaty of Peace between Israel and Jordan of October 1994, has received passing references in what otherwise constitute expressions of hostility and condemnation for alleged violations by Israel. Total silence has been maintained, however, with respect to repeated and barbarous terrorist attacks on Israel's civilian population by extremist Islamic groups. Rather than enabling the parties involved to resolve the remaining points of contention in the ongoing negotiation process, member states of the Commission and notably the Arab states have chosen to use the Commission as a pressure point for excoriating Israel for not conceding, without further discussion, matters explicitly reserved for direct talks between those essentially concerned in reconciling their differences. Hence instead of suspending these unhelpful proceedings, the Commission is used as a forum for prejudicially interfering in the achievement of a successful outcome of these negotiations.

A notably counterproductive initiative of the Commission has been the reappointment in 1995 of a so-called Special

Rapporteur for the territories, despite the resignation of his predecessor, Rene Felber, a former foreign minister of Switzerland, on the grounds that his function was redundant in the light of the ongoing negotiations between the parties involved.

Thus, at this year's session the resolution calling for the withdrawal of Israel from the Golan Heights, an issue on which Syria refused to negotiate on the basis of achieving full peace and normal relations with Israel, sponsored exclusively by Arab and Islamic states, was adopted by 22 votes in favor, 1 against (United States) and 29 abstentions.

The resolution vexatiously entitled "Question of the violation of human rights in the occupied Arab territories, including Palestine," among other unfounded assertions of violations such as killings and widespread detentions without trial, calls upon Israel to terminate what it terms as collective punishment of Palestinians, without mention of the terrorist attacks on Israel population centers by suicide bombers necessitating proportionate security measures in response. It further demands that Israel withdraw from all the territories including Jerusalem, the very questions reserved for negotiation under the accords with the PLO. This resolution was adopted by 27 votes in favor, 2 against (Russian Federation, United States) and 23 abstentions.

What may be considered as the most vexatious and irresponsible resolution of all was that sponsored by the European Union and several other Western democracies in deceptively mild terms which, while recognizing the welcome advances in the peace process and while recognizing that the question of Israeli

settlements in the territories forms part of the negotiations on the final status of these territories, calls for immediate measures to discontinue all activities connected with the settlements, which it qualifies as a violation of the 4th Geneva Convention of 1949. Because of its seemingly moderate terms, this resolution received 49 votes in favor, 1 against (United States) and 3 abstentions.

In order to reaffirm the right of the

At this year's session a resolution called for the withdrawal of Israel from the Golan Heights, an issue on which Syria refused to negotiate on the basis of achieving full peace and normal relations with Israel.

Palestinian people to self-determination under the agenda item dealing with the general right, yet another Arab-sponsored resolution was adopted, welcoming the 1993 Israel-PLO accord which it interprets as justifying a call on Israel to withdraw "from the Palestinian territory, including Jerusalem, and the other Arab territories which it has occupied since 1967 by military force This resolution was adopted by 28 votes in favor, one against (United States) and 23 abstentions.

The one fully positive resolution sponsored by the United States and most of the other members of the "Western European and others" regional group, as well as other members of the Commission, together with Egypt, Israel, Jordan, Algeria, Morocco and Tunisia, repeats the achievements of the Middle East peace process since 1993 in the same terms as the resolutions previously adopted both in the General Assembly and the Commission since 1994 up to the present. This resolution was adopted without a vote.

A further hostile resolution, condemnatory of Israel for its operations against southern Lebanon in response to the resumption of unprovoked Hizballah katyusha attacks on settlements in the north of Israel (misleadingly entitled "Human rights situation in southern Lebanon and West Bekaa") and Israel's alleged general policy of repression in the security zone to the north of the Israeli border, constituted a reversion to type of the one-sided condemnations of Israel without any reference to the relevant facts. This was no surprise since the text mirrored previous years' resolutions on southern Lebanon sponsored by the Arab and Islamic states together with Cuba. What was surprising, in the light of the well-publicized reports in the media of the Hizballah's unprovoked rocket attacks on northern Israel with the silent complicity of the Syrian occupation forces in Lebanon, was the support for the resolution by most of the "Western European and others" group of states in the Commission. The resolution was adopted by 50 votes in favor, 1 against (United States) and 2 abstentions (Cameroon, Cote d'Ivoire).

It should be further mentioned in the

context of the anti-Israel bias prevalent in the Commission that attempts were made to obtain a statement of the Chairman on two issues expressing censure of Israel for its alleged conduct. The first related to Israel's closure of its borders with the territories to prevent further terrorist attacks on its population centers by Hamas terrorists. The attempt to characterize this as collective punishment by the Chairman's statement did not receive the requisite support.

A further attempt was made to introduce a statement by the Chairman to condemn further Israel's military measures against southern Lebanon against the Hizballah attacks after the debate on the item dealing with human rights violations in any part of the world had been closed. This initiative in violation of the Commission's rules was rejected by the Commission's Bureau. When this became known, a further attempt to prolong the debate took the alternative form of other states attempting to intervene on the text of the draft resolution. It was pointed out, however, that this step too would be in breach of the Commission's rules, since only states having a direct interest in the content of the resolution could intervene at that stage in the proceedings.

Attempt to Restrict the Wording of the Resolution to Examine Incidents of Anti-Semitism

A landmark resolution of the Commission in 1994 requested a Special Rapporteur appointed by the Commission to examine, for the first time, incidents of anti-Semitism together

with other forms of contemporary racism in his annual report. This followed the failure of the 1993 Vienna World Conference on Human Rights to condemn anti-Semitism as a specific form of racism. Scarcely two years after the Commission's 1994 resolution, an attempt was made to curtail or de-emphasize reporting on anti-Semitism

The IAJLJ called the attention of the Commission to the horrific spate of four terrorist bomb attacks in Jerusalem and Tel Aviv by specially indoctrinated Hamas religious extremists taking the lives of 58 civilian victims and injuring many more in a deliberate attempt to wreck the peace process.

and other contemporary racist phenomena. Under an amendment to a resolution proposed by Cuba (E/CN.4/1996/24), language was introduced in this sense for amending the draft resolution, sponsored by Albania, Angola, Azerbaijan, Benin, Canada, Chile, China, Israel, Republic of Korea, Mexico, Pakistan, Tunisia and Turkey. Despite

these negative influences, and after consultations between interested delegations in which the IAJLJ, World Jewish Congress and UN Watch took part, the latter's Chairman, Ambassador Morris Abram, intervened with the Cuban delegation, which was finally prevailed upon to withdraw this amendment. The original text of the resolution, as drafted by its sponsors, was finally adopted as Resolution 1996/21, whose central purpose was to extend the Special Rapporteur's mandate for a further three years.

Intervention by the IAJLJ Representative

On March 29, the IAJLJ's representative commented on the Special Rapporteur's report on incidents and governmental measures in breach of commitments undertaken by UN member states in subscribing to the adoption of the 1981 UN Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. The IAJLJ called the attention of the Commission to the horrific spate of four terrorist bomb attacks in Jerusalem and Tel Aviv by specially indoctrinated Hamas religious extremists taking the lives of 58 civilian victims and injuring many more in a deliberate attempt to wreck the peace process. The IAJLJ also called for the adoption of a convention converting the non-mandatory principles of the 1981 Declaration into binding international obligations.



Subscription Announcement

The Presidency of the Association has decided that commencing in 1996, JUSTICE will be distributed to paid-up subscribers only.

This decision was taken in view of the rising costs of publication and postage of the journal, in order to ensure its continued steady publication.

The subscription cost for JUSTICE will be US\$ 50 per annum for 4 issues, commencing in 1996.

In this issue we are enclosing a subscription form. Members and other subscribers are asked to fill in this form, and return it to our Tel Aviv headquarters together with a cheque, thereby guaranteeing their receipt of future issues of JUSTICE.

Your subscription fees will help maintain the high quality of JUSTICE for the benefit of all members of our Association.

WORLD COUNCIL MEETING

LONDON, ENGLAND

JUNE 1-39 1997

The 1997 World Council Meeting of the Association will be held in London, England, between June 1-3, 1997, at the Waldorf Meridien Hotel.

Lectures and debates will concern major legal, economic and public issues, among them: Combating Terrorism - Law, Rhetoric and Reality; Immigration and Asylum - Conflicting Rights and Interests; Legal Aspects of Hi-Tech; Business Ethics; Anti-Semitism and Holocaust Denial in the Internet Era.

In addition there will be receptions, including one at the House of Lords and a Gala Dinner at Great Hall, Lincoln's Inn. A tour of London's Jewish East End has been scheduled for Sunday morning, June 1, 1997, and optional postConference tours have been scheduled to Oxford - June 4, 1997, and to Scotland, including Oxford, from June 4 to June 9, 1997.

The sessions and events of the Meeting in London and other cities in England are open to all members of the Association and registrants of the Meeting.

Further details about the program and registration will be provided in due course.

Kindly complete the enclosed Intention form so that future correspondence on this conference will be mailed to you.

The International Association of Jewish Lawyers and Jurists

WORLD COUNCIL MEETING

of The International Association of Jewish Lawyers and Jurists

London, England, June 1-3, 1997

THE RULE OF LAW AT MILLENIUM'S END: MYTH OR REALITY

Venue: Waldorf Meridien Hotel, Aldwych, London

Sunday, June 1, 1997

Morning Walking tour of London's Jewish East End
 14:00-17:00 Registration
 16:00 Meeting of the Presidency and Heads of Sections
 18:00 Welcome Reception
 19:00 OPENING SESSION

Chairman: Judge MEIR GABAY, Chairman of the International Council of the Association

Welcome: Judge MYRELLA COHEN, Q.C., Chairman, British Section

Opening Remarks: Judge HADASSA BEN-ITTO, President of the Association

Keynote Speaker: To be Announced

19:30 RECEPTION and GALA DINNER at Great Hall, LINCOLN'S INN: Tribute to The Rt. Hon. LORD WOOLF, President of the British Section. on his appointment as Master of the Rolls

Detailed programme and names of speakers to be published at a later date.

Simultaneous translation English-French-English will be provided.

Kosher food will be served at all official receptions, buffet lunch and dinners.

Monday, June 2, 1997

Morning Session

09:30-12:30 ANTI-SEMITISM AND HOLOCAUST DENIAL IN THE INTERNET ERA
 12:45-14:15 Buffet Lunch

Afternoon Session

14:15-17:15 COMBATING TERRORISM - LAW, RHETORIC and REALITY
 20:00 RECEPTION: HOUSE OF LORDS

Tuesday, June 3, 1997

Morning Session

9:30-12:30 IMMIGRATION AND ASYLUM - CONFLICTING RIGHTS AND INTERESTS
 12:45-14:15 Buffet Lunch

Afternoon Session

14:15-17:15 (a) LEGAL ASPECTS OF HI-TECH
 (b) BUSINESS ETHICS

Wednesday, June 4, 1997

Morning: Depart for one day TOUR TO OXFORD - Optional

Thursday, June 5 to Monday, June 9,

Continue from Oxford to LAKE DISTRICT and on to SCOTLAND - Optional

Monday, June 9, 1997

Return to London.

Details of hotel accommodation, prices and tours will be announced soon.

Rooms will be reserved on request from Friday, May 30, 1997. for those who wish to arrive in London for the weekend.

You are kindly requested to complete the enclosed form and return it to us as soon as possible, after which information will be mailed to you.