

Editorial Board:

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

Editor-In-Chief:

Dan Pattir

Co-ordinating Editor:

Dr. Rahel Rimon

Graphic Design:

Ruth Beth-Or

Cover:

A view of the security fence in central Israel
(photo courtesy of the Israel Government
Press Office).

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

E-Mail: IAJLJ@goldmail.net.il

© Copyright (2004) by IAJLJ

ISSN 0793-176X

Printed by Shmuel Press Ltd.

27 Shoken Street, Tel Aviv,

Tel: 972-3-682-2056.

JUSTICE (ISSN 0793-176X) is published 4 times a year
for \$50 per year by The International Association of Jewish
Lawyers and Jurists. Royal Mail International, c/o Yellowstone
International, 87 Burlews Court, Hackensack, NJ 07601.
Periodicals Postage Paid at South Hackensack. POSTMASTER:
Send address corrections to JUSTICE Royal Mail International,
C/O Yellowstone International, 2375 Pratt Boulevard, Elk Grove
Village, IL 60007-5937.

TABLE OF CONTENTS

President's Message / Hadassa Ben-Itto - 2

THE HAGUE: A FENCE AGAINST TERROR

ICJ Advisory Opinion: Israel's

Written Submission / Special Report: Unofficial Summary - 7

The Court is not Competent to hear

Political Non-Legal Submissions / Yaffa Zilbershats - 10

The Use and Abuse of International

Law by NGOs / Gerald M. Steinberg and Simon Lassman - 14

FROM THE ASSOCIATION

Urging the UN High Commissioner for Human Rights:

the UN Should Take Measures Against Anti-Semitism / Special Report - 19

Measures to Combat Anti-Semitism - 22

Recent Measures against Anti-Semitism in France / Joseph Roubache - 23

Human Rights and the New Anti-Jewishness / Irwin Cotler - 24

JEWISH LAW

"Put my silver goblet in the mouth

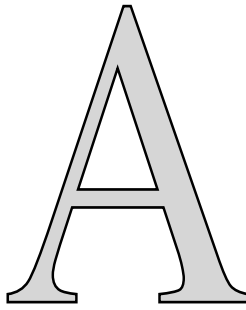
of the bag of the youngest one..." / Elishai Ben Yitzhak - 30

FROM THE SUPREME COURT OF ISRAEL

Israel Lands: Excessive Benefits to the Agricultural Sector Revoked - 35

www.intjewishlawyers.org • www.lawyersdirectory.org.il

PRESIDENT'S MESSAGE



large part of the 34th issue of *JUSTICE*, published in winter 2002, dealt with the *Protocols of the Elders of Zion*.

Since then the use of the *Protocols* has increased worldwide, and has become not only a central weapon against Jews, but also a powerful tool in the ongoing attempt to de-legitimize Israel - the Jewish State.

Throughout the twentieth century the only regime that openly used the *Protocols* as reason to exterminate Jews, was the Nazi regime. Other regimes that supported state anti-Semitism, like communist Russia, did not officially and openly use the *Protocols*, but they did not mind their being used in anti-Semitic propaganda.

We are now facing a recurrence of the Nazi strategy, adopted, copied and refined by the Moslem world.

It is worth noting that the Arab world was greatly impressed by Nazi doctrines throughout the years. The anti-liberal and anti-Western spirit of fascism fascinated the Arab world, and targeting the Jews, which was the basis of Nazi ideology, played into the hands of growing Arab and Moslem opposition, first to Zionism, as expressed in a growing Jewish population in Palestine, and then, as a main theme of Arab propaganda against the State of Israel.

One may, sometimes, wonder whether the world has gone mad: here are three movements, based on different ideologies, but identical in their aim to achieve world domination: Nazi Germany; Communist Russia and Islamic fundamentalism. There are no hidden agendas here; there is a proclaimed purpose to undermine world order and force other nations and societies to bend to their respective rule, whether based on racial ideology, setting up Jews for extermination, social totalitarianism that marked for destruction all those who were conceived to be a threat to their aim of world rule, or a fundamentalist religious ideology that marks all nonbelievers as infidels and proclaims a holy *Jihad*, in which killing infidels is a religious tenet.

All three movement, that openly aimed to change the whole world order and set themselves up as world rulers, chose to single out first Jews and now the Jewish state as criminal conspirators, who are actually implementing their plan to dominate the world.

When the UN adopted the resolution equating Zionism with racism, Israel's Ambassador Haim Herzog tore the resolution up on the podium of the General Assembly, in a dramatic gesture, that more than the resolution itself, got the attention of the media and thus reached a large public around the world.

Unfortunately, what was intended as a dramatic gesture also defined our own attitude to this infamous resolution. We forgot all about it, we treated it as a piece of paper, until we realized, ten years later, how this equation had infiltrated into language, into academia, even into dictionaries that defined 'racism' as a form of apartheid, Nazism, and Zionism. By then it was too late, as delegates to the UN Conference on Racism, in Durban can attest. The combination Zionism=Racism has become a code-word, used and misused in contexts completely divorced from its content.

We must face the fact that anti-Semitic messages always have their roots in some kind

of a lie or a libel imprinted on the minds of the masses by clever manipulation. The longer such a lie is out there, the more difficult, and indeed almost impossible, it becomes to erase it. A Swedish professor once stated that sadly as long as teachers in elementary schools could not all be monitored, some would still teach children that the Jews crucified Jesus Christ, and this message was much stronger than any proclamation of the church absolving the Jews from blame.

His prophetic words come to mind as we are dreading the consequences of the new film by Mel Gibson, *The Passion of the Christ*, again blaming Jews for the crucifixion of Jesus, in hair-raising brutal scenes to be shown in thousands of cinemas around the world, and unfortunately promoted by large numbers of Christian groups.

Alongside religious anti-Semitism, a time came when political developments necessitated a new kind of weapon to blame the Jews. Thus, from the nineteenth century onward, two countries, Germany and France, were in the forefront of developing a new kind of political anti-Semitism, one which blamed the Jews for all the economic, financial and political disasters that had befallen their respective countries. The Russian *Ochrana*, the Black Hundreds, who incited the pogromchiks with cries of “Beat the Jews and save Russia”, did not limit themselves to religious messages. As The Tsar’s throne became more and more shaky, the Jews could be targeted as the enemies, especially as there were some Jewish names among the Bolshevik leaders.

This trend of political anti-Semitism gave birth to the *Protocols of the Elders of Zion*, which, to this day, blames the Jews for any disaster in the world, including the terrorist attack in New York on 11th September 2001.

World media paid little attention to the testimony in a trial that took place in Hamburg Germany between October 2002 and February 2003, where Mounir-el-Motassadeq was accused of terrorist activity. He had been a core member of the Hamburg *al Qaida* cell, a close friend of Mohammed Atta, the ringleader of the 9/11 perpetrators. He had held in trust the bank account of Marwan al-Shehhi who had steered the plane into the second Twin Tower. One witness, Shahid Nickels, a member of Mohammed Atta’s core group between 1998 and 2000, said the following: “Atta’s *weltanschauung* was based on a National Socialist way of thinking. He was convinced that ‘the Jews’ were determined to achieve world domination. He considered New York City to be the center of world Jewry which was, in his opinion, Enemy Number One.”

Sharid Nickels further testified about the perpetrator’s core group: “They were convinced that Jews control the American government as well as the media and the economy of the United States. ... Motassadeq shared Atta’s attitude in believing that a worldwide conspiracy of Jews exists. According to him, Americans want to dominate the world so that Jews can pile up capital.”

If you wish to learn how this conspiracy theory leads to the de-legitimization of Israel, here is the testimony of another witness, Ahmed Maglad, who frequently joined the group’s meetings. “For us” he said, “Israel didn’t have any right to exist as a state. ... We believed that German and French policies were designed to suit Arab countries whereas the USA is considered to be the mother of Israel.”

Finally, Ralf Götsche who lived in the same student dormitory as the accused, recalled: “Motassadeq once said: ‘What Hitler did to the Jews was not at all bad’.”

This was not the ideology of a fringe terrorist group. This was, and is, to this day the major anti-Zionist ideology not only of extreme movements like *Hamas*, but also of official and semi-official organs of countries that made peace with Israel, and of the Palestinian Authority that proclaims its readiness to participate in a peace process.

Indeed, the Nazi belief in a worldwide Jewish conspiracy not only survived the collapse of Hitler's regime, but was eagerly adopted in 1947 by the Arab world. Tens of thousands of Arab copies of the *Protocols of the Elders of Zion*, were published in the following decades.

The politization of the anti-Semitic message made it immediately fit to be used by the non-Christian world. Devoid of traditional Christian accusations based on the crucifixion, this new form of anti-Semitism fell like a ripe plum into the hands of the Moslem world, which was in the process of defining its anti-Jewish message. Thus, what was initially an anti-Semitic fabrication soon became an anti-Zionist tool. It began appearing in Arab and Moslem bookstores; leaders like King Farouk were handing out the *Protocols* as gifts to their guests.

Actually, Arab leaders like the Mufti of Jerusalem, and Arab movements like the Moslem Brotherhood, that supported Hitler throughout the Nazi regime, inherited his message and carried it forward immediately following the end of World War Two all the way to 9/11.

The new impact of the Nazi-like conspiracy theories becomes particularly obvious if we take a look at the Charter of the Muslim Brotherhood of Palestine that calls itself *Hamas*. This Charter, created in 1988, represents one of the most important Islamic programs of today.

The Brotherhood of Palestine defines itself as a "universal movement" whose *jihad* is "the spearhead and the avant-garde" in its struggle against "World Zionism".

The Charter clearly indicates that it is heavily influenced by the *Protocols of the Elders of Zion*. According to the Charter "the Jews were behind the French Revolution as well as the Communist Revolutions." They were "behind World War I so as to wipe out the Islamic Caliphate ... and also were behind World War II, where they collected immense benefits from trading in war materials and prepared for the establishment of their state."

They "inspired the establishment of the United Nations and the Security Council ... in order to rule the world through their intermediaries. There was no war anywhere without their [the Jews'] fingerprints on them." The original text of this Charter is clearly stated in Article 32: The intention of the Zionists "has been laid out in the *Protocols of the Elders of Zion*, and their present conduct is the best proof of what is said there."

I am sometimes told not to blame Moslems, only the radical fundamentalist elements. But at the expense of not being politically correct, the truth must be told. Today, it is not only radical groups like *Hamas* which are using the *Protocols* as a means to de-legitimize both the Jews and the Jewish State.

If we have learned one lesson, and I hope we have, it is the need to listen not only to messages refined for our ears, but also to those aimed at our adversary's public.

According to Palestinian ideology the Jews do not comprise a nation but only a religious group, and therefore they do not have a right to a national home. None other than the current Palestinian Prime Minister, Ahmad Qurei, used these words as reported in *Al-Hayat Al-Jadida*, on June 15 2003:

“President Bush said that Israel is a Jewish state, which is a cause for our concern. This should not have been said ... What is the meaning of the concept of a Jewish state... Does this mean that this is a Jewish state, this is Sunni, this is Shi'ite, this is Alawite, and that one is Christian... These differences could plunge the region into a whirlpool...”

One favourite argument is that Britain directed the Jews to Palestine, by way of the Balfour Declaration, with two goals:

1. To control the natural resources of the Middle East, by planting a foreign “cancer” and thus gain control of the Arab states.
2. The Jews were such a detriment to European society that sending the Jews to the Middle East was an ideal way to “rid Europe of the burden of its problematic Jews”.

As part of the daily discussion, a historian explained in an educational program that the *Protocols of the Elders of Zion*, the Russian forgery that was presented as the Jews’ secret plan to rule the world, played a role at the first Zionist Congress in 1897. The Palestinian Authority often teaches that Zionist ideology is based on the *Protocols*. To quote Dr. Riad Al-Astal, history lecturer at Al-Azhar University in Gaza: “There were two major elements for which Britain and the other European states were striving: the first element was to get rid of the Jews, who were known as those who provoke civil wars, disturbances, and financial crises in Germany, in France and in other European states. Regarding the second point... it is: the European plan, the British-French plan... to torpedo any hope for an Arab unity”.

Here is a passage from an article published on 12 June, 1998, in the Palestinian Authority daily, *Al-Hayat Al-Jadida*:

“The difference between Hitler and Balfour was simple: the former [Hitler] did not have colonies to which to send the Jews and so he destroyed them, whereas [according to] Balfour’s plan... Palestine turned into one of his colonies and he began to send the Jews there. Lord Balfour is Hitler with colonies, while Hitler is Balfour without colonies. They both wanted to get rid of the Jews ... Zionism was crucial to the defense of the West’s interests in the region, [by] ridding Europe of the burden of her Jews.”

One of the most popular theories of the origins of the *Protocols*, is that they were composed behind the scenes of the first Zionist Congress in Basel. This theory was presented in such convincing terms that the plaintiffs at the famous Bern Trial in 1934 were compelled to call witnesses to disprove it, they called not only Jewish leaders like Haim Weitzman and Rabbi Ehrenpreis from Sweden, but also secretaries who had worked at the congress, and they presented in court the actual record of the proceedings at the congress, all this to disprove the lie that the public meetings of congress were just a front, while the real meetings were secret, behind the scenes, preparing the Jewish plan for world domination.

The soap operas from Egypt and Syria are therefore nothing new. They are just a popular way of spreading the same message to many millions all at once, poisoning their minds in what seems to be an irreversible process.

Jews have always been wary of taking aggressive measures even when danger stares them in the face. As persecuted minorities, Jews generally chose to assume a defensive

role, not too loud, not too aggressive. In measuring anti-Semitism by something like the Richter scale of earthquakes, Jews murmured among themselves when anti-Semitism took on the form of a hostile religious procession, or some hooligans attacking a single Jew; when it became more menacing Jews gathered in synagogues and prayed; when the scale reached a high of seven or eight, they protested to the authorities, they even went further and called for a boycott of Ford vehicles when Ford persisted in spreading the *Protocols of the Elders of Zion*; the Rothschild bank went so far as to deny a loan to the Russian Tsarist government because of the pogroms, and, of course, Jews boycotted German goods when it became clear what Hitler was doing.

But these were mostly minor, ineffective measures, as Jews learned so well.

Even if we have not yet reached a situation parallel to that of the 1930s in Europe, as some maintain, we should realize that waiting for the current wave of anti-Semitism to climb much higher on the scale puts Jews and Israel in grave danger.

Unfortunately various western groups, mostly but not only, the anti-globalization movements, have swallowed the Arab ideology and greatly contribute to the global atmosphere that singles out Jews and Israel for mistreatment and discrimination, in the media, in the UN, and from there in public opinion.

This time we cannot say that we have not been warned, for the danger is obvious.

Combating anti-Semitism in all its forms is very high on the agenda of our Association, as reflected in the recent and the present issues of *JUSTICE*. Much more must be done, and we urge our members worldwide to join us in this struggle.

On March 23 we shall convene our 12th International Congress in Israel, and we hope our members will make an effort to be with us here, to show support for our common cause and to participate in our deliberations.

Hadassa Ben-Yitvo

Israel's decision to stay away from the International Court of Justice session at The Hague, convened following a UN General Assembly request for an Advisory Opinion on Israel's security fence, stemmed from the basic premise: the ICJ is not competent to deal with political non-legal issues. Joining Israel in refusing to appear were most Western and Latin American countries, as well as Russia, Australia, Japan and others. While rejecting the Court's jurisdiction Israel forcefully presented its arguments concerning the necessity for the fence as protection against ongoing murderous acts of terror before the world media. *JUSTICE* presents highlights of Israel's written submission (pages 7-9) and a legal view (pages 10-13).

ICJ Advisory Opinion: Israel's Written Submission

Special Report: Unofficial Summary

In July 2002, faced with an unprecedented wave of suicide bombings, and following a month in which 37 separate terrorist attacks resulted in the murder of 135 people, and injured 721, in buses, malls and restaurants, Israel decided to construct a temporary security fence as a defensive and non-violent means of preventing the unimpeded access of Palestinian suicide bombers into Israel's towns and villages.

On 8 December 2003, the 10th Emergency Special Session of the United Nations General Assembly requested an Advisory Opinion from the International Court of Justice on the legal consequences arising from the construction by Israel of a "wall" in "occupied Palestinian Territory". The Court requested interested states, along with certain international organizations and "Palestine", to make submissions setting out their views on the question.

Along with many other states, Israel is strongly of the view that the Court is not the appropriate forum for discussion of this issue. Accordingly, Israel decided not to enter into a substantive discussion of the security fence before the Court, but rather to set out, in a detailed 130 page document, the reasons why it believes that the Court does not have jurisdiction in the matter, and why, even if had, it should exercise its discretion to decline to hear the case.

Running through many of Israel's arguments are two fundamental concerns about the request for an Advisory Opinion: its total silence on the reason for the fence, Palestinian terrorism,

and the damage the request is likely to cause to the agreed Roadmap process.

Silence on Palestinian terror

Neither the question referred to the Court, nor the 20-paragraph General Assembly resolution referring it, makes any reference - not a single word - to the ongoing terrorism directed daily against Israel and its citizens. Similarly the extensive dossier of 88 documents on the question provided to the Court by the United Nations is, staggeringly, totally silent on the subject of Palestinian terrorist attacks. It is devoid of any of the United Nations resolutions condemning terrorism, as well as Israel's letters to the Secretary General detailing the terror attacks it has faced.

These attacks, through suicide bombings, car bombs, drive-by shootings and stabbings, have left 916 children, women and men dead in the past 40 months of violence and thousands injured and scarred. Over the past 12 months, 218 people have been murdered in terrorist attacks, including two families which lost 5 members each, across three generations, in a suicide bomb attack at Maxim's restaurant in Haifa in October 2003.

At the same time Israel has faced chilling threats of "mega-terror" attacks, including an attempt to blow up the Azrieli twin skyscrapers and the Pi Giliot gas and oil depot in Tel Aviv.

It is inconceivable that the ICJ should be requested to give an Advisory Opinion on the issue of Israel's security fence at the

behest of the very terrorist organization which has been actively behind many of the murderous attacks which have made the fence necessary. It is even more inconceivable that the request should make no reference at all to the brutal reality of terrorism faced by Israel. Indeed, at the time of transmitting Israel's submission to the ICJ, Jerusalem suffered yet another terrorist atrocity, when a suicide bomber blew up a bus in the city center, killing at least ten people and maiming dozens.

Undermining the Roadmap

The request for an Advisory Opinion flies directly in the face of the only initiative for resolving the Israel-Palestinian conflict accepted by the sides and approved by the international community - the Roadmap. This comprehensive approach to resolving all issues in the Israeli-Palestinian conflict, was sponsored by the United Nations, the United States, the European Union and the Russian Federation, and has been accepted by the parties. It was specifically endorsed by the Security Council in Resolution 1515 less than three weeks before the Palestinian initiative to request an Advisory Opinion.

The Roadmap addresses the totality of the Israeli-Palestinian dispute, and sets out an agreed sequence of parallel obligations to bring the two sides back to meaningful negotiations. The Roadmap was carefully negotiated and represents a delicate balance. The request to the Court undermines this balance by seeking to prejudice matters agreed to be negotiated and undercut the carefully constructed scheme for resolving the conflict.

In taking up this request the Court would also be giving a green light to further attempts to bring the Middle East dispute piecemeal to the Court and away from the negotiating table. It is likely that other conflicts in other regions may well suffer the same fate.

Jurisdiction and Propriety

With these concerns uppermost in its mind, Israel contends (a) that the Court lacks jurisdiction to consider the Advisory Opinion request, and (b) that even if it did have jurisdiction, it should exercise its discretion to decline to respond to the request:

(a) The Court lacks jurisdiction in this case

The request for the Advisory Opinion was outside the competence of the Emergency Special Session which made it. This Emergency Special Session was convened under the "Uniting for Peace" procedure. Under its own rules, this procedure is available only where "the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of peace and security". In the

current case there has been no such failure by the Security Council. On the contrary, less than 19 days before the Emergency Special Session adopted the Advisory Opinion resolution, the Security Council exercised this responsibility by endorsing the Roadmap in Resolution 1515 and declaring itself to be "seized of the matter". The issue of requesting an Advisory Opinion, it should be noted, was never raised before the Security Council.

Additionally, the Uniting for Peace procedure provides that it is only applicable when the General Assembly is "not in session at the time". On this occasion, however, the General Assembly was meeting in regular session at the very time the Emergency Special Session was convened to consider the Advisory Opinion request. Moreover, the "Resumed" nature of the Emergency Special Session - convened on 12 separate occasions since April 1997 is clearly at odds with the intent of a procedure which envisages the convening of an emergency session to address a specific issue of immediate concern.

As regards the jurisdiction of the Court, its Statute as well as the UN Charter provides that an Advisory Opinion can only be given on a "legal question". The question posed in this case is so vague and uncertain as to be incapable of being considered a "legal question". It gives no indication whether the Court is being asked to find that a given situation is unlawful, or merely to assume its illegality. Further, it asks the Court to ascertain "legal consequences" without indicating for whom, even though legal consequences cannot exist in a vacuum.

(b) The Court should exercise its discretion to decline the request

Even if the Court were to consider that it has jurisdiction, it has discretion to refuse a request for an Advisory Opinion where this would be incompatible with its judicial functions.

In particular, the jurisprudence of the ICJ makes it clear that the Court should decline to give an Advisory Opinion when to do so would effectively evade the principle that a state is not obligated to allow its disputes to be submitted to judicial settlement without its consent. In this case the subject of the request is clearly a matter of dispute in itself, as well as an integral part of the wider Israeli-Palestinian conflict. And Israel, for its part, has clearly not accepted the jurisdiction of the Court to adjudicate in its dispute with the Palestinians. On the contrary, every agreement between Israel and the Palestinians which relates to the settlement of disputes provides for negotiation - and not the ICJ - as the agreed means of dispute resolution.

The Court has also determined in its jurisprudence that it should decline to hear a case where it does not have sufficient evidence and information to arrive at a judicial conclusion. This

would appear to be a decisive consideration in this case, which would require the Court to undertake the impossible task of addressing issues of fact and law - concerning, *inter alia*, military necessity, proportionality and effectiveness - at every point along the planned and actual route of the fence. The Court cannot, and should not, try to place itself in Israel's shoes in determining the means by which Palestinian terrorism should be dealt with.

Finally, the fact that "Palestine" - the prime mover behind this request - is the very party whose support for terrorism has made this fence necessary, and has frustrated progress with the agreed Roadmap mechanism for resolving the conflict, is itself a compelling reason for the Court to find that this request has not been made with "clean hands" and to decline to answer.

Procedural failings

Beyond the reasons outlined above, why the Court cannot, and should not, accede to the request for an Advisory Opinion, a number of procedural issues thus far, already raise the troubling suspicion that the Court itself risks becoming politicized and its standing undermined. Among the issues that give cause for concern are:

(i) Prejudicial terminology

In titling the case: "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", the Court has adopted the political and prejudicial terminology of the request itself. The use of the term "wall", when in fact less than 5 percent of the fence is a concrete barrier and over 95% consists of wire fences with access and crossing points, is clearly propagandist, while the reference to "Occupied Palestinian Territory" is similarly prejudicial, and ignores Security Council Resolutions 242 and 338, the Israel-PLO agreements and the Roadmap which all call for the border between the two sides to be agreed through negotiation.

(ii) Unrealistic Time Limits

While the General Assembly requested that the case be heard "urgently", the shortness of the time-limits set by the Court is problematic in the extreme. Israel expressed its concerns directly to the Court about the need for a significant period of time to prepare its statement, given the seriousness of a question which goes to the heart of its security needs. The Court nevertheless established a time-table, the speed of which is virtually unprecedented, especially in a case of this complexity.

(iii) Participation of "Palestine"

The Court's decision to invite "Palestine" to participate

in the proceedings has no legal basis in the United Nations Charter or the Statute or Rules of the Court, which allow only for the participation of states parties to the Court's Statute and international organizations.

(iv) Prior involvement of Judges in the dispute.

Israel has raised the question of possible bias within the Court, as a result the direct involvement in the Israel-Palestinian dispute of one of the Members of the Court who, in his former official positions, advocated and spearheaded political campaigns against Israel, including the origination of the very Emergency Special Session of the General Assembly which referred this Advisory Opinion request to the Court. Israel has noted that participation by such a judge would create an unacceptable appearance of bias.

Conclusion

The request for an Advisory Opinion willfully ignores the brutal campaign of terrorism that is integral to any serious consideration of Israel's security fence. It also flies in the face of the Roadmap, which remains the only agreed mechanism for the parties to return to negotiations and resolve their conflict. It is for these reasons that, notwithstanding the massive voting block wielded by the Arab group in the General Assembly, the vote requesting an Advisory Opinion failed to gain the support of a majority of the members of the United Nations. Significantly, all the state members of the Quartet - including all the members of the European Union - either voted against the resolution or abstained.

Israel recognizes that there are states which have concerns about the security fence and its route. Many of these concerns are shared in Israel, and are at the moment the subject of internal judicial and political review. But the crucial question before the Court is whether, by acceding to this political request, the Court would actually be setting back the prospects for a peaceful resolution of differences between the parties.

The Representative of Singapore expressed the concerns of many about this initiative in the Emergency Special Session debate. Explaining that his country has consistently supported the Palestinian position in the General Assembly, and indeed has supported every one of the Assembly's 17 pro-Palestinian resolutions, he felt constrained not to support the Advisory Opinion request, stating: "We do not consider it appropriate to involve the ICJ in this dispute in this way". And, as the Representative of Uganda added: "The solution lies in a negotiated settlement by both sides. That is why, in our opinion, referring the matter to the International Court of Justice, would not serve the cause of peace."

The Court is not Competent to hear Political Non-Legal Submissions

Yaffa Zilbershats

The UN General Assembly has asked the International Court in The Hague to provide an Advisory Opinion on the question of the legality of the security barrier which Israel is building in order to obstruct terrorists wishing to enter Israel.

I shall attempt to examine this issue by focusing on four of its aspects:

- Clarifying the status of the Court in The Hague in general and its competence to provide an Advisory Opinion, in particular.
- The history of the legal question now facing the Court
 - What is the question?
 - What is its origin?
 - What are the legal issues raised by it?
- What are the possible consequences of the Court's judgment and what ramifications will it have for the State of Israel;
- Is the judgment of the Israeli High Court of Justice likely to have an affect on the international proceeding?

1. Clarifying the Status of the Court in The Hague

The UN Charter, the international document which established the United Nations organization, numbers the International Court of Justice among the six organs making up the UN. The powers of the Court are anchored in the UN Charter and the Statute of the Court which are annexed to the Charter and form an inseparable part of it. These international documents reveal that the powers



Opinion on any legal question".

of the International Court operate in two channels:

- Claims between states but on condition that the states expressly consent to the jurisdiction of the Court by a general express declaration, or *ad hoc* for a particular issue.
- An Advisory Opinion, which is the relevant procedure in this case. Article 96(1) of the UN Charter provides:

"The General Assembly or Security Council may request the ICJ to give an Advisory

In other words, the General Assembly of the UN or the Security Council may submit "any legal question" to the Court.

In the case at hand, apparently concerned that the United States would impose a veto in the Security Council, the procedure used was a question following a decision of the General Assembly.

The Statute of the Court provides that when the procedure of an Advisory Opinion is employed, the referring body must formulate "an exact statement of the question...".

The Court must notify all the states party to the Statute of the Court of the fact that a question has been referred to it.

The Court may consider the question in an academic manner without asking for a response from states, and it may ask for responses from states or from international organizations which it chooses to hear. The responses may be submitted in writing or orally or both in writing and orally. In the case before us, the Court decided that responses in writing should be submitted by 30 January 2004 and that oral arguments would commence on 23 February 2004.

Prof. Yaffa Zilbershats is the Vice-Dean of the Faculty of Law, Bar-Ilan University, Israel, and Academic Advisor to the IAJLJ.

The Court is not competent and therefore cannot hear the submissions of individuals who do not officially represent a state or a recognized international organization approached by the Court. Thus, a position paper submitted by a private person, whatever his public standing, will not be accepted by the Court.

There is another important point to be made in relation to the Court:

The International Court in The Hague, whether it is operating in accordance with the procedure of claims between states or is giving an Advisory Opinion, decides for itself whether or not it has jurisdiction and only upon an affirmation that it possesses jurisdiction makes a determination regarding the question which has been submitted to it.

This explains Israel's quandary whether even to respond to the hearing, whether to attack the issue of jurisdiction only, or whether also to deal with the arguments on the merits. It is important to reiterate that if the Court decides that it does not possess jurisdiction, the legal hearing will come to a complete halt so that consideration of the question of jurisdiction is fundamental. In other words, as noted, the Court has jurisdiction to hear "any legal question" and an argument against the exercise of jurisdiction will arise when the question is a political non-legal one, which justifies denial of competence by the Court.

The International Court of Justice sits in The Hague and is not the International Criminal Court which too sits in The Hague and which began operating in July 2002. The International Criminal Court is empowered to hear claims against private individuals who are alleged to have committed war crimes or crimes against humanity. The Court in the case at hand hears claims between states or delivers Advisory Opinions. The composition of the Court is as follows: 15 judges sit in the Court; these are elected for a period of 9 years and may be re-elected. Every three years elections are held for five judges who must be elected by a majority of the General Assembly and the Security Council.

They are elected on the basis of their professional qualifications.

A state may not be represented by more than one judge.

Today:

President - China

Deputy President - Madagascar

Judges - France, Sierra Leone, Russia, Great Britain, Venezuela Slovenia, Holland, Brazil, USA, Japan, Germany, Jordan and Egypt.

The jurisdiction of the International Criminal Court is complementary; it will hear a claim against a person only if it

reaches the conclusion that the person did not pay for his act within the state. The jurisdiction of the International Court in The Hague is not complementary, it can be concurrent; an action can be brought against the state before an internal judicial instance (for example, the High Court of Justice) but this fact does not limit the power of the International Court to hear the matter in any manner.

2. The Path by which the Story of the Barrier Reached The Hague

A. On 21 October, 2003 the UN General Assembly reached a decision relating to:

"Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Palestinian Territory".

In this decision, fear was expressed that the route marked out for the wall being constructed by the State of Israel (1) could prejudice future negotiations leading to the solution of two states for two peoples; and (2) could cause humanitarian hardship for the Palestinians, and therefore, the decision:

1. Called upon Israel to stop building the wall in the Palestinian areas which is in departure of the Armistice Line of 1949, and which comprises a breach of international law;
2. Requested the UN Secretary General to report periodically to the General Assembly regarding Israel's compliance with the decision, the first report to be submitted within a month.

B. On 24 November 2003, a month after the decision, the UN Secretary General submitted his report.

In his decision Kofi Annan concluded as follows:

1. That Israel is not complying with the GA demand to stop building the barrier along a route beyond the Green Line;
2. The planned route of the barrier incorporates settlements and settlers within the Israeli side of the barrier and encircles Palestinian communities;
3. The army is requisitioning land for the purpose of building the barrier, albeit he pointed out that the requisitions are subject to appeal to a special committee, and the decisions of this committee may be appealed to the High Court of Justice.
4. The construction of the barrier as described above leads to breaches of human rights:

I Restrictions on the freedom of movement of the Palestinians to leave and enter the enclosed villages;

- Restrictions on the residents of the enclaves;
 - Even greater restrictions on those who do not reside in the enclaves.
- II Restrictions on the freedom of occupation of the Palestinians by reason of the isolation of towns from their agricultural lands, while surrounding villages are separated from urban markets or services;
- III About two weeks after Kofi Annan submitted his report, on 8 December 2003, the General Assembly of the UN reached a decision to ask the International Court of Justice to give an Advisory Opinion:

“On Israel’s construction of a separation barrier in the West Bank.”

As already mentioned, position papers must be submitted by 30 January 2004 and oral submissions will commence on 23 February 2004.

- IV It may be assumed that the questions which will be considered by the Court will be derived and inferred from Kofi Annan’s report.

In the first stage the Court will be required to contend with the question of its jurisdiction and resolve the dilemma whether the question posed is legal, or, as Israel asserts, an issue which forms part of the political process aimed at resolving the Israeli-Palestinian dispute. If Israel’s position is accepted, the proceedings will come to an end unless the Court moves on to deal with other legal questions arising out of Kofi Annan’s report.

- The legitimacy of building a barrier along a path departing from the Green Line. It would seem that constructing a wall on or to the west of the Green Line is not problematic from a legal point of view and a state is entitled to take defensive actions within its own borders.

The premise of Kofi Annan’s report is that the Green Line is the recognized international border of Israel and the construction of a fence beyond that line *per se* comprises a breach of international law, even if it does not cause hardship to the Palestinian population. It is not clear whether the Court will agree with this position and will pursue an examination of the issue on the basis of that premise or will decide to consider the question of the Green Line as Israel’s border.

- In the event that the Court will accede to the view that the Green Line is Israel’s border - the question

of the status of the territories beyond the Green Line will naturally arise.

Israel maintains a regime in these areas which is based on international law as set out in the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, namely, a regime of belligerent occupation.

Prima facie, holding these territories by way of belligerent occupation is legitimate under international law. However, following World War II, no precedents have been set for belligerent occupation persisting for decades. The legitimacy of such belligerent occupation has been examined by the Israeli High Court of Justice, which has accepted it as “long-term belligerent occupation” and in the light of this reality has determined the scope of the permitted and prohibited activities of the Military Commander in the area.

At the same time, the legitimacy of this determination and its implementation have yet to be examined by international legal forums.

A serious international judgment dealing with the question of the establishment of a defensive structure in administered territory, such as the security barrier, will first and foremost require a definition of the legal regime in the territory.

If this is legitimate belligerent occupation, the occupying power may take measures in the area for the purpose of ensuring its security and the safety of its citizens, obviously while taking into account the needs and rights of the local population. The fact that it takes these defensive measures within the territory is not illegitimate.

Nonetheless, it is possible that the Court will decide that holding territory by way of belligerent occupation for a number of decades is not legitimate belligerent occupation. In such a case, the legal basis of belligerent occupation in the territories will be negated and a large number of the military acts carried out there will be regarded as illegitimate unless recognized as acts of self-defence.

- Let us assume that the Court will find that Israel’s legitimate border is the Green Line and that it holds the territories beyond that Line - Judea, Samaria

and the Gaza Strip - under a legal regime which is recognized by international law, namely, belligerent occupation. In such a case, the occupying power will be entitled to take measures in the area needed to ensure its security or needed in order to serve the local population, including requisitioning of land on condition that the requisitioning indeed directly serves security needs or the needs of the local population, as appropriate.

- Even if the Court decides that Israel's belligerent occupation of the areas is not legitimate, the question which will ensue is: according to what standards should Israel's conduct in the territories be determined? Is a war underway there, so that it is legitimate to engage in certain defensive acts within the context of the war, or would it be wrong to define the situation as a war so that it would not be possible to engage in any defensive operations beyond the Green Line?
- Whatever the nature of the ruling in connection with the Green Line, the legitimacy of the belligerent occupation or the definition of the current situation as war, Israel is in any event committed to infringing the human rights of the local population to the least possible extent, irrespective of whether these human rights are derived from humanitarian law or from general human rights law. The restrictions on freedom of movement, the right to health, the right to education and freedom of occupation, even if imposed for a proper purpose, *i.e.*, they are intended to protect the citizens of Israel from terror attacks, must comply with the test of proportionality. It is necessary to examine whether the construction of the barrier along its current path serves security needs, *i.e.*, whether it achieves the purposes of the restrictions or whether it is possible to take a measure which causes less injury to basic rights but would also achieve the objective of protecting civilian lives. We may presume that the Court will examine these issues as part of its deliberations.

4. The Petition to the Israeli High Court of Justice

Petitions have been submitted to the High Court against the construction of the barrier along certain routes beyond the Green Line and against the requisitioning of land.

In practice, the High Court has been required to deal with questions similar to those facing the Court in The Hague. The position taken by the Israeli High Court in relation to certain of the questions raised is well-known:

- it has recognized the legitimacy of the belligerent occupation of the administered territories even though it has persisted for a long period of time and has also defined the security situation in the area as a situation of war against terror which justifies a broad range of defensive activities.
- Within this framework the High Court has examined the legitimacy of various military activities, authorized various activities and disqualified others, which, in the Court's view, have failed to meet proper standards of international law and fundamental principles of Israeli law.

At first glance, rulings of the High Court of Justice may assist the State of Israel in its legal battle on the international arena. The prestige of the Supreme Court and its professional standing may strengthen the contentions of the state. This statement would undoubtedly be true were we facing personal claims before the International Criminal Court in The Hague. There, the Court's jurisdiction is complementary and any local judgments on the issue can only help the defendant party. Here, however, the deliberations are being conducted by a different judicial instance. This Court does not possess complementary jurisdiction. The first issue which it will decide is the question of jurisdiction; a determination of absence of jurisdiction will follow from the Court accepting the argument that the question is a political one and therefore non-justiciable. This is an argument which Israel must run notwithstanding that the Israeli High Court, a patently legal instance, has considered questions which Israel now claims before the International Court are non-justiciable political issues.

5. Israel's Decision not to Appear before the Court

Israel chose not to present its arguments in order to avoid conferring legitimacy on the Court's deliberations on substantive issues. Thus, while on one hand, Israel lost a platform from which it could voice its position on the issue of borders, belligerent occupation and defence against terror, it inspired **all** the countries of the free world to refrain from appearing. This is a strong statement by the free world that, together with Israel, it opposes these issues being heard before an international legal tribunal and believes that the Israeli-Palestinian dispute should be resolved by a political process.

The Use and Abuse of International Law by NGOs

Gerald M. Steinberg and Simon Lassman

NGOs (non-governmental organizations) focusing on human rights issues often use international law and terms such as *war crimes*, *crimes against humanity*, *disproportionate use of force*, *excessive response*, *indiscriminate killing* and *arbitrary use of force*, as part of their arsenal. This has proven an effective weapon in the campaign to demonize and delegitimize Israel that is being led by some of the most powerful international human rights NGOs in cooperation with their Palestinian partners.

Human rights NGOs - particularly those that define themselves as 'law focused' - have become powerful members of the large and well-funded 'NGO community' that is active in the Israeli-Palestinian conflict and in international frameworks such as the infamous 2001 Durban UN Conference against Racism. In this conference, a parallel NGO Forum had a far greater impact than the official diplomatic framework, delivering vitriolic and baseless charges against Israel. As will be demonstrated in the following analysis, in the NGO reports and campaigns, both before and after Durban, politically loaded claims, with immense rhetorical weight, such as 'infringements of international law' reflect little understanding of the complexities of international law.

Indeed, there is a prevalent trend in the international NGO community, in sharp contradiction to their ostensible universal



human rights objectives, to support the demonization and delegitimization of the State of Israel. A notable example is the campaign to fuse the concepts of 'apartheid' and the 'Berlin Wall', in order to coin the phrase, 'Israel's apartheid wall.' These and many other examples are documented by the NGO Monitor project, and can be accessed at www.ngo-monitor.org.

As the NGO Monitor's reports demonstrate, the highly politicized role of NGOs is, in large part, a reflection of the three-fold division of NGOs that are active in the Israeli-Palestinian conflict. The first level consists of international bodies such as Amnesty International, Human Rights Watch, the International Commission of Jurists, and Oxfam, whose operations are truly global and very influential. Amnesty International, for example, claims a membership of one and a half million, and an annual operating budget of \$30 million with projects in 140 countries. The second group is made up of region-specific NGOs such as Miftah, Palestinian Center for Human Rights (PCHR), Physicians for Human Rights - Israel (PHR-I), and LAW. The most prominent among them are 'legal focused' NGOs which have made a point

Prof. Gerald Steinberg is the Director of the Conflict Management Program at Bar Ilan University, Israel. He and Simon Lassman are the editors of www.ngo-monitor.org.

of amassing 'data' and 'facts' to further their goals of undermining Israel. And the third group consists of NGOs that collect funds for a variety of projects and areas, and provide financial and technical support to smaller regional NGOs. Examples include the Ford Foundation, International Commission of Jurists (ICJ), New Israel Fund, Christian Aid, and the Advocacy Project.

Working together, the resulting NGO network now constitutes a very powerful force, as demonstrated in the case of Durban, the condemnation of Israeli action in Jenin (April 2002), and, most recently with respect to the campaign on the "apartheid wall". The "information chain" that links the local NGOs to the international superpowers, when combined with the amplification resulting from the public relations machines at the disposal of groups such as Amnesty International, Oxfam, Christian Aid and Human Rights Watch, have created an overwhelming force that has captured and severely distorted the core human rights agenda and impact of international law in this framework.

The information chain

In the past decade, a large number of local 'law focused' Palestinian NGOs, LAW, *Al-Haq*, *Al-Mezan* and *Adalah* (from the Arab Israeli sector) have been created. These organizations serve as vital 'grassroots' information providers for the international NGOs, which then use this information in their reports, political campaigns and fund raising activities. The connections between Palestinian 'legal focused' NGOs and the powerful international NGOs, which have the capacity and lobbying facilities, provide an efficient channel for anti-Israel propaganda to the media and to government officials.

A recent example of how this information chain uses and distorts the language of international law for anti-Israel political objectives is found in the Amnesty report entitled *Israel/Occupied Territories: Wanton destruction constitutes a war crime*, issued, 13 October 2003¹.

"Amnesty International calls on the Israeli authorities to put an immediate end to the practice of destroying Palestinian homes and other properties, and of using *excessive, disproportionate and reckless force* against unarmed Palestinians and in densely populated residential areas, which frequently result in the killing and injuring of *unarmed civilians, including children*."

This language is a very close echo of the terms used by the local NGOs. *Adalah* Special Report, dated June 2002, on *Israeli Military Attacks on the Occupied Palestinian Territories*² reads as follows:

"The assault on the civilian population, infrastructure and property and against the lives and bodies of civilians is *unreasonable and disproportionate*, and was carried out with excessive force. The petitioners sought an immediate end to the shelling and striking of civilians and civilian targets, as the army is prohibited *from indiscriminately attacking against civilian targets*."

Another clear example of the flow of information from local to international NGOs is seen through the prism of the International Commission of Jurists (ICJ). The ICJ claims it "is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights....What distinguishes the International Commission of Jurists (ICJ) is its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law."

The ICJ's Middle East division works through three Palestinian NGOs - *Al-Haq*, LAW, and the Palestinian Center for Human Rights (PCHR). All these three organizations claim to be apolitical, but in reality, their activities reveal a clear ideological agenda to undermine the international legitimacy of the State of Israel.

All three were very active in the Durban framework and continue to produce reports that repeat gross inaccuracies and distort human rights terms. These NGOs have also contributed to the simplistic equation that Palestinian suffering begins and ends with Israel's military actions in the West Bank and Gaza Strip by using and abusing terms from international law. Clear examples include *Israeli forces rampant in Nablus Old City*, dated 23 February 2003.

This press release features a long list of Palestinian casualties with no explanation as to why this operation was undertaken. A LAW press release, *Updated overview of Israeli war crimes and crimes against humanity*, <http://www.lawsociety.org/Reports/Index.html> goes even further. This statement, like many others issued in the name of human rights by the NGO community, fails to consider or analyze the complex legal and political questions of what constitutes a 'war criminal' and what the term 'crime against humanity' means. There is also no attempt to establish criteria and analyze the facts and circumstances of events. Instead the report

1. <http://web.amnesty.org/library/Index/ENGMD150912003?open&of=EN-G-ISR>.
2. <http://www.adalah.org/eng/optagenda.php>.

makes brash statements and unsupported political allegations such as:

“(there is) evidence of a policy to *deliberately target civilians or indiscriminate attacks* launched knowing they will cause *excessive losses to civilians* in deaths, injuries and property”.

In addition to constituting a clear contradiction of ICJ’s mission statement, some of their affiliates, including Palestinian Center for Human Rights enjoy ‘observer status’ at the UN and regularly submit reports to the UN Commission on Human Rights (UNCHR). Such reports to the UNHCR leave no doubt that the use of such terms is a deliberate ploy to shape the public discourse and achieve an ideological aim of undermining Israel. As Jeremy Rabkin, a Professor of Law at Cornell University has written, “To judge by international authorities... Israel...is the world’s most odious regime. Driven in large part by the NGO agenda, the UN Human Rights Commission issued six condemnations of Israel in 2001 and eight condemnations in 2002, while no other state has ever received more than one condemnation in the same year.”³

At the same time, the UNHRC has consistently ignored Palestinian terrorism against Israeli civilians, destroying the credibility of the organization. Terror directed against Israelis is not on the agenda of these local NGOs, and as a result of this and other factors, the immorality and illegality of such terrorism receives very limited attention at the level of the international NGOs.

At a different level, the Euro-Mediterranean Human Rights Network (EMHRN) provides another instance of the information chain related to the politicization of human rights, and abuse of the language and substance of international humanitarian law. EMHRN receives 80% of its funding from the EU and has considerable influence on its foreign policy. It has also been at the forefront of the campaign for the suspension of trade agreements with Israel as seen in this letter, NGO Open letter for the EU concerning the EU-Israel Association Council, (18.10.02), addressed to EU Foreign Affairs Ministers, EU High Representative for CFSP, Javier Solana and EU Commissioner, Chris Patten. The letter states:

“In view of the *large-scale human rights and humanitarian law violations* committed by Israel and due to the fact that in practice the Agreement continues to cover goods produced in the Occupied Territories (in the settlements), we call on the EU to take negative measures under the agreement, such as the suspension of trade benefits.”

The rationale given in the press release is:

“Israel’s indiscriminate, excessive and disproportionate use of force....Willful killings, arbitrary executions and targeted assassinations.”

The report makes no mention of the Israeli army’s efforts to limit civilian casualties in its fight against a sustained campaign of terror. Instead of describing how Israel chose to risk its own soldiers in a land attack on the Jenin Refugee Camp instead of an aerial bombardment that would have been far less risky, Israel is accused of “willful killings.” Moreover, no mention is made of the willful killings, in the truest sense of the term, that Israelis have been exposed to by frequent Palestinian suicide bombings.

The letter was signed by Abdelaziz Bennani, President of the Euro-Mediterranean Human Rights Network (EMHRN), Sidiki Kaba, President of the International Federation for Human Rights (FIDH) and Eric Sottas, Director of the World Organization against Torture (OMCT). It should be noted that a similar press release was issued 11.4.2002, just a few months earlier, also calling for the suspension of the association agreement with Israel.

EMHRN’s official news source is the Arab Human Rights Network based in Nazareth, which has played an active part in spreading publicity for the ‘Stop the Apartheid Wall Campaign’ and pressuring the EU to encourage Israel to adopt a law of ‘right of return’ for Palestinian refugees.

The success of these Palestinian NGOs derives from their wholesale adoption of the nomenclature of human rights rhetoric in mission statements and public announcements. Their destructive influence, on the other hand, is a direct result of an uncompromising ideological and political campaign, adopted by the international organizations. Continued success is the direct consequence of a lack of accountability and transparency mechanisms that have failed to expose the glaring contradictions between mission statements and highly ideological actions among both Palestinian and international NGOs such as Amnesty International and Human Rights Watch.

For these and many more leading members of the NGO community, the absence of democratic accountability and transparency has neither blunted their prominence nor removed their “halos” of perceived objectivity. Unchecked authority has

3. *Azure*, Issue No. 14, Winter 2003.

allowed several groups to blur the distinction between advancing universal human rights and promoting narrow ideological and political causes. In the process, they ignore the moral dilemmas, political complexities, and the nature of armed conflict and terrorism.

The Funders

Much of the moral authority of NGOs, as well as their political strength, is provided by the support from funding and facilitator organizations. The huge budgets that NGOs have acquired turn them into political superpowers. Although the funding groups have a normative responsibility to ensure that their funds and support are not being directed in covert ways to support terrorism or political campaigns, such as the demonization of Israel, this requirement is largely ignored. While funding organizations have taken great care to establish financial-transparency mechanisms to make sure money is not misappropriated, (one notable exception to this is the Palestinian NGO LAW), the substantive work that the NGOs engage in has been subject to far less scrutiny. Funding institutions and individuals have granted significant political power to organizations that hide behind a veneer of "moral guardianship."

One can categorize three types of funding bodies active in the areas of human rights and humanitarian issues. The first consists of governmental bodies and UN organizations, such as the European Union, UNICEF, USAID, CIDA (Canada), and other ministries for overseas assistance. The second type, identified above, is made up of other NGOs that style themselves as "facilitator organizations," providing invaluable logistical, technical, financial, and professional support, such as the ICJ. The third type includes foundations such as the Ford Foundation and the German Fund for Palestinian NGOs.

Following the exposure and analysis by www.ngo-monitor.org and in other sources, there is some evidence of a change of direction in the attitude of funding organizations to the demonization and incitement campaign against Israel. Ford Foundation President Susan Berresford published a public letter affirming that the Ford Foundation has been funding NGOs that pursue an anti-Israel or anti-Semitic agenda. In addition, senior EU officials have mentioned privately that they are reviewing funding procedure to certain Palestinian NGOs in light of the information and analysis reported by NGO Monitor. These two important steps however are minor compared to the extent of funding ideological human rights NGOs are still receiving. Moreover, it is not clear to what extent the Ford Foundation and the EU will actually effect a change. The

Habitat International Coalition is a clear example of an NGO with a virulently anti-Israel agenda that still enjoys Ford funding.

Conclusion

Human rights NGOs have derived considerable international legitimacy from the claim that they are 'grassroots' organizations, representing individual interests often overlooked by political parties and do not have to pander to short-term electoral interests. They claim to represent global interests and norms, not restricted to the interests of one group or state. Together they form an integral part of 'international civil society', a concept that has won several NGOs, including a few virulently opposed to Israel's existence, such as the Palestinian Center for Human Rights, indirect representation at the UN as 'observers.'

Although a fundamental principle of human rights is that they advocate universal norms, several high-profile Palestinian NGOs use sophisticated advocacy campaigns to become prime suppliers of 'grassroots human rights news'. The EU, United Nations Human Commission on Human Rights and independent government enquiries use their reports on a regular basis. The most recent example is the House of Commons International Development Select Committee enquiry report of February 2004, which based its report on submissions from groups such as Christian Aid and Save the Children Fund. This results in politically biased declarations, analyses and policy recommendations.

It is not coincidental that both the international media and humanitarian NGOs devote disproportionate time to Israel and the territories. The press, academic institutions, UN diplomats, and policy-makers in individual governments rely heavily on NGO assessments and reports (and *vice versa*, so that the NGOs often quote diplomats, journalists, and academics). This closed circle does not always tell the full story - and the journalists, diplomats, and academics readily make use of the accessible and simplistic packaged information and political analyses that the NGOs efficiently supply and distribute. The NGOs recognize that cooperation with the press and the diplomatic community is vital for fund-raising, without which no NGO can function, and this results in a highly incestuous relationship, immune from external scrutiny.

This situation will not end until the "halo effect" which grants the NGO community immense freedom to abuse the framework of international law and almost uncontrolled **influence in the UN, foreign ministries and the media is subject to external examination.**

Additional Sources:

- Gerald M. Steinberg and Simon Lassman, "Monitoring the Political Role of NGOs", *Jerusalem Letter / Viewpoints* No. 499 1 Sivan 5763 / 1 June 2003, Jerusalem Center for Public Affairs June 2003 (<http://www.jcpa.org/jl/vp499.htm>)
- Mary B. Anderson, "Humanitarian NGOs in Conflict Intervention", in *Managing Global Chaos*, eds. Chester Crocker, Fen Hampson and Pamela Aall, (Washington, D.C.: United States Institute of Peace Press, 1996) p. 343-4
- Kenneth Anderson, "The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations", *Chicago Journal of International Law*, Vol. II, No. 2 (Fall 2001): 371-388.
- David Rieff, *A Bed for the Night, Humanitarianism in Crisis* Simon and Schuster, USA, 2002.
- Micahel Ignatieff, *"Human Rights as Politics and Idolatory"*, Princeton University Press, 2001.
- Irwin Cotler, "Durban's Troubling Legacy One Year Later: Twisting the Cause of International Human Rights Against the Jewish People", *Jerusalem Issue Brief* 2:5, Institute for Contemporary Affairs/Jerusalem Center for Public Affairs, August 2002, <http://www.jcpa.org/brief/brief2-5.htm>.
- Jeremy Rabkin, *Why Sovereignty Matters*, American Enterprise Institute Press, 1998.
- Richard John Neuhaus, *"The Public Square, First Things"*, February 2000, <http://www.firstthings.com/ftissues/ft0002/public.html>.



Winter in the Upper Galilee (photo courtesy of the Israel Government Press Office)

As the fight against anti-Semitism is a top priority on the Association's agenda, senior representatives of the Association, together with representatives of the World Jewish Congress, urged the UN High Commissioner for Human Rights to take tough and decisive measures against the ever-more pervasive phenomena of anti-Semitism around the world. Our representatives held a lengthy meeting on these issues with the Acting High Commissioner for Human Rights (pages 19-21), and submitted a document of recommendations (page 22) as well as detailed information both in written and oral statements to the Human Rights Commission, concerning extremely anti-Semitic TV series produced in Egypt and Syria and screened during the holy month of Ramadan. The Commission failed to condemn the televising of these series.

Urging the UN High Commissioner for Human Rights: The UN Should Take Measures Against Anti-Semitism

Special Report

Present at the meeting which took place on 15 January 2004, in Geneva:

Mr. **B. Ramcharan**, Acting High Commissioner for Human Rights (AHC)

Mr. **Eric Schwartz**, Executive Director, Office of the UN HCHR

Jonathan Prentice, Assistant to the Acting HC

Daniel D. Atchebro, assistant to the UN Special Rapporteur on Racism

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

Joseph Roubache, President of the IAJLJ, French section

Daniel Lack, Legal Advisor to the WJC Geneva office, and representative of IAJLJ to the UN in Geneva

Maya Ben-Haim Rosen, Director of the WJC Geneva office

The **Acting High Commissioner** stressed that he was a friend of the Jewish organisations, recalling the contribution of Jewish organisations to the creation of the UN and to the development of human rights. He recalled the spring period of Israel's participation at the UN prior to the deterioration of the climate in subsequent years.

Daniel Lack responded that unfortunately, like the Prague Spring, it was overshadowed by the resumption of the conflict. The information on the resurgence of virulent anti-Semitism sent to the Special Rapporteur on contemporary forms of racism, of which his office had received a copy, spoke for itself. While the professional integrity and good faith of the Human Rights secretariat was appreciated, within the Human Rights Commission itself, the politicisation of the debate gave rise to repetition of objectionable defamatory statements at the 59th Session reaching intolerable levels. It visibly caused embarrassment to the High Commissioner who preferred not to be present at these meetings. In the light of the acutely deplorable situation now reached, it was necessary to insist on concrete action and the adoption of specific measures.

The IAJLJ had just held a successful meeting in Paris last October on "International Terrorism and Anti-Semitism", after which France had taken further measures to combat anti-Semitism in consultation with a panel of lawyers. This was a good example of how anti-Semitism could be fought.

Hadassa Ben-Itto stated that she had decided to attend the meeting because of the importance of this issue. She had

considerable experience of the UN, starting with General Assembly session in 1965 when the transparent attempt was made to condemn Zionism with anti-Semitism as suggested by the Soviet Union with the backing of the Arab states, during the discussion of the then draft convention on the elimination of all forms of racism. She was also at the 1975 session when the GA resolution was introduced to condemn Zionism as a form of racism. She was all the more appalled to discover what was currently taking place in the UN after so many years with regard to the continuing and increasing expression of anti-Semitism and discrimination against Israel. She referred to the sustained attempt to exclude any reference to anti-Semitism ever since 2001 from post - Durban UN GA resolutions against racism and religious discrimination. This was particularly deplorable, also because it undermined UN credibility.

No UN action was taken to counter this development, which was becoming even more pronounced. The world-wide resurgence of anti-Semitism was continuing unabated with the UN as a silent witness. Hadassa Ben-Itto further stated that she had studied the “*Protocols*” for 6 years. This notorious falsification used to achieve sinister murderous aims was being distributed around the world as if it were an authentic document.

The Egyptian TV series based on the *Protocols*, followed by the recent Syrian TV series repeating the blood libel against the background of the *Protocols* in the most explicit manner, both replicated on satellite TV stations around the world, had given rise to widespread abhorrence. The UN had to join in the universal condemnation of this despicable phenomenon, and also should express its unqualified condemnation of the blatant anti-Semitic incitement to hatred and violence in the Palestinian educational curriculum and in the media with the inculcation of the martyrdom exemplified by suicide bombers as a model to be emulated.

Confidence that the UN would stand in the forefront of the campaign to eradicate these practices was lacking. The UN should be expected to join the ranks of those countering these terrible manifestations in which all human rights organs and bodies should be actively involved but regrettably this had not yet occurred. If concrete action would not be taken in the form proposed, the situation would escalate uncontrollably. Specific measures therefore had to be introduced and implemented.

Joseph Roubache referred to the specific relevance of the French situation. He believed that France was not an anti-Semitic

country but nonetheless there were many anti-Semitic incidents in France. These acts arose out of the Arab-Israel conflict, as typified by the image given to the conflict by the media’s distorted representation of an Israeli soldier confronting a Palestinian boy. They were committed in many instances by people originating from Maghreb countries. The average French citizen was indifferent to this situation but there were several political groups on the extreme left, and others such as the ecologists, normally well disposed but who viewed the Palestinians as the victims and Israel as the oppressor. It assuaged feelings of guilt for what had occurred to the Jews of France as the victims of the Nazi occupation to view them as the victimisers. It had become necessary to convey the implications of this situation to the French authorities and to sensitise them to the issues involved. As a result of the IAJLJ conference in October 2003, a dialogue has been instituted with the competent governmental and judicial authorities. It was apparent that the further down the hierarchy contact was made within the bureaucracy, insensitivity to anti-Semitism increased. A conscious effort therefore had to be made to make the authorities aware of the realities and to ensure that the law prosecuting cases of anti-Semitism was consistently followed up and implemented at all levels. A committee of lawyers was thus established to examine specific cases with the competent prosecuting officers and for review with the appropriate judicial authorities.

Daniel Lack indicated that the French example of the recognition of the reality of anti-Semitism as a phenomenon that had to be combated by the introduction of concrete measures, provided an example of what it was desirable to see happening at the UN level. Seven concrete proposals (see p. 22 of this issue of *JUSTICE*) were accordingly submitted to the AHC and his colleagues for consideration with a view to their implementation

The AHC expressed his gratitude to the representatives of both organisations for accepting his invitation. He referred to the Secretary General’s recent speech in which he had referred to the problem of anti-Semitism. The latter had stressed the need to take action to combat anti-Semitism. The AHC believed that it was the intention of the Special Rapporteur on racism to refer to anti-Semitism in his next report and also to suggest writing a separate report on anti-Semitism, parallel to the report on Islamophobia already submitted. Mr Acherbo, the assistant to the Special Rapporteur on racism, emphasised that the latter was ready to

receive and carry out a special mandate from the Commission to write a report on anti-Semitism. The AHC said he would discuss this suggestion with the Special Rapporteur, and that he would be surprised if the Commission would not give him the mandate that he would request for this purpose. The AHC also referred to a speech he had recently given at a meeting of the American Jewish Committee in New York on the subject of anti-Semitism.

In responding to the specific proposals as a human rights activist and not as Acting High Commissioner, he wished to comment as follows:

- As regards the first two proposals concerning ruling out of order defamatory anti-Semitic statements made before the Commission on Human Rights he would ask his colleagues to draft an appropriate study based on past experience.
- With regard to the third proposal requiring the Commission to consider wide ranging monitoring of all forms of anti-Semitism, he thought that it involved political aspects. There would undoubtedly be counter proposals made by the Commission calling for some additional elements having political connotations. He needed to study the issue further and would revert to this suggestion.
- As for the fourth proposal involving dealing with specific cases of anti-Semitism in the media and on the Internet, he thought it preferable to await the report on anti-Semitism by the Special Rapporteur on racism, and then ask the Special Rapporteur on the freedom of speech Mr. Ligabo of Kenya to write a related report.
- Concerning the fifth proposal with regard to the proscribing of the *Protocols*, the AHC indicated his awareness of this problem. A further study on this subject by holding a seminar

for example at the University of Lund for which funds might be available from the Swedish government, might be a possibility to be entertained. It would be similar to what had been undertaken at the seminar on the Right to Leave at the Institute for Human Rights in Strasbourg attended by Professor Meron and on which Hurst Hannum had made a series of recommendations. This was followed by the revival of this issue in the Sub-Commission at which Mr. Mubanga Chipoya was appointed Special Rapporteur. Similarly the *Protocols* could be the subject of a special issue for action.

- The AHC found the sixth proposal for a special UN day to commemorate the Holocaust to be attractive and not unfeasible. It would however require some wider application to attract broader support. He would need to examine how this suggestion could be implemented by combining it with some other features as was the case with the third proposal.
- So far as the seventh proposal was concerned with regard to reacting to the contents of UN resolutions concerning omissions or otherwise commenting on their contents, he had personally experienced that it was impossible for a UN official to request a UN organ to adopt a resolution with or without a particular content or to refrain from taking a certain course of action. He was given to understand that by so doing he would be overstepping the bounds of what would be politically acceptable.

In conclusion the AHC expressed appreciation for the useful and concrete exchange which had taken place. He promised to revert to the specific matters that had been put to him



The waves of anti-Semitic cartoons in the Arabic media go on: from Al-Itihad (Dubai), titled: The End.

Measures to Combat Anti-Semitism

Recommended to the Office of the High Commissioner for Human Rights by the International Association of Jewish Lawyers and Jurists and the World Jewish Congress

In the light of the alarming increase of anti-Semitism worldwide as reported by detailed submissions to the UN Special Rapporteur on Racism, the International Association of Jewish Lawyers and Jurists and the World Jewish Congress urge the Office of the High Commissioner for Human Rights to initiate the following measures:

1. All Chairpersons of UN forums and bodies should rule out of order any statements made by member delegations, observers and representatives which contain defamatory matter violating the provisions of the principle human rights instruments.
2. Should any speaker, after admonishment by the Chair persist in such remarks, the Chair should declare that person out of order and call on the next speaker.
3. The Commission should establish appropriate mechanisms to monitor all forms of racial discrimination, with special reference to anti-Semitism, including such phenomena as the racist stereotyping of Jews, denial of the Holocaust and other expressions of anti-Semitism. Its mandate should include monitoring school curricula and teaching manuals to ensure that any such anti-Semitic references are expunged.
4. The Commission should exercise utmost vigilance to proscribe and condemn use of media including radio, television and internet which incite to hatred and violence against Jews and urge all states to adopt legislation proscribing such actions as punishable criminal offences.

Particular reference is made in this context to the televised series broadcast in 2002 by Egyptian television ("*Knight without a Horse*") and in 2003 ("*The Diaspora*") by Syrian and Lebanese television networks, both replicated world wide by satellite stations, spreading deliberate falsehoods constituting incitement to genocidal anti-Semitism.

5. The increased dissemination and use of the notorious forgery "*The Protocols of the Elders of Zion*" in book form, electronic media, propaganda and educational programs, should be unreservedly condemned and proscribed by the Commission.
6. The Office of the High Commissioner should recommend that January 27, the date of the liberation of Auschwitz, be declared as the International Day for the Commemoration of the Holocaust and for the Elimination of Contemporary Anti-Semitism.
7. The Office of the High Commissioner should use its good offices and best endeavours to put an end to the exclusion of references to anti-Semitism in relevant resolutions on racism and religious intolerance adopted by UN organs, as has occurred particularly since the 2001 Durban Conference against Racism.

Geneva, 15th January, 2004

Recent Measures against Anti-Semitism in France

Joseph Roubache



Following the recent conference held by the Association in Paris on “International Terrorism, Racism, Anti-Semitism: What Response to Evil?” the French Minister of Justice, M. Dominique Perben requested Maître Joseph Roubache, President of the French Section of the IAJLJ, to establish an *ad hoc* committee which will be responsible for identifying and pursuing cases involving anti-Semitism in France.

The committee is composed primarily of Jewish lawyers and examining magistrates of the District Attorney’s office; it will co-ordinate its activities with the competent departments in the Ministry of Justice and its objectives are to maintain constant contact with the judicial authorities and ensure that incidents of anti-Semitism are properly prosecuted and punished.

The appointment of this committee represents an additional element in the monitoring mechanisms now being instituted by the French authorities, which include the assignment to each of the 33 Courts of Appeal in France of a District Attorney with special responsibility for following-up cases involving anti-Semitism. The District Attorneys act, *inter alia*, upon representations made to them by the IAJLJ’s French Branch.

These measures have already had an effect: the District Attorney of Paris has instituted criminal proceedings against the comedian Dieudonné who uttered anti-Semitic remarks during a television program, when portraying the caricature of an orthodox Jew.

The District Attorney of Paris took similar action in respect of the screening

throughout France via the European satellite system of the Syrian television series “*The Diaspora*”, which is charged with inciting genocidal anti-Semitism.

The new committee set up by M. Roubache held its first meeting on 29 January 2004, at the Ministry offices in Place Vendôme in Paris. Participants included attorneys Alain Jakubowitz, Michel Zaoui, Ariel Goldmann and Marc Levy; Rabbi Michel Sarfaty as well as Mr. Patrick Hubert, Director of the Minister’s Office; Mrs. Quemefleur, Chief of Judicial Services; Mrs. Muller, Technical Advisor and Mr. Mathieu Bouchette.

Its discussions led to the following areas of proposed activity being identified:

- Cataloguing the various complaints of anti-Semitic acts and ensuing penal proceedings in France. It was decided that these cases would be assigned a special code which would enable their identification and improve follow-up procedures.
- The need for a Ministerial directive aimed at ensuring coordination with the public prosecutor’s office.
- Publishing proceedings and decisions concerning acts of anti-Semitism.
- Provision of training for Justices in every Appeal Court
- Preventive measures, through school education about the existing law. Activities to be taken in cooperation with the Ministry of Education.
- Measures to fill the *lacunae* in international legislation concerning anti-Semitic speech, disseminating anti-Semitism and racial hatred via broadcasts by satellite television

stations and through the Internet. In relation to this it was agreed that greater cooperation was needed with the European Council as well as the European Union. Particular emphasis was placed on the European Commission in Brussels issuing a ‘ruling’ on this matter, in view of its binding force on all Member States.

On the French national level, the committee decided that the Prime Minister, M. Jean-Pierre Raffarin would announce (as indeed he later did) the extension of the powers of the CSA (Superior Council of the Audio-Visual, France’s media watchdog) in order to prohibit television broadcasts of an anti-Semitic nature in France, including broadcasts which had not previously been subject to such prohibitions.

The committee agreed to meet again in March, under the effective presidency of Justice Minister, M. Dominique Perben.

Adv. Joseph Roubache is Deputy President of the IAJLJ and head of its French Section.

Human Rights and the New Anti-Jewishness

Irwin Cotler

We are witnessing today a new, escalating, virulent, global, and even lethal anti-Jewishness, reminiscent of the atmospherics of the 1930s, and without parallel or precedent since the end of World War II. This new anti-Jewishness overlaps with traditional anti-Semitism but is distinguishable from it; it found early juridical and even institutional expression in the Zionism is racism resolution, but goes dramatically beyond it. The new anti-Jewishness needs a new vocabulary to describe it, but can perhaps best be described - using a rights-based juridical perspective - as the discrimination against, denial of, or assault upon the right of Israel and the Jewish people to live as an equal member of the family of nations; of the emergence of Israel in a metaphorical sense as the collective Jew among the nations; and of the singling out of Israel for differential and discriminatory treatment in the international arena.

Traditional anti-Semitism involves the right of Jews to live as equal members, in whatever host society they lived. It is, in effect, a Diaspora-centred inquiry for which we have developed indicators. If you look at those indicators - such as discrimination in housing, education, and employment - you will think that anti-Jewishness is indeed in retreat and a marginal phenomenon. Yet Jews feel in their gut that anti-Semitism is increasing. This gut feeling can and must be understood in an academic, normative sense - not just in a visceral sense. In order to do this, what we need is an Israeli-centred inquiry, for which we have yet to develop any set of indicators to identify it, monitor it, address it, expose it and the like.

Prof. Irwin Cotler is the newly appointed Minister of Justice and Attorney General of Canada. Until this appointment he served as Special Counsel of the IAJLJ in which capacity he gave this presentation at the Paris International Conference on "Terrorism, Racism, Anti-Semitism: What Response to Evil?", held on 15-17 October, 2003.

What is common to both forms of anti-Semitism is discrimination. All that has happened is that it has moved from discrimination against the Jews as individuals - a Diaspora-centred, social science inquiry - to discrimination against the Jews as a people - an Israeli-centred focus with respect to the right of Israel to live as an equal member of the family of nations. Therefore, from a conceptual and analytical point of view - and I would also say, from a strategic and an advocacy point of view - we need not only to distinguish between the old and new anti-Jewishness, but we need a new conceptual framework, a new set of indicators by which we can identify, monitor and expose and combat this new anti-Semitism; we need a paradigm shift. And I want to suggest a new framework of inquiry, organized around what I would call a rights-based or human rights perspective, a kind of juridical framework of inquiry. In that regard, I am going to share here a set of five indicators, though elsewhere I have written about twelve indicators of this new anti-Jewishness.



Still, the effect of the new anti-Jewishness can only partially be understood through these indicators. What makes this new anti-Jewishness so pernicious is its globality; and what makes the globality so prejudicial is the role of the media. By the media dimension, I am referring not only to anti-Semitism in the media, particularly as it has found expression in the European and

Arab media, but also - and no less importantly, though much less appreciated - the manner in which the media suppresses or sanitizes, marginalizes or omits, the pandemic of anti-Jewishness. Accordingly, in discussing these five indicators, I will also be referring to the role the media has played in exasperating the threat - and the danger - of the new anti-Jewishness.

Before I proceed, however, there is a caveat that needs to be added. Whatever the situation may be now, and however disturbing it may be, 2003 is not 1943. There is a Jewish state today as an antidote to Jewish powerlessness; there is a Jewish people with untold resources - intellectual, moral, material - that allows the Jewish communities to gather freely; and there are non-Jews prepared to stand up and be counted with the Jewish people.¹

Genocidal Anti-Semitism

The first indicator and the most lethal type of anti-Jewishness is what I would call genocidal anti-Semitism. I do not use this term lightly; in fact, I am using it in its juridical sense, as defined by the Genocide Convention. Accordingly, I am referring to the public call for the destruction of Israel and the killing of Jews wherever they may be. If anti-Semitism - as Robert Wistrich defined it in his brilliant work - is the most enduring of all hatreds, and genocide is the most horrific of all crimes, then the convergence of this genocidal ideology with genocidal criminality is the most toxic of combinations. There are three manifestations of this genocidal anti-Jewishness.

The first finds expression in the covenants or the charters of *Hamas*, *Islamic Jihad*, and *Hizbullah*, which not only call for the destruction of Israel and the killing of Jews wherever they may be, but also for the perpetration of acts of terrorism in furtherance of that objective. In this sense, the notion of 'suicide bombers' is a misnomer. Even the term 'homicide bombers' - which was intended to act as a refinement upon it - is also a misnomer, because not all homicide is intentional criminality. I think the more apt characterization is that of genocide bombers - not because that is a characterization that I am ascribing to them, but because it is a definition which they themselves assert about themselves in their covenants and charters, and one need only read it to see that the genocidal ideology is anchored in their own chartered covenants and commitments.

The second manifestation is what may be called the religious *fatwas*, or execution writs, where this genocidal call is held out as a religious obligation - where Jews and Judaism are characterized as

the perfidious enemy of Islam. Thus, Israel emerges not only as the collective Jew among the nations, but also as the Salmon Rushdie among the nations. Yet there is a difference: when Iran issued a *fatwa* against the Muslim writer, the entire European community and others sought to impose sanctions against Iran. With respect to Israel and Jews, we have *fatwas* not only from Iran, but *fatwas* issued by clerics throughout the Muslim and Arab world. And - with bitter irony - rather than see the European community threaten those who *issue* those *fatwas* against an entire state and people, we see the state and people threatened with sanctions for their response to the religious *fatwas* themselves.

The third example of this genocidal anti-Semitism is the state-sanctioned call for the destruction of Israel and killing of the Jewish people. These calls emanate from one member state of the United Nations - commonly Iraq or Iran - and target another member state of the international community and United Nations, Israel. What remains so disturbing about this is the indulgence, the acquiescence, the sometimes understanding for these genocidal calls, which are glossed over in the silent response, reminding us of Edmond Burke's statement that the surest way to ensure that evil will triumph in the world is for enough good people to do nothing.

When you look at the media coverage of genocidal anti-Semitism, for the most part, you find that it either makes no reference to it, or - when it does make reference to it - it sanitizes the genocidal anti-Semitism itself. By "sanitizing it," I mean the media's characterization of genocidal bombers as "militants" or "freedom fighters" or, perhaps worst of all, as "activists" - since as a human rights person, I am normally called a human rights

1. For instance, America is different now than it was then, as the polls themselves have shown. Even with regard to the polls, however, one has to contextualize, as they still convey some disturbing manifestations. First of all, the fact that 20% of Americans believe that American support for Israel may be responsible for the World Trade Center bombing is itself disturbing. Second, in the rest of the world - not the Arab world, but the European world, the Canadian world - a *majority* of the people believe American support for Israel was a cause of the World Trade Center bombing. Further, there is the astonishing contradiction that emanates from the Arab-Muslim universe: a significant majority of Arabs and Muslims believe that the attack on the World Trade Center was justified, while a significant majority of Arabs and Muslims believe that the attack was deliberately caused by Israel. By contextualizing and globalizing our perspective, one gains an understanding of the Orwellian nature of the thinking that is taking place.

activist, thereby putting me in the same category as genocidal bombers. Thus, the media works to either marginalize genocidal anti-Semitism by not referencing it, or sanitize it in the manner in which it does reference it.

One example of the Canadian Broadcasting Corporation's coverage will suffice as a case study. When Canada moved - belatedly - to list *Islamic Jihad*, *Hamas*, and then finally *Hizbullah*, as terrorist entities, the CBC referred to the decision as resulting from - what they called - Canada's use of a fabricated quote about Sheik Nasrallah of *Hizbullah*, whom it called a legendary cleric in the international arena. Of course, this claim is completely baseless, as the witness testimony and documentary evidence presented certainly did not have to rely on one allegedly-fabricated quote in order to provide the evidentiary basis for *Hizbullah* to be listed as a terrorist entity. Going even further, though, the CBC's correspondent went on to say that in making this decision, the Canadian government was taking sides - that it was choosing between the characterization by Israel and its supporters, and the characterization of *Hizbullah* as a national liberation movement. But I want to suggest that it was not Canada that was taking sides; it was the media that was taking sides. All of the objective documentary evidence and witness testimony - not to mention *Hizbullah's* acknowledgement of its own objectives - characterized it as a terrorist organization. And for the CBC to say that Canada was choosing sides, and for it to imply that it was done as a result of the pressure of Israel and its supporters, is to run very close to the line, not only in the sanitizing of genocidal anti-Semitism, but in the insidious characterization of the reasons for it.

Political Anti-Semitism

The second indicator of the new anti-Jewishness is what might be called political anti-Semitism. And here too there are three manifestations.

First is the denial to the Jewish people of its right to self-determination - the only right consecrated in both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, and which is accorded to all other peoples of the globe.

The second manifestation of political anti-Semitism is the discrimination against or denial of the right of the Jewish people and Israel to its own independent state.

The third is the attribution to Israel of all the evils of the world - the demonization of Israel. In other words, as a contemporary

analog to the medieval indictment of the Jews as the poisoners of the wells, Israel is regarded as the poisoner of the international wells.

The whole, in terms of this political anti-Semitism, may be summed up best by my friend and colleague Per Ahlmark, who said that traditional or classical anti-Semitism in its most insidious form sought to make the world *judenrein*; this new anti-Jewishness wants to make the Middle East - and the world - *judenstatrein* - free of a Jewish state.

Ideological Anti-Semitism

Ideological anti-Semitism is the third indicator of the new anti-Jewishness. By ideological anti-Semitism, I am referring to the discrimination against, denial of the Jewish people's *raison d'être* or *right to be* - among other things, the denial of Zionism as the legitimate national liberation movement of the Jewish people. I am not talking about critiques, even serious critiques, of Israel or Zionism. Those, of course, are fair, common, and part of legitimate speech.²

The first manifestation of this ideological anti-Semitism was its institutional and juridical anchorage in the 'Zionism is racism' resolution at the United Nations, a resolution that - as Senator Daniel Moynahan said - gave the abomination of anti-Semitism the appearance of international legal sanction. But we have gone beyond the notion of Zionism as racism, notwithstanding the fact that there was a formal repeal of this resolution at the United Nations. 'Zionism as racism' is alive and well in the international arena, particularly in the campus cultures in North America and the like. But there are two additional dimensions of this ideological anti-Semitism that bear appreciation.

The first is the indictment of Israel as an apartheid state. This manifestation involves more than the simple - though horrendous - indictment of Israel as an apartheid state; it also involves, as evidenced by the events in Durban, the call for the *dismantling* of Israel as an apartheid state. This indictment is not limited to talk about divestment - it is about the actual dismantling of Israel

2. Even anti-Zionist critiques may be justified - although I know there are those who say **anti-Zionism** is synonymous with **anti-Semitism**. Where you have a situation where certain ideological dimensions appear, **anti-Zionism** shades dangerously into **anti-Semitism**. Accordingly, and from a juridical perspective, I do not like to use **anti-Zionism** as necessarily being synonymous with anti-Semitism, though I recognize the possibility - and even tendency - for this to happen.

based upon the notion of apartheid as a crime against humanity.

Along with the characterization of Israel as an apartheid state is what might be called the 'nazification' of Israel. Israel is constantly depicted as a Nazi state, through imagery and rhetoric alike. The convergence of these two indictments is used to portray the dismantling of Israel as a moral obligation. Such a state, as discourse puts it, does not really have a right to exist - and who could deny that an apartheid, Nazi state has no right to exist today? What more, this characterization allows for "resistance" to this Nazi apartheid state to be deemed justifiable - after all, such a situation is portrayed as nothing other than *occupation et resistance*, where resistance against an apartheid, Nazi occupying state is legitimate, if not mandated.

Discriminatory Treatment in the International Arena

This fourth indicator of the new anti-Jewishness is the most insidious one. I use the term "insidious" because of its particularly sophisticated character, its Orwellian inversion of law and language. I am referring here to the singling out of Israel for differential and discriminatory treatment in the international arena: where anti-Semitism proceeds under the banner and mask of human rights; and where the United Nations - referred to as the lynchpin of international human rights law - becomes the protective cover under which this mask of human rights acts itself out. From a juridical human rights perspective, I will detail but three examples.

The first is the World Conference against Racism in Durban. Durban is a metaphor not only for the Jewish condition and for the state of Israel in the world today, but also for the state of the world that Israel inhabits. In order to truly understand what took place, one needs to appreciate that Durban was an international human rights conference under the auspices of the United Nations, a conference that was not supposed to have any country state indictment. Instead, in complete breach of its own procedures and principles, the conference against racism became a conference of racists against Israel and the Jewish people. The conference that was supposed to commemorate the dismantling of South Africa as an apartheid state turned into a conference calling for the dismantling of Israel as an apartheid state. The conference that was to celebrate - and I share this emotion - human rights as the new secular religion of our time, turned into a conference indicting Israel as the new meta-human rights violator of our time, in effect condemning it as the new anti-Christ of our time. The conference

that was to speak in the name of humanity, ended up speaking in the name of inhumanity. Never in all my years have I witnessed the kind of virulence and intensity of that anti-Jewishness that I found in the festival of hate at Durban.

The second example of this sort of Orwellian anti-Jewishness marching under the banner of human rights takes place annually at the United Nations Human Rights Commission. Again, this point must be understood in context: the United Nations has emerged as the lynchpin of international human rights law today. The United Nations represents a tremendous influence on its class of professional civil servants, members of Parliament around the world, and the critical mass of people that are exposed to this kind of decision-making internationally; further, students all over the world learn the jurisprudence of the United Nations and the Human Rights Commission as part of their learning and part of their intellectual experience. What happens at the UN Human Rights Commission - a body held out in particular as being the repository of international human rights doctrine and law-making - is that the session begins with Israel being the only country for which the agenda reserves a country-specific indictment even before the Commission begins its deliberation. There is an agenda item labelled "Human Rights Violations by Israel in the Occupied Territories," followed by another single item that refers to all other human rights violations in the rest of the world. The only country that is singled out for a country-specific indictment even before the deliberations begin, in breach of the UN's own procedures and principles, is Israel.

Even worse, wholly 40% of all the resolutions at last year's United Nations Human Rights Commission were passed against Israel. Among those that passed were resolutions that indicted Israel for war crimes, crimes against humanity, and genocide - language right out of the Nuremberg indictments for the very victims of Nuremberg. Not only was there silence and acquiescence in the face of these resolutions, but even authorization and approbation by the UN Human Rights Commission. In a not-so-subtle reference to Israel, the same Commission also passed a resolution justifying the use of resistance by all available means in instances of colonialism, foreign occupation, and the like. Thus while the major human rights violators of our time enjoy

3. Not one resolution has been passed against China in the 35 years of the Commission; in fact, a resolution that was proposed to just *consider* China was rejected. Similarly, countries like Libya - which now Chairs the Human Rights Commission - and Syria also enjoy effective immunity.

exculpatory immunity,³ Israel is singled out for differential and discriminatory treatment. While other states can assume that they can engage in human rights violations with impunity and go on to Chair the Commission, Israel is not even eligible to be elected to the UN Human Rights Commission as a member - because in order to be elected to any of the United Nations decision-making bodies, you have to be proposed by a region. Israel is prohibited from becoming a member of the Asian region - its natural geographic grouping - and it has been given only partial and limited standing in the Western European and Others group. It is therefore effectively disenfranchised in a process where - in a kind of Alice-in-Wonderland way - the conviction and the punishment is decided upon even before the hearings begin.

One final example should suffice. Between the times of Durban and the meeting of the UN Human Rights Commission, another meeting important to Israel took place. This one did not have as much public resonance as the others, but it remains disturbing in its discriminatory application to Israel as the Jew among the nations. In December 2001, the contracting parties to the Geneva Convention convened. Again, context is important: the Geneva Convention was passed, in the aftermath of the Holocaust, as a regime of international humanitarian law to protect civilians in armed conflict. For 52 years after its adoption in 1949, the contracting parties of the Geneva Convention never met - notwithstanding the genocide in Cambodia, the ethnic cleansing and genocide in the Balkans, the unspeakable and preventable genocide in Rwanda, and the killing fields in Sudan and Sierra Leone. The first time - and the only time - that the contracting parties of the Geneva convention came together to put a country in the docket was in December 2001, and the country put in the docket was Israel. This discriminatory treatment is not only an issue for Israel - it stands as an assault upon the international human rights order, undermining the whole regime of international humanitarian law.

Totalitarian Arab Anti-Semitism⁴

The fifth indicator of the new anti-Jewishness is what may be termed the new totalitarian Arab anti-Semitism. Totalitarian anti-Semitism is not new: we had this of course in terms of Nazism and communism, the ideological forerunners of this new totalitarian anti-Semitism. Similarly, Arab anti-Semitism is not new; it even preceded the establishment of the State of Israel. What is new, however, is the totalitarian character of this Arab Islamic anti-Semitism - this simultaneous convergence of the following elements or factors.

First is the state-sanctioned culture of hate. I am not referring here to hate that is expressed by individuals and groups, speech that democracies hold to account either through legislation or by countering such hatred with more speech; I am referring to a state-sanctioned culture of hate that operates in non-democracies with a culture of impunity.

Second is the critical mass of this trafficking of hate - this teaching of contempt and demonizing of the other in the mosques, in the media, in the summer camps and the like. Third is the religious underpinning of this teaching of contempt, where anti-Semitism in effect becomes a religious obligation. Fourth is the globality of the expression of this anti-Semitism and its diffusion in terms of the transnational terrorist network. Fifth is the immediacy of the transmission of the messages of hate: the global internet of hate. Sixth is the appropriation and amplification of both European and Christian anti-Semitism.

Seventh is *la trahison des clercs* - the treason of the intellectuals - the undue and preponderant involvement of academics and scholars and clerics and intellectuals and journalists. Eight is the *rayonnement* in the mass media - for example, the *Protocols* as *vox populae*. So you have the convergence of anti-Semitism from above in *la trahison des clercs*, and anti-Semitism from below, through the mass media and anti-Semitism in the Arab street.

Nine is the lethality of this genocidal ideology of hate. Ten is the ubiquity of the Nazification of Israel and the Jew as metaphor and message of this demonizing. Eleven is the toxic convergence of all these indicators of anti-Semitism that I went through earlier - genocidal, political, ideological, *etc.* - in this new anti-Jewishness. Twelve is the absence of democracy.

The final thing is the intensity, the virulence, the fanaticism, of this new anti-Jewishness, standing in contrast - as Robert Wistrich pointed out in the *London Times* - to the Arab anti-Semitism described by Bernard Lewis in 1986. In the past, Arab anti-Semitism was embedded in an intellectual, literary and cultural sense, but it did not have the virulence and intensity that it has today, in particular as a post-September 11 phenomenon.

Conclusion

There are other indicators of the new anti-Jewishness, indicators that deserve greater elaboration than this article permits:

4. This indicator is borrowed from Yehuda Bauer.

theological anti-Semitism, cultural anti-Semitism, economic anti-Semitism, Holocaust denial, and the like. But what is most important to emphasize is that we need a new paradigm shift, a new conceptual grid. I say this not only from an intellectual point of view, but also from a policy point of view. For the new anti-Jewishness involves the most lethal forms of anti-Semitism, mixed with this most insidious yet sophisticated marching of anti-Semitism under the mask of human rights.

And what is so serious about all this for the world - not only its Jews - is that while it may begin with the Jews, it does not end with

Jews; while it may begin with Israel, it does not end with Israel. It undermines the entire regime of international human rights law; it undermines the entire regime of international humanitarian law and the integrity of the United Nations under whose auspices it acts. In other words, anti-Semitism - the old and the new - is the canary in the contemporary pantheon of evil. Accordingly, we have a moral responsibility to make moral and juridical arguments to fight the new anti-Jewishness: not only on behalf of Israel and the Jewish people, but on behalf of humanity as a whole.

The Association Congratulates Prof. Irwin Cotler on his Appointment as Canada's Minister of Justice and Attorney General

The Association congratulates its outgoing Special Counsel Irwin Cotler on his recent appointment as Minister of Justice and Attorney General of Canada. Irwin Cotler is Member of Parliament for Mount Royal, where he was first elected in a by-election in November 1999 with 92% of the vote, in what was characterized as "the most stunning electoral victory in this century by any standard." He was re-elected in the general election of November 2000 with the highest percentage in the country.

On December 12, 2003, the Prime Minister appointed him Minister of Justice and Attorney General of Canada. Minister Cotler currently serves as a member of the following Cabinet Committees: Priorities and Planning, the Domestic Affairs, the Canada-U.S. and the Aboriginal Affairs Cabinet Committees. He is also Vice-Chair of the Security, Public Health & Emergencies Cabinet Committee and an alternate on the Treasury Board Cabinet Committee.

Although an M.P. for only four years, he has already made a distinctive mark as Chair of the Parliamentarians for Global Action (Canada), a body of 1500 democratically elected parliamentarians, and Member of its International Council; (2001-2003) Co-Chair of the Parliamentary Human Rights Group, the first ever all-party joint House-Senate human rights caucus; (2000-2003) Executive Member of the Inter-Parliamentary Union; Honorary Member of the Women's Caucus; and Special Advisor to the Minister of Foreign Affairs on the International Criminal Court, where, inter alia, he shepherded the War Crimes and Crimes Against Humanity Act through Parliament.

MINISTER COTLER is currently on leave as a Professor of Law at McGill University, where he is Director of its Human Rights Programme, and Chair of InterAmicus, the McGill-based International Human Rights Advocacy Centre. He has been a Visiting Professor at Harvard Law School, a Woodrow Wilson Fellow at Yale Law School, and is the recipient of five Honourary Doctorates including one from York University, whose citation referred to him as "a scholar and advocate of international stature."

An international human rights lawyer, he served as Counsel to former prisoners of conscience in the Soviet Union (Andrei Sakharov), South Africa (Nelson Mandela), Latin America (Jacobo Timmerman), and Asia (Mughtar Pakpahan). He recently served as international legal counsel to imprisoned Russian environmentalist Aleksandr Nikitin; Nigerian Nobel Laureate Wole Soyinka; the Chilean-Canadian group Vérité et justice in the Pinochet case; Chinese-Canadian political prisoner, Professor KunLun Zhang; and, most recently, served as Counsel to Professor Said Edin Ibrahim, the leading democracy advocate in the Arab world.

A constitutional and comparative law scholar, he has litigated every section of the Canadian Charter of Rights and Freedoms, including landmark cases in the areas of free speech, freedom of religion, women's rights, minority rights, war crimes justice, prisoners' rights, and peace law. He has testified as an expert witness on human rights before Parliamentary Committees in Canada, the United States, Russia, Sweden, Norway, and Israel, and has lectured at major international academic and professional gatherings in America, Europe, Asia, Africa, and the Middle East.

A noted peace activist, he has been a leader in the movement for arms control, and helped develop "Peace Law" as an area of both academic inquiry and legal advocacy. Irwin Cotler has been engaged - both as scholar and participant observer - in the search for peace in the Middle East. He has lectured in both Arab countries and Israel for over twenty years and has been an active participant in "rapprochement" dialogues between Israelis and Palestinians.

A leader in the struggle against impunity and the development of international humanitarian law, Irwin Cotler has served as Counsel to the Deschênes Commission of Inquiry in the matter of bringing Nazi war criminals to justice; filed amicus briefs before the International Criminal Tribunals for former Yugoslavia and Rwanda; and testified before the Senate Committee on Foreign Affairs regarding humanitarian intervention and the application of humanitarian law in Kosovo.

“Put my silver goblet in the mouth of the bag of the youngest one...”

Elishai Ben Yitzhak

The *Torah* portion of *Miketz* relates the drama taking place as a result of the encounter between Joseph and his brothers, a drama that demonstrates Joseph's twofold behaviour. On the one hand, he plays the part of the foreign ruler who does not understand their language. He tests them in various ways - he accuses them of spying,¹ he imprisons his brother Shimon,² and demands that they bring their brother Benjamin to Egypt.³ His treatment of the brothers reaches its peak when he orders his silver goblet put among Benjamin's baggage, in an attempt to fabricate the evidence necessary to “frame” him.⁴ On the other hand, Joseph also shows himself to be more humane: he invites his brothers to dine with him, and drinks with them until they reach the point of inebriation;⁵ he returns their money to them; and, finally, he shows his feelings and, unable to bear the pain of the encounter with them, steps aside to weep,⁶ notwithstanding his position as deputy to the king. Joseph's emotional, psychological and educational motives have troubled Biblical commentators, and they have attempted each in his own way, to explain Joseph's behaviour.⁷

As mentioned above, one of Joseph's schemes was the attempt to fabricate evidence and “plant” it in Benjamin's baggage, in order to incriminate him and convict him of theft. Here is the *Torah's* description:



Then he instructed his house steward as follows, “Fill the men's bags with food, as much as they can carry, and put each one's money in the mouth of his bag. Put my silver goblet in the mouth of the bag of the youngest one, together with his money for the rations.” And he did as Joseph told him. With the first light of morning, the men were sent off with their pack animals. They had just left the city and had not gone far, when Joseph said to his steward, “Up, go after the men! And when you overtake them, say to them, ‘Why did you repay good with evil? It is the very one from which my master drinks and which he uses for divination. It was a wicked thing for you to do!’” He overtook them and spoke those words to them.

Using Joseph's actions as our starting point, I would like to outline, in general terms, the principles in Jewish law relating

1. *Gen.* 42:8.
2. *Ibid.*, 42:24.
3. *Ibid.*, 42:20.
4. *Ibid.*, 44:2.
5. *Ibid.*, 43:33-34.
6. *Ibid.*, 42:24, 43:31.
7. There are those who viewed Joseph's actions as a kind of rebuke for his brothers: *Bereshit Rabbah* 93, 10; *Hagigah* 4b. Others saw his behaviour as an attempt to realize his dreams: Ramban on *Gen.* 42:9; Naftali Tzvi Yehudah of Volozhin, *Ha'amek Davar*, *ibid.* Others still saw Joseph's actions as an attempt to rectify his brothers' behaviour: Abarbanel on *Gen.* 42; Rabbi Yitzhak Arama, *'Akedat Yitzhak*, *Genesis*, Part 30, Question 4. See also: A. Jacobson, “*Ha-Od Avi Chai? - HaMaftetch leHitnahagut Yosef*” [“Is My Father Yet Alive? - The Key to Joseph's Behaviour”], *Megadim* 14 (*Sivan* 5751), p. 27; Y. Bin-Nun, “*HaPilug vehaAchdut: Kefel haTaut haMarah veHelem haGilui*” [“Division and Unity: Bitter Error and the Shock of Discovery”], *Megadim* 1 (*Nissan* 5746), p. 20.

Adv. Elishai Ben Yitzhak, of the Center for the Teaching and Study of Jewish Jurisprudence at “Sha'arei Mishpat” College. The article was translated for *JUSTICE* by Perry Zamek.

to the fabrication of evidence on the one hand, and obtaining evidence by illegitimate means on the other.

The issue of confessions and illegally obtained evidence is an important component of the legal process. Justice Barak (as he then was) defined this issue as touching on “the roots and nerves of the criminal process, reflecting the need to expose the truth, on the one hand, and the need to protect the proper interests of the accused on the other.”⁸ Discussion of this issue raises fundamental questions: Which interest takes precedence? Do the discovery of the truth and the punishment of offenders come first, or are they superseded perhaps by the protection of human rights and the maintenance of behavioral norms appropriate for human dignity? But first let us look at the question of fabrication of evidence.

Fabrication of Evidence

The planting of the goblet in Benjamin’s bag was certainly an unacceptable act, since there can be no doubt that it is forbidden to fabricate evidence of a crime that had never been committed. But the question remains: what do we do about a criminal whom we are sure has committed a crime, when there is no admissible evidence that would prove his guilt in court? Would it be permitted to fabricate evidence, in order to achieve a result that everyone knows would be appropriate and just?

The Rambam,⁹ basing himself on the *Talmud*,¹⁰ dealt with this type of issue, although his ruling was made in the civil, rather than the criminal, context:

[The case of a] student who says to his teacher: You know that, were someone to give me all the money in the world, I would not lie. Now, *ploni* owes me one hundred [זוז], but I only have one witness who can testify to that fact [but the *Halacha* is that this is insufficient, since “by the word of two witnesses shall a matter be established”]. Please go and join with [my one witness]. **If he joins him**, then he is a lying witness [and the *Torah* has commanded: “Do not testify falsely against thy neighbour” (*Ex.* 20:12)].

Thus, the fabrication of evidence is forbidden, even when the aim is to achieve a truthful outcome.

Rabbi Shlomo ben Adret (*Rashba*)¹¹ was asked: in certain circumstances, people are permitted to take the law into their own hands. Does this also include permission to make untruthful claims or falsify documents, provided that the aim of preventing injustice is achieved? He responded:

Heaven forbid that the seed of Abraham should utter falsehood, as it is written: “The remnant of Israel will not do iniquity nor speak

falsehood...” but certainly falsehood is hated and truth is beloved. Indeed, its value is beyond that of gold.

A similar response was given by Rabbi Israel Isserlein (Germany, 15th century):¹²

Our Sages warned **against seeking devices and deceitfulness even so that one might retrieve that which is legally his**. How much more so that one should not dream up crooked devices to unlawfully hold that which belongs to his fellow. And if someone seeks subterfuges and dubious methods to evade the law, the one [who is opposing him] may not do so.

In light of all this, a decision of Rabbi Yosef Hayyim ben Eliyahu al-Hacham,¹³ better known as the *Ben Ish Hai* (Baghdad, 19th century), is particularly puzzling. In it, he gives permission, in principle, to falsify a document in order to prevent another person from transgressing a *Torah* law (the case dealt with a proposal to fabricate a fictitious will, in order to prevent the distribution of an estate under the civil law, whose provisions contradicted *Torah* law). This is what he wrote:

It is certainly permitted, and there is no concern here about transgressing the prohibition of “From a false matter...”, since the sages have stated: One may deviate [from the truth] for the sake of peace.¹⁴ And this is preferable, in order to strengthen the *Torah*’s authority. And there is no greater peace than this... But the matter should certainly be considered very carefully, and one should not use such permission in every case. And they should put the fear of heaven before them. And, before anything else, they should consider the consequences... and above all they should seek appropriate advice. And the matter should be resolved through wisdom and understanding and knowledge.

8. HCJ 249/82, *Moshe Vaknin v. Military Appeals Court*, 37(2) P.D. 393, at 421-422.

9. Rambam, *Mishneh Torah*, Laws of Testimony, 17:5.

10. *Shevuot*, 31a. This is also the ruling of *Rema* (Rabbi Moshe Isserles) in his glosses on the *Shulchan Arukh*, *Hoshen Mishpat*, 28:1: “And it is forbidden for a person to testify to something of which he has no knowledge, even though he was told by a person whom he knows would not lie.”

11. Responsa of *Rashba*, Part 3, No. 81.

12. *Terumat Hadeshen*, Responsa, No. 306.

13. Responsa *Torah Lishmah*, No. 371.

14. Regarding this principle, see Y. Shapira, “*Shekarim Levanim uShekarim Acherim*” [“White Lies and Other Lies”], Justice Ministry *Parshat Hashavua* Sheet No. 3, *Toldot* 5761.

Although he qualifies his decision greatly, and warns against applying his decision across the board, nonetheless his decision is puzzling because, in contrast to the uncompromising position expressed in the sources quoted above, his response seems to justify the fabrication of evidence whenever the opposing party is found to be acting unlawfully.

From a False Matter, Keep Yourself Far

Not only is it forbidden to fabricate evidence and falsify documents, even if done to achieve an outcome which is itself just, but it is even forbidden to utilize less serious tricks, based on the commandment, “From a false matter, keep yourself far” (*Ex.* 31:1), as the *Talmud* states:¹⁵

From where do we learn that if one person owes three people 100 זוז, that one creditor should not take the part of the plaintiff, while the other two serve as witnesses, in order to obtain [the money] from him, and then they can divide it among themselves? Scripture says: “From a false matter, keep yourself far.”

That is, it is forbidden for the three creditors to divide into two groups, one being the plaintiff and the others the witnesses, in order to ensure the return of their money, even though it is clear that the truth is on their side, since the *Torah* states, “From a false matter, keep yourself far,” and the real truth is that all three should be plaintiffs.¹⁶

It is even forbidden to act deceptively, in order to extract an admission from the other party. Thus, the Rambam rules:¹⁷

If he said to him: come and stand alongside the witness, so that the borrower will see this and will be afraid, and, thinking that the two of you are witnesses, will admit [to the loan] of his own accord - **it is forbidden to stand and appear that he is a witness, even if he does not testify.** And, regarding this and all similar matters, it is said “From a false matter, keep yourself far.”¹⁸

Evidence Obtained by Illegitimate Means

So far we have seen that it is forbidden to fabricate evidence, even if the aim of such fabrication is to achieve ends that correspond to the factual truth. Now we can turn to the question: What is the status of valid evidence obtained by illegitimate means? The *Mishnah*¹⁹ deals with tricking a person into carrying out a transgression in order to obtain his conviction:

For all whom the *Torah* condemns to death no witnesses are hidden to entrap them, excepting for this one [that is, one who

incites or seduces others to commit an act of idol worship]... But if he was cunning and declined to speak before them, witnesses are hidden behind a partition... then the witnesses stationed behind the partition take him to *Beth Din*.

The *Talmud* explains how the witnesses are hidden to entrap the seducer.²⁰

A light is lit in an inner chamber, the witnesses are hidden in an outer one [which is in darkness], so that they can see²¹ and hear him, but he cannot see them. Then the person he wished to seduce says to him, ‘Tell me privately what thou hast proposed to me’; and he does so ... the witnesses who were listening outside bring him to the *Beth Din*.²²

From the words of the *Mishnah*, there are those who sought to infer that one may not hide witnesses, and entice a person to sin, except in the extreme case of one who is inciting others to worship idols, which is one of the three most severe transgressions. But this should not be done in order to incriminate a person suspected of any other transgression. A possible reason for this is because

15. *Shevuot*, 31a.

16. See also Responsa *Iggerot Moshe* (Rabbi Moshe Feinstein), *Yoreh Deah*, Part 3, No. 133, where he writes that not only is it forbidden to utilize such tricks in legal proceedings, but it is even forbidden in commercial transactions, since it is fraudulent behaviour.

17. Rambam, *Mishneh Torah*, Laws of Testimony, 17:6, based on *Shevuot*, 31a. This ruling was codified in the *Tur* and *Shulchan Arukh*, *Hoshen Mishpat*, 28:1.

18. For an alternative approach, see Responsa *Havot Yair*, No. 136; Responsa *Yehudah Ya'aleh*, *Hoshen Mishpat*, No. 187.

19. *Sanhedrin*, 7:10

20. *Sanhedrin*, 67a.

21. Is there an actual need for the witnesses to *see* the criminal (something not mentioned explicitly in the *Mishnah*) in order to obtain a conviction, or is it sufficient that they hear his voice? According to one of the *Talmudic* commentators, there is no need, unless the witnesses are not familiar with the criminal, and cannot identify him by voice alone: “It appears that... here [where there is a need to see him] we are talking of a stranger, who would not be recognizable unless they saw him. For if he were very familiar to them, and they recognize his voice, it would be sufficient for them to hear [him], and they would not need to [actually] see [him] (*Sanhedrei Ketana* on *Sanhedrin* 67a, sv “*Madlikin lo et haNer*”). Compare, on this point: Udi Wolff, “*VehaYadayim yedei Esav? - Zihui al pi kol*” [“And the hands are those of Esau? - Voice-Based Identification”], Justice Ministry *Parshat Hashavua* Sheet No. 146, *Toldot* 5764.

22. See also: Jerusalem Talmud, *Sanhedrin*, 7:13; *Yevamot* 16:6.

the subterfuge itself involves the prohibition against inducing someone to commit a transgression.²³

And, even though it is forbidden to obtain evidence by means of concealing witnesses, nonetheless this would not invalidate evidence obtained by means of concealing witnesses illegally.²⁴

A similar conclusion was reached by the Rabbinical Courts²⁵ with regard to evidence obtained by violating an individual's privacy;²⁶ even if the individual's privacy was violated illegally, this in itself would not be sufficient to disqualify the evidence.

"The Fruit of the Poisoned Tree" in Israeli Law

In contemporary legal systems, there are two main approaches to the issue of fabrication of evidence or using evidence obtained dishonestly or by trickery to obtain a criminal conviction.

The first approach is that of the American legal system, in which this kind of evidence is called "the fruit of the poisoned tree." According to this approach, the police and investigative authorities should be prevented from obtaining evidence by improper means, even if their aim is to bring about the conviction of criminals whom there would be no other way to convict. Therefore, if it turns out that the evidence was obtained deceitfully, the courts will not accept it.

According to the second approach, which is customary in British law, relevant evidence is admissible, even if obtained deceitfully or by trickery, but its probative value may be reduced in certain circumstances.²⁷

Israeli law has not adopted the doctrine of the "fruit of the poisoned tree", as can be seen from statements by (the then) Justice Elon:

In the Israeli legal system it is an indisputably accepted principle that evidence, which is itself valid and reliable, but which was obtained by illegitimate or illegal methods, is admissible, and the courts have no discretion as to its disqualification...

Indeed this Court has warned the authorities regarding their disregard of the provisions of the law and the directives of the Court regarding the collection of evidence, and has even threatened to consider disqualifying evidence obtained by such means... nonetheless, the matter has not gone beyond the level of a warning, and the official view [of the courts] is that illegitimate means... for obtaining evidence which is itself valid do not disqualify such evidence.²⁸

Elsewhere Justice Vitkin explained why it should be permitted for an investigator to utilize deceptive methods in the interrogation of a criminal.²⁹

We need to take into consideration the difficulties faced by the police in its war against crime, particularly against organized crime, which is carried out by hoodlums and members of the underworld. I am not saying that in this war all means are valid, but I am also not prepared to be naïve and demand that investigators not ask tricky questions or use what might be called "tricks." The interrogation of a criminal is not a negotiation between two calm, fair-minded businessmen, transacting their business on the basis of the greatest mutual trust... I would not demand such "fairness"... from an investigator trying to get a suspect to talk... it is the right

23. Although this explanation is not found in any of the classical commentaries on the *Talmud*, it was suggested in A. Kirshenbaum, "*HaMilkud vekaHadacha liDvar Averah baHalachah haYehudit*" ["Entrapment and Incitement to Commit Criminal Acts in Jewish Law"], *Dinei Yisrael* 15 (5749-5750), p. 63f. See also the editor's comment on the article by Rabbi S. Dikhovsky, "*Haazanot Seter*" ["Wiretapping"], *Techumin* 11 (5750) 299, at 302-303, note 2. As we have noted, the *Talmudic* commentators explained the problem with hiding witnesses in a different manner: the absence of a formal warning to the transgressor, and the fact that the criminal does not acknowledge that he is about to commit a capital offence. For details, see Kirshenbaum, pp. 58-63.

24. Compare: *Minhat Hinukh*, Commandment 462, from which it may be inferred that the intention of the *Mishnah* is not that it is **forbidden** to hide witnesses in the case of other transgressions, but that **there is no positive command to do so**, while in the case of one who incites to worship idols, there is a positive command to do so because of the seriousness of his actions. This can also be seen in the words of the Rambam, *Mishneh Torah*, Laws of Idol Worship, 5:3: "The inciter... it is a positive command to hide witnesses [to be able to testify against] him. For all whom the *Torah* condemns to death no witnesses are hidden to entrap them, excepting for this one." Based on this, we cannot conclude that evidence obtained by illegitimate means is still valid, since, according to this approach, obtaining evidence by hiding witnesses is not illegal.

25. See File 2408/5750 (Tel Aviv), *Piskei Din Rabbaniim* 14, p. 289, and the appeal to the Supreme Rabbinical Court, in File 74/5750, *Piskei Din Rabbaniim* 14, p. 321.

26. See also A. Ben-Shlomo, "*Kevod haAdam mul Shelom haTzibbur beHashpalat haAssir*" ["Human Dignity versus Public Welfare in the Issue of Mistreating a Prisoner"], *Techumin* 17 (5757), p. 144, where he holds that "there is no limitation on the methods that may be used to obtain evidence against a criminal involved in serious offences, as opposed to the customary standard..."

27. For a comparative analysis, see A. Harnon, "*Raayot sheHussegu shelo kaDin: Mabat Hashvaati*" ["Evidence Obtained Illegally: A Comparative View"], *Landau Volume*, 5755, p. 983.

28. Further Hearings 9/83, *Military Appeals Court v. Vaknin*, 42(3) P.D. 837, at 853.

29. Criminal Appeals 216/74, 243/74 *Gad Cohen v. State of Israel*, 29(1) P.D. 340.

and duty of the investigator to utilize reasonable means to obtain information from the person being questioned.

However, this is where the question arises: Are all means indeed legitimate? Can any investigator do whatever he thinks best, until we reach the point of anarchy?

Justice Haim Cohn, who was alert to the problems involved in granting excessive power to investigators, attempted to set limits on the use of such evidence, and tried to raise the bar before those involved in investigations:³⁰

It is a *sine qua non* in any war against crime that those fighting crime be law abiding, and adhere absolutely to the law in their activities; to the extent that they disregard or are negligent in their duties toward the citizens caught in their net, they also contribute, by their own actions, to the validation and intensification in crime. This is obvious.

At the same time, as we have noted, the tendency in Israeli law is to prefer the question of the weight of the evidence over that of its admissibility.³¹ At times, obtaining evidence illegally has the effect of reducing the weight of that evidence to zero.³²

The enactment of **Basic Law: Human Dignity and Liberty** has bolstered the argument that the legal position regarding illegally obtained evidence should be changed.³³ Support for the “fruit of the poisoned tree” doctrine began to be heard in our own country. Although the Supreme Court has not yet had the final word on the encounter between obtaining evidence by illegitimate means and human dignity, we can already see that some of the lower courts have begun to consider adopting the doctrine of the “fruit of the poisoned tree.”

Thus, for example, we find in one judgment:³⁴

With the enactment of Basic Law: Human Dignity and Liberty, there is now a justification for disqualifying evidence obtained by violating fundamental constitutional rights.

Elsewhere we find:³⁵

Basic Law: Human Dignity and Liberty has strengthened the rights of the accused, and it may be that it even allows for the constitutional remedy of invalidating evidence obtained illegally. However, this remedy should be used only in the most serious, exceptional cases, in which the flaws in obtaining the evidence involve a severe violation of constitutional rights.

However, there also exists a different view,³⁶ that:

The doctrine of the poisoned tree should be applied by means of legislation, since its adoption would fundamentally change a portion of the laws of evidence. Where the legislator believed that certain social values should be protected by disqualifying evidence obtained illegally, he did so explicitly, although in a qualified manner.

Conclusion

As we have seen, on the one hand, Jewish law is very severe with regard to the whole issue of fabrication of evidence, but on the other hand it does not disqualify valid evidence solely because it was obtained by illegitimate means. If a criminal act has been committed in obtaining the evidence, those who have acted illegally have to answer for their actions, but this in itself is insufficient to disqualify the evidence so obtained.

-
30. See Criminal Appeals 559/77 *Moshe Meiri v. State of Israel*, 32(2) P.D. 180, at 182-183.
 31. See Further Hearings (Criminal) 4342/97, *State of Israel v. Suliman al Abid*, 51(1) P.D. 736, 840; Criminal Appeals 1275/95 *Nissim v. State of Israel*, 51(5) P.D. 359, 363; Criminal Appeals 6147/92, *State of Israel v. Cohen*, 48(1) P.D. 62, 80; Criminal Appeals 5614/92, *State of Israel v. Messika*, 49(2) P.D. 669, 680-681.
 32. See Criminal Appeals 559/77 (*supra*, note 30); M. Ben-Ze'ev, “*Raayot sheHusgu shelo kaHalacha - haOmnam Nifretza haDerekh leIkaron haPesilah?*” [“Evidence Obtained Illegally - Is the Way Now Open for the Principle of Disqualification?”], *HaPraklit* 32 (5738), p. 466.
 33. See A. Gross, “*Klal Pesilah Hukati - Ha-Im Yesh Lo Makom beYisrael?*” [“A Constitutional Invalidation Rule - Is It Appropriate for Israel?”], *Mishpatim* 30 (5749), p. 145; A. Harnon, “*Raayot sheHusgu shelo kaDin - Ha-Im Nishtanah haMatzav haMishpati be'ikvot Hok Yesod: Kevod HaAdam veHeruto?*” [“Evidence Obtained Illegally - Has the Legal Situation Changed as a Result of the Basic Law: Human Dignity and Liberty?”], *Mechkerei Mishpat* 13 (5756), p. 139.
 34. Criminal Files (Nazareth) 511/97, *State of Israel v. Adnan Uda*, published in the Nevo legal database.
 35. Criminal Files (Magistrates, Jerusalem) 4012/95, *State of Israel v. Shmuel Citrin*, published in the Nevo legal database.
 36. Criminal Files (Tel Aviv) 40250/99, *State of Israel v. Miner bin Kisser Badin*, published in the Nevo legal database.

Israel Lands: Excessive Benefits to the Agricultural Sector Revoked

H.C.J. 3939/99, 4690/99, 244/00, 1308/00, 4269/00, 8350/00
Kibbutz Sdeh Nahum et al v. Israel Land Administration et al

Before: President Aharon Barak, Justices Theodor Or, Eliahu Maza, Tova Strasberg-Cohen, Dalia Dorner, Dorit Beinish, Ayala Prokazia

Judgment delivered on 29.8.2002.

Precis

This case concerned a number of decisions of the Israel Land Council which dealt with changes in the zoning of state owned agricultural land which had been leased out to agricultural settlements. The rezoning was intended to enable the development of the land for residential and commercial purposes. The petitioners objected on two main grounds - first, that the decisions had been made without authority on the ground that only the Knesset could decide how the land should be used and second, that the decisions themselves were unreasonable. The inter-ministerial Milgrom Committee had recommended that the decisions be revoked as unreasonable and the state had accepted this view.

Justice Or delivered the unanimous opinion of the court. Initially, he set out the normative basis on which state lands are managed in Israel and continued with an analysis of the reasonableness of the decisions which had had an enormous social and economic impact on the citizens of the state. The unanimous judgment held that while the Israel Land Council was competent to make the decisions, the decisions themselves were unreasonable and void, and gave excessive and unfair benefits to the agricultural sector at the expense of the rest of the population.

Justice Theodor Or

Judgment

Management of state lands - the normative basis

Justice Or noted that it is a fundamental principle of Israel law that there is a prohibition on the transfer of ownership of Israel lands, save in special cases concerning particular types of

land or transactions which have been specified by statute. Thus, Section 1 of Basic Law: Israel Lands provides as follows:

“The ownership of Israel lands, being the lands in Israel of the State, the Development Authority or the Keren Kayemet Le-Israel, shall not be transferred either by sale or in any other manner.”

Section 2 of the Basic Law states:

“Section 1 shall not apply to classes of lands and classes of transactions determined for that purpose by Law.”

The Law for this purpose is the Israel Lands Law - 1960.

According to Section 2(a) of the Israel Land Administration Law - 1960, the Israel Land Administration (“ILA” or “Administration”) is the body responsible for administering Israel lands. Heading the ILA is a Director who is appointed by the government and who is subordinate to the Minister of Construction and Housing. The law provides that the ILA must report on its activities to the government at least once a year and the government must report in turn to the Knesset (Section 4 of the ILA Law).

The ILA does not have a legal personality which is separate from that of the state. It is an administrative mechanism, which is subject to the government and operates as an organ of the government. As an agent it must act loyally towards its principal and not exceed the boundaries of its mandate. As an agent of the state, the ILA is subject to the norms of public law, alongside the norms of private law. Its employees are public servants.

Justice Or noted that Section 3 of the ILA Law regulates the establishment of the Israel Lands Council and its powers:

“The government shall appoint an ‘Israel Lands Council’ which shall lay down the land policy in accordance with which the Administration shall act, shall supervise the activities of the Administration and shall approve the draft of its budget, which shall be fixed by law.”

The Council comprises 18-24 members who are appointed by the government; half on behalf of the government and half on

behalf of Keren Kayemet Leyisrael (KKL). Statutory restrictions are imposed on the number of Council members who also hold positions in the agricultural sector, albeit it is possible that within those restrictions certain members would have interests in lands which are in the ownership of the state and which are designated as agricultural lands.

Justice Or noted that three pieces of legislation were enacted by the Knesset: Basic Law: Israel Lands, the Israel Lands Law - 1960 and the Israel Land Administration Law - 1960. In addition a covenant had been signed between Keren Kayemet Leyisrael and the State of Israel. The purpose of all these was to put an end to the duplicate handling of state lands by the various institutions owning the land (the state and KKL) and to unify the administration of the land by the state, the Development Authority and KKL, in one body. Under the covenant, it was agreed that the ILA would administer lands owned by the state, the Development Authority or KKL whether acquired in the past or in the future by the state, and that the Israel lands would be administered in accordance with the principle that they would not be sold but would only be leased.

Justice Or cited President Barak's judgment in H.C. 6618/95 *Ka'adan v. Israel Land Administration*, 54(1) P.D. 258, in which President Barak explained the special purpose of the ILA Law, namely, to prevent the transfer of ownership of land to undesirable persons, enable the execution of security policies and implementation of national projects, such as absorption of immigration, dispersal of populations and agricultural settlement. Other special purposes included easing planning projects while retaining reserves of land for national needs and allocating open areas for public purposes - thereby enabling the implementation of urban planning and preventing speculative trade in state lands.

Justice Or also referred to the general purposes of the Law, which reflected the fundamental values of society and law in Israel, including, the principle of equality, and concluded by noting that the agricultural sector comprises a significant portion of the activities of the ILA - out of 20.3 million dunam of state lands, some 3.7 million dunam are fit for agricultural use. More than 650,000 people live in agricultural settlements, namely, cooperative associations and community villages, farming about 4.7 million dunam which comprise a fifth of the land of the state; of these about 2.8 million dunam are leased as agricultural estates.

Administration Leasing Policy

Turning to the policy of the ILA when leasing agricultural

lands, Justice Or explained that these lands were transferred to the lessees for agricultural and ancillary purposes such as living quarters. In its first decision of 17.5.1965, the Israel Land Council had decided that farmers would be required to contract to live on the land; its zoning designation would not be changed except in special circumstances; the annual lease payments would be very low compared to urban lease payments; and in cases where the land would be rezoned - the land would return to the ILA and the lessee would receive compensation. A compensation committee was eventually established which implemented the policy of restoring to the farmer the value of his rights and investments in the land, without reference to the value of the land following rezoning.

In the 1990s decisions were taken which were incompatible with this policy: Decision 717 which enabled agricultural settlements interested in so doing to develop industrial areas on parts of their leased land; Decision 727 which was intended to create a large fund of available lands for construction and residential housing, by rezoning land which had previously been allocated for agricultural use and paying financial incentives to lessees whose rezoned land was returned to the ILA; the incentive was calculated according to the value of the land following rezoning; and Decision 737 which dealt with expansions for residential areas in agricultural settlements, where the expansion and rezoning were initiated by the cooperative association; financial incentives were offered to associations seeking such expansions.

The Petitioners

Justice Or then moved to describe the long list of petitioners, comprising a social movement and academics and their contentions that the above decisions had been profoundly flawed, primarily because they harmed one of the most important resources of the public. According to the petitioners the Council had only taken into account the interests of the agricultural sector and had ignored those of other sectors of Israeli society and consequently were discriminatory and grossly unreasonable; the petitioners argued that the proper forum for decisions having such important social, economic and ecological significance was the *Knesset*, through primary legislation. Other petitioners included the Society for the Protection of Nature which contended that the decisions seriously impaired the state's interest in having areas of open contiguous land and maintaining the rural nature of agricultural land.

The Respondents

The long list of respondents argued at length in relation to the

property rights held by agricultural settlements and particularly the right to lease in perpetuity. Consequently, the Israel Land Council's decisions merely reflected property reality in Israel; they argued that the Council was the body in charge of determining policy in respect of Israel lands and that their decisions were reasonable in the circumstances. Business entrepreneurs argued that many project contractors had already relied and acted on the basis of the Council's decisions and invested monies in projects which had been agreed with the ILA. Invalidating the decisions would therefore have retroactive effect on persons relying in such a way and might lead to an undesirable chain reaction which would have a deleterious effect on the economy. Other respondents argued that these payments would have the effect of resolving the huge debts of the United Kibbutz Movement and would not benefit the individual members, save by creating job opportunities. The state's response (by the Minister of National Infrastructure, ILA and Israel Land Council) largely relied on the conclusions of a public professional inter-ministerial committee, known as the Milgrom Committee, which reported on 14.12.2000. The Committee concluded that all three decisions were unreasonable and that other decisions had to be taken in which the incentives offered were significantly lower. The Attorney General relied on these recommendations before the High Court and agreed that the decisions were unreasonable and did not reflect contemporary land reality in Israel and a proper balance of competing interests. The state argued, however, that the proper forum to make such decisions was the Israel Land Council.

Primary and secondary legal regulation

Justice Or noted that considerations of the separation of powers, the rule of law and democracy required that general and fundamental policy which had great influence on the lives of individuals should be shaped by primary legislation. The manner of its realization and implementation could be determined by secondary legislation or by the state authorities. The presumption that the legislature chose to retain general powers to determine arrangements and policy and that it allocated the power to regulate to the secondary legislature could be refuted by express, clear and unequivocal statutory language. The *Knesset* was not restricted by the constitution. Justice Or gave examples of this delegation of the power to regulate matters by way of 'primary arrangements' and left open the question whether such a process could continue following the adoption of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation (in the instant case the

court did not have to decide this question in view of the fact that the various Israel land laws were enacted prior to the Basic Laws). Thus, turning to the land laws Justice Or held that there could be no doubt that the language of the law was clear and that it vested the Israel Land Council with the right to determine primary arrangements. The laws were spare in their provisions except for the principle concerning the prohibition on the transfer of ownership of Israel lands and the exceptions to that principle. The legislation did not make any provisions concerning the manner in which the land was to be managed but it did assign this power to the Council.

In view of this Justice Or concluded that the decisions could not be invalidated on the grounds that the Israel Lands Council was incompetent to make them, by reason of the fact that they were of a primary nature.

Gross unreasonableness

Justice Or then turned to an examination of the reasonableness of the decisions. First, he considered Decision 343 regarding compensation to farmers following the return of rezoned land and the compensation committee's policy of taking into account the crops grown on the land but not its anticipated value following rezoning. The petitioners had claimed a greater land value than was recognized by the state. The state had responded that all three decisions were unreasonable - bearing in the mind the conclusions of the Milgrom Committee - and that the benefits granted to the lessees were excessive and the decisions had to be invalidated for that reason. The state had not yet established a new policy. Justice Or held that this fact alone did not justify rejecting the state's position. The Council had decided to benefit the lessees at a particular point in time; it could later be decided that this policy was wrong or only appropriate for a particular period of time. When circumstances and needs changed, the competent authority was entitled to change its policy. No person had a right to insist that an authority adopt a permanent economic policy towards him. Likewise, a person could not argue that he based his business calculations on a particular policy. This was the case here, in view of the circumstance and the conclusions of the Milgrom Committee, the Israel Land Council had reached the conclusion that the three decisions were not reasonable and that its policy had to be reconsidered and different interests balanced.

In view of this Justice Or held that the petitions to the effect that the three decisions should not be implemented had to be upheld. Nonetheless, in view of the dispute regarding the reasonableness

of the decisions at the time they were taken he felt it necessary to comment on this issue. His conclusion on this issue was that none of the decisions met the test of reasonableness, in that each of them benefited the lessees in a grossly unreasonable way.

General considerations

Justice Or explained that the function of the Israel Land Council was to set policy in respect of Israel Lands, whereas the function of the Israel Land Administration was to manage the land. The land was a unique asset of the state and it was difficult to overstate its importance. If the nation and its culture were the “spirit” of the people, their land was its “body”.

Justice Or quoted S. Rowton Simpson:

“Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal, or precious stones. We live on land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence, and its distribution and use are of vital importance.” (S. Rowton Simpson, *Land Law and Registration* (Cambridge U. Press, 1976) 3).

Land, therefore, was a critical recourse which had particular importance in a country such as Israel, which has narrow borders, high population density and absorbs immigrants. Land could not be created and therefore the state had to calculate its steps with the land at its disposal which could be zoned and made available in accordance with the changing needs. In these circumstances, the state had to act cautiously in relation to waiving rights in the land and ensure the maintenance of sufficient reserves for various future needs - building, agriculture, industry and other employment, open areas, including preservation of the environment - in accordance with current and future urban building plans.

Another consideration which the Israel Land Council had to take into account was that the lease rights in accordance with customary Administration conditions entailed the grant of rights for very long periods of time, where it was not clear that following the lapse of 98 years the lessee would be asked to vacate the land. The public perceived these leases as being very close to the transfer of ownership - the privatisation of public rights in land. In practice, therefore, the Administration had only limited control of the land upon it being made the subject of a long lease.

The Administration acted as the trustee of the public in administering state land. It had to safeguard the public interest

including by preserving the land for the benefit of the public as a whole and refraining from granting unjustified benefits in land to others. Like every administrative body the Administration had to act fairly, in accordance with relevant considerations and equality, granting equal opportunities to all members of the public. Granting land to one person, prevented a grant to another, and the issue of priorities arose in all its gravity, as did issues of discrimination versus permissible distinctions.

Here the question which arose concerned the weight to be given to the rights of the various types of agricultural settlers against the background of their historical contribution to the state and its security. There was no dispute that the agricultural settlements had contributed greatly; they had worked the land for long periods, spurred by ideology and the aspiration to promote the Zionist ideal. Many of these settlements were established as border settlements which delimited and guarded the borders and provided security to the residents in the centre of the country. The agricultural settlers had also contributed to the development of farming and Israeli produce. The question which arose was the weight which had to be accorded to these factors. The case also brought to the forefront the principle of realizing distributional justice in the allocation of land. This principle was concerned with the just social distribution of social and other resources. The duty to weigh issues of just distribution was an inseparable part of the powers of an administrative authority which was empowered to decide on the allocation of limited resources. This duty was widely applied in High Court cases concerning discrimination, freedom of occupation and equality of opportunities, compensation for the infringement of land plans, and the property regime between spouses. The principle of distributional justice had particular weight in the instant case. The Israel Land Administration was the body responsible for all Israel lands. The importance of this asset could not be too greatly emphasized nor the importance of distributing and allocating it in a just and appropriate manner. There was a huge public interest in such resources being distributed by the state, or the authorities acting on its behalf, in a fair, just and reasonable manner.

Clearly different fundamental priorities could dictate different ways of distribution, without these being unlawful. However, this did not mean that every distribution would necessarily be lawful. The authority had to take into account all the ramifications and contexts of its decision and give them appropriate weight, within the framework of the priorities which it had set. Here, because the legislation did not establish substantive guidelines for the

distribution of the resources in society, it was necessary, despite the difficulties entailed, to maintain close judicial scrutiny in order to ensure that the distribution of resources be just and fair.

The reasonableness of Decision 727

Decision 727 had enabled the lessees to enjoy the benefit of the rezoning of the agricultural land which had been leased to them, notwithstanding that according to the state, the contractual rights in the lease had not accorded them such a right. The policy behind the decision had been to give an incentive to lessees to agree to rezoning, particularly for residential housing. The primary motive for this decision was the state of the housing market and the fear that the situation would worsen in the absence of a quick mechanism for reclaiming agricultural land, particularly in view of the massive immigration from the former Soviet Union. The alternative of court proceedings and partial compensation - without relation to the value of the land - would have been overly lengthy in the circumstances. Justice Or considered the factors weighing against this trend, such as planning considerations which aspired to promote construction in existing urban areas and not in open land, and the social consideration concerning the extent of the compensation referred to in the decision. In this connection the Milgrom Committee had concluded that the compensation was much higher than was appropriate, and as such caused social tension and raised questions regarding the justification of distributing public assets to a defined and limited sector of the population. The Committee had been of the opinion that the level of compensation for rezoned land could be significantly reduced and still create an incentive to farmers to return the land to the Administration. The Committee retained the correlation between the level of compensation and the value of the land following rezoning.

Justice Or noted that the question which arose in these circumstances was whether it had been essential, at the time of reaching Decision 272, to help resolve the housing problem by rezoning agricultural land, and if so whether the Administration had done enough to reclaim agricultural land by the legal measures at its disposal without granting compensation or granting reduced compensation. Justice Or concluded that he did not have sufficient data to conclude that the measure in fact taken by the Administration was not required, although the process by which it was implemented was to be criticized.

First, it would have been appropriate for the decision to relate to areas in which there was an immediate demand for land for

housing, around the periphery of urban areas. In fact not only did Decision 727 offer considerable benefits to agricultural lessees in areas in which rezoning to residential areas was not necessary but the proposal itself created an incentive to farmers to engage in a process which was undesirable from a planning point of view. Justice Or held that setting the level of compensation as a certain percentage of the value of the land following rezoning was unsatisfactory for a number of reasons. First, it created a link between the lessee and the value of the land following rezoning (contrary to the premise that the lease was for agricultural purposes only and that in the event of rezoning the lessee was only entitled to the contractual compensation established by the lease). A benefit in percentage terms created a joint right to enjoy the benefit of the rezoning. Second, a benefit in percentages created confusion or uncertainty regarding the real rate of compensation in absolute terms. Third, determining the compensation in terms of a percentage of the value of the rezoned land indicated the absence of a just distribution between lessees of agricultural land in different areas of the country, notwithstanding that the lease terms and payment in the centre of the country and the periphery were similar. Likewise the contributions of farmers in the north was no less than that of farmers in the centre, but following rezoning the value of the land would be vastly different. The payment of different amounts of compensation would create a grave feeling of discrimination.

Justice Or found that this decision to grant such high compensation was also motivated by the economic-financial crisis in which the Kibbutz and Moshav movements found themselves and the aspiration to help them resolve their debt problem. Justice Or held that this consideration was neither appropriate nor relevant. Notwithstanding the absence of statutory guidelines regarding the land policy to be followed by the Council and Administration, taking advantage of the right to grant incentives in order to benefit the agricultural sector against the background of their severe financial and economic difficulties, without connection to the proper level of compensation, was improper and exceeded the powers vested in the Israel Land Council to set land policy. The Council had not been given the task of finding solutions to the difficulties of the agricultural cooperative settlements, and such an activity exceeded the powers vested in it by law. Justice Or found that the rate of compensation was excessive and had not been explained in the decision, finally he emphasized that even if the incentive encouraging the reclaiming of agricultural land was a legitimate tool of land policy, it was not

possible to exceed the boundaries of such an incentive towards the grant of compensation at such high rates which could not be justified under the rubric 'incentive'. The Milgrom Committee had reached a similar conclusion.

In view of all this Justice Or found that Decision 727 was manifestly unreasonable and void and should not be implemented, albeit in any event the state had decided not to implement it in view of its unreasonableness.

The reasonableness of Decision 737

This decision enabled agricultural land to be allocated for the residential needs of the agricultural settlers. Underlying this was the desire to strengthen the agricultural settlements by introducing a younger population. Justice Or held that on one hand, the decision was incompatible with existing planning policy; it aimed to draw a relatively strong population away from urban areas contrary to planning trends and would also increase the traffic burden on the roads between cities and the peripheries - an undesirable phenomenon. On the other hand, it met the need to strengthen the population of the agricultural settlements. In the balance between the two, even if the scales tilted in favour of reclaiming some of the agricultural land and providing additional housing solutions in the agricultural settlements, the rate of the benefits established by the decision was inappropriate. The decision made possible the allocation of plots for housing according to the needs and wishes of particular agricultural settlements and did not offer a solution to the housing needs of the general public. The decision was problematic from the point of view of distributable justice in view of the fact that the urban population was not granted a comparable arrangement. The deduction offered to the agricultural settlements amounted to an unjust benefit in relation to state lands; some of the lessees were acquiring the rights for speculative purposes, and a considerable number of the housing units were later being sold on the open market by the lessees, for a good profit.

For these and other reasons Justice Or held that this decision too was unreasonable to an extent which justified regarding it as unlawful and void.

The reasonableness of Decision 717

This decision was intended to meet employment needs in agricultural settlements, by freeing land for the construction of industrial plants. This was not improper and not a new policy of the IL Administration. The Milgrom Committee had stated that the state did not lack land reserves for trade and industry needs

and therefore this decision did not further the goals of the state, nonetheless, this did not negate the importance of the decision for the agricultural settlements and there was nothing improper in granting opportunities for creating new sources of employment in these locations. Despite all this, Justice Or held that it was not clear what justification could be shown for granting the lessees a considerable reduction of the lease payment, of 49% or more, following rezoning. There was no corresponding arrangement in the urban sector thereby leading to a manifest absence of equal opportunities: granting benefits to one sector in order to create employment possibilities and precluding them from another, *prima facie* without any justification for the distinction. Granting such benefits not only infringed equality but also equal opportunities and therefore freedom of occupation. It had already been held in the past that impairing freedom of competition in a statute, by granting an advantage to one competitor over another, was a breach of the fundamental right to freedom of occupation. Where such a breach did not comply with the limitation clause in Basic Law: Freedom of Occupation, that statutory provision was void. The duty to respect the right to freedom of occupation applied to every governmental authority and also bound the Israel Land Council. The above decision was reached when Basic Law: Freedom of Occupation was already in force.

The Milgrom Committee too was of the opinion that there was no justification for the reduction of lease fees awarded to agricultural settlers and also concluded that employment needs could be met by smaller tracts of land than allocated by the decision.

In view of all the above, Justice Or held that rezoning agricultural land in order to enable agricultural settlements create sources of wealth and employment in industry, trade and tourism, without a tender, did not justify the award of financial benefits in the shape of a considerable reduction in lease fees. There was also no justification for allocating land for these purposes in a quantity which exceeded what was necessary for those purposes. This decision too was therefore unreasonable and void.

Additional remarks

In response to the contention that the petitions were not justiciable because they dealt with political and ideological questions relating to the land policy of the state, Justice Or held that while it was true that behind the above decisions were political issues, the court was not dealing with these aspects. The court was dealing with their legality and the petitions here were

no different to any others concerning the judicial review of the decisions of administrative authorities, which might have political or ideological ramifications.

Dealing with the issue of the delay in filing the petitions, some five years after the decisions had been taken, Justice Or held that even if reliance had been placed on these decisions the respondents could be granted relief notwithstanding that the decisions would be held void - and the delay *per se* did not justify dismissal of the petitions. Secondly, the petitions raised questions in which the public had a profound interest. They dealt with decisions having far-reaching economic and social implications in relation to state lands and their use. This interest tilted the balance towards hearing the petitions and considering the lawfulness of the decisions.

Finally, Justice Or considered whether it was desirable that the Israel Land Council should have authority to engage in primary regulation, after noting the various criticisms directed at this state of affairs, Justice Or held that it would have been proper for the legislature to establish statutory guidelines relating to the land policy concerning Israel lands, and not leave such wide powers to the Israel Land Council, which was an administrative body. In relation to such important matters it would have been better if the legislature had set the primary arrangements. This would have prevented claims that an executive body was making biased decisions which infringed the principle of equality, either by reason of its composition or because it was subject to pressure or influence by interested but extraneous parties.

Conclusion

Taking into account all the above, Justice Or held that all three decisions of the Israel Land Council were void and should no longer be implemented. This judgment was to take effect at a later date, as many transactions had taken place on the basis of these decisions, which had far-reaching economic and social implications. Transitional provisions were required in relation to which transactions could still be implemented and which could not in view of the invalidation of the decisions. These provisions had to take into account arrangements already made by the agricultural sector in reliance on the three decisions. The appropriate body to determine the transitional provisions was the Israel Land Council, not the court. The Council had the experience and expertise to deal with these issues and draw the proper balance between the interests of the entrepreneurs, creditors, farmers, and general public until new decisions could be taken in relation to the issues dealt with by the three invalid decisions.

President Barak and Justices Maza, Strasberg-Cohen, Dorner, Beinish and Prokazia concurred.

Abstract prepared by Dr. **Rahel Rimon**, Adv.



Spring in the Sharon plain (photo courtesy of the Israel Government Press Office)

The 12th International Congress of Jewish Lawyers and Jurists

March 23-26, 2004

on

Israel 2004: Dilemmas and Solutions

Venue of Congress: Dan Panorama Hotel, Tel-Aviv

Venue of Opening Session: Inbal Hotel, Jerusalem

Programme

Tuesday, March 23, 2004

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

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

18:00 - 20:00 Buffet Supper

20:00 **Opening Session**

Opening Remarks:

Judge Hadassa Ben-Itto, President of the International Association

Keynote Speakers:

Guests of Honor **Mr. Joseph (Tommy) Lapid**, Minister of Justice and Deputy Prime Minister, Israel

Professor Irwin Cotler, Minister of Justice, Canada (to be confirmed)

Return by buses to Dan Panorama Hotel, Tel-Aviv.

Wednesday, March 24, 2004

09:00 - 11:00 The Palestinian Refugee Problem:
Possible Solutions

No Right - No Return

Professor **Yaffa Zilbershats**, Faculty of Law, Bar Ilan University

Are There Viable Solutions?

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

The Politics of Palestinian Refugee Claims

Professor **Gerald M. Steinberg**, Director, Program on Conflict Management and Negotiation, Bar-Ilan University

11:00 - 11:30 Coffee Break

11:30 - 13:30 New Realities And Old Law: The Need To Reform International Law

The Role of the Law and of the Lawyer in the Fight against International Terrorism

Colonel **Daniel Reisner**, former Head of International Law Department, IDF

Efforts to Formulate International Conventions against Terrorism

Ambassador **Alan Baker**, Legal Adviser, Foreign Ministry of Israel

The EC "Wider Europe" Initiative and its Implications for Israel

Dr. **Arie Reich**, Bar-Ilan University, Vice Dean, Faculty of Law

13:30 - 15:00 Lunch

Guest speaker: His Excellency Ambassador **Daniel Kurtzer**, the United States Ambassador to Israel

15:00 - 17:00 **The Future Of Jerusalem: Jewish, Moslem And Christian Perspectives**

The Jewish Perspective

Rabbi **David Rosen**, International Director of Interreligious Affairs, American Jewish Committee

The Christian Perspective

Archbishop of Constantina **Aristarchos**, Chief Secretary of the Greek Orthodox Patriarchate

The Moslem Perspective

Dr. **Mithkal Natour**, Professor of Islamic Law, Religious College, Baqa El Garbiya

Free Evening

Thursday, March 25, 2004

09:00 - 11:00 **The Impact Of The Current Security Situation On Civil Legal Practice**

Litigation

Mr. **Alex Hertman**, Attorney

Real Estate

Mr. **Zeev Hartavi**, Attorney

Hi-Tech

Mr. **Ori Rosen**, Attorney

Commercial Transactions

Mr. **Richard Mann**, Attorney

11:00 - 11:30 Coffee Break

11:30 - 13:30 **Israel And The Diaspora: Mutual Dependence And Responsibility**

Who Speaks for the Jewish People?

Professor **Shlomo Avineri**, Department of Political Science, The Hebrew University, Jerusalem

The Jewish People: Must We Choose between Geography and History?

Mr. **Efraim Halevy**, former National Security Adviser to the Prime Minister of Israel

Does The Present Situation Influence the Diaspora-Israel Relationship?

Dr. **Rolf Bloch**, former President of the Federation of Jewish Communities of Switzerland (SIG)

Afternoon: Walking Tour of Neve Tzedek Quarter, Nachlat Binyamin Street, old quarters of Tel-Aviv

Evening: Farewell Dinner

Friday, March 26, 2004

09:00 - 12:00 **Business Meeting**

Chairperson: Advocate **Itzhak Nener**, First Deputy President of the IAJLJ
Activities of the Association - Report and Discussion
Resolutions
Elections

13:00

Optional: Departure to Golden Tulip Hotel, Dead Sea, for weekend (3 nights) till Monday morning, March 29, 2004

The International Association of Jewish Lawyers and Jurists

e-mail:

iajlj@goldmail.net.il

Websites:

www.intjewishlawyers.org

www.lawyersdirectory.org.il

Registration

For information about the 12th Congress and registration for the Congress, please contact:
The International Association of Jewish Lawyers and Jurists, 10 Daniel Frish Street,
Tel-Aviv, 64731

Telephone: (03)6910673, Fax: (03) 6953855

Or E-mail: iajlj@goldmail.net.il

Registration Forms will be e-mailed upon request

Registration Fee: US\$200 per participant

Accompanying person: US\$150

Registration fees include:

Buffet supper in Jerusalem

Lunch on Wednesday, December 24, 2003

2 coffee breaks

Farewell Dinner

Walking tour in Tel-Aviv

Kits/name tags

Transportation to and from Jerusalem for the

Opening Session

Hotel accommodation:

6 Night Package:

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

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

Free entrance to Hyatt spa.

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

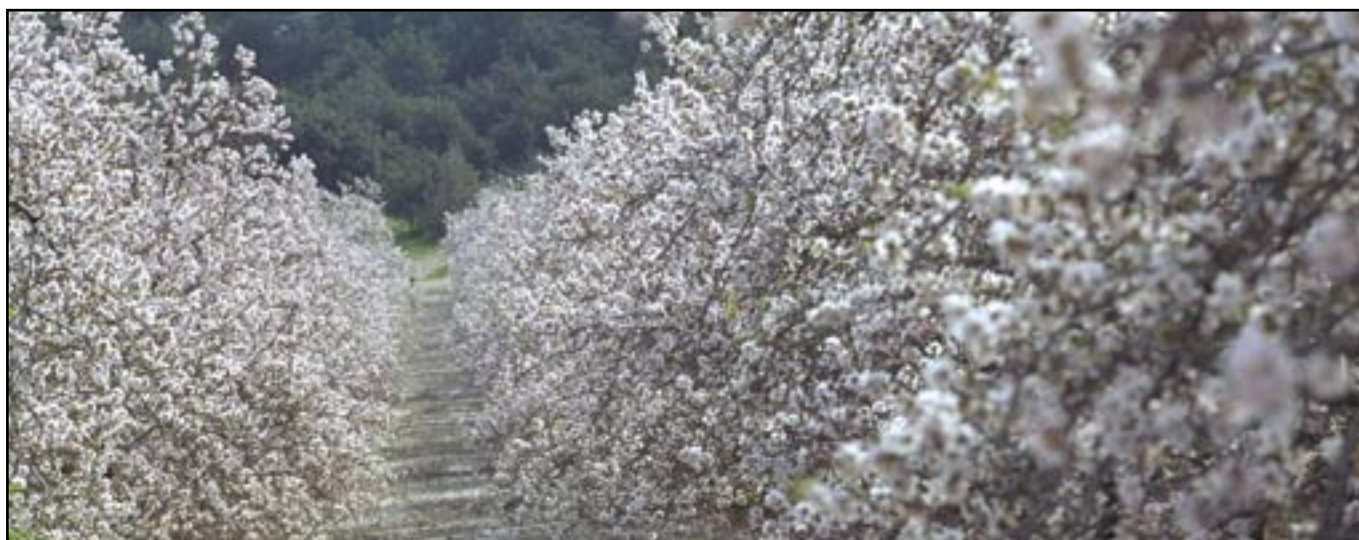
Rate per person sharing a double room US\$430

Single room supplement US\$255

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

Double room on bed and breakfast basis US\$110

Single room on bed and breakfast basis US\$100





The International Association of Jewish Lawyers and Jurists

Honorary Member of Presidency:

Justice Moshe Landau

Honorary Deputy Presidents:

The Rt. Hon. The Lord Woolf (U.K.)
Justice William Kaye (Australia)
Baruch Geichman (Israel)

Honorary Vice Presidents:

Suzie Sadot

President:

Judge Hadassa Ben-Itto

First Deputy President:

Itzhak Nener

Deputy Presidents:

Neal Sher (U.S.A.)
Justice Vera Rottenberg Liatowitsch (Switzerland)
Joseph Roubache (France)
Dr. Oreste Bisazza Terracini (Italy)

Vice Presidents:

Dr. George Ban (Hungary)
Dale Cohen (South Africa)
Igor Ellyn Q.C. (Ontario, Canada)
Jossif Gueron (Bulgaria)
Dr. Mario Feldman (Argentina)
Isidore Wolfe (B.C., Canada)

Chairman of the Council:

Mayer Gabay (Israel)

Treasurer:

Abraham (Abe) Neeman (Israel)

Academic Adviser:

Dr. Yaffa Zilbershats (Israel)

Permanent Representative to the UN in Geneva:

Daniel Lack (Switzerland)

Permanent Representative to the UN in New York:

Roy S. Schondorf (USA)

Representatives to the Council of Europe in Strasbourg:

Joseph Roubache (France)
Daniel Lack (Switzerland)

Adviser on Projects:

Jonathan Goldberg, Q.C. (UK)

Members of the Presidency*

Alan Baker
Aliza Ben-Artzi
Rachel Ben-Porath
Prof. Michael Corinaldi
Baruch Geichman
Haim Klugman
Dr. Meir Rosenne
Prof. Amos Shapira
Ethia Simcha
Dr. Mala Tabory
Shimon Tsur

Members of the Executive Committee and Council:**

Myriam Abitbul
Israel Baron
Gideon Fisher
Louis Garb
Stanley Godofsky
Renana Gutman
Amir Halevy
Frances Chasan Holland
Alon Kaplan
Menachem Kunda
Gabriel Levy
Nathan Lewin
Aya Meyshar
Dov Milman
Isaac Mintz
Judith Sahar
Barry Schreiber
Dr. Ovadia Soffer
Michael Traison
Marcos Wasserman
Robert Weinberg

Executive Director:

Ophra Kidron (Israel)

* All the Officers of the Association are members of the Presidency.

** All members of the Presidency are members of the Executive Committee and Council.