The International Association of Jewish Lawyers and Jurists

JUSTICE

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Carved stone Chanukah Menorah made in Morocco in about 1900.
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10 Daniel Frish St., Tel Aviv 64731, Israel.
Tel: 972-3-691-0673
Fax: 972-3-695-3855
E-Mail: IAJLJ@goldmail.net.il

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PRESIDENT'S MESSAGE

Recently, the Jerusalem District Court examined the question of membership in the Association, namely, whether an individual, who does not actively seek to become a member of the Association and does not believe in its goals and principles, can be a member? This question arose as a result of claims made primarily by the Head of the Israeli Bar Association, to the effect that all lawyers in Israel, even those who are not familiar with the Association, do not identify with its causes or oppose its goals, are members of the Association and are entitled to participate in its elections. Judge Itzhak Inbar dismissed these claims and ordered the plaintiffs to pay the legal costs of the Association and its elected members in the sum of about US $10,000. Due to the importance of this decision to our Association we are publishing a full free translation of it in this edition of *JUSTICE*. It is interesting to note several of the Court's determinations. (See full text of the court's judgment on pp. 4-13).

The Court ruled that members of the Bar who had not joined the Association personally, were not and could not be members. Automatic membership, without the approval or request of the potential member, cannot co-exist with the principle of freedom of association which constitutes a substantive element of "human dignity" as defined in the light of Basic Law: Human Dignity and Liberty. "Automatic membership" also violates the principles of free will and freedom of contract which determine, *inter alia*, the individual's freedom to engage in a contract. Every lawyer in Israel enjoys the freedom "to decide on his or her own whether he or she would like to join the Association as a member and accept upon him or herself the burden of its articles of association". The Court ruled that the Bar's position did not conform to the basic values of our legal system and the articles of our Association. It is important to note that the Court also saw fit to hold that one of the sources of the long-standing arrangement between the Bar and the Association was the financial benefit derived by the Bar from its relationship with the Association and noted the role of our Association in obtaining the property on which the home office of the Bar and the headquarters of the Association were eventually built in Jerusalem and in raising donations for the establishment of the offices of the Bar in Tel Aviv.

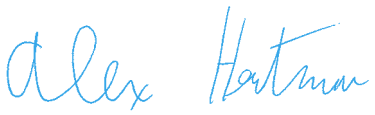
The validity of the elections within the Association, which took place last March in Israel, has been clear to us from the start. It has now been approved by the Court as well. It is a matter for regret that there were those who saw fit to bring the matter for legal review; we are pleased that the District Court in Jerusalem accepted our legal position, which is well-founded on the principles of our Israeli legal system as well as principles of jurisprudence.

We welcome any member who wishes to join our Association. In joining, we see identification with the important causes and goals which we hope to achieve. With your help we shall work tirelessly to fulfill these goals.

I hope that this year's difficulties and the attempt to hurt the IAJLJ by initiating groundless legal proceedings against it are behind us now that the Jerusalem District Court has fully and completely rejected the Israeli Bar Association's lawsuit. In my view, this enables us to proceed with our goals and causes. The year 2005 promises to

hold many activities for the IAJLJ and its members, among them a seminar in Europe, in which discussions will be held regarding methods for combating rising anti-Semitism; an important meeting in Jerusalem in March 2005 in cooperation with the Israel Democracy Institute, where a dialogue and exchange of ideas between Israelis and Jews who live in the Diaspora will take place, in order to contribute to the process of preparing a draft constitution for Israel (see article on pp. 21-23); and finally, a first conference is planned to take place in the USA in cooperation with Georgetown University towards the end of 2005 or the beginning of 2006.

By combining our efforts with those of all of our members, and enjoying the co-operation of our direct members and member organizations, we shall overcome, together, the huge challenges that await our people.



Tenth Anniversary of JUSTICE

Upon bringing this issue to print, we proudly mark the 10th anniversary of *JUSTICE*.

This 40th issue of *JUSTICE*, together with its 39 previous issues and special publications, speaks for the continuity, consistency, clarity and courage with which it faithfully represents the policies and vision of the International Association of Jewish Lawyers and Jurists.

JUSTICE has focused its efforts on providing a qualitative assortment of wide-ranging themes, analyses, commentaries and opinions on the basic issues at the heart of the Jewish legal agenda as well as on current world developments of interest to the Jewish jurist.

Serving as the distinctive and prestigious platform for the Association, *JUSTICE* has committed itself to following the highest professional journalistic standards combined with accurate and readable reporting of often complex legal and public topics. Our goals have been unfailing continuity, ongoing presentation of permanent features and columns, diversity of contributors and the reporting of highlights of international conferences organized and sponsored by the Association, as well as its activities worldwide. We have sought to be vigilant in fulfilling our task, persuasive in our message and vocal in our defense of the Jewish interest.

We trust that our devoted readers concur with us. We in *JUSTICE* look forward to continuing and improving our journal, making it worthy of the trust of our wide-ranging readership and the entire membership of the Association.

Dan Pattir
Editor-in-Chief

District Court Upholds IAJLJ Elections

Following the IAJLJ Congress which took place in March 2004 and in which elections were held for the officers of the Association, the Israel Bar Association brought proceedings to question the legality of the election process. The claim was dismissed by the District Court of Jerusalem. This is a full translation of the ensuing judgment of Judge Itzhak Inbar delivered in November this year.

Judgment by the District Court of Jerusalem

In the Matter of:

1. Israel Chamber of Advocates
2. Marcus Wasserman, Adv.
3. Moshe Chichik, Adv.
4. Benny Steinberg, Adv.
5. Ilan Shirkon, Adv.
6. Ribah Salomon, Adv.
7. Doron Barzilai, Adv.
8. Ed Friedman, Adv. - **The Applicants**

Against

1. The International Association of Jewish Lawyers and Jurists
2. Alex Hertman, Adv.
3. Haim Klugman, Adv.
4. Irit Kahn, Adv.
5. Abraham Doron, Adv.
6. Prof. Yaffa Zilbershats - **The Respondents**

Judge Itzhak Inbar presiding

1. What is the meaning of the arrangements which were reached between the Israel Chamber of Advocates (the "Bar") and the International Association of Jewish Lawyers and Jurists (the "Association") regarding the status of members of the Bar in the Association? Are the approximately 30,000 attorneys who are members of the Bar also members of the Association by virtue of their membership of the Bar, notwithstanding that they did not ask to be members of it? Is it even possible to make a person a member of a corporation without his consent and without his knowledge ("unknowing membership")? These are the principal questions which must be decided in these proceedings.

Factual and Procedural Background

2. Applicant 1, the Bar, is a statutory corporation which operates by virtue of the Israel Chamber of Advocates Law, 1961. Applicant 2, who is a member of the Bar, holds a position in the Executive of the Association and was present at a meeting of the Congress of the Association on 26.3.04, which is at the focus of this claim (hereinafter: "the Meeting"). Applicants 3-8 are a few members of the Bar who were prevented from entering the Meeting on the ground that they were not members of the Association and were not entitled to vote at the Meeting.

3. The Association was established in 1969 with the purpose of dealing with legal issues of special importance to the Jewish people and the State of Israel. The crowning jewel of these activities is the fight against discrimination directed at the State of Israel in the international arena and UN institutions, anti-Semitism and Holocaust denial. Another goal of the Association is to strengthen the status of Jewish law (para. 3 of the affidavit of the previous President of the Association, Judge H. Ben-Itto). There is a dispute concerning the legal status of the Association: is it a registered society as asserted in the Application, or is it a voluntary international organization, under the framework of which the society was founded (paras. 51-54 of Ben-Itto's affidavit). I should first say that I see no need to decide this

dispute. For the purpose of the proceedings before me I shall take as my premise a position favourable to the Applicants, namely, that the society provides a general framework for the activities of the Association in Israel and abroad (as the Applicants assert in para. 57 of the supplementary response).

4. This claim, which was filed in court on 6.5.04, concerns a meeting of the Congress of the Association which took place on 26.3.04, in which Respondents 2-6 were elected to various posts in the Association: President, Vice-President, Secretary General, Treasurer and Coordinator with International Bodies. The principal contention of the Applicants is that the leaders of the Association unlawfully prevented dozens of members of the Bar from entering the Meeting notwithstanding that by virtue of the arrangements between the Bar and the Association all the members of the Bar were members of the Association. And if this is not enough, an agenda for the Meeting, with the particulars required by law, was not published; various propositions made by members of the Association were not put to the vote; the Congress elected officials whom it was not entitled to elect; the Congress elected a Presidency which lacked various officials contrary to the articles of the Association; the Congress voted for a "bloc" of candidates and not for each candidate separately; matters were not put to the Congress which had to be put before it and proper minutes were not kept of the Meeting. Against the background of these complaints, the court is asked to declare that the Meeting was conducted unlawfully; that all the members of the Bar are members of the Association and are entitled to participate in congresses of the Association, to vote and be elected therein; and that the election of Respondents 2-6 to various positions in the Association and all the other decisions taken in the Meeting lack legal effect. Likewise, the court is asked to order the convening of a new congress of the Association within 90 days.

The principal contention of the Applicants is that the leaders of the Association unlawfully prevented dozens of members of the Bar from entering the Meeting

5. The Respondents oppose the application. In their view the proposition that there can be "unknowing membership", which underlies the application, is unfounded. All the decisions in the Meeting were taken lawfully and in accordance with acceptable and customary practices in the Congress for years. The submission of the application about a month and a half following the completion of the election process was tardy in the extreme and acquiescing to it would cause the Association great and irremediable damage.

All the members of the Bar are members of the Association by virtue of their membership of the Bar – Indeed?

6. The principal argument of the Applicants, on which the hearing focused, asserts that by virtue of the arrangements which were reached between the Bar and the Association, all the members of the Bar became members of the Association by virtue of their membership of the Bar. Accordingly the leaders of the Association acted unlawfully when they prevented members of the Bar who had arrived at the Meeting from participating in it, on the ground that they had not personally and voluntarily joined the Association.

The Respondents confirm in their response that in the past the members of the Bar were granted a special status, which was expressed in the right to join the Association without paying membership fees, however, they argue, that it was always necessary for them to engage in a personal and voluntary act of joining. Moreover, the exemption from paying membership fees had been cancelled prior to the Meeting.

7. The decision concerning the status of the members of the Bar in the Association will elucidate the discussion as a whole. Thus, if there is merit to the stance taken by the Applicants, it is difficult to imagine that the comprehensive denial of the right of membership of all the members of the Bar in the Association can remain without relief. In contrast, the conclusion that members of the Bar are not members of the Association by virtue of their membership of the Bar is sufficient to force the dismissal of the claim of the Bar and all the other Applicants who did not join the Association personally (namely, all the Applicants except Applicant 2), as a person who is not a member of the Association cannot complain about defects in its meetings. It is therefore

necessary to examine first the issue of membership. We shall examine this issue in more detail, turning first to an examination of the articles of the Association.

Articles of the Association

8. The articles of the Association comprise a contract between the Association and its members and between the members *inter se* (C.A. 959, 54/96 *Hollander v. Hameymad Hahadish Tochna Ltd.*, 52(5) P.D. 673, 687). This is a document the importance of which is difficult to overestimate. If all the members of the Bar are members of the Association by virtue of their membership of the Bar it may be expected that this would be expressly stated in the articles. Yet, I can find nothing in the articles to reflect the position taken by the Applicants. This is the wording of the relevant provisions dealing with membership of the Association:

> "4) Membership of the Association is open to:
>
> a) Jewish lawyers and jurists.
>
> b) Organizations of Jewish lawyers and jurists.
>
> c) Other lawyers and jurists and organizations of lawyers and jurists without distinction of race and religion who identify with the purposes of the Association.
>
> 5) Every application to be admitted as a member shall be submitted in writing. Members shall be admitted by decision of the Executive.
>
> 6) The Council may terminate the membership of a member upon the recommendation of the Executive, however the membership of a member shall not be terminated without notice in advance and an opportunity to be heard.
>
> 7) The Executive is entitled to terminate or suspend the membership of any member because of non-payment of membership fees due from him according to the articles.
>
> 8) A member is entitled to withdraw from the Association by a written application."

We see that the articles do not support the position of the Applicants, as under the provisions of Article 4(5) of the articles and the general context it is necessary to engage in a personal and voluntary act of joining in order to become a member of the Association.

The decision of the National Council of the Bar dated 14.12.76

9. Both sides agree with the view that the basis of the membership arrangement may be found in the decision taken by the National Council of the Bar on 14.12.76. In this context all necessary weight must be given to the insistence of the Bar that the National Council alone is entitled to enter into, or modify, a contract of this type in the name of the Bar. The decision of the National Council therefore has particular importance, since even under the view of the Bar it would be difficult – and perhaps even impossible – to accord the membership arrangement a meaning which is different from that accorded to it by the National Council in its decision.

Yet, an examination of the decision taken by the National Council shows no support for the current stance of the Bar. On the contrary, the decision clearly supports the position of the Respondents. These issues arise unambiguously in the course of the discussion in the National Council, which it is material to set out here in full:

> "Adv. Nener: With regard to the International Association – asks what will happen with regard to those members who will not want to join the Association".

To this question, Adv. Berger answered:

> "I propose to authorize the allocation of 120,000 IP to the Association annually. This allocation will enable all the members of the Bar to become members of the Association, without being required to pay membership fees. Members who do not want to will not join."

The Head of the Bar at the time, Adv. Tunik elaborated:

> "The Association provides a service to the people of Israel and it is important to set an example by all the members of the Bar joining the Association."

The decision itself also stated:

> "To allocate to the International Association of Lawyers and Jurists 120,000 IP annually, and this vests all the members of the Bar with the right to become members of the International Association without any further payment."

Thus, the decision did not state that all the members of the Bar automatically became members of the Association without their knowledge and without being asked if they were interested in so being. All that was said in the decision was that the members of the Bar were vested with the right "to become members of the Association… without any further payment". The language of the decision refers to the future and did not remove the need for a personal voluntary act of joining as required by the articles

of the Association. The novelty of the decision lies in the fact that the members of the Bar could realize their right to join the Association without being required to pay membership fees.

10. This was the situation from the point of view of the Bar. However, how did the Association understand the arrangement? An answer to this question may be found in a letter dated 4.2.77 sent by the then President of the Association, Justice H. Cohn, to all the members of the Bar, in which he suggested that they realize the right granted to them to join the Association. The letter reads as follows:

> "We are pleased to inform you that the Council of the Chamber of Advocates which has allocated a certain sum for the routine activities of this Association, has decided that each member of the Bar who shall join as a member of the Association, shall be exempt from paying membership fees to the Association and shall enjoy all the rights which the Association grants to its members. In order to allow the Executive of the Association to admit you as a member of the Association, you are asked to fill in the accompanying application form, sign it and return it to us. After the Executive of the Association shall admit you as a member of the Association, you shall be sent a certificate of membership…".

The Bar also did not notify its members that they had all become members of the Association. This conduct speaks for itself

It seems to me, that these statements speak for themselves.

11. In order to paint the full picture it should be added that the Bar, to all the members of which Justice H. Cohn's letter was sent, did not jump to notify the Association of its so called mistaken understanding of the decision of the National Council. The Bar also did not notify its members that they had all become members of the Association. This conduct speaks for itself. We may therefore summarize and conclude that the decision reached by the National Council of the Bar, on the basis of which the membership arrangement is based, does not support the Applicants' position. On the contrary, it was clear to both the Bar and to the Association that even after the decision of the National Council it would be necessary to engage in a personal voluntary act of submitting a written application in order to become a member of the Association.

Unknowingly becoming a member of a corporation – is it possible?

12. This is the place to pause and examine the fundamental validity of the thesis underlying the claim. Is it at all possible to turn a person into a member of a corporation without his knowledge? Can the Bar and the Association turn all the members of the Bar, admitted from time to time, into members of the Association, even though they did not ask to be members of the Association and without connection to their national affiliation and worldviews? These questions must be answered with a resounding – No. There are a number of reasons for this conclusion and I shall refer to each of them below.

Making a person unknowingly a member of a corporation is incompatible with the principle of freedom of association, which comprises part of human dignity within the meaning of Basic Law: Human Dignity and Liberty, and which includes within it the very decision to associate (A. Barak, *Interpretation in Law*, vol. 3, Nevo Press, 1994, at 430-431). It also breaches the principles of freedom of will and freedom of contract. These principles, which too are derived from human dignity (F.H. 22/82 *Beit Yules v. Raviv*, 43(1) P.D. 441, 470-471, 478, 486) provide, *inter alia*, for the freedom of an individual to enter into a contract, "the freedom of every individual to decide with whom he wishes to enter into a contract, is an integral part of human dignity and liberty" (Barak, *id*. at 426). Each and every member of the Bar is therefore vested with the freedom to decide for himself if he is interested in becoming a member of the Association and take upon himself the burden of the articles of the Association, which, as noted, comprises a contract between the Association and the members and between the members *inter se*. Turning a member of the Bar into an unknowing member of the Association violates this freedom. In this context, I should note that I cannot accept the Bar's contention that the articles of the Association do not impose any obligations on its members, apart from the obligation to pay membership fees, which in any event is borne by the Bar. First, the undertaking by the Bar to bear the membership fees, which is an obligation external to the

articles, does not discharge the members of the Association from the article obligation. Thus, for example, if for some reason, the Bar should cease paying the membership fees, the Association would be entitled to claim them from the members themselves. Second, and more importantly, joining the Association entails acceptance of the aims of the Association and the duty to abide by its decisions. This was explained by B. Greenberger and N. Ben Tor in their book: *Laws of Associations in Theory and in Practice,* vol. A, Boursi Press, 2002, at p. 165, when they state: "It is accepted thinking in a corporation that a member is a person possessing rights and obligations in the corporation which he joined, in order to act within it so as to promote and realize its purposes. This membership entitles the member to participate in the meetings of the corporation, vote in them, choose their institutions on one hand, and obliges him to comply with the decisions of the corporation, on the other hand." It is not in vain that a mechanism was established in the articles of the Association which enables the Executive to make a recommendation to the Council concerning the termination of membership of a person in the Association (Article 4(6) of the articles). Clearly, therefore, admitting a person as a member of a corporation cannot be done save with his knowledge.

It is highly doubtful whether the Bar Association is actually entitled to turn all its members into members of corporations without first obtaining their agreement

Making a person unknowingly a party to the articles of a corporation is also incompatible with the laws of contract formation in the narrow sense. According to these laws it is not possible to create a contract without intention (Sections 1-5 of the Contracts (General Part) Law, 1973; C.A. 440/75 *Zandbank v. Danziger*, 30(2) P.D. 260, 266-267). Of course, it is not possible to say of all 30,000 members of the Bar that they unknowingly intended to acquiesce to the articles of the Association.

Admitting an unknowing member is incompatible with the principle of personal membership of *an amuta* (non profit society). Section 17 of the *Amutot* Law, too expresses the connection between membership of a society and identification with its aims; activities which cannot be performed save knowingly. It is also difficult to reconcile it with Section 18 of the Law, under which "An *amuta* shall keep a register of members in which every member, his address and identity number and the dates of the commencement and termination of his membership shall be recorded." Shall we demand of a society that it record in its register members who do not know of their membership? Naturally, this proposition would lead to the strangest results. Thus, for example, in this case, agreeing with it would lead to the result that if the institutions of the Association decide to terminate the membership of a member of the Bar in the Association by virtue of Article 4(6) of the articles, on the ground that he acted in a manner contrary to the aims of the Association, it would be required to allow him to be heard, notwithstanding that he does not even know that he is a member of the Association.

Against the background of all the above, it is highly doubtful whether the Bar Association is actually entitled to turn all its members into members of corporations without first obtaining their agreement. As a statutory, public and exclusive corporation in its profession, the funding for which comes from members of the Bar whose membership in it is mandatory (Section 23 of the Chamber of Advocates Law), the heads of the Bar are obliged to "promote the interests of all the members of the Bar" (HCJ 6218/93 *Dr. Shlomo Cohen, Adv. v. Chamber of Advocates*, 49(2) P.D. 529, 540-541). I accept the position of the Bar that within this framework, the Bar is entitled to act to promote universal values which are important to the Bar and its members, such as "promotion of human rights and principles of human equality and the right of every state to peaceful relations" (para. 3(a) of the articles of the Association), however, in the light of the considerations which we set out before, it would seem that the promotion of these values, however important, cannot be carried out by way of turning all the members of the Bar unknowingly into members of various corporations. As an aside it should be noted that in Israel and abroad, there are many other corporations and organizations which are devoted to the advancement of universal values. Can the Bar turn its members into unknowing members of all of them? Of course not.

13. These matters have direct ramifications for the interpretation of the membership arrangement which was entered

into between the Bar and the Association, as in every case in which the arrangement is subject to different constructions, one which supports its validity is preferable to one under which it is invalid (Section 25(b) of the Contract (General Part) Law, 1973; G. Shalev, *Laws of Contracts*, 1995, at pp. 304-306)). The parties must also be presumed to have intended, in their mutual relations, to comply with the basic principles of the law (A. Barak, *Interpretation in Iaw*, vol. 4, *Interpretation of Contracts*, Nevo Press, 2001, at pp. 552-553). Earlier we saw that the articles of the Association and the decision of the National Council of the Bar dated 14.12.76 are compatible with the basic values of the legal system. The situation is totally different in relation to the current contention of the Bar.

Meeting of the Central Committee of the Bar on 14.12.93 and the covenant of 1.1.97

14. The Applicants seek to rely on the comments of the previous President of the Association , Judge H. Ben-Itto during the meeting of the Central Committee on 14.12.93: "Because of the coalition between the Bar and the Association when it was founded, it was decided that all the members of the Bar would be members of the Association, this was what was agreed and therefore it was decided that the Bar would participate in the membership fees…". However, it is right to also emphasize the following sentence: "… this is not forced membership but a right which the Bar grants to its members…". These comments are actually compatible, therefore, with the position of the Respondents. Moreover, these comments should be interpreted in accordance with the situation which arose between the establishment of the original arrangement in 1976 when on one hand, the members of the Bar did not realize their right to join the Association and the option which was given to them to do so without paying membership fees was left "virtual and lacking any effective significance" (para. 100 of Ben-Itto's affidavit); and on the other hand, those few who chose to come to the meetings and congresses were not scrupulously subjected to the formal requirement of registration as members of the Association (*id*, para. 98). The comments of the previous President of the Association do not, therefore, alter the picture.

15. The same is also true of the covenant signed between the Bar and the Association on 1.1.97, on which the Applicants rely most strongly. In that covenant it is stated, *inter alia*, that "since its establishment the Association, of which members of the Bar are automatic members, obtains a fixed annual allocation from the Israel Bar Association and accommodation in the buildings of the Bar in Jerusalem and in Tel Aviv". However, in view of all the foregoing, it should be explained that the phrase "automatic members", which suffers from certain vagueness, refers only to the right to become a member without payment of a membership fee, yet without removing the article need to submit a personal application to join. In other words, the significance of the statement in the covenant is that upon submission of an application to join and its authorization by the Executive, the applicant will become an "automatic member" in the sense that he will not be required to pay a membership fee which he would have been required to pay in the absence of the arrangement. Conceivably also, this phrase reflected the practice in place at the time, which did not have a legal or contractual basis, in which the Association did not strictly apply the formal requirements to those few who came to the meetings of the Association. Whatever the case, it is worth emphasizing again that the equation whereby the phrase "automatic members" equals "unknowing members", is incompatible with fundamental legal principles and the articles of the Association. Such an equation also has no basis in the decision of the National Council of the Bar, which we learned from the Applicants is the decision-making body.

The conduct of the parties following the signing of the covenant

16. If there is need for further evidence that the covenant does not support the thesis of "unknowing membership" it may be found in the conduct of the parties over the years following its signing. In those years not only did the Association begin to take measures to meet formal requirements in so far as concerned the registration of members, but also the arrangement which had applied until then under which it sufficed for a member of the Bar to make an application in order to turn him into a member without being required to pay membership fees, was cancelled.

17. The above change began with the recommendation of the Ne'eman Committee which had been appointed by the Presidency of the Association, to the effect that from then onwards the requirement of personal membership set out in the articles and payment of personal membership fees would be strictly followed. In consequence of the report of the committee, which was adopted by the Executive of the Association, the Association gave broad publicity to the principle of personal membership following a process of joining in accordance with the articles: in the internet website of the Association, in the magazine of the Association

– *JUSTICE* – and in various conferences, including those which were held within the premises of the Bar. Thus, for example, on 28.1.01, the then President of the Association, Judge H. Ben-Itto, participated in a meeting of the Committees of International Legal Organizations of the Bar, explained to those present the personal and direct membership route of the members of the Bar and asked for the help of the Bar with the enrollment of lawyers from among the members of the Bar in the Association. At the same time, the Association wrote directly to many legal firms in the country suggesting that they join the Association. And what was the response of the Bar? Did it protest to the Association that the members of the Bar were anyhow members of the Association? Not at all. Not only did the Bar not protest, but it actually cooperated with the Association. On 15.4.02, the Professional Studies Committee of the Bar decided that it "recommended to members of the Bar to join and become active in the International Association of Jewish Lawyers and Jurists. The committee recommends that registration forms for active and direct participation be sent to all the members of the Bar. Active participation awarded receipt of *JUSTICE* 3-4 times per year and additional rights in the organization". Likewise, in the report of the Director General of the Bar concerning the activities of the Bar for the years 00-01 it was said that these days the Association was conducting an enlistment campaign for personal membership without the report stating, or even hinting, that the members of the Bar were already members of the Association. It is interesting to note that within this framework the head of the Bar was registered as a member of the Association, fulfilling to the letter the article process of joining, including submitting a registration form and payment of membership fees. True, within the framework of the financial reports of the Association the Association continued to attribute the budgetary support of the Bar to membership fees which were received from the Bar, however, in the light of all the circumstance, I accept the Respondents' explanation that this was based on a pure error, founded on the "linking" of the few reports which had been issued before the adoption of the recommendations of the Ne'eman Committee in the year 2000 to the period which followed.

18. The Applicants contend that there is no reason to an arrangement under which the Bar agreed, year after year, to pay the Association considerable membership fees against the admission of just a few members of the Bar to the Association. There is no real merit to this argument. First, at all times prior to the dispute which is the subject of this claim, there was substantive cooperation between the Bar and the Association, and the entirety of the circumstances shows that the Bar would have supported the advancement of the aims of the Association in any event. Second, it appears that the Bar obtained an economic benefit from the connection with the Association. Thus, for example, the Association played a part in obtaining the plot in Chopin Street in Jerusalem, on which the house of the Israel Bar Association was built and the center of the Association, and the enlistment of donations which assisted in the construction of "Beit Hapraklit" in Tel Aviv.

The Applicants contend that there is no reason to an arrangement under which the Bar agreed, year after year, to pay the Association considerable membership fees against the admission of just a few members of the Bar to the Association. There is no real merit to this argument

19. In order to explain the calls of the Association and some of the institutions of the Bar for lawyers to personally join the Association, the Applicants contend that there are two parallel ways of joining the Association: articled joining which entails payment of membership fees as was done by the head of the Bar, on one hand, and joining unknowingly ("automatically") on the other hand. However, this construction seems forced. It would appear that there is no reason for an arrangement under which a member of the Bar, who is in any event a member of the Association, to join the Association a second time and pay membership fees, yet, if he does not do so nonetheless remain an unknowing member of the Association without paying membership fees. We saw above that this outcome is also irreconcilable with basic principles of law.

20. The Applicants further contend that events following the issue of the recommendations of the Ne'eman Committee were not unequivocal and were insufficient to modify a written contract, under which all the members of the Bar were members of the Association notwithstanding that they had not complied with the procedure of personally joining set out in the articles of the Association. The contention relies on the ruling given in

CA 4956/90 *Pogaz Marketing Co. Ltd. v. Southern Gazit Ltd.*, 46(4) P.D. 35, 41, whereby in order to modify a written contract by way of the later conduct of the parties, it is necessary to show a "clear and solid basis". However, we already saw above that *ab initio* the covenant was not intended to state that all the members of the Bar were unknowing members of the Association. From this perspective, therefore, nothing changed. The parties' conduct following the signing of the covenant reflected what had previously been agreed in any event and what was - continued. On the margins I would add that contrary to the argument of the Applicants, the argument that the significance of the membership arrangement entailed nothing more than the right to ask to join without paying membership fees was properly explained in the first response submitted on behalf of the Respondents.

Meeting of the National Council of the Bar on 30.11.03 – Epilogue

21. Against the backdrop of everything explained above, it is interesting to examine the statements made during the meeting of the National Council recently held within the framework of the discussion on the budget of the Bar for the year 2004 and the continued financial support of the Association.

As in the meeting of 1976 in which the membership arrangement was discussed, in this meeting too nothing at all was said to the effect that all 30,000 lawyers in Israel had become, so-to-speak, unknowingly, members of the Association. On the contrary, when the head of the Bar reviewed before the members of the Council the activities of the Association and its *nexus* to the Bar, he emphasized that the number of members was extremely small. In his words: "… in this Association – if I understand correctly, hundreds are connected one way or another – these can be counted on the fingers of one hand…". And later: "The Association goes around and portrays itself as if it represents the Jewish lawyers in the world, and this is simply not true. In this Association members are – to the best of my knowledge, and I said to you – this is a secret, they don't want to reveal it to us – we are really speaking of a small number". And later: "The Bar Association has to decide – if it wants to give money to an association in which it has no status, no influence…". It is difficult to reconcile these comments and the argument which was raised in the proceeding before me, that in this Association – no more and no less than all the members of the Bar are members – namely, thirty thousand people.

True, within the framework of his comments, the head of the Bar also mentioned the covenant, stating that "according to that covenant all the members of the Bar are members of this Association", however, at the same time he emphasized that this was "a strange covenant which was signed, and in my opinion it has no binding legal status". And lo, the members of the National Council did not see fit to object to these remarks put by the head of the Bar and not without reason: the National Council of the Bar had never sanctioned a membership arrangement which entailed the unknowing joining of all the members of the Bar to the Association. Such an arrangement, had it been made, would indeed have been "strange" and legally invalid. At all relevant times, the only members of the Association were those lawyers who complied with the article admission process. The significance of the phrase "automatic membership" mentioned in the Covenant, referred to nothing more than the right to join as a member without paying membership fees. How did the "strange covenant which was signed… which has no binding legal status" – in the words of the head of the Bar – suddenly become the bedrock of the claim by the Bar? The Respondents did not have a real answer to this fundamental conundrum, undermining the claim.

The Bar "a member organization" in the Association – Indeed?

22. Within the framework of their response to the Respondents' response, the Applicants added an additional pillar to their claim, arguing that the Bar is a "member organization" of the Association. It should be noted that according to the articles of the Association a "member organization" is entitled to a "single vote for every 50 members of the organization which it represents, but not more than 10 votes" (Articles 4 and 10(7) of the articles). However, no evidentiary basis whatsoever was provided for this argument, which was first raised within the framework of the response to the response. No application to join by the Bar or minutes of the National Council authorizing the Bar to join as a member of the Association were submitted in evidence. In the minutes which were submitted in evidence there is no mention of this assertion. The head of the Bar did not refer to this issue in his affidavit, nor did he even hint at it, whereas the Deputy Director General of the Bar, who did refer to it, based herself on "legal advice" and not on facts. And if this does not suffice, those Applicants whose entry into the Meeting was prevented did not argue that they had arrived at the Meeting as the representatives of the Bar as a "member organization", as opposed to persons acting in the Association as members by virtue of "unknowing

membership". There is, therefore, no merit to this argument.

The claim of the Bar and Applicants 3-8

23. The foregoing is sufficient to lead to the dismissal of the claim of the Bar (Applicant 1) and Applicants 3-8, as an outcome of rejecting the proposition of "unknowing membership"; these Applicants are not members of the Association and therefore they cannot complain about defects which occurred in its meetings. Only the claim of Applicant 2 therefore remains – Adv. Wasserman – who in the past joined the Association personally and voluntarily. We shall now turn to an examination of this claim.

The claim by Adv. Wasserman

24. The claim of the Bar (Applicant 1) and Applicants 3-8 was also filed in the name of Adv. Wasserman (Applicant 2) and the arguments of the Applicants, including those concerning the membership of all the members of the Bar in the Association, were heard as a unified claim without distinguishing between the status of the Applicants. At the same time, in contrast to all the other Applicants, Adv. Wasserman joined the Association personally in the past in accordance with the article process of joining. Counsel for the Applicants is therefore correct to point out that rejecting the Applicants' position on the issue of unknowing membership is not sufficient *per se* to dismiss his claim.

25. The area of dispute in so far as it may be gleaned from the affidavit sworn by Adv. Wasserman is more limited than that set out in the claim itself. According to the affidavit, until the Meeting itself Adv. Wasserman had not received any advance information or an agenda, however, he saw fit to come to the Congress "without a preconceived view, I hoped to gain an impression during the course of the Congress from the various opinions and views which would be presented and come to my conclusion accordingly". During the course of the Congress he received a letter from the Presidency of the Association setting out the names of recommended candidates as well as a letter from the Bar and sections of the Association in the United States and England. Likewise, a program was distributed which stated that elections would be held on the last day of the Congress, the fourth day. At the opening of the election meeting the previous President of the Association made some remarks. After her, the representative of the US section and the head of the Bar asked to make statements, but their comments were cut short. Following the conclusion of the speeches, one of the members of the Presidency gave notice that as there was only one proposal on the agenda for the election of a list of candidates it had to be deemed to have been accepted; however, in view of the demand by members, a vote was held by raising hands, following which the chair declared the confirmation of the list proposed by the outgoing Presidency. Adv. Wasserman obtained the impression that the vote had been stolen, without allowing different views to be voiced and discussed. At this stage he believed that matters had got too far out of hand and left the Meeting. A few days later he wrote to the previous President of the Association, Judge Ben-Itto, and expressed his displeasure at events. After a month and a half he joined the Bar and the other Applicants in their claim to the court.

26. The Respondents seek to dismiss *in limine* the claim submitted by Adv. Wasserman on grounds of tardiness. On the merits, they argue that up to the date of the election only Respondents 2-6 submitted their candidacy to positions which had to be filled, and in the absence of any alternative candidates there was no need whatsoever to hold a vote. The convening of the Congress and its agenda, including the election, were published about half a year prior to the Meeting in the journal of the Association and on its Internet website. All those having a right to vote were given the right to vote. All the decisions were reached lawfully and in accordance with the custom of the Association from previous years. The orderly conduct of the Meeting was cut short solely because of the rowdy behaviour of the head of the Bar.

27. After weighing the matter I reached the conclusion that the Wasserman claim must be dismissed by reason of the severe tardiness in submitting it without consideration of the contentions on the merits (for the application of the doctrine of tardiness to a "civilian" election process, *see* C.A. 2219/92 *Shapira-Libai v. Israeli Labor Party et al*, 46(4) P.D. 221; C.A. 341/87 *Hershkovitz v. Ein Vered Workers Moshav*, 44(2) P.D. 286; for the application of the doctrine in civil law generally, *see* C.A. 6805/99 *General Talmud Torah v. Local Building and Planning Committee for Jerusalem*, 57(3) P.D. 433, para. 13 *et seq.*). I shall explain my position below.

Adv. Wasserman decided to come to the Meeting and took part in the vote on the list of candidates (para. 15 of his affidavit). By doing so he waived defects which had taken place, if at all, in the process of summoning the Meeting (*cf. Hershkovitz case* above, para. 4).

Moreover, Adv. Wasserman did not trouble to address his complaints to the Association and his claim to the court was only

made a month and a half after the election. True, a few days after the Meeting he wrote to the previous President of the Association, but not only was the letter not addressed to the Association itself but rather to its retired President, it also contained general and non-specific complaints and did not seek any operative relief whatsoever. On the contrary, at the end of his letter, Adv. Wasserman pointed out that "I do not intend to take a position regarding the candidates, but to express my deep disappointment and objection concerning everything that happened", and nothing more. In his affidavit, Adv. Wasserman did not explain what caused him to change his mind and turn to the courts. Also no explanation was given for the great delay in filing the claim, that no interim relief was claimed in due time, and that no earlier letter had been address to the Association itself. In all this, the matter here is distinguishable from HCJ 5743/99 *Duwak v. Mayor of Kiryat Bialik*, 54(3) P.D. 410 referred to by the Applicants, as in that case the court emphasized the fact that the petitioners had taken various preliminary steps, which did not happen in the instant case. Adv. Wasserman's petition is flawed therefore by grave subjective delay. Moreover, it is apparent that had it not been for the filing of the claim by the Bar [Adv. Wasserman's] claim would never have seen the light of day. It is highly doubtful whether the filing of the claim in such circumstances is a proper exercise of the right to bring suit. A hearing on the merits of this "late" claim after the main claim of the Bar – which Adv. Wasserman joined – was rejected, would turn the court into a tool for the extra-legal disputes of the parties. In this regard the comments in HCJ 232/85 *Rubin v. Head of the Israel Chamber of Advocates*, 39(2) P.D. 215 are apposite. There, a petition to annul agreements concerning an election process to the chairmanship of the Bar was dismissed *in limine*, even though the petition was filed about 15 days before the election, and even though the delay in that case lasted for about a month only:

> "The court is – and is obliged to be – an external body which supervises the legality of the elections. It must not be turned into one of the tools of war in the conflict between the parties. Such a late application turns the court, in the nature of things, into a piece on the chess board of their public dispute. This outcome must be prevented, and the rules of tardiness are the means, which shall be used by the court to prevent this undesirable result".

The court is – and is obliged to be – an external body which supervises the legality of the elections. It must not be turned into one of the tools of war in the conflict between the parties

From the objective perspective of the tardiness, it should be mentioned that following the elections notice was given to the international bodies with which the Association is in contact regarding the changes which had taken place in its leadership. There are no grounds to doubt the statement of the Respondents that "the activities of the International Association regarding these bodies and regarding other bodies, through its new elected officials, is at its height". Upholding the application would create a leadership vacuum, harm the Respondents and cause an upheaval which might seriously damage the activities of the Association.

It should be added to all the foregoing that in this case we are referring to elections to a voluntary body where the contentions raised by Adv. Wasserman are at most borderline. The gravity of the defects which occurred, if any, in the election of Respondents 2-6 to their posts cannot near the gravity of a defect in the election of a statutory public official, in which situation the relative weight of the passage of time might be reduced.

Conclusion

28. The claim is dismissed

The Applicants will pay Respondent 1 the costs of the application and legal fees in the sum of NIS 20,000 together with VAT and a similar sum will also be paid to Respondents 2-6 (together).

Given on 15 November 2004, in the absence of the parties.

Translation by **Dr. Rahel Rimon**, Adv.

United Nations Condemns Anti-Semitism

On 24 November, 2004 the Third Committee of the United Nations General Assembly passed a resolution calling for the "Elimination of all forms of religious intolerance". Making this a breakthrough resolution is a paragraph which specifically refers to anti-Semitism despite efforts of the Organization of Islamic Conference to prevent or amend such references. The Arab and Muslim bloc, which includes non-aligned states, has an automatic majority in the General Assembly. Voting, therefore, is usually stacked against Israel. Last year Israel abstained from the annual religious intolerance resolution as a result of its failure to refer to anti-Semitism. This year, European and other countries rejected the OIC's arguments, insisted on a reference to anti-Semitism, and the resolution was ultimately adopted unanimously with 177 votes in favour.

The relevant part of the new resolution reads as follows:

The Third Committee of the United Nation General Assembly:

"Recognizes with deep concern the overall rise in instances of intolerance and violence directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia".

***JUSTICE* will report further on this resolution following its adoption by the General Assembly of the U.N.**

Chanukah Menorah made of brass with a star and crescent borrowed from Islam. The Menorah was made in Bagdhad, Iraq in about 1900

One Small Step: Is the U.N. finally ready to get serious about anti-Semitism?

Anne Bayefsky

I appreciate the opportunity to speak to you at this first U.N. conference on anti-Semitism, which is being convened six decades after the organization's creation.

This meeting occurs at a point when the relationship between Jews and the United Nations is at an all-time low. The U.N. took root in the ashes of the Jewish people, and according to its charter was to flower on the strength of a commitment to tolerance and equality for all men and women and of nations large and small. Today, however, the U.N. provides a platform for those who cast the victims of the Nazis as the Nazi counterparts of the 21st century. The U.N. has become the leading global purveyor of anti-Semitism – intolerance and inequality against the Jewish people and its state.

Not only have many of the U.N. members most responsible for this state of affairs rendered their own countries *Judenrein*, they have succeeded in almost entirely expunging concern about Jew-hatred from the U.N. docket. From 1965, when anti-Semitism was deliberately excluded from a treaty on racial discrimination, to last fall, when a proposal for a General Assembly resolution on anti-Semitism was withdrawn after Ireland capitulated to Arab and Muslim opposition, mention of anti-Semitism has continually ground the wheels of U.N.-led multilateralism to a halt.

There has never been a U.N. resolution specifically on anti-Semitism or a single report to a U.N. body dedicated to discrimination against Jews, in contrast to annual resolutions and reports focusing on the defamation of Islam and discrimination against Muslims and Arabs. Instead there was Durban - the 2001 U.N. World Conference "Against Racism", which was a breeding ground and global soapbox for anti-Semites. When it was over U.N. officials and member states turned the Durban Declaration into the centerpiece of the U.N.'s antiracism agenda - allowing Durban follow-up resolutions to become a continuing battlefield over U.N. concern with anti-Semitism.

Not atypical is the public dialogue in the U.N.'s top human rights body - the Commission on Human Rights - where this past April the Pakistani ambassador, speaking on behalf of the 56 members of the Organization of the Islamic Conference, unashamedly disputed that anti-Semitism was about Jews.

For Jews, however, ignorance is not an option. Anti-Semitism is about intolerance and discrimination directed at Jews - both individually and collectively. It concerns both individual human rights and the group right to self-determination - realized in the State of Israel.

What does discrimination against the Jewish state mean? It means refusing to admit only Israel to the vital negotiating sessions of regional groups held daily during U.N. Commission on Human Rights meetings. It means devoting six of the 10 emergency sessions ever held by the General Assembly to Israel. It means transforming the 10th emergency session into a permanent tribunal -which has now been reconvened 12 times since 1997. By contrast, no emergency session was ever held on the Rwandan genocide, estimated to have killed a million people, or the ethnic cleansing of tens of thousands in the former Yugoslavia, or the death of millions over the past two decades of atrocities in Sudan.

Prof. Anne Bayefsky delivered this speech at the U.N.'s conference on Confronting Anti-Semitism: Education for Tolerance and Understanding, sponsored by the United Nations Department of Information, on 21 June, 2004. Prof. Bayefsky is a senior fellow at the Hudson Institute and an adjunct professor at Columbia University Law School.

That's discrimination.

The record of the Secretariat is more of the same. In November 2003, Secretary-General Kofi Annan issued a report on Israel's security fence, detailing the purported harm to Palestinians without describing one terrorist act against Israelis which preceded the fence's construction. Recently, the Secretary-General strongly condemned Israel for destroying homes in southern Gaza without mentioning the arms-smuggling tunnels operating beneath them. When Israel successfully targeted *Hamas* terrorist Abdel Aziz Rantissi with no civilian casualties, the Secretary-General denounced Israel for an "extrajudicial" killing. But when faced with the 2004 report of the U.N. special rapporteur on extrajudicial executions detailing the murder of more than 3,000 Brazilian civilians shot at close range by police, Mr. Annan chose silence. That's discrimination.

At the U.N., the language of human rights is hijacked not only to discriminate but to demonize the Jewish target. More than one quarter of the resolutions condemning a state's human rights violations adopted by the commission over 40 years have been directed at Israel. But there has never been a single resolution about the decades-long repression of the civil and political rights of 1.3 billion people in China, or the million female migrant workers in Saudi Arabia kept as virtual slaves, or the virulent racism which has brought 600,000 people to the brink of starvation in Zimbabwe. Every year, U.N. bodies are required to produce at least 25 reports on alleged human rights violations by Israel, but not one on an Iranian criminal justice system which mandates punishments like crucifixion, stoning and cross-amputation of right hand and left foot. This is not legitimate critique of states with equal or worse human rights records. It is demonization of the Jewish state.

As Israelis are demonized at the U.N., so Palestinians and their cause are deified. Every year the U.N. marks Nov. 29 as the International Day of Solidarity with the Palestinian People - the day the U.N. partitioned the British Palestine mandate and which Arabs often style as the onset of *al nakba* or the "catastrophe" of the creation of the State of Israel. In 2002, the anniversary of the vote that survivors of the concentration camps celebrated, was described by Secretary-General Annan as "a day of mourning and a day of grief".

In 2003 the representatives of over 100 Member States stood along with the Secretary-General, before a map predating the State of Israel, for a moment of silence "for all those who had given their lives for the Palestinian people" – which would include suicide bombers. Similarly, U.N. rapporteur John Dugard has described Palestinian terrorists as "tough" and their efforts as characterized by "determination, daring, and success". A commission resolution for the past three years has legitimized the Palestinian use of "all available means including armed struggle" - an absolution for terrorist methods which would never be applied to the self-determination claims of Chechens or Basques.

Although Palestinian self-determination is equally justified, the connection between demonizing Israelis and sanctifying Palestinians makes it clear that the core issue is not the stated cause of Palestinian suffering. For there are no U.N. resolutions deploring the practice of encouraging Palestinian children to glorify and emulate suicide bombers, or the use of the Palestinian population as human shields, or the refusal by the vast majority of Arab states to integrate Palestinian refugees into their societies and to offer them the benefits of citizenship. Palestinians are lionized at the U.N. because they are the perceived antidote to what U.N. envoy Lakhdar Brahimi called the great poison of the Middle East - the existence and resilience of the Jewish state.

Of course, anti-Semitism takes other forms at the U.N. Over the past decade at the commission, Syria announced that yeshivas train rabbis to instill racist hatred in their pupils. Palestinian representatives claimed that Israelis can happily celebrate religious holidays like Yom Kippur only by shedding Palestinian blood, and accused Israel of injecting 300 Palestinian children with HIV-positive blood.

U.N.-led anti-Semitism moves from the demonization of Jews to the disqualification of Jewish victimhood: refusing to recognize Jewish suffering by virtue of their ethnic and national identity. In 2003 a General Assembly resolution concerned with the welfare of Israeli children failed (though one on Palestinian children passed handily) because it proved impossible to gain enough support for the word Israeli appearing before the word children. The mandate of the U.N. special rapporteur on the "Palestinian territories", set over a decade ago, is to investigate only "Israel's violations of . . . international law" and not to consider human-rights violations by Palestinians in Israel.

It follows in U.N. logic that nonvictims are not really supposed to fight back. One after another concrete Israeli response to terrorism is denounced by the Secretary-General and Member States as illegal. But killing members of the command-and-control structure of a terrorist organization, when there is no disproportionate use of force, and arrest is impossible, is not illegal. Homes used by terrorists in the midst of combat are legitimate military targets. A nonviolent, temporary separation of parties to a conflict on disputed territory by a security fence, which is sensitive to minimizing hardships, is a legitimate response to Israel's international legal obligations to protect its

citizens from crimes against humanity. In effect, the U.N. moves to pin the arms of Jewish targets behind their backs while the terrorists take aim.

The U.N.'s preferred imagery for this phenomenon is of a cycle of violence. It is claimed that the cycle must be broken - every time Israelis raises a hand. But just as the symbol of the cycle is chosen because it has no beginning, it is devastating to the cause of peace because it denies the possibility of an end. The Nuremberg Tribunal taught us that crimes are not committed by abstract entities.

The perpetrators of anti-Semitism today are the preachers in mosques who exhort their followers to blow up Jews. They are the authors of Palestinian Authority textbooks that teach a new generation to hate Jews and admire their killers. They are the television producers and official benefactors in authoritarian regimes like Syria or Egypt who manufacture and distribute programming that depicts Jews as bloodthirsty world conspirators.

Listen, however, to the words of the Secretary-General in response to two suicide bombings which took place in Jerusalem this year, killing 19 and wounding 110: "Once again, violence and terror have claimed innocent lives in the Middle East. Once again, I condemn those who resort to such methods". "The Secretary General condemns the suicide bombing Sunday in Jerusalem. The deliberate targeting of civilians is a heinous crime and cannot be justified by any cause". Refusing to name the perpetrators, Mr. Secretary-General, Teflon terrorism, is a green light to strike again.

Perhaps more than any other, the big lie that fuels anti-Semitism today is the U.N.-promoted claim that the root cause of the Arab-Israeli conflict is the occupation of Palestinian land. According to U.N. revisionism, the occupation materialized in a vacuum. In reality, Israel occupies land taken in a war which was forced upon it by neighbours who sought to destroy it. It is a state of occupation which Israelis themselves have repeatedly sought to end through negotiations over permanent borders. It is a state in which any abuses are closely monitored by Israel's independent judiciary. But ultimately, it is a situation which is the responsibility of the rejectionists of Jewish self-determination among Palestinians and their Arab and Muslim brethren - who have rendered the Palestinian civilian population hostage to their violent and anti-Semitic ambitions.

There are those who would still deny the existence of anti-Semitism at the U.N. by pointing to a range of motivations in U.N. corridors including commercial interests, regional politics, preventing scrutiny of human rights violations closer to home, or enhancement of individual careers. U.N. actors and supporters remain almost uniformly in denial of the nature of the pathogen coursing through these halls. They ignore the infection and applaud the host, forgetting that the cancer which kills the organism will take with it both the good and the bad.

The relative distribution of naiveté, cowardice, opportunism, and anti-Semitism, however, matters little to Noam and Matan Ohayon, ages 4 and 5, shot to death through their mother's body in their home in northern Israel while she tried to shield them from a gunman of Yasser Arafat's al-Aqsa Martyrs Brigades. The terrible consequences of these combined motivations mobilized and empowered within U.N. chambers are the same.

The inability of the U.N. to confront the corruption of its agenda dooms this organization's success as an essential agent of equality or dignity or democratization.

This conference may serve as a turning point. We will only know if concrete changes occur hereafter: a General Assembly resolution on anti-Semitism adopted, an annual report on anti-Semitism forthcoming, a focal point on anti-Semitism created, a rapporteur on anti-Semitism appointed.

But I challenge the Secretary-General and his organization to go further - if they are serious about eradicating anti-Semitism:

- Start putting a name to the terrorists that kill Jews because they are Jews.
- Start condemning human-rights violators wherever they dwell - even if they live in Riyadh or Damascus.
- Stop condemning the Jewish people for fighting back against their killers.
- And the next time someone asks you or your colleagues to stand for a moment of silence to honour those who would destroy the State of Israel, say no.

Only then will the message be heard from these chambers that the U.N. will not tolerate anti-Semitism or its consequences against Jews and the Jewish people, whether its victims live in Tehran, Paris or Jerusalem.

Al-Manar: The Case of Official Authorisation of Anti-Semitic Propaganda

The Presidency of the IAJLJ has appointed Judge Hadassa Ben-Itto, Dr. Meir Rosenne and Advocate Irit Kohn to form a special committee to deal with issues of anti-Semitism.

The committee has been closely following developments in the international arena. It accords particular importance to the fact that national as well as international bodies are becoming increasingly aware of the need to combat anti-Semitism. These bodies are finally beginning to recognize that anti-Semitism, in its historical as well as its modern manifestations, not only endangers Jews but also disrupts the political and cultural fabric of society. Anti-Semitism revives the old demons that caused disaster around the world and serves as a dangerous weapon in a new war - a war that the world has not yet learned how to face, let alone win.

Our Association has always advocated the passing of relevant legislation that specifically targets anti-Semitic incitement and criminalizes anti-Semitic acts. The Association also attaches importance to open declarations by states and public bodies denouncing anti-Semitism. Thus the Association welcomes the fact that new such laws are being passed in various countries and that important bodies like the European Union and the Council of Europe (through ECRI) recently published extensive reports on anti-Semitism. Even the UN, which for years avoided specific condemnation of anti-Semitism, has recently mentioned anti Semitism in a resolution of the Third Committee of the General Assembly, in the context of religious intolerance.

Yet, reports, and even laws, are mere declarations, if implementation is not pursued. A most discouraging recent development in France is proof that even a country which has adopted the most outspoken laws condemning anti-Semitism, may approve the screening of a vitriolic anti-Semitic series prepared by the Hizbullah, a series which dares show on television the ritual murder of a Moslem child by bearded Jews.

Upon going to press it has been announced that France has decided to ban the broadcast of Hizbullah's *Al-Manar* channel in France. The US government has decided to prevent *Al-Manar* broadcasts in view of Hizbullah's status as a terrorist organisation.

Special Report

In November 2004, the Conseil Superieur de l'Audiovisuel (CSA), the French Broadcasting Authority, decided to license *Al-Manar*, the television station of the Hizbullah. This license enables the satellite TV *Al-Manar* to broadcast all over Europe

CRIF, the representative body of French Jewry, has taken up the challenge. CRIF's President Roger Cukierman warned the French government that this license amounts to "an official authorization delivered by France to anti-Semitic propaganda" and urged the government to reconsider. Likewise, he wrote to CSA Chairman Dominique Baudis, that "CSA's decision to license Hizbullah's television *Al-Manar* brought your institution into disrepute".

CRIF has also pointed to the inconsistency in the CSA position which is explainable only by CSA having bowed to external pressure. It will be recalled that In July 2004, the CSA asked the Conseil d'Etat (the French Supreme Court) to ban *Al-Manar* following the broadcast of "The Diaspora" which depicts a Zionist plot to dominate the world.

ADL has supported CRIF in calling for the termination of *Al-Manar's* license because of its daily incendiary anti-Semitic and anti-Israel programming; its glorification of terrorism against Westerners and calls for the recruitment of Palestinian "martyrs"to kill Jews. *Al-Manar* is also believed to be a conduit to channel money to Hizbullah, and it openly and actively solicits funds on the air and on its web site.

(Continued on p. 20)

"*Al-Manar* is a Vector of Poison"

Letter to President Jacques Chirac from the President of the Association's French Section

Paris, 19th November, 2004

Monsieur President of the Republic,

On the occasion of the 20th anniversary of the "Judaism and Liberty" Association, which, in my capacity as President of our Association, I had the honour to attend, you spoke strongly against anti-Semitism. This did not surprise us, knowing your unremitting determination to act under all circumstances and in all places against this calamity.

The Prime Minister, with the ministers of his government, and particularly our Guardian of the Seals, Mr. Dominique Perben with whose office I am collaborating in this matter also follow this line.

How, then, can one not be deeply overwhelmed by the statement that was broadcast by the press, namely in the *Figaro* of 19 November, 2004, according to which the High Audiovisual Council is in the process of allowing the Lebanese Hizbullah television network, *Al Manar*, to propagate its broadcasts in France, under the shield of a covenant.

Should one believe the rumours, as they are reported by the press, to the effect that such a decision is not independent of political considerations?

We have always known that the fight against anti-Semitism must be conducted not only by declarations, although these are certainly deeply sincere, but also by sanctions and the repression of the proliferators of hate in our city suburbs. *Al Manar* is a vector of this "poison".

Mr. President, we are permitting ourselves to call upon you publicly, to urge you to put into effect the weight of your authority and the strength of your conviction, so that the "murderous" message of the Hizbullah may be prohibited in French territory.

Yours Sincerely,
Joseph Roubache

France to seek to modify the existing legislative framework

Response from the Education Counsellor of President Chirac to Joseph Roubache, President of the French Section of the Association

Paris, 6th December, 2004

THE PRESIDENCY OF THE REPUBLIC
The Counsellor for Education and Culture

Mr. President,

You have been kind enough to inform the President of the Republic about your concerns regarding the broadcasting of the *Al Manar* television network.

Mr. Chirac has considered your letter with attention, and has instructed me to respond.

As you know, the High Audiovisual Council, which is the independent, competent authority in this matter, has decided to refer the matter to the State Council, in order to obtain the interruption of this broadcasting. The State Council is expected to state its position soon.

Moreover, the French Government has decided to modify the existing legislative framework so as to strengthen the judicial means which would make possible the interruption of programs carrying images or wording of an anti-Semitic character.

Lastly, as this relates to a satellite network broadcasting off American territory through the Telstar satellite, the French Government will undertake new initiatives for international cooperation on this subject, especially in Europe.

Mr. President, pray accept the expression of my best sentiments.

Roch-Olivier MAISTRE

"It uses the oldest anti-Semitic themes"

Letter from the Association's Resident Representative to the European Council to Ms. Isil Gachet of ECRI

Strasbourg, 26th November, 2004

Madame,

ECRI has recently been good enough to wish to consult with us regarding ways of efficiently fighting racism and anti-Semitism. We are especially sensitive to our collaboration with your Commission, which has always stressed its sincere and determined commitment to this common fight.

This is why we are addressing you today. Indeed, this is the time not only for vigilance but also for action, now that the French High Audiovisual Council (CSA) has just approved, under the terms of an agreement signed on 19 November, broadcasts in France of *Al-Manar*, the Lebanese Hizbullah television network.

This organization is recognized by the European institutions and by the United Nations as being a terrorist organization. We may recall that it is responsible for the car bomb attack against the French peacekeeping force in Lebanon, causing over 250 deaths, the assassination of Louis Delamarre, the French ambassador in Lebanon, and the kidnapping of many Europeans, diplomats, instructors and journalists.

Al-Manar, which pursues the declared goal of the Hizbullah, that is, to deny the Jewish people the right to a state, is well known to many of our members. It uses the oldest anti-Semitic themes, which it revisits.

In particular, by adopting, in the form a series, the notorious falsehoods of the *Protocols of the Elders of Zion*, it tries to propagate the slander of the "Jewish plot" against Islam and presents Jihad terrorism as a legitimate defence.

In another very popular program, it enacts the Middle Age accusations of "ritual murders", for example, by showing, in the form of a report, people dressed as Rabbis as they slaughter a Christian child, in the preparations for the Jewish Passover.

Such television programs are watched in our cities and suburbs, where a significant community of Maghreb origin, or more generally, Arabic speaking people, resides.

All the efforts and means sought and deployed, especially by ECRI, to fight against the anti-Semitic gangrene, are in danger of being irreparably jeopardized, or even destroyed, by the message conveyed through this hate network.

We would respectfully request that you intervene immediately with the CSA and the appropriate French authorities, to control this disasterous attempt to attack the Jewish people and the peaceful and humane inclinations of Europe.

In addition, and starting immediately while awaiting the CSA response, we request that you urgently put into effect permanent means of review, which would allow *Al-Manar* programs to be reviewed in their entirety.

Yours Sincerely,
Gilles Kaufman
Resident Representative of the IAJIJ at the European Council

(Continued from p. 18)

Joining forces with these two organizations, our Association too has taken up the challenge and President of the French Section Joseph Roubache has written to President Jacques Chirac urging him to put his weight behind prohibiting Hizbullah anti-Semitic broadcasting (see p. 19 left) and our Resident Representative to the European Council, Gilles Kaufman, has written to Mrs. Isil Gachet of ECRI to protest against the licensing of *Al-Manar* (see above). President Chirac's response is also reported here (see p. 19).

Recently, these efforts have borne fruit, and French Prime Minister, Jean-Pierre Raffarin, has joined those calling for *Al-Manar* to be taken off air, after it had allegedly accused Israel of exporting AIDS to the Middle East. Addressing the French Senate, Raffarin said "*Al-Manar*'s programs are incompatible with our values. It is clear they will lead to the termination of the contract between the CSA and *Al-Manar"*.

Constitution by Consent: An Underpinning for Political Legitimacy

Arye Carmon

Since the early 1990s, there has been a constant erosion of the *status quo* regarding the main rift in Israeli society: the argument over the "Territories," or the question of Israel's Eastern border. Since the 1992 Madrid Conference, and on several subsequent occasions, the possibility has been raised that Israeli governments may reach a decision on this issue. This, in turn, has raised the question of legitimacy: who is authorized to approve decisions on crucial issues (such as the establishment of a Palestinian state, the dismantling of settlements, an Israeli withdrawal from the West Bank and Gaza and so on)? The approval of the Oslo Accords by the Knesset with a small majority; the decision of Prime Minister Barak to continue negotiations with the Palestinians at Taba after the failure of the Camp David talks; and Prime Minister Sharon's disengagement plan have all been subject to attacks challenging the legitimacy of the decision. In general, the critics have not merely attacked the decision itself, but have claimed that the process constituted a distortion of proportional democracy. Over the past twelve years, elected governments that have moved toward a decision on critical issues have faced opposition ranging from physical violence (culminating in the assassination of the prime minister), verbal violence, often approaching and even passing the border of incitement, and repeated calls for the distorted use of a problematic tool - the referendum. The diverse nature of opposition to decisions taken by the elected institutions of Israeli democracy underlines the grave condition of legitimacy for political decisions in this young democracy.

What is a democratic decision, and when is a decision legitimate? What mechanisms are available to democracy in order to ensure that a decision taken in the elected institutions by the smallest of majorities (even if it is only 51 percent) will be accepted by the opposition (even if it constitutes 49 percent)? Such questions as these embody a distinction between a formal (or legalistic) decision and a legitimate decision. In some cases, a majority whose representatives are working toward a decision is rendered silent by the vocal opposition of a minority, due to its fear of jeopardizing the unity and integrity of the political collective (many refer to the reaction of formal American institutions to slavery, between the late 18th century and the civil war as such "silence"). Numerous historical precedents show that the issue of reaching a decision the ramifications of which will also be acceptable to those who oppose the decision is a complex one. These precedents also implicitly suggest that democracy has developed internal mechanisms designed to protect the minority from the tyranny of the majority.

This article addresses Israeli democracy at this point in time. The basic assumption is that Israeli democracy is still in the early stages of its formation. As such, it is a vulnerable and weak democracy that is required to face a heavily overloaded agenda including the need to reach historic decisions that will determine the identity, values and character of the state for generations to come. For the purpose of this discussion, it is important to clarify a number of basic concepts regarding the significance of legitimacy

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Prof. Arye Carmon is the founder and President of the Jerusalem-based Israel Democracy Institute.

in auspicious political decisions - concepts that are examined from diverse and sometimes contradictory approaches.

"Legitimacy is the foundation of such governmental power as is exercised both with a consciousness on the government's part that it has a right to govern and with some recognition by the governed of that right" (*International Encyclopedia of the Social Sciences*, David L. Sillis ed. The Macmillan Company & The Free Press, vol. 9, p. 244).

What is the right to govern in a civil society, and what is the significance of the recognition by the governed of this right? What are the standards for legitimacy? The broad answer to these questions is that "Civil legitimacy exists when a system of government is based on agreement between equally autonomous constituents who have combined to cooperate toward some common good" (*ibid.*, p. 245). However, this broad answer does not address the nascent status of Israeli democracy, where the heart of the social and political debate relates to the question as to what constitutes the common good. In the well founded, developed and substantive representative democracies, a range of basic agreement may be characterized from minimum to optimum. The minimum includes agreement on the rules of the game according to which the government operates. The rules of the game include the commitment on the part of the government to protect civil rights and liberties, and to adhere to rules and norms designed to protect the common good. These two dimensions - commitment to human rights and adherence to these rules and norms - are usually enshrined in a complete constitution. The optimum relies on a broad level of trust among the various components of the political collective - a level of trust enabling acceptance and tolerance of the differences of others within the collective. This level of trust provides the foundation for the constant effort of a representative democracy to achieve consensus - an effort culminating in a decision of the majority that is accepted by the minority. At the beginning of the 21st century, Israeli democracy lies outside this range of basic agreement - it does not enjoy the minimum conditions, and the optimum is thus clearly unattainable.

Israeli democracy is the system of government of a newly born ancient people who, in historical terms, has only recently renewed its political sovereignty. The passing of just two generations since the dispersed Jewish people returned to their homeland is too short a period to permit the emergence of a tradition of responsibility for political sovereignty. The outlines of such responsibility cannot be inculcated in the consciousness of the Israeli collective; nor can they be manifested in the political behaviour of the individuals who comprise this collective. Accordingly, Israeli democracy is characterized by systemic instability, political fluidity and uncertainty regarding the emergence of the desired balance in the tension between the Jewish and liberal foundations of the nation's identity. These factors combine to make Israeli democracy formal or procedural in character, as opposed to the substantive democracy characteristic of well-established democracies.

Moreover, the needs that result from the vulnerable and fragile nature of Israeli democracy require an enormous investment of intellectual, psychological and social resources in order to prepare the foundation for the emergence of a tradition of responsibility for political sovereignty. These are long-term investments, and the best example of such a process comes from the founding fathers of the USA in the late 18th century. At the beginning of the 21st century, however, most of Israel's resources are inevitably directed to coping with the unprecedented burden facing the public agenda - a burden that is unparalleled in any other nation, let alone the democratic nations. In present-day Israel, all resources are devoted to the here-and-now, to the short-term need to cope with the crises that result from this over-burdened public agenda.

The absence of consensus regarding the characteristics of political legitimacy is directly related to the fact that Israel does not have a complete constitution; for example, when the elected political leadership, serving as the government, nears the point of reaching a decision on a highly controversial issue, those whose world view is threatened by the decision demand that a referendum be held. In theory, accepting this demand should strengthen the political legitimacy of the government's decision. In general, however, the demand is broader in nature, including overtly anti-democratic conditions, such as a majority of 60 percent of voters, or a majority among those eligible to vote - conditions the sole intent of which is to create a tyranny of the minority by discriminating against the Arab citizens of Israel. By raising the banner of a referendum, the advocates create a serious threat to representative democracy. In a representative democracy, elected representatives are supposed to create decisions by means of political discourse, creating coalitions and developing agreements that must inevitably be based on compromises. In other words, a step intended to create legitimacy for fateful decisions on controversial issues actually exacerbates existing rifts. Similarly, one may note the agreement reached recently by a body called the Forum for National Responsibility with part of the leadership of the settlers regarding the "rules of the game" as and when the government implements the disengagement

plan. While this agreement secured a significant achievement - the establishment of rules of political behaviour designed to prevent violence - the agreement also noted that the decision on the disengagement must enjoy a "solid majority." The term "solid majority" was not defined, but it clearly implies a Jewish majority. Thus a minority that is unwilling to accept the decision of the majority in a democracy that lacks agreement on the basic rules of the game seeks to reach decisions through means that weaken democracy.

Over the past few years, a public council has operated under the auspices of the Israel Democracy Institute with the goal of promoting the creation of a complete constitution for the State of Israel. The public council is headed by the retired President of the Supreme Court, Justice Meir Shamgar. Established under the slogan "Constitution by Consent," the members of the council represent a broad range of views in Israeli society. After four years' work, the task of preparing a full constitution is nearing completion. At the same time, the Knesset Constitution Committee is discussing the draft of a constitution for the First Reading in the Knesset. The proposed constitution prepared by the public council of the Israel Democracy Institute will shortly be submitted to the Constitution Committee as a basis for its deliberations. Completion of the constitution and its ratification by the Knesset will yield a fixed, stable course for the tempestuous river of the Israeli body politic. Completing this historic task will enable Israel to begin to cope with a difficult reality dominated, as noted, by a burdensome agenda demanding numerous fateful decisions, and resting on a fragile and tenuous governmental infrastructure. Moreover, and on the hope and assumption that the constitution will be accepted by broad consensus, completion of this endeavor will create an institutionalized and stable framework for Israeli society, with all its diversity and minorities, to address the sense of discrimination and mistrust that are rife within this society. Mistrust, as a behavioral characteristic of both individuals and groups, threatens the minimal level of cohesion required in order to maintain a viable and vital collective in the long term. This mistrust is also one of the symptoms of the weakened state of political legitimacy.

Chanukah Menorah, brass and other metals, made in Fez, Morocco in about 1875

Chanukah Menorah, brass and other metals, made in Poland in about 1800

The Issue of Israel's security fence erected as a temporary measure to combat terrorism has attracted a great deal of international attention and condemnation. In this issue of *JUSTICE* we seek to paint a different part of the picture by reporting judge Thomas Buergenthal's dissenting opinion (p. 26) and the recent judgment of Israel's Supreme Court (p. 29).

Had Enough?

Anne Bayefsky

The recent decision on Israel's security fence by the International Court of Justice (ICJ), the U.N.'s legal arm, is a classic example of how the vilification of Jews does not end with Jews.

United Nations mistreatment of the Jewish state takes many forms, from the refusal to admit Israel into the negotiating and electoral groups of many U.N. operations, to Israel's demonization by U.N. human-rights machinery applied to no other state. Though antithetical to the U.N.'s founding principle of the equality of nations large and small, many believe that the consequences of these facts of U.N.-life can be confined to Jewish self-determination. The ICJ has proved them wrong.

U.N. ASSAULT

The Court has declared four new rules about the meaning of the right of self-defence in the face of terrorism today.

(1) There is no right of self-defence under the U.N. Charter when the terrorists are not state actors.

(2) There is no right of self-defence against terrorists who operate from any territory whose status is not finalized, and who therefore attack across disputed borders.

(3) Where military action is perpetrated by "irregulars", self-defence does not apply if the "scale and effects" of the terrorism are insufficient to amount to "an armed attack... had it been carried out by regular armed forces". (The scale in this case is 860 Israeli civilians killed in the last three years - the proportional equivalent of at least 14 9/11's.)

(4) Self-defence does not include nonviolent acts, or in the words of Judge Rosalyn Higgins: "I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter".

These conclusions constitute a direct assault on the ability of every U.N. member to fight international terrorism. The U.N. Charter was not a suicide pact and Security Council resolutions in response to 9/11 were intended to strengthen the capacity to confront violent non-state actors, not defeat it.

Having couched their analysis in general terms, however, some of the judges were concerned that the go-ahead for Palestinian suicide bombers might not be obvious enough. So Judge Abdul Koroma of Sierra Leone wrote: "It is understandable that

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Prof. Anne Bayefsky is a senior fellow at the Hudson Institute and an adjunct professor at Columbia University Law School.

a prolonged occupation would engender resistance". Judge Nabil Elaraby of Egypt said, "Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence". He "wholeheartedly subscribe[d] to the view" that there is "a right of resistance". Judge Hisashi Owada of Japan spoke of the "the *so-called* terrorist attacks by Palestinian suicide bombers against the Israeli civilian population".

The judges need not have worried. Within hours a joint statement from Hamas, Islamic Jihad, and Yasser Arafat's Fatah organization announced: "We salute the court's decision". Proclaimed a Hamas communiqué "The racial wall represents the true image of the Zionist entity... The Islamic Resistance Movement, Hamas, welcomes the ICJ's decision and considers it a good step in the right direction.... We stress the need to continue our efforts and *use all available means* to stop the construction of the racial wall and remove its effects". The Popular Front for the Liberation of Palestine issued a statement hailing the ruling as "a step forward". This judgment clearly played very well to an audience from the State Department's list of foreign terrorist organizations.

There are other disturbing features of the majority judgment and its six concurring opinions. The Court expansively declared that an advisory opinion about one state gives rise to third-party obligations on every U.N. member state. General Assembly resolutions and the output of other U.N. political bodies - produced in a numbers game which free countries cannot win - are given considerable weight as sources of obligations. The General Assembly's 10th Emergency Session (which is dedicated to condemning Israel) can be reconvened in perpetuity, thereby seriously reducing U.N. capacity to deal with emergencies anywhere else.

At the same time, other aspects of the Court's decision were crafted to apply to a party of one. A barrier between terrorists and their targets is illegal, according to the Court, because it "severely impedes" or "prevents the realization" of a "right of the Palestinian people to self-determination". No mention was made of the fact that the barrier can and will be moved to accord with the recent Israeli Supreme Court decision, or that previous barriers in southern Lebanon and the Sinai Peninsula were also moved. Jewish self-determination, on the other hand, was not discussed. So the impediment to self-governance by way of Palestinian terrorists who murder Cabinet ministers, or open fire at polling stations, never made it onto the Court's radar screen.

The barrier was also said to violate other Palestinian rights: freedom of movement, the right to work, to health, to education, and to an adequate standard of living. Not once did the Court refer to the individual rights of Israelis, though the rights violated by terrorism start with the right to life and end with the freedom to move anywhere without fear of dying on the way to school or work. Finding a human-rights violation meant interpreting the international rule of proportionality. Undermining all efforts to combat terrorism, the Court balanced Palestinian rights against Israeli "military exigencies" and Communist-inspired concepts of "national security" or "public order". This tactic placed only faceless beneficiaries on the other side of the scale.

Furthermore, said the Court, the right of self-defence does not apply against Palestinian terrorism because it operates from Israeli-controlled territory and is therefore not international. The international borders between Iran, the departure point of the arms-laden ship *Karine-A* and its intended port in Gaza, or between Damascus, headquarters of The Front for the Liberation of Palestine's General Command, and suicide bombers in Haifa, apparently slipped the judges' minds.

Chanukah Menorah, precious metals, made in the Czech Republic in about 1875

Dissenting Opinion of Judge Buergenthal

Thomas Buergenthal

1. Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree. However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case. In reaching this conclusion, I am guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports* 1975, pp. 28-29, para. 46). In my view, the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits.

2. I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (*see* para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed

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Prof. Thomas Buergenthal has been a member of the International Court of Justice since March 2000. He is a Professor of International and Comparative Law at the George Washington University Law School, D.C., USA, and the US National Member of the UN Human Rights Committee.

The following is his minority opinion in which he stated that the International Court of Justice should have declined to render an Advisory Opinion.

on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. It is equally true with regard to the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (para. 122). I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations.

Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows:

> "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." (Para. 139.)

6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State. Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ." Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). In its resolution 1368 (2001), adopted only one day after the September 11, 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. (*See* Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839-840.)

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory whatever the concept of "control" means given the attacks Israel is subjected to from that territory - or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.

7. In summarizing its finding that the wall violates international humanitarian law and international human rights law, the Court has the following to say:

> "To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments." (Para. 137.)

The Court supports this conclusion with extensive quotations of the relevant legal provisions and with evidence that relates to the suffering the wall has caused along some parts of its route. But in reaching this conclusion, the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. It is true that in dealing with this subject the Court asserts that it draws on the factual summaries provided by the United Nations Secretary-General as well as some other United Nations reports. It is equally true, however, that the Court barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court claims to rely on. Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General, A/ES-10/248, p. 8, the Secretary-General reports Israel's position on this subject in part as follows: "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status." The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).

9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

10. A final word is in order regarding my position that the Court should have declined, in the exercise of its discretion, to hear this case. In this connection, it could be argued that the Court lacked many relevant facts bearing on Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This proposition would be valid if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. But that is not the rule applicable to advisory opinion proceedings which have no parties. Once the Court recognized that Israel's consent to these proceedings was not necessary since the case was not bought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. While I have my own views on whether it was wise for Israel not to produce the requisite information, this is not an issue for me to decide. The fact remains that it did not have that obligation. The Court may therefore not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping legal conclusions.

"Only a separation route based on the path of law, will lead the state to the security so yearned for"

Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank

Before President Aharon Barak, Vice-President Eliahu Mazza, and Justice Michael Cheshin
Judgment delivered on 30.6.2004

The Commander of the IDF Forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before the Court was whether the orders and the fence are legal.

Extracts from the Judgment of President A. Barak

Background

1. Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter - the area] in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000.

A short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere: in public transportation, in shopping centers and markets, in coffee houses and in restaurants. Terror organizations use gunfire attacks, suicide attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area.

The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us…

2. These terror acts have caused Israel to take security precautions on several levels. The government, for example, decided to carry out various military operations, such as operation "Defensive Wall" (March 2002) and operation "Determined Path" (June 2002). The objective of these military actions was to defeat the Palestinian terrorist infrastructure and to prevent terror attacks… These combat operations - which are not regular police operations, but embody all the characteristics of armed conflict - did not provide a sufficient answer to the immediate need to stop the terror. The Ministers' Committee on National Security considered a list of steps intended to prevent additional terror acts and to deter potential terrorists from participating in such acts... Despite all these measures, the terror did not come to an end. The attacks did not cease. Innocent people paid with both life and limb. This is the background behind the decision to construct the separation fence.

The Decision to Construct the Separation Fence

3. The Ministers' Committee for National Security reached a decision (on April 14, 2002) regarding deployment in the "Seamline Area" between Israel and the area.. The purpose behind the decision was "to improve and strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists from the area of Judea and Samaria into

Israel." The IDF and the police were given the task of preventing the passage of Palestinians into the State of Israel. As a temporary solution, it was decided to erect an obstacle in the three regions found to be most vulnerable to the passage of terrorists into the Israel: the Umm El-Fahm region and the villages divided between Israel and area (Baka and Barta'a); the Qalqilya-Tulkarm region; and the Greater Jerusalem region. It was further decided to create a team of Ministers, headed by the Prime Minister, which would examine long-term solutions to prevent the infiltration of Palestinians, including terrorists, into Israel.

The location of this fence, which passes through areas west of Jerusalem, stands at the heart of the dispute between the parties.

The Separation Fence

7. The "Seamline" obstacle is composed of several components. In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50 - 70 meters... In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons…. Hereinafter, we will refer to the entire obstacle on the "Seamline" as "the separation fence."

The Seizure Proceedings

The Petition

9. The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. These lands are adjacent to the towns of Mevo Choron, Har Adar, Mevasseret Zion, and the Jerusalem neighbourhoods of Ramot and Giv'at Zeev, which are located west and northwest of Jerusalem. Petitioners are the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted… The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified.

10. Petitioners' argument is that the orders are illegal in the light of Israeli administrative law, and in the light of the principles of public international law which apply to the dispute before us. First, petitioners claim that respondent lacks the authority to issue the orders of seizure. Were the route of the separation fence to pass along Israel's border, they would have no complaint. However, this is not the case. The route of the separation fence, as per the orders of seizure, passes through areas of Judea and Samaria. According to their argument, these orders alter the borders of the West Bank with no express legal authority. It is claimed that the separation fence annexes areas to Israel in violation of international law. The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to

Israel. As such, there is no legal basis for the construction of the fence, and the orders of seizure which were intended to make it possible are illegal. Second, petitioners argue that the procedure for the determination of the route of the separation fence was illegal. The orders were not published and were not brought to the knowledge of most of the affected landowners; petitioners learned of them by chance, and they were granted extensions of only a few days for the submission of appeals. Thus, they were not allowed to participate in the determination of the route of the separation fence, and their arguments were not heard.

11. Third, the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. Their right to property is violated by the very taking of possession of the lands and by the prevention of access to their lands. In addition, their freedom of movement is impeded. Their livelihoods are hurt and their freedom of occupation is restricted. Beyond the difficulties in working the land, the fence will make the trade of farm produce difficult. The fence detracts from the educational opportunities of village children, and throws local family and community life into disarray. Freedom of religion is violated, as access to holy places is prevented. Nature and landscape features are defaced. Petitioners argue that these violations are disproportionate and are not justified under the circumstances. The separation fence route reflects collective punishment, prohibited by international law. Thus, respondent neglects the obligation, set upon his shoulders by international law, to make normal and proper life possible for the inhabitants of Judea and Samaria… According to their argument, despite the language of the orders of seizure, it is clear that the fence is not of a temporary character, and the critical wound it inflicts upon the local population far outweighs its benefits.

The Response to the Petition

12. Respondents, in their first response, argued that the orders of seizure and the route through which the separation fence passes are legal. The separation fence is a project of utmost national importance. Israel is in the midst of actual combat against a wave of terror, supported by the Palestinian population and leadership. At issue are the lives of the citizens and residents of Israel, who are threatened by terrorists who infiltrate into the territory of Israel. At issue are the lives of Israeli citizens residing in the area. The construction of the separation fence system must be completed with all possible speed. The separation fence has already proved its efficacy in areas where it has been erected. It is urgent that it also be erected in the region of petitioners' villages. Respondents claim that a number of terror attacks against Jerusalem and against route no. 443, which connects Jerusalem and the city of Modi'in, have originated in this area. The central consideration in choosing the route of the separation fence was the operational-security consideration. The purpose of the fence is to prevent the uncontrolled passage of residents of the area into Israel and into Israeli towns located in the areas. The separation fence is also intended to prevent the smuggling of arms, and to prevent the infiltration of Palestinians, which will likely to lead to the establishment of terror cells in Israel and to new recruits for existing cells. Additionally, the forces acting along the obstacle, and Israeli towns on both sides of it, must be protected. As dictated by security considerations, the area of the separation fence must have topographic command of its surroundings. This is in order to allow surveillance and to prevent attacks upon the forces guarding it. To the extent possible, a winding route must be avoided. In addition, a "security zone" is required to provide warning of possible terrorist infiltration into Israel..

13. Respondents explain that, in planning the route of the separation fence, great weight was given to the interests of the residents of the area, in order to minimize, to the extent possible, the injury to them. Certain segments of the fence are brought before the State Attorney for prior examination and, if necessary, before the Attorney-General as well. An effort is being made to lay the obstacle along property that is not privately owned or agriculturally cultivated; consideration is given to the existing planning schemes of Palestinian and Israeli towns; an effort is being made to refrain from cutting lands off from their owners. In the event of such a cutoff, agricultural gateways will allow farmers access to their lands. New roads will be paved which will provide for the needs of the residents. In cases where damage cannot be avoided, landowners will be compensated for the use of their seized lands. Efforts will be made to transfer agricultural crops instead of cutting them down...

14. Respondents claim that the process of seizure was legal. The seizure was brought to the knowledge of petitioners, and they were given the opportunity to participate in a survey and to submit appeals. The contractors responsible for building the obstacle are instructed to move (as opposed to cutting down) trees wherever possible. Some buildings, in cooperation with landowners to the extent possible, are taken down and transferred to agreed locations...

15. Respondent's position is that the orders of seizure are legal. The power to seize land for the obstacle is a consequence

of the natural right of the State of Israel to defend herself against threats from outside her borders. Likewise, security officials have the power to seize lands for combat purposes, and by the laws of belligerent occupation. Respondents do not deny the need to be considerate of the injury to the local population and to keep that injury proportionate; their claim is that they fulfill these obligations. Respondents deny the severity of the injury claimed by petitioners. The extent of the areas to be seized for the building of the fence, the injury to agricultural areas, and the injury to trees and groves, are lesser - by far - than claimed. All the villages are connected to water systems and, as such, damage to wells cannot prevent the supply of water for agricultural and other purposes. The marketing of agricultural produce will be possible even after the construction of the fence. In each village there is a medical clinic, and there is a central clinic in Bidu. A few archeological sites will find themselves beyond the fence, but these sites are neglected and not regularly visited. The educational needs of the local population will also be taken into account. Respondents also note that, in places where the separation fence causes injury to the local population, efforts are being made to minimize that injury. In light of all this, respondents argue that the petitions should be denied.

The Hearing of the Petition

16. Oral arguments were spread out over a number of hearings. During this time, the parties modified the formulation of their arguments. In light of these modifications, respondent was willing to allow changes in part of the route of the separation fence. In certain cases the route was changed *de facto*...

The Normative Framework

23. The general point of departure of all parties - which is also our point of departure - is that Israel holds the area in belligerent occupation *(occupatio bellica)*. *See* HCJ 619/78 *"El Tal'ia" Weekly v. Minister of Defense;* HCJ 69/81 *Abu Ita v. Commander of the Area of Judea and Samaria*… In the areas relevant to this petition, military administration, headed by the military commander, continues to apply. The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter - the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949...

24. Together with the provisions of international law, "the principles of the Israeli administrative law regarding the use of governing authority" apply to the military commander... Thus, the norms of substantive and procedural fairness (such as the right to have arguments heard before expropriation, seizure, or other governing actions), the obligation to act reasonably, and the norm of proportionality apply to the military commander…

25. This petition raises two separate questions. The first question: is the military commander in Judea and Samaria authorized, by the law applying to him, to construct the separation fence in Judea and Samaria? An affirmative answer to this question raises a second question concerning the location of the separation fence… The parties concentrated on the second question; only a small part of the arguments before us dealt with the first question. The question of the authority to erect the fence in the area is complex and multifaceted, and it did not receive full expression in the arguments before us...

Authority to Erect the Separation Fence

26. Petitioners rest their assertion that the military commander does not have authority to construct the fence on two claims. The first is that the military commander does not have the authority to order construction of the fence since his decision is founded upon political - and not military - considerations.

27. We accept that the military commander cannot order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to "annex" territories to the state of Israel. The purpose of the separation fence cannot be to draw a political border…

…

Indeed, the military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the military commander's authority… The passage of time, however,

cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

28. We examined petitioners' arguments, and have come to the conclusion, based upon the facts before us, that the fence is motivated by security concerns. As we have seen in the government decisions concerning the construction of the fence, the government has emphasized, numerous times, that "the fence, like the additional obstacles, is a security measure. Its construction does not express a political border, or any other border."…

30. Petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but by political ones. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line," that is to say, on the armistice line between Israel and Jordan after the War of Independence. We cannot accept this argument. The opposite is the case: it is the security perspective - and not the political one - which must examine the route on its security merits alone, without regard for the location of the Green Line...

31. We set aside seven sessions for the hearing of the petition… Petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the area, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding.

32. Petitioner second argument is that the construction of the fence in the area is based, in a large part, on the seizure of land privately owned by local inhabitants, that this seizure is illegal, and that therefore the military commander has no authority to construct the obstacle. We cannot accept this argument. We found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal them. Regarding the central question raised before us, our opinion is that the military commander is authorized - by the international law applicable to an area under belligerent occupation - to take possession of land, if this is necessary for the needs of the army. See articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention. He must, of course, provide compensation for his use of the land... Of course, regarding all these acts, the military commander must consider the needs of the local population... The construction of the separation fence falls within this framework. The infringement of property rights is insufficient, in and of itself, to take away the authority to build it. It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs.…. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers...

The Route of the Separation Fence

33. The focus of this petition is the legality of the route chosen for construction of the separation fence. This question stands on its own and it requires a straightforward, real answer. It is not sufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, and which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. *See* Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants,* 33 Law Q. Rev., 363, 364 (1917); Y. Dinstein, *The Law of War* 210 (1983). He must act within the law which establishes his authority in a situation of belligerent occupation...

34. The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population…

This Court has emphasized, in its case law since the Six Day War, that "together with the right to administer comes the obligation to provide for the well being of the population." HCJ 337/71 *Al-jamaya Al-masihiye L'alararchi Elmakdasa v. Minister of Defense*, at 581 (Sussman, D.P.)...

35. This approach of this Court is well anchored in the humanitarian law of public international law. This is set forth in Regulation 46 of the Hague Regulations and Article 46 of the Fourth Geneva Convention… These rules are founded upon a recognition of the value of man and the sanctity of his life…

The rules in Regulation 46 of the Hague Regulations and in Article 27 of the Fourth Geneva Convention cast a double obligation upon the military commander: he must refrain from

actions that injure the local inhabitants. This is his "negative" obligation. He must take the legally required actions in order to ensure that the local inhabitants shall not be injured. This is his "positive" obligation. In addition to these fundamental provisions, there are additional provisions that deal with specifics, such as the seizure of land. See Regulation 23(g) and 52 of the Hague Regulations; Article 53 of the Fourth Geneva Convention. These provisions create a single tapestry of norms that recognizes both human rights and the needs of the local population as well recognizing security needs from the perspective of the military commander. Between these conflicting norms, a proper balance must be found. What is that balance?

Proportionality

36. The problem of balancing between security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including reasonableness and good faith.. One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation; second, it is a central standard in Israeli administrative law which applies to the area under belligerent occupation…

37. Proportionality is recognized today as a general principle of international law... Proportionality plays a central role in the law regarding armed conflict. During such conflicts, there is frequently a need to balance between military needs and humanitarian considerations… Proportionality is a standard for balancing…

38. Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law... At first a principle of our case law, then a constitutional principle, enshrined in Article 8 of the Basic Law: Human Dignity and Freedom, it is today one of the basic values of the Israeli administrative law... The principle of proportionality applies to every act of the Israeli administrative authorities. It also applies to the use of the military commander's authority pursuant to the law of belligerent occupation.

The Meaning of Proportionality and its Elements

40. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it. This principle is a general one. It requires application. As such, both in international law, which deals with different national systems - from both the common law family (such as Canada) and the continental family (such as Germany) - as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality…

41. The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality "in the narrow sense.") The test of proportionality "in the narrow sense" is commonly applied with "absolute values," by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the administrative act is tested *vis-à-vis* an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act - by employing alternate means, for example - ensures a substantial reduction in the injury caused by the administrative act.

42. It is possible to say that the means used by an administrative authority are proportionate only if all three subtests are satisfied. Satisfaction of one or two of these subtests is insufficient. All three of them must be satisfied simultaneously. Not infrequently, there are a number of ways that the requirement of proportionality

can be satisfied. In these situations a "zone of proportionality" must be recognized (similar to a "zone of reasonableness.") Any means chosen by the administrative body that is within the zone of proportionality is proportionate.

43. This principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation…

The Proportionality of the Route of the Separation Fence

44. The principle of proportionality applies to our examination of the legality of the separation fence. It is reflected in the government decision (of October 1, 2003) that "during the planning, every effort shall be made to minimize, to the extent possible, the disturbance to the daily lives of the Palestinians due to the construction of the obstacle." The argument that the damage caused by the separation fence route is proportionate was the central argument of respondents. Indeed, our point of departure is that the separation fence is intended to realize a security objective which the military commander is authorized to achieve. The key question regarding the route of the fence is: is the route of the separation fence proportionate? The proportionality of the separation fence must be decided by the three following questions, which reflect the three subtests of proportionality. First, does the route pass the "appropriate means" test (or the "rational means" test)? The question is whether there is a rational connection between the route of the fence and the goal of the construction of the separation fence. Second, does it pass the test of the "least injurious" means? The question is whether, among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the separation fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence. According to the "relative" examination of this test, the separation fence will be found disproportionate if an alternate route for the fence is suggested that has a smaller security advantage than the route chosen by respondent, but which will cause significantly less damage than that original route.

The Scope of Judicial Review

45. Before we examine the proportionality of the route of the separation fence, it is appropriate that we define the character of our examination. Our point of departure is the assumption, which petitioners did not manage to negate, that the government decision to construct the separation fence is motivated by security, and not a political, considerations. As such, we work under the assumption - which the petitioners also did not succeed in negating - that the considerations of the military commander based the route of the fence on military considerations that, to the best of his knowledge, are capable of realizing this security objective. In addition, we assume - and this issue was not even disputed in the case before us - that the military commander is of the opinion that the injury to local inhabitants is proportionate. On the basis of this factual foundation, there are two questions before us. The first question is whether the route of the separation fence, as determined by the military commander, is well-founded from a military standpoint. Is there another route for the separation fence which better achieves the security objective? This constitutes a central component of proportionality. If the chosen route is not well-founded from the military standpoint, then there is no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest); if there is a route which better achieves the objective, we must examine whether this alternative route inflicts a lesser injury (the second subtest). The second question is whether the route of the fence is proportionate. Both these questions are important for the examination of proportionality. However, they also raise separate problems regarding the scope of judicial review…

The Military Nature of the Route of the Separation Fence

46. The first question deals with the military character of the route. It examines whether the route chosen by the military commander for the separation fence achieves its stated objectives, and whether there is no route which achieves this objective better. It raises problems within the realm of military expertise. We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours - to the extent that we have a opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander would have set out the route as this military commander did…

47. The petition before us is exceptional in that opinions were submitted by the Council for Peace and Security. These opinions deal with the military aspect of the separation fence. They were given by experts in the military and security fields, whose expertise was also recognized by the commander of the area. We stand, therefore, before contradictory military opinions regarding

the military aspects of the route of the separation fence… Thus, for example, it is the view of the military commander that the separation fence must be distanced from the houses of Jewish towns, in order to ensure a security zone which will allow pursuit after terrorists who have succeeded in passing the separation fence, and that topographically controlling territory must be included in the route of the fence. In order to achieve these objectives, there is no escaping the need to build the separation fence proximate to the houses of the local inhabitants. In contrast, the view of military experts of the Council for Peace and Security is that the separation fence must be distanced from the houses of local inhabitants, since proximity to them endangers security. Topographically controlling territory can be held without including it in the route of the fence. In this state of affairs, are we at liberty to adopt the opinion of the Council for Peace and Security? Our answer is negative. At the foundation of this approach is our long-held view that we must grant special weight to the military opinion of the official who is responsible for security….

Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

The Proportionality of the Route of the Separation Fence

48. The second question examines the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the military field; rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander. In the framework of this question we are dealing not with military considerations, but rather with humanitarian considerations. The question is not the proportionality of different military considerations. The question is the proportionality between the military consideration and the humanitarian consideration. The question is not whether to prefer the military approach of the military commander or that of the experts of the Council for Peace and Security. The question is whether the route of the separation fence, according to the approach of the military commander, is proportionate. The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court…

From the General to the Specific

49. The key question before us is whether the route of the separation fence is proportionate. The question is: is the injury caused to local inhabitants by the separation fence proportionate, or is it is possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence which is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence.

President Barak then turned to a detailed examination of each of the orders, the topography of the route to be constructed, its security importance - military rationality, the impact on the local population, alternative routes offered by the petitioners and similar factors, considering each section of the route on the basis of the route's proportionality, using the three subtests. On the basis of this examination, President Barak concluded that parts of the route were not proportionate and had to be annulled.

Overview of the Proportionality of the Injury Caused by the Orders

82. Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the entire route of the part of the separation fence which is the subject of this petition. The length of the part of the separation fence to which these orders apply is approximately forty kilometers. It causes injury to the lives of 35,000 local inhabitants. 4000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot

prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will have to separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

83. During the hearings, we asked respondent whether it would be possible to compensate petitioners by offering them other lands in exchange for the lands that were taken to build the fence and the lands that they will be separated from. We did not receive a satisfactory answer... Taking petitioners' lands obligates the respondent, under the circumstances, to attempt to find other lands in exchange for the lands taken from the petitioners. Monetary compensation may only be offered if there are no substitute lands.

84. The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes... The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabbala and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.

85. The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

Epilogue

86. Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. I discussed this point in HCJ 5100/94 *The Public Committee against Torture in Israel v. The Government of Israel*, at 845:

> We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy - she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.

The result is that we reject the petition against order no. Tav/105/03. We accept the petition against orders Tav/104/03, Tav/103/03, Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.

Respondents will pay 20,000 NIS in petitioners' costs.

Vice President E. Mazza and Justice M. Cheshin concurred.

Full translation may be found at *www.court.gov.il*
Abstract prepared by *Dr. Rahel Rimon, Adv.*

Conflict of Interest of Public Officials

Ron S. Kleinman

Parshat Korah has long served as the epitome of an attempt by a group of people to undermine the authority of the leadership. A significant part of the criticisms raised by Korah and his associates is the accusation leveled against Moshe and Aharon that they had taken the bulk of leadership roles for themselves: "You have gone too far! All the people in the community are holy, and God is with them. Why are you setting yourselves above God's congregation?" (*Num*. 16:3).

Even absent these claims, the fact that the leadership was held by two brothers raised questions among the early sages as to their ability to sit together in judgment, and to carry out actions which, at least on the surface, were tainted with a clear conflict of interest, both personal and substantive.

A number of research papers have already discussed the Jewish law aspects of the prohibition against public officials dealing with matters in which they have a conflict of interest[1]. In the present article we intend first to provide a short overview of the underlying **basis for the prohibition** in Jewish law. We will then focus on the two classic models for **resolving** situations in which conflicts of interest arise, and look at their contemporary applicability in the framework of Jewish law as compared with Israeli law.[2]

The question of conflicts of interest for public officials has had a great deal of attention in Israeli law, in legislation[3], judicial rulings[4] and among legal scholars[5]. To deal with the vexed issue of conflict of interest of elected public officials at the municipal level, a special committee was set up, and as a result of its work, rules to deal with these situations were published.[6]

The Legal Basis for the Prohibition

The basic foundation for prohibiting public officials from ruling on matters in which they have a conflict of interest derives from a halacha established in the Middle Ages, in which the halachic authorities equated the status of public officials with that of judges. Because of the importance of this point, I would like to expand upon it somewhat.[7]

Dr. Ron S. Kleinman teaches Jewish Law, Torts and Property Law at the Faculty of Law, Ono Academic College (OAC), Kiryat Ono.
Perry Zamek translated the article for *JUSTICE*.

1 See N. Rakover, *Shilton haChok b'Yisrael* (The Rule of Law in the Jewish Sources; Heb.), pp. 77-101; Ron. S. Kleinman, "Conflict of Interest of Public Officials in Jewish Law: Prohibitions, Scope and Limitations", *Jewish Law Association Studies*, X, ed. H.G. Sprecher, State University of New York at Binghamton (2000), pp. 93-116.

2 The overview here is a shortened version of a paper to be published in "Dayan ve-Diyun" by the Faculty of Law at Bar-Ilan University, following a conference under that title held in 2001. In that article I have proposed a third model, a description of which would be too long for the present article.

3 See the legislation mentioned by Rakover (note 1, above), p. 81. In addition, see the Planning and Building Law, 5725-1965, Section 47, in regard to a member of employee of a planning body; the Companies Ordinance [New Version], 5743-1983, Chapter D1, in particular Sections 96xxvii and 96xxix, in regard to office holders in a corporation, today the Companies Law 5759-1999, Sections 254, 269-270.

4 The leading decision in this regard is HCJ 531/79, *Likud Faction v. Petach Tikva Municipal Council*, 34(2) P.D. 566, in which Justice Barak examines the principle, its rationale and scope.

There is no source in the Talmudic literature that equates the standing of public officials, or, as the Halacha calls them, the *Tovei Ha'Ir*, with that of judges. At the same time, it would seem that this idea underlies a discussion in the Jerusalem Talmud[8], which equates the *parnasin*, or charity wardens, with judges who are empowered to rule on monetary issues. It is for this reason that Rabbi Abba bar Zavda ruled: "*Parnasin* may not be appointed less than three in number," parallel to the number of judges on a court that deals with monetary issues. It seems that it is for the same reason that Rabbi Yohanan rules there: "Two brothers may not be appointed [together] as *parnasin*," just as two brothers may not be appointed to be members of the same court[9].

The equation of the *Tovei Ha'Ir* to judges begins in the responsa literature, particularly from the 10th century on[10]. Granting the status of judges to the *Tovei Ha'Ir* gave legal authority to their actions and ordinances, but also provided the basis for applying stricter behavioral norms to them, and for imposing the same restrictions that applied to judges to the *Tovei Ha'Ir*. Thus, the laws of disqualification due to **family relationship or personal interest** - that is, the prohibition of hearing cases and ruling on them in situations of conflict of interest - which originally applied to judges and witnesses[11], were now applied to the *Tovei Ha'Ir*. The doctrine established in Jewish law, that the status of public officials is the same as that of judges, also appears in the decisions of the Israeli Supreme Court[12].

The Limits of the Prohibition

The application of the disqualification based on family relationship ought to have led to a clear halachic ruling, that two individuals defined by halacha as "relatives" cannot serve together on a single public body - such as a municipal council (the modern equivalent of the *Tovei Ha'Ir*), the Knesset or the government - and that public officials may under no circumstances rule on matters affecting their relatives. Similarly, the application of the disqualification based on "personal interest" to public officials should have led the halachic authorities to conclude that, wherever there is a suspicion that a public official has a personal interest in the matter under discussion, that individual would be disqualified from discussing the matter. Moreover, even if the personal interest was in a matter affecting a relative of a public official, the latter ought to be disqualified from considering it[13].

However, such a strict halachic position, whether in regard to judges or to the *Tovei Ha'Ir*, would have had serious effects on the functioning of Jewish communities in the Middle Ages. Many of those communities were small[14], and their members often married one another, thus leading to the situation that, at times, all the witnesses and judges in the town would either have

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5 See, for example: A. Barak, *"Nigud Interesim beMilui Tafkid"* [Conflict of Interests in Carrying Out One's Role], *Mishpatim* 10 (5740-1980) 11; T. Shefnitz and V. Lusthaus, *"Nigud Interesim baSherut haTzibburi"* [Conflict of Interests in the Public Service], Uri Yadin Volume, Part 2 (Jerusalem, 5750-1990) 315; S. Nitzan, *"Nigud Inyanim shel Havrei Knesset"* [Conflict of Interests of Knesset Members], *Mishpatim* 20 (5751-1991) 457; R. Har-Zahav, *Ha-Mishpat Ha-Minhali Ha-Yisraeli* [Israeli Administrative Law], Jerusalem 5757-1997, pp. 299-397; S. Naboth, *"Haver Knesset ke-'Ne'eman ha-Tzibbur'"* [The Knesset Member as a 'Public Trustee'], *Mishpatim* 31 (5761-2001) 433, at pp. 500-503.

6 See: *Din ve-Heshbon ha-Va'ada be-Nose Nigud Inyanim shel Nivharei Tzibbur ba-Reshuyot* [Report of the Committee on Conflicts of Interest of Elected Officials in the Municipalities], Ministry of Justice, Jerusalem 5744-1984; *Klalim li-Mniat Nigud Inyanim shel Nivharei Tzibbur ba-Reshuyot ha-Mekomiyot* [Principles for Preventing Conflict of Interests of Elected Officials in the Municipalities], *Yalkut Hapirsumim* 3087, 23 Av 5744 (21.8.84), p. 3114; Consultative Committee on Conflict of Interests, *Hachlatot bi-Dvar Mniat Nigud Inyanim shel Niharei Tzibbur ba-Reshuyot ha-Mekomiyot* [Decisions in Respect of Preventing Conflict of Interests of Elected Officials in the Municipalities], Ministry of Justice, Jerusalem 5753-1993.

7 For a discussion of the broader bases of the prohibition, see my article (note 1, above), pp. 96-101.

8 Jerusalem Talmud, Peah, 8:7 (21a).

9 Compare Baba Bathra 8b. For a detailed discussion of the passages in the Jerusalem and Babylonian Talmuds and the relationship between them, see my article (note 1, above), pp. 104-109.

10 On the authority of rule of the public and its representatives, and on the equation of the Tovei Ha'Ir to judges, see, for example: Y. Ber, *"Ha-Yesodot veha-Hatchalot shel Irgun ha-Kehilah ha-Yehudit Bimei ha-Beinayim"* [Foundations and Beginnings of Organization of the Jewish Community in the Middle Ages], Zion 15 (5710-1950), particularly at pp. 28-31; M. Elon, *"Samchut ve-Otzma ba-Kehilah ha-Yehudit - Perek ba-Mishpat ha-Tzibburi ha-Ivri"* [Authority and Power in the Jewish Community - A Chapter in Jewish Public Law], *Shenaton ha-Mishpat ha-Ivri* 3-4 (5736-5737 [=1976]), p. 13f.

11 See the sources cited in note 10, above, and in my article (note 1, above).

12 See, for example, the decision of Justice Elon in HCJ 400/87 *Kahane v. Speaker of the Knesset*, 41(2) P.D. 729, at p. 741, which indicates that the level of impeccability required of elected officials has to be similar to that required of judges.

13 For a discussion of disqualification on the basis of family relationship or personal interest, see my article (note 1, above), pp. 102-104, 110-114.

14 See H. Soloveitchik, *Shu"t KeMakor Histori* [Responsa as Historical Source], Jerusalem, 1991, p. 29.

a personal interest in the matter or would be related to the parties concerned[15].

It is not surprising, therefore, that in a halachic query addressed to Rabbenu Tam (12th century) from the community of Orleans in France, the difficulty of finding a local judge is mentioned: "And in our town there is none [who can judge], since all are brothers and relatives [to one of the parties], apart from Rabbenu Shlomo beRabbi Yitzhak, and he does not wish to sit [in judgment]"[16].

A similar problem is faced by the *Tovei Ha'Ir*, who had to decide, as a matter of course, on matters affecting all the residents of the town, at times also on matters affecting themselves or their relatives. Thus, for example, Rabbi David Oppenheim (Prague, 17th-18th centuries) was asked in the following terms regarding the appointment of two relatives as community officials: "There is a certain community, in which 12 householders live. Seven of them are members of one family, father and son and brother and son-in-law and uncle, all totally disqualified from serving as witnesses in respect of each other. Another four are [from families] that are permitted to do so, and the twelfth is also related to the previously mentioned family [*i.e*. the seven householders who are all related to each other]"[17].

Therefore, the communities had to permit judges and community officials to act even in cases of conflict of interest. We shall see that the halachic authorities generally gave approval to this leniency, based on the models that will be described below.

Model A - Renunciation of a personal or communal interest

On the face of it, there would seem to be a simple way to solve the problem of conflict of interest within Jewish law. This would be for the individual concerned to break off his connection from, or renounce his claim to, the personal interest. In the Talmud this is called *histalkut*, and it removes the difficulty of personal interest. A *baraitha* in Baba Bathra (43a) describes a case in which personal or communal interest may interfere with the legal process: "The residents of a town whose *Sefer Torah* was stolen from them: [the case] may not be tried by the judges of that town, nor may evidence be given by the people of that town." Rashbam comments: "[This refers to] witnesses who saw that [the perpetrator] stole it, or who testify that this is the *Sefer Torah* of that town." The Talmud asks: Why is it forbidden for the judges of that town to try the case? They could renounce their claim on the *Sefer Torah*, and thereby no longer have an interest in the case - that is, each of the town's judges could write a statement of the form "I have no further claim on this *Sefer Torah*," and make a formal *kinyan* to give effect to this renunciation.[18] Indeed, the halachic ruling is that such a renunciation of personal claim is in fact effective, both for witnesses and judges who have such a personal interest[19].

However, the application the renunciation model is very limited, both from a halachic and from a practical point of view, for a number of reasons[20]:

a. There are interests that cannot be renounced. An example of this was the question of the extent to which an individual would share in the overall tax burden paid by the community in the Middle Ages, when the Jewish communities were assessed a total tax figure. In such a case, reducing the tax paid by one member of the community increased the burden on the rest of the community. This would also be the case where there is only one *Sefer Torah* in the town, since, in this case, the judge cannot renounce his rights in the *Sefer Torah*, since he too is obligated to hear it read[21].

b. There are those who hold that renunciation is effective for a judge only when there is no other judge available who is free of the taint of personal interest[22].

c. The demand that the judge renounce his rights is particularly severe. Thus, for example, Rabbi Shlomo ben Shimon Duran (Algiers, early 15th century) states in his responsa that the judge must renounce his personal interest, not only for himself, but also for his descendents. Rabbi Duran adds, and this is a reasonable demand, that "there needs to be an investigation by the *Beit Din*"

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15 For example: "But what I see is that, in any public matter, in all places, they are accustomed to having people of that town rule [even though they have a personal interest]. For, if it were not so, they would not be able to deal with any matters that affect themselves" (Responsa of *Rashba*, Part 5, No. 273).

16 *Sefer HaYashar*, Responsa (Berlin 5648 [1898]), No. 36, p. 63.

17 Responsa *Nishal David* (Jerusalem, 5735 [1975]), *Hoshen Mishpat*, 9.

18 Baba Bathra, *ibid*. See: Rashbam, *ibid., sv listalku*; Shulchan Arukh, *Hoshen Mishpat*, 37:18.

19 Rambam, *Mishneh Torah*, Laws of Testimony, 16:1; *Shulchan Arukh, ibid*.

20 For a discussion in Israeli law of various solutions based on "renunciation" of personal interest, see: Shefnitz and Lusthaus (note 5, above), pp. 325-327. See also note 24, below.

21 See: Baba Bathra, 43a; Responsa of the Rosh (Rabbenu Asher), Rule 6, No. 15; Tur, *Hoshen Mishpat*, 7:17; Shulchan Arukh, *Hoshen Mishpat*, 7:12, and Rema, *ibid*.

22 Responsa *Mishpetei Shmuel*, Nos. 66 and 79.

to exclude the possibility of deceit or collusion[23]: the judge may well sell his portion in the partnership only for show; he might then rule in a case involving the partnership, and then re-purchase his share[24].

d. At times renunciation of personal interests is not practical, even if it is theoretically possible. For example, would it be practical to demand that a judge, who is to rule on the level of municipal taxes in his town, sell his apartment and move to another town before commencing his consideration of the case?!

e. Finally, renunciation is only effective in cases of personal interest. This solution is clearly not applicable in regard to disqualification on the grounds of family relationship, since who can cut off his ties with his siblings, parents or children?

Where there is a conflict of interest in matters that are to be decided on by a public body, such as a municipal council, it may be enough to "neutralize" the public official by having them refrain from taking part in any discussions and decision-making procedures on matters in which he has a personal interest. This approach, which is well accepted in our own day[25], was already implemented in the communal ordinances of one diaspora community[26]. In such a case, we do not argue that the very fact that this official is a member of a public body (municipal council, local planning committee, *etc*.) - even if he takes no part in the deliberations or votes in which he or his relatives have an interest - would be sufficient to render all decisions by that body tainted by extraneous considerations. Although this may sometimes be the case, this would be insufficient to disqualify all members of that body in advance from considering the case. This is because personal interest is determined in light of the question of whether one who is to rule on a matter has a **present** interest in the subject; we do not take into consideration future or potential considerations[27]. For, if this were not the case, we would, for example, have to disqualify all of the colleagues of a judge who has a personal interest in a particular matter. However, the law does not require this, and we need not be concerned for conflicts of interest beyond those established in Halacha[28].

Model B - Legislation Permitting Conflict of Interests

Due to the difficulty of finding judges and witnesses who are not related to the parties or who have no personal interest, and the inconvenience that would be caused to Jewish communal life, which developed greatly during the Middle Ages, many Jewish communities established customs, or even communal ordinances, that permitted judges and witnesses who were members of the community to carry out these roles, even if they were related or had a personal interest. The *Rishonim* in Spain, from the 13th century on, mention that these customs or rulings had spread to a large number of communities[29], and that they had received the imprimatur of the halachic authorities.

Two justifications have been brought by the halachic authorities to underpin these customs and ordinances. The first is the principle that the parties to a case may agree between themselves that the testimony of someone who would normally be disqualified may be presented in court, or that someone who would normally be disqualified from sitting as a judge may do so. This is akin to the Talmudic concept of "I accept my father as trustworthy"[30]. The agreement of the community is, therefore, what grants validity to the previously invalid witnesses and judges[31]. The second justification is based on custom[32].

23 Responsa of Rabbi Shlomo ben Shimon (Rashbash) [Duran], No. 568.

24 Under Israeli law, in certain circumstance it is permitted for a public official who sold his rights in a business to retain the right to repurchase them at the end of his term of office, provided he pays the full market value of those rights. See Shefnitz and Lusthaus (note 5, above), pp. 325-327

25 See, for example: the Local Councils Order (A), 5711-1950, Section 103(a); Municipalities Ordinance [New Version], Section 122(a); Planning and Building Law, 5725-1965, Section 47(a); *Klalim li-Mniat Nigud Inyanim shel Nivharei Tzibbur ba-Reshuyot ha-Mekomiyot* [Principles for Preventing Conflict of Interests of Elected Officials in the Municipalities] (note 6, above), Section 11.

26 In the communal ordinances of Tiriya (Turkey, early 19th century) it was established that the "[tax] assessor" may not assess the tax liability of his relatives, such as father, or son or grandson. In addition, it was ruled that, when his relatives' assessment was being discussed, "that assessor must go out, to a place where he cannot hear their [the other assessors?] voices." See M. Benayahu, *Kovetz Al Yad* 4 (1946), p. 210.

27 See: Shulchan Arukh, *Hoshen Mishpat*, 37:2,10; Responsa *Terumat Hadeshen*, No. 354; Responsa *Darkhei Noam, Hoshen Mishpat*, No. 22

28 On this point, see also: Hazon Ish, *Pirkei Emunah uVitachon*, Chapter 3.

29 See, for example: Responsa of *Rashba*, Part 1, Nos. 680 and 811; Responsa of the Rosh, Rule 5, No. 4.

30 The Mishnah states: "If one [of the contending parties] says to the other: I accept my father or your father as trustworthy" (*Sanhedrin*, 3:2). See also Shulchan Arukh, *Hoshen Mishpat*, 22:1.

31 Responsa of *Rashba*, Part 1, No. 680; Part 2, No. 107; Part 5, No. 184.

32 Responsa of *Rashba*, Part 1, No. 811; Part 5, No. 286. See also M. Elon, *HaMishpat HaIvri* [published in English as *The Principles of Jewish Law*] (Jerusalem 1988), p. 596, note 178 (Heb.). Regarding the status of custom in commercial matters in Jewish law, see my doctoral thesis, *Minhagei ha-Socharim be-Darkhei ha-Kinyan ba-Mishpat ha-Ivri (Kinyan Situmta)* [Merchants' Customs for Modes of Property Acquisition in Jewish Law], Bar-Ilan University, Ramat Gan 2000, particularly the second chapter.

An interesting balance between the needs of the community, on the one hand, and the desire to ensure that not all the judges are related to the parties, on the other, appears in an ordinance mentioned in a responsum of Rabbi Shlomo ben Avraham Aderet (Spain, 13th century), which states: "That the community has agreed that even two relatives may sit in judgment, provided that there will be a third [judge] who is not related to either one"[33]. Rashba gives this regulation legal validity, and notes that this has been accepted in many communities in regard to taxes:

> It is clear, too, that once the community has so decided, their decision is final. And thus have all the communities done in regard to taxes, that the people of the town issue rulings and take testimony from the people of the town, **even though they are related to the judges** and to those subject to assessment. Furthermore, **the *Beit Din* and the witnesses are interested parties in both their testimony and their rulings**, and are testifying in their own behalf. Yet all this is [valid] by virtue of the agreement of the community.

Indeed, the halacha is codified thus in the *Shulchan Arukh*[34]: "And if they have made an ordinance or if there is a local custom that the judges of the town may judge even in matters of taxes - their decisions are valid".

Similar to that law, which applies to the **judges**, more recent halachic authorities ruled that it is also permitted to appoint ***Tovei Ha'Ir*** who are related, or who have personal interests, provided that the community has agreed to such an appointment, either by adopting a communal ordinance to that effect, or because that is the local custom[35]. This leads, apparently, to the clear and unequivocal conclusion, that if a country has an accepted custom or laws that permit public officials to act on issues in which they themselves have a personal interest, then such conflict of interest is nullified. However, the halachic authorities have ruled that such customs or legislation need to be given the most **restrictive interpretation**.

Thus, for example, communal ordinances allowing a judge to rule on community matters only apply if these are matters that apply to the community as a whole, such as taxes, Torah scrolls, the synagogue, and the charity fund. That is, the judge may rule only if his interest is only a **general one**, no greater than that of any other member of the community. On the other hand, in matters in which the judge, or one of his relatives, has a direct **personal interest**, such communal ordinances would not permit him to rule, since the communities never intended such ordinances to be used to permit judges to rule in such cases[36].

A nice example of this distinction can be found in a decision made by Rabbi Yehudah Ayash[37] in regard to someone who left a portion of his property to "the scholars and to the poor of the town." The other inheritors appealed against the will for a number of reasons. One of their arguments was that the community's judges had a personal interest in the legacy, since they were "included among the scholars" of the town.

Rabbi Yehudah agreed that the ordinance that permitted a judge to rule, even in cases in which he had an interest, was effective "specifically in matters **which apply equally to all, and whose benefit is general[ly applicable], both to the ordinary people and to the [leaders] alike**." That is, where the judge's interest is equal to that of the other residents of the town. However, "it is clear that the judges of that town cannot rule on a matter in which they themselves have a **special benefit**," such as in the present case, "and this is clear and obviously true, both by law and by reasoning"[38].

Moreover, the existence of legislation that permits a judge to rule on matters in which he has a conflict of interest does not necessarily provide a magical solution to the problem. We still need to look at whether it would not be "better" to have the matter adjudicated by a judge who has no special interest in the matter, since the purpose of such ordinances (or customs) was only to bring about "improvement and not impairment"[39].

Furthermore, this would seem to be the case, even where there is an explicit regulation permitting the judges to rule in matters in which they have a clear personal interest[40], since there is a general principle, established in Jewish law from earliest times: "That

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33 Responsa of *Rashba*, Part 6, No. 7.

34 Shulchan Arukh, *Hoshen Mishpat*, 7:12. See also *Arukh Hashulchan, ibid*., para. 22.

35 See, for example: Rabbi Shmuel Kalai (Arta, Greece, 16th century), Responsa *Mishpetei Shmuel*, No. 92, which permits the appointment of relatives to the communal leadership on the basis of a communal ordinance or custom; he writes, "And thus have all the communities throughout the Diaspora done."

36 See, for example, Rabbi Yitzhak bar Sheshet Barfat (Spain-Algiers, 14th century), Responsa of the Rivash, No. 195, sv *U-mah she-ta'anu*.

37 Responsa Beit Yehudah, Hoshen Mishpat, No. 13, *sv shmini*.

38 In fact, he suggests that the problem of the judges' conflict of interest be solved by means of *histalkut* (renunciation of rights). See Model A, above.

39 See Arukh Hashulchan, *Hoshen Mishpat*, 37:22.

40 In spite of what we have said above, at note reference 31.

it is a man's duty to be as free of blame before men as before G-d"[41]. Thus, any legal provision permitting a public official to act even where there is a conflict of interest, particularly a personal interest, would not stand up to the test of justice being seen to be done. Indeed, in a number of communities, ordinances were established forbidding public officials, such as the *Tovei Ha'Ir* or the community's tax assessor, to act in such cases of conflict of interest[42].

For this reason, I feel that in modern legal systems, such as that operating in the State of Israel, it is improper to grant legislative permission to public officials to have unlimited power to act or make rulings on matters in which they have some personal interest. Such powers can only lead to rumors of improper behavior, even if they are duly authorized under the law[43].

Concluding Note

It is clear that public officials, both elected and appointed, who have the power to establish behavioral norms for the community through legislation or executive decision, must themselves behave unimpeachably. When public officials are tainted by conflict of interest, their actions lose their moral validity, and the trust placed in them by the public is weakened. It is appropriate to note a comment by the Hazon Ish, Rabbi Avraham Yeshaya Karelitz (Lithuania-Bnei Brak, 19th-20th centuries), which was quoted recently in the "public case" portion of the **Deri** trials[44]:

> Even if one were to agree as to the great wisdom of the sage, he should not obligate himself to listen to him, should he find that his ruling is affected by some interest… **for through this there arises a generation that judges its judges, and every man will do what is right in his own eyes**… and the whole atmosphere of the town, and sometimes that of the whole country, becomes filled with sharp words, squabbles and dissension.

41 Mishnah, Shekalim 3:2. See also my article (note 1, above), pp. 95-99.

42 See, for example, the halachic query addressed to Rabbi Shmuel di-Modena (Salonika, 16th century), Responsa of *Maharshdam, Yoreh Deah*, No. 175.

43 It seems that in the past decade the Israeli courts have been more willing to apply, in cases of apparent favoritism, the stricter test of "reasonable apprehension", as opposed to the test of "real possibility." Evidence of this trend can be found, for example, in the following decisions: HCJ 3132/92 *Mushlav v. District Planning and Building Committee, Northern District*, 47(3) P.D. 741, at p. 747; Civil Appeals 3030/96 *Municipality of Jerusalem v. Cahila Engineering and Construction Jerusalem*, 50(5) P.D. 565, at p. 570; HCJ 1100/95 *Cassuto v. Ehud Olmert, Mayor of Jerusalem*, 49(3) P.D. 691, at p. 698; HCJ 5848/99 *Paritzky v. District Planning and Building Committee, Jerusalem*, 54(3) P.D. 5 at p. 19. However, there are those who still adopt the "real possibility" test, see: HCJ 6641/93 *Tzeirim Lema'an Haifa Faction in the Haifa Municipality v. Haifa Municipal Council et al*., 48(3) P.D. 555 at p. 559 and p. 561. See also: D. Barak-Erez, *"Mishpat Minhali"* [Administrative Law], *Sefer ha-Shana shel ha-Mishpat be-Yisrael* [Israeli Law Annual] 5752-5753 (publ. 5754-1994), 197, at p. 223.

44 Hazon Ish (note 28, above). Quoted in Criminal File 1872/99, *State of Israel v. Aryeh Deri, Tak-Shal* 2003(3) 569, para. 5, brought in my article (note 1, above), p. 95.

Chanukah Menorah, brass and other metals, made in Frankfurt, Germany in 1924

Judaism in the Law of Israel

Dorothy Werner

It is somewhat ironic that the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713 - 1953, the Law that states in Section 2: "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law", was drafted in ignorance of Jewish religious law.

It is stranger still that, in all the years since, nothing has been done to correct it.

In Judaism, the law regarding leverite marriage is found in *Deuteronomy* 25:5-10. First of all, verse 5 provides for three conditions to be met:

1. The brothers must dwell together
   AND
2. One of them dies
   AND
3. The deceased had no children

If all of these conditions are met, it becomes the duty of the brother of the deceased to conceive a child with the widow; that child then being considered the issue of the deceased (verse 6).

Verses 7-10 provide for the consequences of **his** refusal to enter into leverite marriage. The widow complains to the elders, who then summon him and talk to him. He then restates his refusal to marry her. In the *chalitza* ceremony wherein **he** is released from the obligation of marrying her, the widow, in the presence of the elders, loosens his shoe, spits in his face and verbally humiliates him.

And yet, Section 7 of the Civil Law (above), begins, "Where a rabbinical court, by final judgment, has ordered that a man be compelled to give his brother's widow *chalitza*...".

The Law is obviously in error, since **he** is the one being released from the obligation, and not she.

Genesis 38: 6-26 clearly shows that in patriarchal times, leverite marriage was considered a right, and not an obligation, of the widow. Playing the part of a harlot, Tamar becomes pregnant with Judah, her father-in-law. Judah had refused to give his youngest son in leverite marriage to Tamar. In the end, Judah acknowledges that she was justified in her actions.

The issue of divorce fares no better in this poorly drafted law.

Section 6 begins, "Where a rabbinical court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband...".

There is nothing in the *Torah* that forbids a woman from divorcing her husband. In fact, *ketubot* have been found from the time of Ezra, which clearly state that either party can divorce the other.

Divorce law is mentioned in the *Torah* in only one place, *Deuteronomy* 24: 1-4. This passage essentially warns men not to take divorce lightly. This warning is repeated in *Malachi* 2: 13-16. The men in question believe in God and make their offerings. God rejects their offerings because of their callous treatment of the wives of their youth, whom they have divorced in order to chase after other women.

The following articles in the Judaism's Egalitarian World web site

http://www.jeworld.org/ present this issue in greater detail.

What The Torah Says About Divorce Law
http://www.jeworld.org/marriage-divorce/restrictions.htm

Egalitarian History in Jewish Divorce
http://www.jeworld.org/marriage-divorce/divorce.htm

It is hoped that the legal profession will exert its influence to correct the wording of this law and the subsequent ones that are based on it. In this manner, the rabbinical courts will finally actually apply Jewish religious law to matters of marriage and divorce of Jews in Israel.

Dorothy Werner, from Natanya, Israel, is an independent researcher in egalitarianism in Halacha.