



# Justice

**42** Spring  
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**THE INTERNATIONAL ASSOCIATION  
OF JEWISH LAWYERS AND JURISTS**



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# President's message

The appalling utterance that Israel should “be wiped off the map,” made last October by Iranian President Mahmoud Ahmadinejad, and that country’s apparent pursuit of nuclear weapons, have been condemned by many countries and even provoked UN Secretary-General Kofi Annan to point to Iran’s obligations, as a member state of the UN, “to refrain . . . from the threat or use of force against the territorial integrity or political independence of any State.”

President Ahmadinejad’s call for the destruction of Israel constitutes a punishable act pursuant to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which Iran is a state party. Iran is also in breach of its obligations under the UN Covenant of Civil and Political Rights to prohibit by law any propaganda for war and any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence.

The repeated public advocacy of the destruction of Israel, a leitmotif for the proxy war it has been relentlessly conducting against Israel through surrogates such as Hizbollah and Islamic Jihad, and its strongly anti-Semitic rhetoric, including statements denying the Holocaust, prompted IAJLJ to call on the UN “to formally request the Iranian Government to unequivocally repudiate the statement of the Iranian President of 26 October last, failing which the measures envisaged under Chapter VII, including the application of appropriate sanctions contained in Article 41, should be envisaged.”

This resolution was drafted and passed at our recent conference in Eilat, and I urge all our members to press their governments to do likewise. The international community must unite in its efforts to vehemently oppose such public statements, which are nothing less than incitements to commit genocide. Only strong and sufficiently forceful measures by the democratic community may prevent Iran from escalating statements into action.

The election of Hamas to lead the Palestinian Authority, exactly three months less a day after Iranian President Ahmadinejad’s statement, and its announcement immediately afterward that “the movement [would] not change a single word in its

charter” which calls for the destruction of Israel, again serve to remind us, as former Mossad chief Efraim Halevy writes in this issue, that we must “keep up a relentless campaign on the world stage . . . prioritize (the) fight against anti-Semitism and . . . link it to the larger struggle of the free world against international Muslim terror and against the danger of proliferation of weapons of mass destruction.”

International Muslim terror and weapons of mass destruction are but an aspect of human rights, whose pursuit is one of the key objectives of our Association. As a member of the Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations, IAJLJ recently presented its views on the new UN Human Rights Council, replacing the discredited UN Commission on Human Rights, to the United Nations Office of the High Commissioner on Human Rights. An abridged version of our statement appears in this issue .

All these are but part of our continuing efforts to promote human rights and combat prejudice and threats to the Jewish people. During the last six months, our Association was privileged to have been involved in three different conferences held at three different locations around the globe.

In Eilat, on 10-13 November 2005, we held an International Conference on Legal Issues: International Aspects. There, in Israel’s beautiful southernmost city, we exchanged ideas and held discussions on various legal aspects of tax, family and commercial law. While considering issues of common interest to us as lawyers and jurists, the conference agenda also examined the mounting anti-Semitism in Europe and, in particular, focused on today’s biggest threat to the existence of Israel – Iran’s belligerent conduct and those venomous statements of Iranian President Mahmoud Ahmadinejad calling for the destruction of Israel.

In January 2006, a special event launching a new book, *Jewish Names in the Bulgarian Legal Sciences*, was organized by Association members in Bulgaria. As most of my family perished during the Holocaust, it was very meaningful for me to speak at an event in a European country whose Jewish citizens survived the Holocaust and contributed to



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the development and enhancement of that country's legal sciences. Indeed, the history of the Bulgarian Jews is unique, as their survival is owed largely to the citizens of Bulgaria, including leading intellectuals, parliamentarians and the head of the Orthodox Church at that time. Unlike international conferences usually hosted by our Association in commemoration of those Jewish lawyers and jurists who perished in the Holocaust, the reasons for our presence at this special event were somewhat different – to ensure the continuity of the Jewish spirit; to honor and commemorate the Jewish contribution to the legal sciences in Bulgaria; and also to extend the Association's appreciation and gratitude to the Bulgarian community for ensuring the survival of the Bulgarian Jews.

In March 2006, we celebrated in Buenos Aires the opening of our member association in Argentina. More than 100 Argentinean lawyers participated in a conference on the International Protection of Human Rights, which was followed, the day after, by a gala dinner. It was remarkable to note that most of the participants at this conference were young Jewish lawyers, strongly committed to dealing with issues of common interest to us all and, in particular, legal issues affecting Jewish communities in Argentina. During my visit, I also met with the prosecutors in charge of the investigation of the terrorist attack on the AMIA (Asociación Mutual Israelita Argentina) building in 1994 that caused the death of more than 80 Argentinean citizens, most of whom were Jewish. It was impressive for me to see that in the last year and a half substantial efforts have been invested in the long attempt to bring to justice anyone involved

in this terrible attack. We wish our friends in Argentina all the best in developing their association and in promoting and achieving the goals they have set for themselves.

On May 24, we held the inaugural Haim H. Cohn Annual Lectureship, convened in the memory of our Association's past president and deputy chief justice of the Israeli Supreme Court. In cooperation with the Law School of the College of Management, Prof. William Treanor, Dean of the Fordham University School of Law, lectured on and discussed "Human Rights in a Constitutional Framework." In a foreword, Justice Aharon Barak, President of the Supreme Court of Israel, noted the important contributions made to Israeli jurisprudence by the late Justice Cohn.

In November this year, we will be convening an international conference in Budapest, Hungary, continuing our remembrance of the Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their respective countries. I invite you to mark your calendar and take part in this special event.

Finally, it is my pleasure to draw your attention to and thank the new editorial board of *Justice* for its efforts. As you may appreciate from these notes and from reading this edition, our Association is moving forward and embarking on new activities. We would be delighted to hear your thoughts and suggestions on these or any other initiatives that could contribute to promoting and furthering our goals.

Alex Hertman  
*President*

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# The Hamas Charter

*The recent Palestinian Legislative Council elections were won by Hamas. IAJLJ is indebted to the Intelligence and Terrorism Information Center at the Center for Special Studies for granting permission to publish its analysis of the Hamas charter, which sets down Hamas' commitment to destroy the State of Israel through holy war (jihad).*

On 25 January 2006, the day Palestinian Legislative Council elections were held, Dr. Mahmoud al-Zahar, senior Hamas leader in the Gaza Strip and candidate for the post of foreign minister, stated that Hamas was committed to the ideology of its 1988 charter. He noted emphatically that "the movement [would] not change a single word in its charter," which calls for the destruction of the State of Israel, and would not become a purely political movement, but quite the opposite, it would continue its policy of "resistance" (i.e., terrorist attacks) (Reuters, Gaza, January 25).

The Hamas Charter referred to by Mahmoud al-Zahar was formulated during the first year of the previous round of the violent Israeli-Palestinian confrontations (1987-1993). It was edited and approved by Ahmad Yassin, the movement's founder and leader, and issued on 18 August 1988. The charter is Hamas's most important ideological document as it was formulated and honored by its founders, and as of this writing, copies continue to be circulated in the Palestinian Authority (hereinafter: "PA")-administered territories. It makes extensive use of Islamic sources (the *Qur'an* and *Hadith*) to assure its religious Islamic basis.

The main points of the Hamas Charter:

1. The conflict with Israeli is religious and political: The Palestinian problem is a religious-political Muslim problem and the conflict with Israel is between Muslims and the Jewish "infidels."
2. All Palestine is Muslim land and no one has the right to give it up: The land of Palestine is sacred Muslim land and no one, including Arab rulers, has the authority to give up any of it.
3. The importance of *jihad* as the main means for the Islamic Resistance Movement (Hamas) to achieve its goals: An uncompromising *jihad* must be waged against Israel and any agreement recognizing its right to exist must be totally opposed. *Jihad* is the personal duty of every Muslim.
4. The importance of fostering the Islamic consciousness: Much effort must be invested foster-

ing and spreading Islamic consciousness by means of education (i.e., religious-political indoctrination) in the spirit of radical Islam, based on the ideology of the Muslim Brotherhood.

5. The importance of Muslim solidarity: A great deal of importance is given to Muslim solidarity, one of whose manifestations is aid to the needy through the establishment of a network of various "charitable societies."

In addition, the charter is rife with overt anti-Semitism: According to the charter, the Jewish people have only negative traits and are presented as planning to take over the world. The charter uses myths taken from classical European and Islamic-based anti-Semitism.

The translation of the charter used in our analysis is of the 2004 edition, published in an ornate format in Qalqilya<sup>2</sup> and issued to celebrate the 17th anniversary of the movement's founding. Copies were among the documents found by IDF soldiers in the Islamic Club in Qalqilya on 27 September 2005.

Sheikh Ahmad Yassin's picture appears on the front cover of the 2004 Qalqilya edition. A picture of his temporary successor, 'Abd al-'Aziz Rantisi appears on the back cover. On the insides of the front and back covers are pictures of prominent terrorists who died during the confrontation (*shaheeds*) and of jailed Qalqilya residents. Some of the Qalqilya terrorists took part in suicide bombing attacks, for example, Sa'id Hutri, who blew himself up at the Dolphinarium Club in Tel Aviv on 1 June 2001, killing 21 civilians and wounding 83, the overwhelming majority of all of whom were teenagers; and 'Abd ai-Rahman Hammad, who was head of the Hamas terrorist-operative infrastructure in Qalqilya and who planned and organized the attack.

THE HAMAS CHARTER includes its radical Islamic world view (conceived by the Muslim Brotherhood in Egypt), which has basically not changed in the 18 years of its existence.<sup>3</sup> With regard to Israel, the charter's stance is uncompromising. It views the "problem of Palestine" as a

religious-political Muslim issue, and the Israeli-Palestinian confrontation as a conflict between Islam and the “infidel” Jews. “Palestine” is presented as sacred Islamic land and it is strictly forbidden to give up an inch of it because no one (including Arab-Muslim rulers) has the authority to do so.

With regard to international relations, the charter manifests an extremist worldview which is as anti-Western as Al-Qaeda and other terrorist organizations.

That worldview brings in its wake the refusal to recognize the State of Israel’s right to exist as an independent, sovereign nation, the waging of a ceaseless *jihad* against it and total opposition to any agreement or arrangement that would recognize its right to exist. At the beginning of the charter there is a quotation attributed to Hassan Al-Bana,<sup>4</sup> that “Israel will arise and continue to exist until Islam wipes it out, as it wiped out what went before.”

Overt, vicious anti-Semitism, with both Islamic and Christian-European origins, is used extensively throughout the document. The all-out *jihad* against the Jewish people is legitimized by presenting the Jews in a negative light and demonizing them as wanting to take over not only the Middle East but also the rest of the world. One of the *jihad*’s deadliest manifestations is suicide bombing terrorism, which was developed mainly by Hamas during the 1990s and has become its leading “strategy” in the ongoing violent Israeli-Palestinian confrontation.

The Jews are also presented as worthy of only humiliation and lives of misery. That is because, according to the charter, they angered Allah, rejected the Qur’an and killed the prophets (the relevant Qur’an verse from Surah Aal-Imran is quoted at the beginning of the charter). The document also includes anti-Semitic myths taken from *The Protocols of the Elders of Zion* (mentioned in Article 32) regarding Jewish control of the media, the film industry and education (Articles 17 and 22). The myths are constantly repeated to represent the Jews as responsible for the French and Russian revolutions and for all world and local wars: “No war takes place anywhere without the Jews’ being behind it” (Article 22). The charter demonizes the Jews and describes them as brutally behaving like Nazis toward women and children (Article 29).

The charter views the *jihad* as the way to take all of “Palestine” from the Jews and to destroy the State of Israel, and Hamas’s terrorist attacks are seen as links in the *jihad* chain carried out during the Israeli-Palestinian conflict.

Article 15 states that “the *jihad* to liberate ‘Palestine’ is the personal duty [*fardh ‘ayn*]” of every Muslim, an idea expounded by ‘Abdallah ‘Azzam.<sup>5</sup>

The charter emphasizes the battle for Muslim hearts and minds, or, “the spread of Islamic consciousness [*al-wa‘i al-islami*],” within three main spheres: the Palestinians, the Arab Muslims and the non-Arab

Muslims (Article 15). The process of fostering and spreading that “Islamic consciousness [*amaliyyat ai-taw’ aiyah*]” is defined as its most important mission. Clerics, educators, men of culture, those active in the media and information services and the generally educated public all have the responsibility to carry it out (*ibid.*).

As part of the battle for hearts and minds, the charter places a special emphasis on education (i.e., indoctrination) in the spirit of radical Islam, based on the ideas of the Muslim Brotherhood. Fundamental changes must be made, it states, in the educational system in the PA-administered territories: it must be “purified,” purged of “the influences of the ideological invasion brought by the Orientalists and missionaries” (Article 15), and the younger generation should be given a radical Islamic education based exclusively on the *Qur’an* and the Muslim tradition (the *Sunnah*). The means used for ideological recruitment, as detailed in the charter, are “books, articles, publications, sermons, flyers, folk songs, poetic language, songs, plays, etc.” When imbued with “correct” Islamic belief and culture, they become an important means of raising morale and building the psychological fixation and emotional strength necessary for a continuing “liberation campaign” (Article 19).

The charter stresses the importance of Muslim solidarity according to the commands of the *Qur’an* and *Sunnah*, especially in view of the confrontation taking place between Palestinian society and the “terrorist Jewish enemy,” described as Nazi-like. One of the expressions of that solidarity is aid to the needy (one of whose main manifestations is the network of various “charitable societies” set up by Hamas, which integrate social activities and support of terrorism).

The charter makes a point of the ideological difference between Hamas, with its radical Islamic world view, and the secularly-oriented Palestine Liberation Organization, but pays lip service to the need for Palestinian unity needed to face the Jewish enemy. It notes that an Islamic world view completely contradicts the Palestine Liberation Organization’s secular orientation and the idea of a secular Palestinian state. Nevertheless, notes the charter, Hamas is prepared to aid and support every “nationalist trend” working “to liberate Palestine” and is not interested in creating schisms and disagreements (Article 27).<sup>6</sup>

A COMPARISON OF the Hamas Charter and its 3 January 2006 platform during the Palestinian Legislative Council election campaign shows that it did not moderate or disguise its commitment to the charter’s basic principles in any meaningful way. Its radical Islamic position

*Continued on page 25*

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# Some remarks concerning the trial of David Irving

*The limits of the freedom of expression have long been discussed in both the national and the international arena. Democracies constantly struggle with the necessity of defining those limits, with the scope of legislation to be adopted, and with the proper ways to apply such laws without infringing on the right of free speech itself.*

Hadassa Ben-Itto

The 1960s marked the adoption by the United Nations of the most important covenants and conventions aimed at protecting basic freedoms but also aimed at protecting the world from a repetition of the atrocities of World War II that were still fresh in everybody's memory.

Established on the ashes of the Holocaust, the UN, representing the international community, realized that hate speech had been an effective weapon used by the Nazis, and that "fighting words" were as dangerous as guns. Thus, these international conventions included paragraphs criminalizing incitement to hatred, discrimination or violence on racial, ethnic, or religious grounds.

Member states, one after another, ratified these covenants and conventions and adopted domestic legislation, modeled on the language and scope of international texts such as the 1966 International Covenant on Civil and Political Rights<sup>1</sup> or the 1965 International Convention on the Elimination of all Forms of Racial Discrimination.<sup>2</sup> Even where denial of the Holocaust was not specified as a crime, these laws criminalizing hate speech were used to try and imprison deniers of the Holocaust in well publicized trials in democratic countries. But some countries, like Germany, Austria and France, which still vividly remembered the Nazi era, passed specific laws criminalizing denial of the Holocaust, and were not reluctant to try deniers under laws that do not require that the Holocaust be proved again and again by survivors who are compelled to relive their personal tragedies in an open court.

We are now witnessing a barrage of statements and articles in the media protesting the prison sentence imposed on David Irving by an Austrian court for denying the Holocaust. Surprisingly, some of those voices come from persons who not only do not condone the denial but oppose it with all their might. In their view, even denial of the Holocaust deserves the protection of free speech and should be confronted by telling the truth, by teaching it, by exposing it in any way possible, but not by criminalizing it or imprisoning its deniers.

In response to those voices I would like to offer a few remarks.

1. These voices were not raised on previous occasions when deniers of the Holocaust were tried on criminal charges in countries like France, Germany, Switzerland, Sweden and Canada, a matter raising a strong suspicion that this is but an attempt to appear politically correct in the face of the ongoing dispute over the Danish cartoons and the violent response of Muslims who wrongly compare the publication of cartoons with denial of the Holocaust.
2. The argument that denial of the Holocaust should be confronted by exposing the truth rather than by imprisoning deniers is at best naïve. Few events in human history have been as documented as the Holocaust in books, recorded evidence, judgments of courts, hundreds of monuments and museums, endowed chairs in universities, and now, in some countries, even in schoolbooks. At long last, after 60 years, on 1 November 2005, even the General Assembly of the United Nations passed a Resolution rejecting any denial of the Holocaust as an historical event, either in full or part, and resolved that 27 January be designated as an annual International Day of Commemoration in memory of the victims of the Holocaust;<sup>3</sup> and yet the Holocaust is still denied not only by individuals but by movements, organizations, governments and the heads of state of some countries.
3. Denial of the Holocaust has no place in the so-called "marketplace of ideas" where free speech demands the free flow of information and the honest exchange of ideas. A blatant lie about historical facts is not an idea and does not deserve to dwell under the umbrella of free speech.

Those who deny the Holocaust are not honest historians voicing an opinion. They have an agenda that is not



*Continued on page 25*

# The new UN Human Rights Council

*On 15 March 2006, the UN General Assembly voted to create a Human Rights Council, replacing the discredited Commission on Human Rights. IAJLJ is concerned that the new body may not be an improvement on the old.*

Daniel Lack

The United Nations Commission on Human Rights (CHR), long a problematic UN agency, reached a nadir as a result of its role in the preparation and follow-up of the conclusions at the "World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance," held at Durban, South Africa, in 2001. Though noble in title, it quickly became evident that the conference was exploited as an opportunity to promote anti-Semitic, anti-Israel and anti-U.S. views.

In part because Israel and Jewish non-governmental organizations (NGOs) everywhere protested this mockery of human rights, the UN in June 2004 convened its first-ever conference on anti-Semitism, "Confronting Anti-Semitism: Education for Tolerance and Understanding." But the taint of Durban would not go away, and after much debate, prompted by UN Secretary General Kofi Annan's severe criticism of the CHR, the General Assembly, by adopting UN Resolution A/60/L.48, created a new body – the Human Rights Council – to replace the CHR. Almost all members of the General Assembly voted for the new Council. The United States, Israel, Palau and the Marshall Islands voted against the proposal; Venezuela, Iran and Belarus abstained.

IAJLJ regrets that the arbitrary time limit for considering further and necessary improvements in the proposals for the Human Rights Council prevailed. This was due to a fear that prolonging negotiations might have further reduced the scope and effectiveness of the text, notwithstanding its weaknesses and inadequacies. Undue haste, fear and suspicion in this context are poor counselors.

With the adoption of the compromise resolution, the scene has been set for testing how its vague and imprecise language will be implemented. Operative Paragraph 4 is a notable example under which it is decided "that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity ...", the very criteria whose disregard brought the CHR

into such disrepute. How will observance of these vitally important principles by the Council be ensured? It would not be inappropriate to temper the prevailing mood of optimism with a note of caution against the danger of history repeating itself.

As a member of the Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations, IAJLJ presented its views to the United Nations Office of the High Commissioner on Human Rights. The statement was drafted and presented prior to the General Assembly vote. Following is an abridged version of the statement with amendments required by the changed context.



THE DRAFT TEXT issued on 23 February 2006 under the aegis of the President of the General Assembly, Jan Eliasson of Sweden, which would decree the establishment of the Human Rights Council, has met with a mixed reception. UN Secretary General Kofi Annan

foresaw a streamlined Council, with fewer members than the current 53 of the CHR, as a standing body meeting throughout the year. The Secretary General's severe criticism of the CHR, pronounced in March 2005, precipitated the current proposals, still a far cry from what was originally envisaged in his report "In Larger Freedom." Nonetheless, the strictures he made as to the CHR's loss of credibility have had their effect. They sounded the knell for the CHR's continued existence.

The CHR created in 1946 by the United Nations Economic and Social Council (ECOSOC), in the wake of WWII, was primarily motivated to prevent the danger of any repetition of that devastating human catastrophe. The UN was born out of the ashes of war and the unparalleled horrors of the Holocaust and genocidal atrocities perpetrated indiscriminately against other ethnic groups designated under the racial edicts of the Nazi leadership.

It was the reaction of the UN member states to these atrocities that stamped "the dignity and worth of the human person" as the human rights hallmark enshrined

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in the Preamble and Purposes and Principles of the UN Charter. Encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion, repeated in Articles 1 and 55 of the UN Charter, was soon reflected in the 1948 Universal Declaration of Human Rights (hereinafter: the Universal Declaration), preceded by one day by the adoption by the UN General Assembly at the same session of the text of the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into effect in 1951.

The two covenants, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights, and the other major human rights conventions that followed, supervised by the Treaty Bodies monitoring compliance by state parties, represent the kernel of today's UN human rights norms and form a code that such states are required to respect.

Actual observance and implementation of these obligations by UN member state parties often fall lamentably short. The contribution of the CHR in this area has been haphazard and contradictory at best. The degree of politicization in which its myriad resolutions have been adopted without any meaningful results has often led to disappointment, frustration and cynicism.

The role of the Office of the High Commissioner for Human Rights in the UN human rights system has varied considerably since this office was created. The incumbent succeeded to this position following the tragic death of her predecessor in Iraq. This relatively new position, created in 1993 for the principal UN official charged with the supervision of all UN human rights programs and activities, bears the formidable challenge of ensuring that all sectors of the system are enabled to function with optimal effect in the promotion and protection of human rights.

Today's General Assembly is unrecognizable from that of 1945. Its complexity, reflecting the Non-Aligned Movement, the Group of 77 (in fact 132 nations), the regional groupings, the Arab League and the members of the Organization of the Islamic Conference, forms an intricate pattern of interests in which some 89 loosely-defined democratic countries regrettably play an ever decreasing role.

The CHR is at the core of the UN human rights system and its projected replacement by the Human Rights Council would present a major opportunity to achieve a significant improvement in the CHR's current moribund status. Yet a major obstacle to significant progress is the new Council's continued and now direct subordination to the General Assembly, as distinct from being a

principal UN organ. ECOSOC will no longer be the interposed supervisory UN organ. Further, there will be 47 Council members, as opposed to the 53 current members of the CHR, hardly a streamlining of a composition that was envisaged to be 30 members at most.

Of the five regional groupings, the Western and Other States would suffer the greatest decrease, from 10 to seven members. The Council's members would no longer be eligible for immediate re-election after two consecutive terms of three years, whereas CHR members could be immediately re-elected after each such term.

A serious weakness arises in that instead of being elected to the Council by a two-thirds majority of the General Assembly as previously envisaged, members of the Council would be elected as in the past by a simple majority in a secret ballot. The simple majority vote would now be conducted directly in the maelstrom of the General Assembly's conflicting interests, with unpredictable consequences.

While members of the new Council could theoretically be suspended for gross and systematic violations of human rights by a two-thirds majority, which notionally might be considered as welcome, censuring CHR members for egregious violations of human rights is unlikely in practice. The current situation in Sudan is but one example of many such failures.

It should also be recalled that governments reputed to be authoritarian and repressive, notably those of China, Cuba, Eritrea, Saudi Arabia and Zimbabwe, in addition to Sudan, continue to serve as members of the CHR.

A periodical review of the human rights performance of all UN member states is ambitiously projected under the new Council, commencing with its own members, but the precise criteria for conducting such evaluations are not specified.

Instead of being convened as a standing body whenever required by human rights crises, the Council would meet three times per year for a total of 10 weeks. The CHR has until now met for one session of six weeks. This does not appear to be a substantial difference.

A new provision projected for the Council enables it to be convened by one-third of its members to respond to urgent human rights situations. The effectiveness in practice of this provision is a matter of conjecture, given the highly politicized context in which it is likely to be invoked.

IAJLJ supports the concerns of a group of NGOs that have adversely commented on preambular Paragraph 7 of the 23 February 2006 draft of the General Assembly proposal on the Council. The draft's concentration

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## Eilat conference mixes business, pleasure and public issues



Israeli Supreme Court Justice Elyakim Rubenstein



Israeli Minister of Foreign Affairs Tzipi Livni



Former Mossad chief Efraim Halevy

For three days last November, members and friends of IAJLJ gathered in Eilat, Israel's gateway to the Red Sea and beyond, to attend our International Conference on Legal Issues: International Aspects. The pages that follow contain several articles based on conference events, which we invite readers of *Justice* to comment on.

The opening event was dedicated to the question of combating anti-Semitism at the state level and was attended by the Honorable Tzipi Livni, then Israeli Minister of Justice and now Minister of Foreign Affairs; Justice Elyakim Rubinstein of the Supreme Court of Israel; His Excellency Gérard Araud, ambassador of France to Israel; His Excellency Simon McDonald, ambassador of Great Britain to Israel; and



IAJLJ representative to the UN Office at Geneva Daniel Lack (left) and French Ambassador to Israel Gérard Araud

Mr. Efraim Halevy, former head of the Mossad.

Friday morning was devoted to international business and tax law, with the first session, Tax Competition for Business, moderated by Dr. Tsilly Dagan of Bar-Ilan University. Participants included Dr. Dagan as well as Jacky Matza, LL.B., CPA, then Senior Deputy Director and today Director of the Israel Tax Authority, and Adv. Dr. Joshua Rosensweig of Israel. A session on Trusts & Estate Planning was moderated by Adv. Alon Kaplan of Israel. Its participants included Jacky Matza, Adv. Kaplan, Adv. David I. Faust of New York and Adv. Barbara R. Hauser, also of New York.

International and Israeli Aspects of Family Law, on Friday afternoon, was divided into two discussions. The first, Children in the Air: Migration & Child Abduction, was moderated by Adv. Yoram Yarkoni of Israel, and its participants included Adv. Yarkoni; Adv. Irit Kohn, IAJLJ Vice President and former Director, Department of International Affairs, Israel Ministry of Justice; Adv. Shmuel Moran of Israel; and Judge Udit Stoffman of the Tel Aviv District Court. The second discussion was titled Marriage and Divorce of Jews: International Perspectives, and it was moderated by Adv. Prof. Dov I. Frimer of Israel. Participants included Adv. Prof. Frimer; Judge Moshe Drori of the Jerusalem District Court; Dr. Ruth Halperin-Kaddari of Bar-Ilan University; and Adv. Yosef Mendelson of Israel.

A traditional Friday evening Shabbat dinner concluded the day's events.

On Saturday, the fitting subject was Jewish Law, conference participants attending lectures by Dr. Shimshon Ettinger of Bar-Ilan University, and Prof. Suzanne Stone of the Benjamin Cardozo School of Law, New York, followed by a discussion held by Dr. Ettinger and Prof. Stone; Judge Moshe Drori of the Jerusalem District Court; Adv. Prof. Dov I. Frimer of



British Ambassador to Israel Simon McDonald



IAJLJ President Alex Hertman



IAJLJ Deputy President Yaffa Zilbershats

Israel; and Justice Elyakim Rubinstein of the Supreme Court of Israel. A gala dinner was held that evening.

*Justice* congratulates Prof. Yaffa Zilbershats, Deputy President and Chair of the Organizing Committee, and organizing committee members Adv. Arik Ainbinder, Adv. Alex Hertman, Adv. Alon Kaplan, Adv. Haim Klugman, Adv. Irit Kohn and Adv. Yoram Yarkoni for their outstanding work in organizing the conference.

# France and the fight against anti-Semitism

*The French government has decided to fight ruthlessly against anti-Semitism nationally and internationally. Gérard Araud, French ambassador to Israel, told the IAJLJ conference in Eilat that the philosophy and scope of the response is based on three pillars: punishing, educating and cooperating.*

Gérard Araud

No one in my country and no one in Europe underestimates the rise of anti-Semitism. We know that all the European democracies are today facing the same challenge, a challenge not only to the security of our Jewish communities but to the very fabric of our democracies.

As do most European countries, France faces the daily reality of anti-Semitism. In fact, the number of anti-Semitic incidents has dramatically increased since 2001 to reach, in 2004, an all-time high figure of 970. These incidents were registered by the Ministry of the Interior, which works in close coordination with Jewish organizations. Among them, 99 were described as "very serious" by the French National Commission on Human Rights.

The figures for 2005 show a decrease of 50 percent in the number of incidents but the brutal assassination of Ilan Halimi, where anti-Semitic elements are undeniable, unfortunately confirm that it is too early to consider whether we have reached a positive turning point.

These are not scattered incidents, and this phenomenon is not limited to France. The annual report of the Global Forum against anti-Semitism mentioned a 20.5 percent increase in violent anti-Semitic incidents worldwide, highlighting the deterioration of the situation in some countries. According to the Anti-Defamation League, a total of 1,821 anti-Semitic incidents were reported in the United States in 2004, an increase of 17 percent over the 1,557 incidents reported during 2003. Human Rights First reported that in Great Britain, 532 anti-Semitic incidents were registered in 2004, an increase of 42 percent over 2003, including a record 83 assaults.

Even if comparisons between countries are always problematic from a strictly statistical point of view, the general pattern is clear: anti-Semitic incidents are on the rise all over the world.

The French government has decided to fight ruthlessly against anti-Semitism both at national and international levels. The philosophy and scope of the response is based on three pillars: punishing, educating and cooperating.

With respect to punishing: Our parliament beefed up the legislation, passing laws on 5 February 2003 and 9 March 2004 mandating tougher penalties for racist, anti-Semitic or xenophobia related offenses. Public prosecutors have been instructed to make full use of penalties provided for by law. Special prosecutors were designated in January 2005 to fight against racism and anti-Semitism. When it comes to the 387 anti-Semitic acts brought to justice in 2004, it must be underlined that 95 percent led to a penal response.

A special law of July 2004 permitted the banning of broadcasts in France of al-Manar TV in December 2004 and of Channel Sahar 1 in February 2005. France was the first country to take this step.

We also began an educational program. A ten-point program of action was presented in February 2003 that includes special teams in schools to identify and tackle incidents, provides tougher penalties for offenders, and calls for handbooks for children and teachers. The distribution of a "Republican Booklet" was also decided on in order to prevent racist and anti-Semitic acts.

As a result of a proposal made by France within the framework of the Council of Europe and adopted in October 2002 by all member countries, a Holocaust Memorial Day is now observed in French schools on 27 January, the anniversary of the liberation of Auschwitz. An agreement was signed on 29 March 2004 with internet service providers to prevent the internet from being used for incitement to racial hatred and violence.

All these efforts are coordinated and monitored by an inter-agency committee (CIRA), set up in November 2003 at the initiative of President Chirac.

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# Britain and the fight against anti-Semitism

*The world has changed in the 60 years since George Orwell wrote his essay on anti-Semitism, yet anti-Semitism is still with us. Britain is doing much to combat racism in all its forms, said British ambassador to Israel Simon McDonald in an address to the IAJLJ in Eilat.*

Simon McDonald, CMG

In his 1945 essay on anti-Semitism in Britain, George Orwell expressed his belief that anti-Semitism is part of a larger problem of nationalism. "But that anti-Semitism will be definitively cured, without curing the larger disease of nationalism, I do not believe," wrote Orwell in conclusion to his essay.

Britain has changed enormously in the 60 years since Orwell wrote these words. It is proud of its multi-cultural society, of the different languages and dialects one hears in cities and towns throughout the British Isles, of the different religions practiced freely, of the huge variety of traditional foods and music the new arrivals brought with them.

Yet anti-Semitism, racism and xenophobia persist.

The Community Security Trust, the body that advises and represents Britain's Jewish community on matters of anti-Semitism and general security, recorded 532 anti-Semitic incidents in Britain in 2004. This was the highest annual total since records began in 1984, up 42 per cent on the previous year's total of 375 incidents.

My government deplores all forms of hate crime. Racists and trouble-makers are not tolerated. The police respond robustly to all reports of hate crimes, and work together with local authorities and community organizations to ensure the safety and security of all our communities.

Britain passed the Race Relations Act in 1976. This law made it illegal to discriminate against anyone on grounds of race, colour, nationality (including citizenship) or ethnic or national origin. Jews and Sikhs are already protected under this law, as they were included in the definition of a racial group, but other religions were not.

The government is now seeking to extend the existing criminal offence of incitement to racial hatred contained in the Public Order Act of 1986. Under the

government's Race and Religious Hatred Bill, incitement to religious hatred will become an offence. On 11 October 2005, the bill came up for its second reading in the House of Lords.

The new law will provide protection against extremist groups who seek to incite hatred against religious communities, and will also provide protection against the activities of a small number of extremist clerics whose aim is to stir up hatred against the "infidels."

On an international level too, there is now less tolerance than ever before of racism and anti-Semitism.

Annually, the UN adopts a resolution calling for the elimination of all forms of religious intolerance. For the first time last year, the resolution was adopted with specific mention of anti-Semitism. The resolution 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."

By unanimous vote, the UN on 1 November 2005 adopted a resolution, G.A.Res. 60/7 (2005), that designates 27 January as an International Day of Commemoration in the memory of the victims of the Holocaust.

The Holocaust was a defining tragedy in modern history. A third of the population of the Jewish people was murdered in the Holocaust. Countless members of other minorities were also killed.

UN member states were urged to develop educational programmes that will inculcate future generations with the lessons of the Holocaust in order to help prevent future acts of genocide.

The resolution, which passed without a single objection, clearly states that the Holocaust will forever be a warning to all people of the dangers of hatred, bigotry, racism and prejudice.



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## A time for sober reflection

*We cannot realistically expect that individual nations or the community of nations will launch sustained offensives against anti-Semitism. But if we are wise, if we focus on the principal enemies, if we keep up a relentless campaign on the world stage, we have every chance of success. The time has come to think differently and to act differently.*

Efraim Halevy

The prime task of an intelligence chief is to precisely define the threat here and now, and to prove its existence, its substance and its parameters, including who or what is under threat. And, once the threat and its target have been satisfactorily determined and the potential damage that can be caused has been established, then the catalog of remedies and responses can be drawn up and presented for approval and subsequent implementation.

It is that simple. Or is it?

Let us try first to define the threat. Is the threat of anti-Semitism in the twenty-first century to be defined solely and narrowly as a physical threat to the well-being of individual Jews and Jewish communities the world over? Or should we broaden the meaning to include the propagation of hatred of the Jew regardless of whether it is translated into concrete action? Should we include any discrimination on the basis of race – in this case the Jewish race – in the confines of the threat? Is anti-Semitism one and the same in Britain or in France or in the United States or in Russia? Is hatred of Israel and of Israeli Jews partly based on strands of anti-Semitism, and if so does Israel lie under a threat of anti-Semitism? As we think and wander farther afield can we not reach a point where the area that we cover is so wide as to defy effective classification?

From a pure intelligence standpoint, and if I may say so not only from this professional angle, the wider the definition, the more nebulous and imprecise does the threat become. The wider you cast your net, the more it will fail to catch any fish.

In today's world, the pressure on intelligence communities to add to the ever lengthening list of menaces to society and to the international order of the free world defies imagination. There is the threat of international terror, the Islamic fundamentalist one occupying the forefront. There is the danger of proliferation of weapons of mass destruction; the growing threat to life

on earth because of global warming; and the threat of AIDS, the disease that is threatening extinction in Africa. There are also threats from hurricanes, tidal waves, earthquakes and related natural phenomena that could destroy the lives of tens or hundreds of thousands of inhabitants on our planet. Granted, some of these threats are not man-made, but this does not absolve us from recognizing them, and by inference demanding that they be confronted and neutralized.

The Director of National Intelligence in the United States, John Negroponte, recently approved a list of priority targets for the intelligence community of the leading country of the free world. The spread of democratization was very high on the list. I do not think that anti-Semitism figured on the list and, I doubt if, in all sincerity, any person in this hall would expect this to occur.

There will be those who say that the existence of other threats, however immense or potentially devastating, does not take us off the hook and does not permit us to stop and heroically blow the shofar of warning against anti-Semitism in its broadest sense. That may well be and I think we can rely upon certain groups and organizations to persevere with their traditional activities against this centuries-old scourge. This blow and counter-blow between Jew haters and detractors and those who carry on the daily struggle against the anti-Semites will probably go on forever. I do not question that this is so.

But intelligence is also the ability and the requirement to list threats in some order of priority and to propose to the leaders of society and state what part of the capability of any nation or society be dedicated to combat each menace. The longer the list the more the selection of priorities becomes acute. Can we realistically expect that effective combat against anti-Semitism will play a serious and sustained role in the daily activities of any government? And when I speak of effective roles and measures, I do not think of public statements of condemnation; of



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these there are and will be an abundance. Neither do I think of this or that measure to overcome bias and discrimination. I also expect local and focused law enforcement against violent outbreaks in problematic trouble spots. What I am saying is that we cannot realistically expect that individual nations or the community of nations, the international scene, will launch high-powered and sustained offensives of an operational and practical nature against this "threat." That's because so many more items on the survival agenda of the world precede the disease of anti-Semitism.

In view of this, has the time not come when we should seek to define the threat more narrowly and precisely? Should we not seek to link the fight against anti-Semitism to a conflict that is high on the international list of priorities? Has the time not come to concentrate efforts against a prime threat, a prime target, in the belief that if we prevail, if we succeed in defeating the "enemy" we shall, at the same time, be dealing a mortal blow to this age-old curse?

I think the time is opportune. First, let us say loudly and clearly that the existence of a flourishing State of Israel is a triumph against the forces of anti-Semitism the world over. That the Jewish people, so often hated and despised and hounded for close to two thousand years, has achieved the impossible and has revived its national and territorial independence. That Israel's very existence is the ultimate denial of anti-Semitism. Second, let us declare to all who will hear that anti-Semitism is not a mortal threat against Israel. Moreover, the power and vitality of the State of Israel are not only a source of pride to the majority of Jews the world over but also a beacon of strength and security. The existence and vitality of Israel have diminished the threat of anti-Semitism world-wide, and insofar as anti-Semitism has focused its aim on Israel, its weaknesses and limitations have over time become ever more pronounced. And third, that Israel is today, as never before, not only a respected member of the community of nations but also a key partner in the ongoing struggle of the free world against the forces of evil and hate, the same forces that are currently trying to undermine the very fundamentals of sane and progressive society.

THERE ARE TODAY twin movements confronting the free world and presuming to jeopardize its existence. One is a non-state group, al-Qa'eda, which has vowed to destroy the political, social and defense fabrics of the United States and its allies, to overturn the so-called infidel regimes of the Arab world, and to cause the destruction of the State of Israel and the

Jewish people. The second is a state, Iran, whose official policy is to wipe Israel off the face of the earth. These two movements do not draw their strengths from identical sources and there is much that lies in conflict between them. One is an 'anti-state' stream within Islam, the other a state-based stream in Islam. As well, one is Sunni and the other is Shiite, the two major conflicting religious dynasties in the Muslim world. Some of their goals are common and some are disparate. The differences were highlighted in the initial two years of the Afghan war following the events of nine-eleven, when the issue of refuge for Taliban and al-Qa'eda operatives fleeing from the war zone into Iran became very complex for the authorities in Tehran. They could not forget that not long before Iranian personnel had been cruelly and brutally murdered by Taliban forces that had defeated Iranian-supported Afghans. The bloody defeat of Iran and the assassination of senior Iranian intelligence officers in Mazar-i-Sharif in northern Afghanistan in 2001 remains a wound that will not heal easily or soon.

I have mentioned these aspects because I would like to illuminate the type of assets that we can deploy in confronting these evils. If we are wise, if we focus on the principal enemies, if we keep up a relentless campaign on the world stage, we have every chance of success. If we divide the enemy, if we harness international public opinion to support this war against al-Qa'eda and against the retrograde Iranian regime, we shall be moving the world in the right direction.

Iran is extremely sensitive to international public opinion. I saw this "on the ground" as Israel's ambassador to the European Union in the mid and late nineties. It mattered to them what the European parliament thought about them. They cared about it and invested much effort in influencing individual parliamentarians and parliamentary groups to accept them and empathize with them.

So, my proposal is to prioritize your fight against anti-Semitism and to link it to the larger struggle of the free world against international Muslim terror and against the danger of proliferation of weapons of mass destruction. Both are crucial threats to the world in which we live. Both are tainted with anti-Semitism and both lend encouragement to anti-Semites. Their resounding defeat will deal a mortal blow to anti-Semites wherever they might be.

NON-GOVERNMENTAL ORGANIZATIONS can and must play a role in this war, this third world war. We as Jews are a partner, a reliable partner in this

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# Competitive taxation in Israel

*Taxation in Israel, as in most countries, is a complex matter. As globalization increases, Israel is attempting to provide a more equitable tax regime, one that improves the country's competitiveness in world markets while maintaining concern for lower income groups.*

Jacky Matza

The Israel Tax Authority wields at present a significant amount of economic power. While in the past the State would invest significant efforts in order to meet the annual tax collection target, today, as of November 2005, the Tax Authority is due to collect \$750 million in excess of the annual tax target. Indeed, taxes are a significant factor that affect the economy, business, and the rate of economic growth. For this trend, one which promotes economic growth, to continue, it is incumbent on the Tax Authority to keep abreast of developments in business practices. On the one hand, we have to reach a situation in which the tax burden does not constitute an obstacle to business activity. On the other hand, we must examine how taxation responds to tax planning, to new financial instruments, and to the phenomenon of globalization. The obvious conclusion is that tax laws cannot be allowed to remain static.

At times, criticism has been raised that the pace at which tax laws are changing is too fast, while the rate at which these changes are sublimated by the citizens of the country and their representatives – accountants, lawyers and tax consultants – is slower, and does not keep up with legislative change. However, for the tax laws to adapt to business processes, they must constantly develop parallel to business development. Just as business cannot keep going merely by staying in place, so too the tax laws cannot remain unchanged. This is not only logical – it's also both appropriate and desirable.

There are a number of areas falling under the responsibility of the Senior Deputy Director-General of the Tax Authority that bear directly on competitiveness. These include pre-tax rulings, international taxation, and the Encouragement of Capital Investment Law. Let me start with these specific areas, and then I would like to move on to a general overview of the Israeli tax system, in light of competitiveness considerations.



The first area is that of pre-tax rulings, taxation rulings that attempt to provide a response to the tax implications of business transactions that have not yet taken place. In Israel, commencing in 2006, the Tax Authority established a department to provide a response to any transaction that might raise difficulties from a tax perspective. Such bodies operate in developed nations throughout the world. Here in

Israel we have adopted a model similar to the American one. It is perhaps even more user-friendly, in the sense of the range of issues for which we are prepared to determine the Authority's position, even before the transaction has been carried out. The aim of this process is to allow both Israeli and foreign investors to examine their tax liability prior to carrying out the transaction, and to create a level of certainty regarding the tax implications of such transactions. Moreover, during 2006, the Tax Authority will publish all of its

taxation rulings on the Internet and in a quarterly summary in order to create transparency. In our opinion, transparency and certainty regarding taxes are essential tools for reducing friction between the taxpayer and the Tax Authority as well as reducing risk on the part of investors.

A second area is that of international taxation. The Tax Authority has an international tax division that reports to the Authority's senior deputy director-general for professional matters. This division not only provides answers in the area of international taxation, but also tries to keep abreast of tax legislation in other countries, so that we can be at the forefront of countries where taxation does not constitute an obstacle to business activity. We cannot compete with the offshore jurisdictions, but we would like to adapt, as far as possible, to the countries of the OECD – which include England, the United States, France and Germany – and those of the European Union, not only in terms of tax rates but also in terms of other processes that will be detailed below. Let's look at the participation exemption. This is a

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model that has been adopted by a large number of European countries, and has been similarly adopted in Israeli tax law. This is a regime that establishes a tax exemption for holding companies established in Israel. The exemption will apply to dividend income from qualifying subsidiaries and to income derived upon their sale. Foreign shareholders in the holding company will benefit from a low tax rate applied to dividends from the holding company.

A third area for which the senior deputy director-general for professional matters is responsible is the Encouragement of Capital Investment Law. This law relates to concessions given to both Israeli and foreign investors who establish factories in Israel, the output of which is sold in a large number of markets. The tax concessions under the law are given on the basis of various factors, among them the location of the production plant. However, even businesses that are not located in outlying areas can benefit from tax concessions, provided that they operate industrial plants or hotels.

LET ME MOVE on to more general issues. The Israeli tax system is undergoing a number of developments aimed at encouraging growth and competitiveness. The Income Tax Ordinance distinguishes between ordinary income, that is, ongoing income – such as from business, salaries, rentals and interest – and capital income deriving from capital gains. From 1965 to January 2003, tax rates on ordinary income in Israel have been the same as those applying to capital income. On 1 January 2003, however, Israel underwent a tax revolution, one of whose principle elements was the change to different tax rates for capital income. While for ordinary income the tax rates are the full tax rates, which at the highest bracket approach 50 percent, for capital income – that is capital gains – the tax rate was reduced significantly. It currently (2005) stands at 25 percent for capital gains on assets not traded on the stock markets, and 15 percent for capital gains made on the stock market (today the rate is 20 percent). A significant reduction in tax rates for capital income is a process occurring in most countries, wherever a distinction is made between tax rates on capital income and those for ordinary income. This is the model adopted by the State of Israel in recent years, taking steps that seem to contradict the outcome.

The State of Israel is also taking serious steps to reduce taxes. In the 1970s, when there was a tax shortfall in Israel, the natural response was to raise taxes. This solution, of raising taxes, was one that at

first glance seemed appropriate and correct, but in fact had the opposite effect. As a result, Israel has in recent years chosen a radically opposite model and reduced taxes significantly. In my opinion, the results indicate that this is the right solution. Together with the head of the State Revenue Administration, I have, in recent months, headed a committee whose objective is to examine the tax laws in Israel, and to develop a five-year tax plan with the aim of determining what the tax policy will be in 2010. The outcome of this committee's work was legislation that passed the Knesset in September 2005 and which came into effect on 1 January 2006 – Amendment No. 147 to the Income Tax Ordinance [New Version], 5721-1961 (hereinafter “Amendment 147” and “the Ordinance”). This legislation establishes not only what will be in 2010, but a modular program that establishes tax policy until then. The cost of the program will be, at its peak, more than NIS 11 billion, which is indeed a significant reduction in taxes. In my opinion, the most important element in the program is in the area of tax rates. The tax rates applying to companies in Israel were, up to two years ago, 36 percent. The Tax Authority is about to carry out a gradual process, formalized in legislation that has already been adopted (Amendment 147), whose end result will be that corporate taxes will be reduced such that in 2010 the corporate tax rate will be 25 percent.

This change certainly constitutes a revolution in the rates of corporate tax in Israel. There may be some who feel that the rate of change is too slow, but we also have to take into account the budgetary costs, and that is the reason for making the process a gradual one. Nonetheless, it is clear that, at the end of the day, in 2010 the tax rate will be a low one. I don't want to suggest that it could compete with all the countries of Europe. For example, the company tax rate in Lithuania is currently 13 percent, and in some other countries, particularly in Eastern Europe, it is also very low.

What I mean when I speak of competitiveness is that Israel must compete with other countries in the world. In the context of globalization, it's impossible to compete with the lowest tax threshold that exists, since we simply cannot go that low. In those countries where corporate tax rates are low – indeed, where tax rates in general are low – it is important to look at how their national budget is constructed, and the structure of their national revenues. In Israel, more than 80 percent of government revenue is from taxes. Other state revenue – a relatively smaller pro-

portion – comes from privatization and from dividends paid by government corporations, but the bulk of the revenue, as I have said, comes from taxes.

In addition to corporate tax, which is due to be reduced to 25 percent, the tax rates for individuals, whose highest bracket is 49 percent, is to be reduced to a maximum rate of 44 percent, which will include both income tax and National Insurance payments. Is this the appropriate tax rate? No. I think that if we could reach a tax rate for individuals of 35 percent, this would be the right tax rate. I was told by the Lithuanian tax authority that the tax rate paid by individuals was currently 15 percent for certain income items and 33 percent for the rest. So, 35 percent or 37 percent tax on individuals in the top tax bracket – that's something that should be taken into account.

It seems to me that the problem in the State of Israel in regard to individual tax rates is not just the rate of tax, but how quickly one gets to the tax threshold. Today, in Israel, one can reach the maximum tax rate on an income of \$7,000 per month. That's pretty quick. In the United States, the maximum tax rate for individuals is not far from our own, but there it takes longer to get to the maximum tax rate. On the macro level, the problem expresses itself in the correlation between the tax brackets, and the tax rates paid by individuals. Even though this is an issue of taxation it also has definite social aspects.

What I find amazing is that 50 percent of Israel's population – more accurately, of households in Israel – don't even reach the minimum tax threshold, that is, a sum of about \$900 per month. In other words, half of the residents of the country don't pay income tax. Three deciles, the sixth, seventh and eighth, pay only 13 percent of the tax. Thus, it is only the top two deciles – the ninth and tenth – that pay 87 percent of the taxes in Israel. The problem with this is twofold. First, it involves a social gap. Second, as far as income taxes are concerned, the implication is that in order to reduce taxes, the only portion of the population that can have taxes reduced is the upper stratum of the population, those in the ninth and tenth deciles. And the reason for this is that five deciles don't pay any tax, and the next two pay only 13 percent. This is a problem for which, at present, I don't see a solution.

I would note that a committee has been set up to examine the issue of negative tax. This is an arrangement that has been adopted in a number of countries, providing that those of the population who do not reach the minimum tax threshold not only do

not pay income tax, but they actually receive a tax credit, and, ultimately, a tax refund check.

The phenomenon of tax evasion is not unique to Israel; it exists to a significant extent in other countries as well. Nonetheless, it appears that in recent years a major psychological transformation has taken place. If, in the past, tax evaders were not ashamed of the fact, today Israeli society has begun to realize that tax evasion harms all the country's citizens, who have to fill the tax shortfall from their own pockets.

A FURTHER AREA that has undergone a systemic change is the taxation system, which changed from a territorial system to a personal system. This is a significant change.

Until 1 January 2003, the system used for taxation in Israel was a territorial one. That is, Israeli residents were liable for tax only on income generated within the boundaries of the state, while residents who produced income outside the state, for example, from interest or rentals abroad, were not liable for tax. There were a number of exceptions, which were almost never applied; for example: an Israeli resident carrying on a trade or profession outside of Israel, identical to that which he carried on within the country, was liable to be taxed in Israel on his overseas income.

On 1 January 2003, Israel moved to a personal system. An Israeli resident is liable for tax on all his income, regardless of whether it was generated within or outside the borders of the state. It's clear that the question of who, exactly, is an Israeli resident is a very difficult one to answer. Israeli residence is not determined by holding an Israeli identity card, but by considering where the center of the individual's life is: where his friends are, his family, his social and economic interests. This is, of course, provided that he has indeed lived for some period in Israel. The breakeven point, between being deemed an Israeli resident or not, is a question of fact. However, to make things easier for us, the law establishes a legal presumption. In defining the term "resident of Israel" in Section 1 of the Ordinance, the law states that an individual will be deemed a resident if he was present in Israel for 183 days or more in a year. This presumption can be overturned, either by the individual or by the Tax Authority. Naturally, there are exceptional cases, and these are examined individually, but this presumption is certainly one that makes things easier for the parties in any official proceedings.

A foreign resident who immigrates to Israel is deemed an Israeli resident, and so he is also liable for

tax, on a personal basis, on passive income from overseas. If a resident of France, for example, immigrates to Israel and has interest income from deposits in France, he will, in fact, be liable for tax in Israel from the date on which he became an Israeli resident.

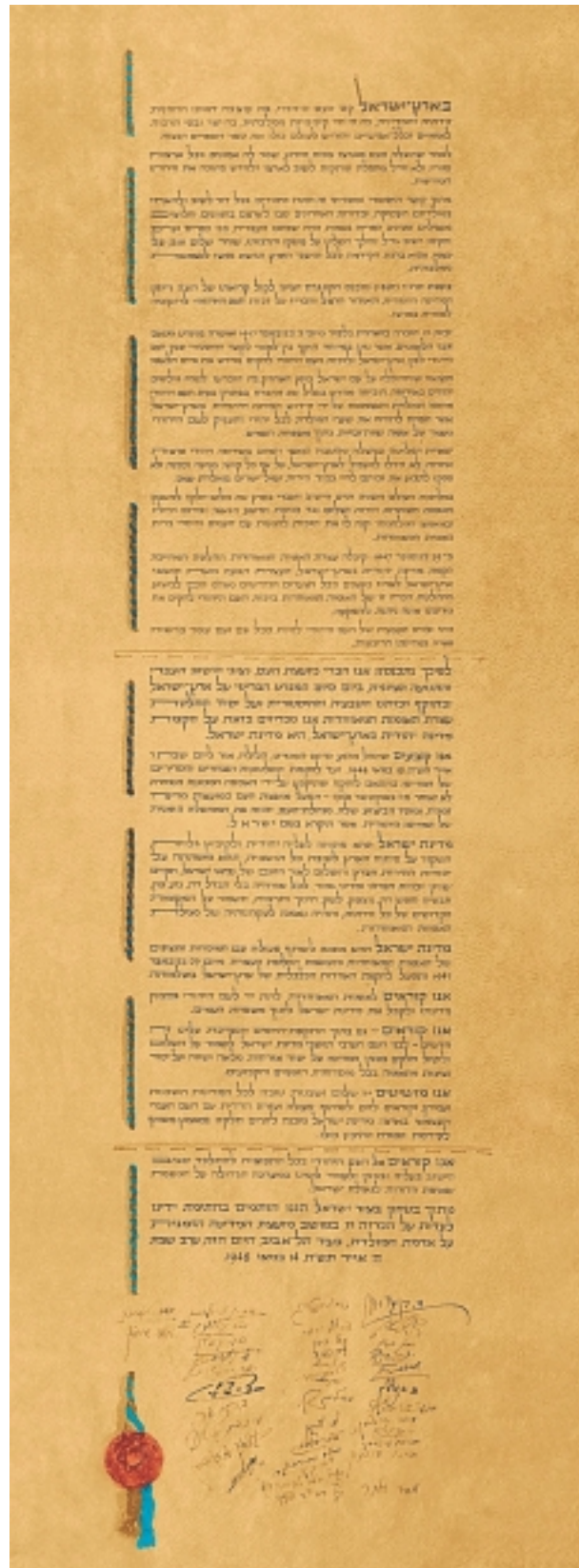
However, since Israel is a Jewish state that welcomes new immigrants, the law provides for certain concessions for new immigrants. Thus, even though our theoretical French immigrant is liable for tax by virtue of his now being an Israeli resident, his passive income from abroad will be exempt from tax in Israel for five years from his date of *aliyah*. By the way, other countries don't offer the same concessions to immigrants; these are granted here because Israel has always been a country that welcomes *aliyah*.

One last point is that Israel has no inheritance tax or gift tax, with the exception of a tax on non-cash gifts given by Israeli residents to overseas residents. That is, an Israeli resident who gives his daughter, also an Israeli resident, a gift of an apartment is not liable for tax. An Israeli resident who gives his daughter, an overseas resident, a cash gift will not be liable for tax either. The only thing liable for gift tax is an asset given by an Israeli resident to an overseas resident, since, when the overseas resident sells that asset overseas, there can be no tax liability in Israel. The solution to this flight of tax is to make the giver of the gift liable for tax on the gift when the gift passes from the Israeli resident to the overseas resident. This is the sole exception; other gifts are not liable for tax and, there is no inheritance tax.

In this lecture, my intention was to indicate the directions in which the Tax Authority is heading: offering incentives to the business world, providing tax concessions to immigrants and attempting to divide the tax burden more fairly and equitably, something that, in the end, could help narrow the social gaps in Israel.

*Jacky Matza, LL.B., C.P.A., is Director-General of the Israel Tax Authority. At the time of writing, he was Senior Deputy Director-General for Professional Matters at the Israel Tax Authority. This address was delivered at IAJLJ's Eilat Conference, on 11 November 2005.*

Following the Jewish calendar, Independence Day was celebrated in 2006 on May 3. Pictured here is *Megilat Ha'atzma'ut*, the Scroll of Independence, as it is called in Hebrew. (Photo: Mark Neyman, Israel Government Press Office.)



# Israel as a trust and business center

*Israel has recently gained important advantages as a financial center through its adoption of a new tax system and a new Taxation of Trusts Law. The latter became effective at the beginning of 2006. The changed environment can benefit foreign and Israeli residents and has implications for a local trust industry.<sup>1</sup>*

Alon Kaplan and Lyat Eyal

## I. TRUSTS UNDER ISRAELI LAWS

The trust institution has been recognized under the Israeli legal system since the 1920s. The enactment in 1923 of the Charitable Trusts Ordinance set out the rules for a public trust. Private trusts were not regulated by statute until 1979 when the 1979 Trust Law (*hereinafter*: the "Trust Law") was enacted.

The Trust Law, which regulates various forms of trusts, resembles the Anglo-American model, although the general applicability of this law is wider. A trust has no necessary form, and no particular procedure is necessary to form a trust that falls within the law. A trust purports to cover any situation in which someone is empowered to deal with property for the benefit of another. Whether a trust arises within a certain legal relationship is not subject to the will of the parties. It is the contents of the relationship that reveal whether a trust arises.

### A. Most frequently used trusts

Trusts may be used for a variety of estate planning purposes in the manners set out below:

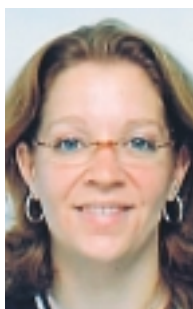
#### 1. Trusts created by law

Trusts may be created by legislation. Under this category fall all statutory fiduciaries, many of them appointed by the court, such as guardians, liquidators and receivers of companies, executors and administrators of estates.

#### 2. Public Endowments

A public endowment is one with an objective to further a public purpose. The beneficiary is neither a

particular person nor a certain institution. It may be a specific group of persons with a particular shared characteristic, for example, a group of children, or a group of disabled persons. The law provides examples such as education, culture, religion, scholarship, science, art, social welfare, health or sports as constituting a "public benefit." A public endowment does not receive the status of a legal entity.



#### 3. Foreign trusts

The concept of private trust under the Trust Law is widely known and used by professionals in Israel. However, its main application is in the capacity of nominee agreements and trust relationships created by law.

Israeli professionals tend to use foreign law trust structures or continental foundations for organizing private and business affairs where a common law form of trust is required.

The main reason for this usage is that the legal structures available under the Trust Law are insufficient. The establishment of a trust which would "skip" generations, often available under foreign trust structures, is not available in Israel. As a result, it is necessary to admit a settlor's will for probate proceedings in order to achieve the settlor's goal of creating a trust that will exist for a number of generations.

This situation leads professionals to advocate the establishment of trusts in foreign jurisdictions to be managed by non-Israeli trustees.

## B. Taxation of Trusts

The taxation of trusts was part of the overall tax reform in Israel. Due to the complexity of the topic, a special committee was appointed – the Committee for the Taxation of Trusts – to recommend how trusts should be taxed in Israel. Headed by Ms. Frida

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Israeli, CPA, a senior officer of the Tax Authority, the Committee's members included public servants and senior practitioners from the private sector.

After long deliberations, the Committee published a report on 24 July 2003 presenting its recommendations. Based on the Committee's recommendations, with certain changes and modifications, the Taxation of Trusts Law was enacted in Israel and is effective as of 1 January 2006.

## **1. The Main Features of the Taxation of Trusts Law**

The law defines three types of trusts:

- a. A foreign resident settlor trust;
- b. An Israeli residents trust;
- c. A foreign beneficiary trust.

### **a. FOREIGN RESIDENT SETTLOR TRUST**

#### **(i) Definition**

A Foreign Resident Settlor Trust requires the following conditions: (i) the settlor must be a non-resident of Israel at the time of formation of the trust and during the tax year; or (ii) the settlor and the beneficiaries must be non residents of Israel during the tax year. This trust is designed either for non-resident family members of Israeli residents who wish to provide for their family in Israel or for foreign residents who wish to appoint an Israeli trustee, rather than trustees in various offshore jurisdictions, to manage family assets and wealth.

#### **(ii) Taxation**

A foreign resident settlor trust is viewed as the foreign resident personally, with the settlor's country of residence as the trust's residence, regardless of whether the trust is classified as revocable or irrevocable. The assets held by the trustee are viewed as though they were held by the foreign resident personally. As a result, the income of the trust is regarded as the income of a foreign resident. Trust profits that are not derived from sources in Israel are not taxable in Israel. Further, there are no reporting obligations in Israel.

In addition, the new law provides that a trustee who is a resident of Israel will not incur any tax liability or be obligated to submit tax reports with respect to the trustee's (i.e., the trust's) income that

would not otherwise exist had all of the trustees been foreign residents.

### **(iii) Israeli Resident Beneficiaries**

In Israel, as a country encouraging immigration, many residents have family members residing abroad. Income derived by a trust established by a foreign resident settlor for the benefit of an Israeli resident beneficiary is not likely to be taxable in Israel if the settlor of the trust would not be taxable in Israel on its income (i.e., income derived from sources outside Israel).

The foreign settlor trust for an Israeli resident beneficiary may be established either during the lifetime of the settlor or as a testamentary trust.

### **b. ISRAELI RESIDENT'S TRUST**

#### **(i) Definition**

An Israeli resident's trust is one where at the time of establishment: (i) at least one settlor and one beneficiary are residents of Israel; or (ii) during the tax year, at least one settlor or one beneficiary are residents of Israel.

In addition, a trust will automatically be regarded as an Israeli resident's trust if it does not match the definition of any other type of trust.

#### **(ii) Taxation**

An Israeli resident's trust is taxable in accordance with Israeli tax laws and in accordance with the relevant tax rates applicable to individuals.

The trustee is obligated to make the tax payments, and distributions of income to the beneficiary will be made after deduction of the taxes payable to the Tax Authority. The beneficiary will have no further tax liability and will be released from any obligations with respect to the payment of taxes on the distributions.

### **c. FOREIGN BENEFICIARY TRUST**

#### **(i) Definition**

A trust of a foreign beneficiary is one that is established by an Israeli resident for the benefit of a foreign resident beneficiary.

The assets and any income derived therefrom are taken out of the Israeli tax network.

Such a trust requires all of the following conditions:

- a. It does not fall within the definition of an Israeli residents trust;
- b. It is an irrevocable trust;
- c. All of the beneficiaries thereof are identified and are foreign residents; and
- d. At least one settlor is an Israeli resident.

## (ii) Taxation

Similar to the foreign resident settlor trust, a foreign beneficiary trust is regarded as the foreign resident personally and will be taxed in the same manner in which an individual foreign resident is taxed in Israel. If the assets and the income derived therefrom are from sources outside Israel, there should be no taxation in Israel. If the assets or the income derived therefrom are from sources within Israel, the double taxation treaty that would have applied had the beneficiary held the assets directly may be applicable. As in the foreign resident settlor trust, the appointment of an Israeli trustee has no relevance for the purpose of taxation.

A beneficiary of a foreign resident settlor trust who immigrates to Israel renders the trust a trust of Israeli residents and therefore taxable in Israel, although the trust may enjoy certain tax benefits permitted by law for new immigrants.

## II. THE UNDERLYING COMPANY IN ISRAEL

The Taxation of Trusts Law provides for the establishment of an underlying company within Israel or abroad. The underlying company is used for the legal separation of the trustee's personal assets and the trust's assets.

An underlying company is a separate legal entity holding the trust's assets for the trustee directly or indirectly. This entity can be a company, foundation, partnership, etc. Every entity that possesses assets that are not its own, but are the trustee's assets by virtue of his duty, fulfills the definition of an underlying company.

Before the new Taxation of Trusts Law was legislated, every Israeli trustee holding such a company would, through the "management and control" test, cause it to be regarded as an Israeli company resident in Israel, and subject it to corporate tax and reporting requirements in Israel. The new law provides that this under-

lying company is now regarded as a "pass through entity" and the "management and control" test is no longer relevant. The Israeli tax authority will "ignore" the company and treat the assets and the income derived therefrom as if they were held directly by the trustee.

As the trustee of a foreign settlor trust is not subject to tax or reporting requirements, the trustee may utilize an underlying company, in Israel or abroad, to hold the trust's assets. Neither the trustee nor the underlying company is subject to tax or reporting obligations on the income derived from sources outside Israel. Where the underlying company derives income from sources within Israel such income is considered earned by a foreign resident.

## Conclusion

The concept of an underlying company is simple and advantageous in constructing the most efficient trust arrangement possible. Until now, settlors and practitioners preferred appointing foreign trustees out of concern that having an Israeli trustee could create tax liabilities in Israel. Following the new law, the place of residence of the trustees will not affect the taxation of the trust. It is the tax status of the beneficiary and the settlor that will determine Israeli tax liability.

This is an important development in the Israeli tax system. It provides opportunities to both Israeli and overseas trust companies and trust and estate practitioners. The appointment of Israeli trustees is encouraged by the Income Tax Authority. Not only will it advance the use of domestic professional services, but it will also enable the Income Tax Authority to communicate directly with trustees. Foreign trustees seeking assistance and better communication with the tax authorities may co-operate with Israeli trustees in order to fulfill their duties in Israel.

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## Note

1. Part of this article was published in 38 *New York State Bar Association (NYSBA)*, Trusts and Estates Law Section Newsletter (2005).

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## France

*From page 12*

The Commission, chaired by the prime minister, includes the ministers of the interior, of justice and of education. It meets every month to monitor the situation and to make proposals. All actions and decisions are taken in close coordination with the CRIF, the umbrella organization of French Jewish organizations.

In December 2004, a High Authority against Discrimination and for Equality was also created.

Last, cooperating with other democracies: We have been promoting a strengthening of the cooperation between countries to better fight anti-Semitism. We supported and took an active part in the initiatives launched in the European Union, the Council of Europe and the Organization for Security and Cooperation in Europe. France is one of the very first signatories of the Council of Europe Convention on Cybercrime as well as of the Additional Protocol on fighting racism and xenophobia. We have also been promoting an international action to tackle the issue of anti-Semitic messages on the Internet. A conference took place in Paris on 16 and 17 June 2004 at which decisions were taken both to prevent the spreading of these kinds of messages and on initiating international cooperation on legal rules to implement.

We welcomed the decision by the UN to adopt G.A. Res. 60/7 (2005) of 1 November 2005 to commemorate the liberation of the Auschwitz-Birkenau concentration camp on January 27 of this year. With our European partners, we played an active role in the vote on this resolution establishing a Yom HaShoah.

In conclusion, French policy can be summarized in two words: Zero Tolerance. We can not claim 100 percent results, but be assured that the French government is making 100 effort to combat this scourge.

The Israeli authorities are aware of our efforts. During his last visit to Paris, last July, Prime Minister Ariel Sharon declared that in the fight against anti-Semitism France was an "example to be followed by other European countries." That statement was recently repeated in Paris by the Israeli foreign minister.

To conclude, let me quote President Chirac who stated on 17 November 17 2003: "Any attack directed against a Jew in France is an attack directed against the whole of France."

*His Excellency Gérard Araud is French ambassador to Israel.*

## Britain

*From page 13*

In Britain, Prime Minister Blair personally instated Holocaust Memorial Day in 2001, and it is a matter that is close to his heart. The day explicitly refers to the importance of confronting not only anti-Semitism, but also racism and other forms of prejudice and persecution, including Islamophobia. It is a broad and inclusive event relevant for all people in Britain. Each of the annual events since the inception of Holocaust Memorial Day has been attended by members of all faith communities. It seeks to draw lessons from those horrendous, dark days for today's generation.

The world's reaction to the ridiculous statements by Iranian President Ahmadinejad that Israel should be wiped out is further proof of international intolerance to such blatant manifestations of hatred, especially against the Jewish State of Israel.

A statement released by European leaders in reaction to the president's comments noted that "The fact that these comments were made on the same day as a horrific attack on Israeli civilians should reinforce the lesson that incitement to violence, and the terrorism it breeds, are despicable and unacceptable acts."

As my Prime Minister said, the comments were "completely and totally unacceptable."

The world has indeed changed in the 60 years since George Orwell wrote his essay on anti-Semitism. Unfortunately, anti-Semitism is not among the problems that have disappeared in this time.

Britain owes a lot to its Jewish community, and it is proud that over a quarter of a million Jews call it home. Through legislation, law enforcement and community cohesion work that aims at better understanding between different communities, my government will continue to fight against anti-Semitism, and all forms of hatred.

*His Excellency Simon McDonald, CMG, is Britain's ambassador to Israel.*

## Human Rights Council

*From page 9*

solely on respect for freedom of religion and belief, as distinct from other fundamental freedoms such as freedom of expression, seems random and unbalanced. Notwithstanding this apparent selectivity, this freedom falls within the broader concept of “the right to freedom of thought, conscience and religion.” As expressed in Article 18 of the ICCPR, this broadly defined and fundamental freedom is subject to the essential qualification that in its enjoyment, “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Further, it should never be forgotten that this freedom “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.”

Both the newly created Council, like its predecessor the CHR, should also never be allowed to forget the cardinal principle contained in the 1948 Universal Declaration of Human Rights (Article 29, Paragraph 2) that applies to the enjoyment of all human rights, namely that in the exercise of his human rights and freedoms “everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Further, IAJLJ shares the concern of these NGOs as to the implications of the interpretation to be given in operative Paragraph 11 of the draft text with respect to the participation of NGOs “while ensuring the most effective contribution of those entities.” NGOs have played a prominent and valued role in responsibly reporting on alleged human rights denials or abuses of human rights. Any unjustified interference with that role would be a serious regression in ensuring respect for human rights by UN member states.

*Daniel Lack is IAJLJ Permanent Representative to the United Nations Office at Geneva.*

## Sober reflection

*From page 15*

war, and we are all on the “right” side. Just as in World War II Jews enlisted alongside all others and fought bravely to defeat the enemy, so must we join the forces of good today and relegate other considerations to a lower place on our list of priorities.

Let us not appear as a people always preoccupied with its own particular fears and always exhorting others to pay attention to the way we are being treated. Let us stand up as equals, as a proud and self-confident nation conscious of its hard-won independence, fortitude and capabilities. We should never be headstrong and arrogant but neither should we plead on the verge of helplessness for our rights and our place under the sun.

I put it to you that the International Association of Jewish Lawyers and Jurists could play a role in transforming the struggle against anti-Semitism to conform to the conditions of the twenty-first century.

In the last two thousand years or more we have never been stronger, never more relevant for international survival and never been less isolated than today. Has the time not arrived for us to adjust our evaluations of the threat and our executive assessment of our own capacities and strengths to modern times?

The time has come to think differently and to act differently. The challenge is yours.

*Efraim Halevy was head of Mossad, Israel's intelligence service, from 1998 to 2002. Since 2003 he has headed the Center for Strategic and Policy Studies at the Hebrew University of Jerusalem.*

## The Hamas Charter

From page 6

was reiterated in both the platform and the statements of its leaders during the campaign, as was its commitment to “resistance” (i.e., terrorism), proof of the charter’s relevance to the present time.

Nevertheless, there is a difference between the two documents, primarily in emphases and the way certain issues are dealt with. The charter relates to Hamas’s fundamental ideological position, while the election platform stresses its desire for civilian reform in areas such as corruption, the war on unemployment, the status of women, political rights, etc. They are all dealt with as part of “Change and Reform” (*al-Taghyir wal-Islah*), Hamas’s slogan and the name of its political party during the elections.

1. Supplements to and clarifications of the *Qur’an*, originally an oral tradition, later written down and codified.

2. Slightly different versions can also be found on the Internet.

3. The Hamas platform made public during the Palestinian Legislative Council election campaign was based on the charter, made relevant to the internal Palestinian arena (with great emphasis placed on the need for internal reforms). For further information see CSS Special Bulletin *News of the Israeli-Palestinian Confrontation* (1-15, 2006).

4. The founder of the Muslim Brotherhood and an important figure in the Hamas *shaheed* pantheon, apparently killed by Egyptian security forces in 1949.

5. Abdallah Azzam was a Palestinian from the village of Silat al-Harithiya near Jenin, who was Osama bin Laden’s ideologue, and later became a popular figure for Hamas. For further information see CSS Special Bulletin *Who is Dr. Abdallah Azzam...* His book defining jihad as the personal duty of every Muslim was published in 1984 and it is reasonable to assume it influenced the Hamas charter.

6. In reality, throughout its history Hamas has refused to obey the Palestinian Authority leadership, both when Arafat was in charge and now under Abu Mazen. Its policy is one of independent terrorism and the refusal to disarm, and it has established itself in the PA-administered territories as a kind of alternative Palestinian Authority so that when the time comes, it will be able to take over the government, as indeed happened.

## David Irving

From page 7

even hidden. Their aim is to incite against Jews, who according to their claim have invented the Holocaust, or encouraged it, in order to get a state of their own. This is exactly the kind of incitement that the international community decided to criminalize in its conventions and covenants.

And finally, education is important, in schools and in universities, but as long as persons like David Irving are free to publish their false views, there may always be those who would believe them and adopt them. The inclusion of facts about the Holocaust in the curriculum of schools and universities does not prevent teachers from presenting opposite views, for there is no supervision in the classroom. Even if properly presented, what happens if a student is later exposed to a book denying the Holocaust? Would he then have to make his own judgment and choose between two versions?

A cleric in Norway once told me that even though the Holy See has now absolved the Jews of the blame of crucifying Jesus, as long as teachers in classrooms teach children that the Jews crucified their Savior, the Jews will still be perceived by those children as Christ killers. We cannot supervise all teachers, he said.

Last but not least: throughout history Jews have suffered from lies and libels, but their reaction has never been violent. Jews don’t revert to burning embassies. Thus, courts of law are a proper public forum to confront those who spread such lies. But private persons do not possess the means to initiate such proceedings, and Jewish communities hesitate to do so. The effectiveness of properly conducted court proceedings was recently made clear at the London trial between David Irving and Deborah Lipstadt. This trial was indeed mentioned in some of the articles as an example of the success of civil proceedings versus criminal proceedings, including the trial in Austria. Yet the trial in London was not initiated by Deborah Lipstadt. It was a libel suit initiated by David Irving, and considering the financial damage he suffered it is doubtful whether another denier will soon travel that same path. Should we then leave the initiative to the Holocaust deniers, or should we encourage authorities to use available legal means to expose and punish those who persist in their blatant incitement against the Jewish People?

*Judge (retired) Hadassa Ben-Itto is Honorary President and Past President of the International Association of Jewish Lawyers and Jurists.*

1. 31 *Kitvei Amana* (Israel Treaty Series) 269
2. 25 *Kitvei Amana* 547
3. G.A. Res. 60/7 (2005)

# Reflections on the integration of Jewish law within Israeli law

*Does Jewish law imply only religious law, or is there a secular aspect that can – or should – have a voice in the state’s legal system? The question has challenged some of Israel’s top legal scholars for many years.*

Shimshon Ettinger

In the early 20th century, some Jews (not necessarily religiously observant individuals) began to promote the idea of developing Jewish law into a suitable basis for the legal system of a secular Jewish state, which they hoped would soon come into being. When the founding of the State of Israel became a reality, the issue of integrating Jewish law within Israeli law led to a fundamental debate between two illustrious Israeli scholars – Professors Menachem Elon and Izhak Englard – both of whom, it so happened, would later serve as justices of the Supreme Court.<sup>1</sup> The divergent views of Professors Elon and Englard are evident from their differing interpretations of the very term “*Mishpat Ivri*,” commonly translated as “Jewish Law.” According to Professor Elon, the term “*Mishpat Ivri*” indicates a division in the realm of *halakha*, between certain issues which are of the nature of ‘law,’ and those matters that are ‘*halakha*,’ that have a specifically religious meaning, but which are not ‘law.’” Thus, Professor Elon argued, *Mishpat Ivri* refers to legal matters of general application within the Jewish legal tradition, as opposed to aspects of *halakha* that are specifically religious in character. Professor Englard, however, vehemently disagreed with Professor Elon’s approach. In Professor Englard’s view, the ostensible division theorized by Professor Elon cannot be justified from the point of view of *halakha* itself, which does not accept such a distinction between supposedly “religious” and “non-religious” matters. Rather, Professor Englard contended, *halakha* views all legal matters, including the most mundane, as components of a unified corpus imbued with religious significance. He argued that an approach like Professor Elon’s derives from an external – i.e., non-*halakhic* – perspective, and is based on distinctions that exist in other legal systems but not in the *halakhic* system.

Professor Englard’s view is difficult to sustain. The distinction between issues that are “law,” on the one

hand, and those that are “religious” but which are not law, on the other hand, is in fact an internal distinction accepted in *halakha* itself. The distinction was first enunciated by the sages of the Talmudic period, and later appeared in the works of numerous medieval and modern commentators (“*Rishonim*” and “*Aharonim*”). For instance, this distinction was expressed by one of the great scholars of recent times, Rabbi Meir Simha

HaKohen of Dvinsk (1843-1926), author of the biblical commentary *Meshekh Hokhmah*. In commenting on the double expression “laws and rules” (*Hukim u-Mishpatim*), which appears in the Torah and in the Talmud, he explains:<sup>2</sup> “*Hukim* – these are religious matters . . . *Mishpatim* – these are [related to] manners and governance, rules that are based in the intellect and in appropriate behavior.” Rabbi Meir Simha’s sharp, unambiguous definition, which differentiates between rules pertaining to religious matters and those of more general

application, is thus internal to Jewish tradition and not dependent in any way on another legal system. This undermines Professor Englard’s claim that such a distinction cannot be maintained within Jewish law.

Nevertheless, it is certainly the case that *Mishpat Ivri* constitutes part of the *halakha*, which is a normative-religious system. This may have implications that would be foreign to the legal system of a modern secular state, as we shall see below while exploring various fundamental issues concerning the possible relevance of *Mishpat Ivri* to legislation and court rulings.<sup>3</sup>

## Legislation

The Elon-Englard debate as to the meaning of the term *Mishpat Ivri* is not merely a question of semantics but rather has significant implications for the broader question of the place of Jewish law in the State of Israel: What value, if any, is there in integrating portions of Jewish law into the Israeli statutory framework?

Professor Englard sees no value in such integration. According to his approach, partial inclusion of *halakha* – grafting it onto another, secular framework – would



“secularize” and demean *halakha*. Moreover, in the event of integration the portion of *halakha* that would be included in the Israeli legal system would, of course, be interpreted in the manner customary in that system, and be applied by those bodies authorized under that system – that is, the courts – and not by those bodies recognized and empowered within *halakha* itself. The act of integration would thus effect a distortion of the very *halakha* that it sought to integrate. Therefore, Professor England insists, from a *halakhic*-religious point of view, there is no value to such a combination.

Professor Elon and others who favor integrating Jewish law within Israeli law do not, for the most part, look at this endeavor from a religious-*halakhic* perspective, but from a cultural-national one. They argue that, when a legislator is confronted with a problem, there is indeed value in having the legislator turn to Jewish law, prior to any other system of law, to seek solutions appropriate to the questions before him. Such an approach, they contend, gives expression to the Jewish national heritage. In their view, the use of Jewish law possesses historical and cultural significance much as does the preservation and development of Hebrew as the national language. At the same time, proponents of integrating Jewish law do not necessarily view such integration as an imperative, as opposed to a value, which admittedly tones down the dissonance between the Elon and England approaches.

The Elon-England debate also has implications concerning the subject matter, if any, to be incorporated from Jewish law: Which areas of Jewish law are most appropriate, by their nature, for inclusion in modern Israeli law?

There would seem to be a consensus that Jewish criminal law is the *least* appropriate for inclusion, for Jewish criminal law exhibits clearly religious characteristics. Crime – particularly that of murder – is perceived as an offense against G-d, and not solely as an act that offends the social order. In order to impose punishments for acts deemed to be offenses against G-d, Jewish law insists upon a heightened level of certainty. This is the source of stringent requirements under Jewish law for proof of a crime, such as the requirement that to be punished, a criminal must have been warned by witnesses *ex ante*, and must have carried out the crime immediately after the warning.<sup>4</sup> Jewish criminal law is thus quite formal in nature, and such formal requirements substantially limit its practical applicability. This is likewise one of the reasons that Jewish criminal law, in its formal-textual form, was not practiced in Jewish communities over the centuries. Thus, the contribution of Jewish crim-

inal law to the modern Israeli legal system would have to be fairly limited.

The principal area in which Jewish law could make a meaningful contribution to Israeli law is, it is possible to say, in matters of private law. Professor England has critiqued this suggestion as well. He argues: “Contemporary private law, with the exception of family and inheritance law, does not, in our opinion, have a deep cultural-national significance. It is far from being what was thought of by the followers of the historical school, as expressing the ‘spirit of the people.’”<sup>5</sup> In other words: If, as proponents of Jewish-law incorporation contend, *Mishpat Ivri* consists not merely of religious matters conceded inappropriate for incorporation but also of “rules that are based in the intellect and in appropriate behavior” (as the *Meshekh Hokhmah* expresses it), why then should we choose to incorporate the *halakhic* arrangement over some other arrangement, which might be equally logical and appropriate?

This question is well-taken broadly speaking, though there is certainly good reason for the default in the Jewish state to be a reliance on the legal principles of Jewish tradition rather than some other, albeit appropriate, option. More fundamentally, however, consideration of issues in private law suggests that Jewish law may indeed offer a unique, original standpoint on certain matters.

For example, in an interesting and important article, Professor Hanoch Dagan considered the law of unjust enrichment in comparative perspective. The principle of *zeh neheneh v'zeh lo haser* (“This one benefits, while the other suffers no loss”) applies where one individual derives a profit from another individual’s asset without the latter’s permission, while not causing any loss or damage to the owner of the asset. According to the Anglo-American legal tradition, in such a case the beneficiary is obligated to indemnify the owner of the asset for the value of the benefit derived. Jewish law, in contrast, exempts the beneficiary from having to make such a payment.<sup>6</sup> Professor Dagan argues that this debate reflects competing worldviews “between different perspectives as to the relationship between man and his fellow.”<sup>7</sup> According to Dagan, the choice between obligating and exempting the beneficiary in this case “requires a choice between the Western, liberal tradition, and the more communal tradition offered by Judaism.”<sup>8</sup> Here, then, the governing rule in Jewish law may in fact be giving expression to an underlying Jewish value – in this case, the communal value of concern for others.

Another example of Jewish private law embodying a particular perspective relates to the potential liability

of a guarantor, as well as that of a debtor, to a creditor. The Israeli rule, not based on Jewish law, is codified in Section 8 of the 5727-1967 Guarantee Law, and provides that where one guarantees a debt, both the guarantor and the debtor are liable to the creditor “jointly and severally.” Thus, in order to enforce his rights, a creditor can take legal action against the guarantor just as he can against the debtor, without any requirement that the creditor first pursue the debtor. This section, which has been frequently criticized as over-exposing guarantors to liability, deviates from the position of Jewish law, which seeks to protect guarantors by holding that a guarantor may not be sued for payment prior to a creditor’s first suing the debtor himself. Regarding the guarantor as the weakest party in the transaction, Jewish law affords him the greatest protection.

Though inclusion of Jewish law in Israeli legislation could give expression to particular Jewish values, per Professor Elon’s suggestion, that approach has not carried the day. Most of the work of civil legislation in Israel has already been completed – with little, if any, reliance on Jewish law. Likewise, the proposed Civil Code, which was recently reformulated and is currently before the *Knesset*, did not seek to make changes on the basis of Jewish law. It is therefore doubtful that it would be possible, at this stage and in the current circumstances, to make significant changes to the state of Israeli legislation. If there is to be greater reliance on Jewish law at this juncture, the likelihood is that it will come from the decisions made by Israeli courts.

### Court Rulings

Beyond codification of Jewish law on the legislative level, inclusion of Jewish law in the framework of court rulings in Israel may be both a more practical and more appropriate avenue for integration. That is so because legal rulings reflect the practical, creative and dynamic expression of the law, even more than legislation does. Could we therefore conclude that Professor Elon’s approach may be more promising in the context of court rulings than it has been in legislation?

The starting point for any discussion of integrating Jewish law in legal rulings is the statute 5740-1980 Fundamentals of Law. This statute aims to guide the filling of lacunae in the law, and directs judges to do so via consideration of “the principles of justice, equity and peace found in Jewish tradition.” Israeli judges are thus expressly directed to look to Jewish tradition in their interpretive approach. Nevertheless, the actual impact of this directive has been minimal, as this statutory principle has been narrowly interpreted in judicial rulings, and its use has therefore become a rarity. Still,

there remain instances in which judges, particularly in the lower courts, have referred to this statute, and, through it, to Jewish law. And even today judges sometimes seek support in *halakhic* sources without referring to this statute, as they did at times before the advent of the statute.

Where judges do refer to Jewish law in their legal rulings, this occurs in one of two ways. The first situation arises in circumstances of ambiguity – where a statute does not rule clearly and unequivocally on a particular issue. In such cases, a judge will sometimes refer to Jewish law when seeking a solution or practical arrangement that is both correct and equitable for the specific dilemma before him. For example, in the *Handelsaltz* case<sup>9</sup> the Court confronted a situation in which one who was present on another’s property (in that case, a bank) happened upon a third party’s lost property. In that context, there arose a question as to the proper interpretation of the 5733-1973 Restoration of Lost Property Law. Section 3 of that statute provides that where one finds lost property in “the domain of another person,” the owner of the property is deemed the finder (such that, for instance, if the original owner is not located within a prescribed period of time, the finder gains ownership over the lost property). But what are the parameters of the term “the domain of another person”? Is a bank similar to a private person’s home, or is it more akin to a street where outsiders come and go freely? Views differed as to whether the term “the domain of another person” should be understood in terms of *ownership* of the place at issue, or whether it referred to *effective control* of the property. In resolving this question, the judges in the various courts considered the *halakhic* rules relating to the return of lost property. Though a majority of the Israeli Supreme Court declined to follow the Jewish-law rule (instead holding that ownership, rather than control, governs), the judges gave serious consideration to the treatment of the matter under Jewish law.

Court rulings also refer to Jewish law in a second circumstance: where judges quote from Jewish legal sources in order to compare them with provisions that exist in Israeli law or in other countries’ legal frameworks. Such references may not constitute the application and adoption of Jewish law within the Israeli legal framework, but undoubtedly from a general, cultural-legal perspective there remains intrinsic value in including Jewish sources in contemporary legal decisions and in debates gaining the attention of other jurists.

At the same time, the application of Jewish law specifically in the realm of legal rulings presents cer-

tain obstacles. First, in contrast to legislation, a judge making a legal ruling must weave a more extensive tapestry of sources needed for the ruling, and must explain and justify his conclusion. This activity requires caution, responsibility and skill, and sometimes the advantages of doing so are outweighed by the disadvantages, when inaccuracies occur or when certain issues are not fully presented.

Another difficulty derives from the particularly religious nature of Jewish law, noted above, which brings us back to Professor Englard. In a ruling by Justice Englard in *Kal Binyan Ltd. v. E.R.M.*,<sup>10</sup> the Supreme Court confronted the question of whether one who acted in bad faith in negotiations preceding consummation of a contract may be required to pay certain damages. Justice Englard's ruling for the Court raises the possibility that the case may involve a lacuna requiring action under the Foundations of Law statute. He therefore turns to the pertinent Jewish legal sources, which express the rule that "mere words are not sufficient to create a legally binding contractual commitment; there is a need for a formal act of commitment (*kinyan*).<sup>11</sup> Thus, from this point of view, the person making the undertaking may, strictly speaking, withdraw his verbal commitment at any point prior to carrying out the act of *kinyan*, the binding act. Despite this technical flexibility, however, *halakha* imposes various sanctions of a moral and religious nature on those who retract their commitment under such circumstances – the sanction in this case being the invoking of a curse upon such an individual. In the words of the *Mishnah*,<sup>11</sup> "But they [*i.e.*, the sages] said: He Who punished the generation of the flood and the generation of the dispersion, He will take vengeance of him who does not stand by his word."

Given that contemporary courts are not authorized to impose threats and curses of this type in their rulings, the question becomes whether it is appropriate, in the integration of Jewish law, that the Israeli civil court "develop" the solution offered by *halakha*, and, in place of the moral sanction set forth in religious law, fashion an appropriate legal sanction. This dilemma demonstrates the fundamental difficulty that sometimes arises in trying to apply the original ideas and practices of Jewish law to Israel's secular legal system. In his ruling in the *Kal Binyan* matter, Englard did not attempt to solve this weighty problem, but simply left as an open question the complications inherent in applying religious law in a non-religious context. In that particular case, he ultimately ruled not in accordance with Jewish law.

Though the non-integration approach articulated by Professor Englard has certainly been more prevalent in practice than Professor Elon's approach, thought-provoking scenarios brought to Israeli courts continue to raise the possibility of integrating Jewish law in particular circumstances. More generally, political and social forces have, in certain instances, led Israeli legislators, judges, and scholars to continue debating the appropriate manner of integrating Jewish law into modern legislation and court decisions. The fundamental debate expressed by Professors Elon and Englard thus lives on.

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### Notes

1. Compare I. Englard, "Research of Jewish Law: Its Substance and Purposes," 7 *Mishpatim* 34 (5736), (in Hebrew), with M. Elon, "More on the Matter of Jewish-Law Research," 8 *Mishpatim* 99 (5737) (in Hebrew).

2. Lev. 18:4-5 (*Parshat Aharei Mot*) (JPS translation): "My rules (*'mishpatai*') alone shall you observe, and faithfully follow My laws (*'hukotai*'): I the L-rd am your G-d. You shall keep My laws (*'hukotai*') and My rules (*'mishpatai*'), by the pursuit of which man shall live: I am the L-rd."

3. The integration of Jewish law into Israeli law also has implications for a third realm beyond legislation and court rulings – that of legal education and research – but the implications of integrating Jewish law into that sphere lie beyond the scope of the present discussion.

4. See A. Enker, "Fundamentals of Jewish Criminal Law," 24 *Mishpatim* 177 (5754-55) (in Hebrew).

5. I. Englard, "Integration of Jewish Law in the Israeli Justice System," in *The Jewish Law and the State of Israel* 110, 132 (J. Bazak ed., 1969).

6. H. Dagan, "Unjust Enrichment Law: Between Judaism and Liberalism," in *Law and History* 165 (D. Gutwein & M. Mautner eds. 1999).

7. *Ibid.* 170.

8. *Ibid.* 167.

9. C.A. 546/78 Bank Kupat-Am v. Handelsaltz, 34(3) *P.D.* 57, on rehearing, F.H. 13/80 Handelsaltz v. Bank Kupat-Am, 35(2) *P.D.* 785.

10. See C.A. 6370/00, *Kal Binyan Ltd. v. E.R.M.*, 56(4) *P.D.* 289.

11. Baba Metzia, 4:2 (Soncino translation).

# International jurisdiction of the rabbinical courts in Israel

*A 2005 law made the rabbinical courts the sole forum in the world with the jurisdiction to resolve the agunah problems of Jews who were married under Din Torah.*

Moshe Drori

In the Israeli legal system, a system of religious courts, a legacy of the Ottoman period, has jurisdiction over matters of marriage and divorce and additional matters related to family law. This article focuses on the international aspects of the jurisdiction of the rabbinical courts in Israel as amended in 2005.

In 1953, the Knesset (the Israeli parliament) enacted the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953.<sup>1</sup> The substantive provision of section 2 provides: "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law." The term "Jewish religious law" (*din torah* in Hebrew) includes: biblical law, rabbinic law and regulations according to *halakha*, the collective corpus of Jewish religious law.

Section 1 of the Jurisdiction Law establishes the jurisdiction of the rabbinical courts: "Matters of marriage and divorce of Jews in Israel, being citizens or residents of the State, shall be under the exclusive jurisdiction of the rabbinical courts." The term "matters of marriage and divorce" includes the validation of marriage and divorce. Accordingly, the rabbinical court is the only legal forum in Israel competent to adjudicate and decide the personal status of a Jew, i.e., whether he is married or unmarried. This jurisdiction is limited to cases in which both of the spouses are Jewish.

WHERE ONE OF the spouses is Jewish and the other is a member of another religion, the judicial forum with jurisdiction to dissolve the couple's marriage is determined by another forum. In 1969, through the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, this power was given to the President of the Supreme Court.<sup>2</sup> Either or both of the parties files an application to the President of the Supreme Court, and the latter exercises his power only after the Attorney General provides him the written

opinions of the relevant religious courts. These religious courts give their opinions in each particular file regarding whether the religious court would give a divorce judgment, or dissolve the marriage, or declare the marriage void *ab initio*. After the President of the Supreme Court receives the opinions of the relevant religious courts of both spouses via the Attorney General, the President decides, at his discretion, whether to refer the matter to one of the religious courts of the spouses or to the Family Court.

The law further determines the substantive law to be applied by the Family Court in the event that it acquires jurisdiction pursuant to the decision of the President of the Supreme Court under the Dissolution of Marriages Law.<sup>3</sup> Where a religious court acquires jurisdiction pursuant to the decision of the President of the Supreme Court, it will then adjudicate the case in accordance with the religious law applicable in that court. Hence, where the Rabbinical Court acquires jurisdiction, it will decide the matter in accordance with Jewish Law, i.e., *halakha*. For example, where the case concerns the mixed marriage of a Jew with a non-Jew, the halakhic position is that the marriage is not valid, and thus in terms of *halakha* there is no need for an act of divorce because the marriage was not valid in the first place.

## Mixed marriages

In 2005 the legal position applying to mixed marriages changed<sup>4</sup> in Matters of Dissolution of Marriage (Special Cases and International Jurisdiction) Law. Section 1 of the 2005 Law comprises all of the amendments to the 1969 Law. Due to the tremendous volume of applications for dissolution of marriages filed with the President of the Supreme Court,<sup>5</sup> and the long time it takes to process each application,<sup>6</sup> it was decided that the Family Court (instead of the President of the Supreme Court) would henceforth be empowered to decide which forum would adjudicate



the matter, and that the Family Court would have residual jurisdiction over the matter, “unless in accordance with the provisions of this Law, the religious court has jurisdiction.”<sup>7</sup> The 2005 amendment did not affect the procedure for requesting the opinions of the respective religious courts, except that in accordance with the amendment, the application was made by the Deputy President of the Family Court, who would apply directly to the heads of the relevant religious courts. The new amendment removes the requirement for the involvement of the Attorney General, and the Deputy President of the Family Court has direct access to the religious courts.

Accordingly, where one of the spouses is Jewish, an application is made to the President of the High Rabbinical Court of Appeals.<sup>8</sup> The purpose of the application for the head of the religious court was to determine “whether there is a need for a divorce under the religious law by which he adjudicates, even by reason of a doubt, so that the spouse to whom that religious law applies will be able to remarry.”<sup>9</sup> If the head of the Rabbinical Court rules that a divorce is required under religious law, the Family Court will transfer to it the application for dissolution of the marriage. On the other hand, the 2005 Law further emphasizes that in such a case, the conferral of application does not as such confer the Rabbinical Court with jurisdiction over matters included in the divorce.<sup>10</sup> In this regard the 2005 Law specifies that the general rules governing jurisdiction and inclusion continue to apply.<sup>11</sup> Should the head of the rabbinical court rule that there is no need for divorce, or if he fails to respond within three months, then the Family Court has jurisdiction to adjudicate the dissolution of the marriage.<sup>12</sup> In this respect, the new law introduced a significant innovation, as until that time the Rabbinical Court had exclusive jurisdiction for the determination of marital status in matters concerning Jews, and according to the 2005 Law the Family Court has jurisdiction in such cases.

For the sake of efficiency, the 2005 Law allows the head of the religious court to give a general notification to the President of the Supreme Court, stating that under specific circumstances there is no need for divorce under the religious law by which he adjudicates as a condition for the ability of the party subject to that law to remarry. This condition obviates the need for an application to the religious court in such cases in the future.<sup>13</sup> This power can be exercised in the case of a marriage between a Jew and someone who is not Jewish, for as stated above, according to *halakha*, mixed marriages are prohibited and invalid.<sup>14</sup> In the 1969 Law, the President of the Supreme Court was

conferred the power to avoid determining jurisdiction for spouses belonging to different religions “if he deems that under the circumstances, it would not be appropriate to grant a remedy to the applicant.”<sup>15</sup> This section was repealed in the 2005 Law. Nonetheless, upon application of one of the litigants, or the Attorney General, the President of the Supreme Court can order that jurisdiction to dissolve the marriage should be conferred to the Family Court or the religious court (including, naturally, the Rabbinical Court) if the President is convinced that it is justified under the circumstances.<sup>16</sup>

### **Rabbinical courts’ jurisdiction concerning Jewish marriages outside Israel**

One of the conditions for the jurisdiction of the Rabbinical Court is that the parties are “Jews in Israel, being nationals or residents of the State.”<sup>17</sup> According to the Supreme Court’s ruling it is insufficient that both spouses be Jewish; there is a need for an additional link that connects them to the State of Israel, by force of their being (physically) in Israel, and by virtue of their personal link to Israel, by force of residency in Israel or citizenship thereof.<sup>18</sup>

A decision recently given by the Supreme Court<sup>19</sup> concerned a Jewish couple who married in Monaco in both a civil and a religious ceremony. They were divorced civilly, and the women petitioned the Rabbinical Court to compel her husband to give her a *get* in accordance with Jewish religious law, because according to *halakhah* she was still married and hence an *agunah* (literally: chained woman). She turned to the Israeli Rabbinical Court. The majority view in the Supreme Court sitting as the High Court of Justice was that insofar as neither of the spouses had any connection to Israel, the Rabbinical Court lacked jurisdiction to rule on their case, both on the question of marriage and divorce, and on the question of maintenance.<sup>20</sup> The minority view was that in order to prevent the woman becoming an *agunah*, the Rabbinical Court was authorized to adjudicate the issue of maintenance, which includes the maintenance awarded under the rule of *meukevet mehamato le-hinaseh* (a woman prevented from marrying for reasons dependent on the husband). For the same reason the Rabbinical Court was also empowered to delay the husband’s departure from Israel and to make his return to Monaco conditional upon him posting a high financial bond.<sup>21</sup>

In 2005, a major legislative change extended the Rabbinical Court’s jurisdiction over divorce such that it was no longer limited to spouses resident in Israel. The Act enacted by the Knesset was part of the law

discussed below.<sup>22</sup> The new Law extended the jurisdiction of the Rabbinical Courts to six additional cases in which Jewish spouses had married under *din torah* (Jewish religious law) and in respect of which one of the following connections to the State of Israel sufficed for purposes of conferring jurisdiction to the Rabbinical Court to adjudicate their divorce:<sup>23</sup> (1) the defendant's place of residence is in Israel;<sup>24</sup> (2) both of the spouses are Israeli citizens;<sup>25</sup> (3) the plaintiff's place of residence is in Israel, provided that he/she lived there for at least one year immediately prior to the filing of the action;<sup>26</sup> (4) the plaintiff's place of residence is in Israel, provided that the most recent spousal residence was in Israel;<sup>27</sup> (5) the plaintiff is an Israeli citizen, and his place of residence is in Israel;<sup>28</sup> and (6) the plaintiff is an Israeli citizen, and lived in Israel for at least one of the two years immediately preceding the filing of the action.<sup>29</sup> In addition, the Law stipulates that where a Jewish couple was married in accordance with *din torah*, and was already divorced under the laws of another state, the Rabbinical Court has jurisdiction to adjudicate an action for divorce in accordance with *din torah*, and an action to remove an impediment to remarrying in accordance with *din torah*, even where only the plaintiff is an Israeli citizen.<sup>30</sup> A classic example of this kind of case occurs where the couple was married outside Israel both civilly and in accordance with *din torah*, and the court of that country issued an order for civil divorce. In these cases the husband may regard himself as being at liberty to remarry whomever he wishes (under the legal system of that state) whereas, in the absence of a *get*, the woman continues to be a married woman according to *din torah*, and therefore she is prevented from remarrying, and any conjugal relations with another man will be deemed as an act of adultery, and any child born from such relations will be regarded as a *mamzer*.<sup>31</sup> In such a case the Rabbinical Court is empowered to adjudicate her divorce, provided that the wife is an Israeli citizen, even where her husband is not an Israeli citizen. This is in addition to the other six possibilities, any one of which suffices to confer jurisdiction to the Rabbinical Court to adjudicate the divorce action. It should further be noted and emphasized that the 2005 Law confers jurisdiction for religious divorces only. The Rabbinical Court is not empowered to adjudicate and rule on matters of civil divorce if an action for a civil divorce was filed in the foreign state prior to the delivery of the *get*.<sup>32</sup>

Furthermore, the conferral of jurisdiction to the Rabbinical Court over matters of divorce is exclusively for purposes of solving the problem of *agunot*, and

accordingly the new law does not "confer the rabbinical court with jurisdiction over matters included in divorce" <sup>33</sup> such as maintenance, property, or child custody.

The jurisdiction conferred to the Rabbinical Court under the 2005 Law is not only jurisdiction over divorce, but also enables the court to adopt measures prescribed by the Rabbinical Courts Law (Upholding Divorce Rulings) 5755-1995.<sup>34</sup> These measures range from the authority to prevent the husband's exit from Israel to the authority to order the imprisonment of a recalcitrant husband.<sup>35</sup> In this way the Rabbinical Court in Israel functions as the sole forum in the world that has jurisdiction to resolve the *agunah* problems of Jews married under *din torah* by using the enforcement mechanism of the State of Israel, including preventing exit from the State, and imprisonment.

Where the plaintiff is not in Israel, the Rabbinical Court still has jurisdiction to adjudicate divorce, if one of the conditions enumerated above exists. However, the 2005 Law provides that in such a case the action must be served to the defendant outside Israel, together with a translation certified by a notary. Even where a judgment is issued due to the defendant's absence, he is permitted to apply for rehearing of the action.<sup>36</sup>

The 2005 amendment enables the High Rabbinical Court of Appeal or one of its *dayanim* (judges) to give a halakhic opinion regarding a *get piturin* (divorce writ under Jewish Law) or a permit to marry in a foreign state, provided that the Rabbinical Court receives a request for its halakhic opinion regarding one of these matters, even if the Jewish spouses are not subject to the exclusive jurisdiction of the Rabbinical Court, but were married in accordance with *din torah*.<sup>37</sup>

In order to resolve practical problems concerning *agunot*, the 2005 Law provides that it will also apply to pending claims.<sup>38</sup> Conceivably, these could be regarded as retroactive application, but a reasonable interpretation of the law is that the issue concerns the conferral of jurisdiction in order to solve problems of *agunot*, and the impeding party has no vested right to continue impeding his/her spouse. There is therefore a moral and substantive reason for the immediate application of the 2005 Law, even with respect to pending actions.<sup>39</sup>

### Conclusion

According to the 2005 Law, the Israeli legal system empowers the Rabbinical Court to deal with Jewish couples even if they were married outside Israel. The 2005 Law made the Rabbinical Court in Israel function as the sole forum in the world that has jurisdic-

tion to resolve the *agunah* problems of Jews who were married under *din torah*. The Rabbinical Court can also use State enforcement mechanisms, including preventing exit from the State and imprisonment to achieve that goal.

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## Notes

1. [1953] *Sefer Hahukim* (Statutes of the State of Israel) (No. 134). 165; (hereinafter the “Jurisdiction Law”).

2. Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 5729-1969 [1969] *Sefer Hahukim* (No. 573) p 248 (hereinafter the 1969 Law); Regulations for Dissolution of Marriage (Special Cases) (Procedures) 5745-1984 [1984] Kovetz Hatakanot (Regulations issued by Israel Government Ministries) No. 4730, 338

3. Sec. 5 of the 1969 Law.

4. Matters of Dissolution of Marriage (Special Cases and International Jurisdiction) (Legislative Amendments), 5765-2005, *Sefer Hahukim 2025*, p. 942 (hereinafter the 2005 Law). This law was enacted on July 26, 2005, was published on August 10, 2005 and became effective three months later; *See*: Sec. 3(a) of the 2005 Law. The law was based on a bill proposed in 2002 to the 15th *Knesset* by the Government (*Haza’ot Hok*, 12, p. 161). The *Knesset* decided that this bill would continue through the legislative process in the 16th *Knesset*; *see* 34th Meeting of the 16th *Knesset*, June 18, 2003 (majority 42:34). The Judicial Committee of the *Knesset* held more than a dozen meetings on this bill, including presentations by legal experts.

5. In the Judicial Committee of the *Knesset*, the representative of the Ministry of Justice, Ms. Moriah Bakshi, reported that the number is 2,000-3,000 cases per year, and Rabbi Eliyahu Ben Dahan, the Director General of the Rabbinical Courts, said that there are 2,000 applications each year; *see*: The 67th Meeting of the Judicial Committee of the *Knesset*, August 18, 2003, p. 16. According to the data sent to me by Ms. Sara Lifshitz, the Secretary of the Supreme Court, these are the precise figures: 2000 – 1,926; 2001 – 2,657; 2002 – 2,551; 2003 – 2,198; 2004 – 2,280; 2005 – 1,752 (to 9 Nov., the day that the new law came into effect).

6. The legal adviser of the Judicial Committee of the *Knesset* said that there are cases where the process takes two years; *see*: The 87th Meeting of the Judicial

Committee of the *Knesset*, 10 Nov. 2003, p. 11.

7. Sec. 1 (a) of the 1969 Law, as amended in sec 1(a) of the 2005 Law.

8. Sec. 2 of 1969 Law and Sec. 3 of the 2005 Law.

9. Sec. 3 (a)(1) of the 2005 Law, in the concluding passage.

10. Sec. 3 (c) of the 2005 Law, in the concluding passage.

11. *See* Secs. 3 and 4 of the Jurisdiction Law.

12. Sec. 3 (d) of the Dissolution of Marriage Law, as amended in 2005.

13. Sec. 3 (f) of the Law.

14. *See* BZ. Schereschewsky, “Mixed Marriage,” in: M. Elon, *The Principles of Jewish Law*, 376-77 (1975).

15. Sec 3 of the 1969 Law.

16. Sec 3 (e) of the 2005 Law.

17. Sec 1 of the Jurisdiction Law.

18. *See for example* the decision of Justice Zamir, in C.A. 3868/95 Werber v. Werber, 52 (5) *Piskei Din* (Reports of the Israel Supreme Court, *hereinafter*: “PD”). 817, 843; and the decision of Justice M. Cheshin in HCJ 1480/01 Hagag v High Rabbinical Court of Appeals, 55 (5) *P.D.* 214, 225-26.

19. HCJ 6751/04 Sabag v Rabbinical High Court of Appeals, (not yet published) (*hereinafter Sabag*).

20. Per Justice A. Procaccia, concurred with by Justice Y. Adiel.

21. Decision of Justice E. Rubinstein *in Sabag*. The minority viewed relied on the previous ruling in HCJ 1796/03 Cobani v. High Rabbinical Court of Appeals (not yet published).

22. Matters of Dissolution of Marriage (Special Cases and International Jurisdiction) (Legislative Amendments), 5765-2005 *Sefer Hahukim 2025*, p. 942. The bill for this law was proposed by MK Yizhak Lavi. *See*: Bill of the Rabbinical Courts Jurisdiction (Marriage and Divorce) (Amendment – Extension of Jurisdiction) Law, 5765-2005, *Haza’ot Hok* 3089. In the 439th Meeting of the Judicial Committee of the *Knesset*, 9 March 2005, the Committee decided that the two bills would be discussed together, and eventually they became two parts of the 2005 Law. The 2005 Law was passed in the *Knesset* by a majority of 46 with a single abstention and no one against. The chairman of the Judicial Committee of the *Knesset*, MK Michael Eytan, emphasized in the *Knesset* that the 2005 Law is a compromise among all the elements in Israeli society, religious and unreligious alike. *See*: 257th meeting of the *Knesset*, 27 July 2005.

23. *See*: Sec 4A (a) of the Jurisdiction Law, which was added under Sec 2 of the 2005 Law.

24. The idea behind this alternative is very simple: the decision of a person to live in Israel and to be resident in the State includes the submission to the jurisdiction of the rabbinical court in Israel.

25. In regard to this alternative, the chairman of the Judicial Committee of the *Knesset*, MK Michael Eytan, said in the 67th meetings of the Committee on 18 August 2003, p. 37: "Citizenship is a strong connection. It is not a weak connection, because he can relinquish his citizenship. He is not bound to hold his citizenship. The mere fact that this person keeps his Israeli citizenship expresses his connection to the State." It should be noted that this rule will apply even to Israelis who live many years abroad.

26. The idea behind this alternative is not to give any advantage to the spouse who leaves Israel, and therefore the spouse who remains in Israel can sue the other side in the Israeli Rabbinical Court.

27. *Ibid.*

28. In order to meet this demand, a Jew can come to Israel, and on the day of his arrival can ask for Israeli citizenship and he will receive it according to the Law of Return. Hence he can sue his spouse immediately in the Rabbinical Court in Israel.

29. One can see a resemblance between this Law and Art. 2 of the 1970 Convention on the Recognition of Divorces and Legal Separations (hereinafter "the Convention"), that stated as follows:

"Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin") –

- (1) the respondent had his habitual residence there; or
- (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled –
  - a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;
  - b) the spouses last habitually resided there together; or
- (3) both spouses were nationals of that State; or
- (4) the petitioner was a national of that State and one of the following further conditions was fulfilled –
  - a) the petitioner had his habitual residence there; or

- b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or
- (5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled –
  - a) the petitioner was present in that State at the date of institution of the proceedings and
  - b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce."

It should be clear that Israel never signed the Convention, because the rabbinical court cannot recognize the divorce of a secular court. Nevertheless, the ideas behind the Convention, were one of the sources of the new Israeli law. *See*: the comments of Dr. Perez Segal, from the Ministry of Justice, in the Judicial Committee of the *Knesset* in the 67th meeting of the Committee on 18 August 2003, pp. 23-24.

30. *See*: Sec. 4A(c) of the Jurisdiction Law as amended in 2005.

31. *See*: BZ Schereschewsky, "Mamzer," in Elon, *supra* note 14, 435, 438.

32. Sec. 4A(b)(2) of the Jurisdiction Law, as amended in 2005.

33. Sec. 4A(e) of the Jurisdiction Law as amended in 2005.

34. [1995] *Sefer Hahukim* (No. 1507) 139. This Law was amended and updated in 1995, 1996, 1998, 2000 and 2004.

35. *See in detail* M. Drori, "Enforcement of Divorce In Israel," [www.sanhedrin.co.il](http://www.sanhedrin.co.il).

36. *See*: Sec. 4B of the Jurisdiction Law, as amended in 2005. In this matter *compare* Art. 8 of the Convention: "If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition."

37. *See*: Sec. 4C of the Jurisdiction Law, as amended in 2005.

38. Sec.3(d) of the 2005 Law.

39. Thus, Ms. Sabag (*See: supra* note 19) can now ask for Israeli citizenship and move to Israel, after which the Rabbinical Court in Israel will have jurisdiction, according to Sec. 4A(a)(5) of the Jurisdiction Law, as quoted *in supra* note 23.

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# Israeli extradition law

*For many years the Israeli Police considered Zeev Rosenstein among its most wanted men.*

*The request from the United States for his extradition, to stand trial on charges of conspiracy to import dangerous drugs and distribute them within its territory, serves as an opportunity to raise some important issues related to the question of who can be extradited from the State of Israel. The decision on Rosenstein's appeal to the Supreme Court of Israel (Cr. A. 4596/05) was rendered on 30 November 2005<sup>1</sup>*

Irit Kohn

Initially, the 1954 Extradition Law<sup>2</sup> permitted the unrestricted extradition of Israeli citizens. The rationale for this was that Israel functioned under a system of English common law, which made it difficult to try people locally for events that took place outside the domicile of the Israeli courts. As a result, the preferable way was to extradite people to where they had committed their crimes. This is the approach taken in common law countries, among them the United States.

Until 1978 the law functioned as described. In that year, a new law came into force. Proposed initially by MKs Menachem Begin, Ehud Olmert and others in 1975, it provided that Israeli citizens could not be extradited unless they were wanted for a crime carried out prior to their becoming Israeli citizens. The late prime minister, Menachem Begin, whose name is associated with this amendment, suggested two justifications for the proposed restriction.

First, he noted that most countries, including all of the countries in Western Europe, sought to avoid the extradition of their citizens. The second, but perhaps more important reason, related to a concern for the welfare of Jews who might be extradited, in light of the historical phenomenon of anti-Semitism. This concern was raised regarding the various stages of the criminal process, including both the trial and the punishment phases.

The amended law adopted a hybrid approach. On the one hand, the number of people who could potentially be extradited from Israel to other countries was reduced. On the other hand, the jurisdiction of the Israeli courts was expanded, so as to cover those instances where extradition was no

longer possible. In this way, the legislator sought to ensure that the restrictions on extradition would not create a loophole that would permit criminals to escape justice.

In fact, difficulties arose in bringing to trial, in Israel, those citizens whose extradition had been requested by a foreign country. Among these difficulties were the collection of evidence in the place where the crime took place and the inability to compel witnesses to appear and testify in Israel.

As a result, the impression was created (an emphasis that was based in fact) that Israel had become a sanctuary for criminals. Over time, many attempts were made to change the legal situation that had been created, but the *Knesset* chose not to remove the protections afforded to Israeli citizens who had committed crimes abroad. In 1998, however,

Israel acceded to the Convention on the Transfer of Sentenced Persons<sup>3</sup> (hereinafter: "the Convention") and formalized its provisions in legislation. Fulfilment of the conditions according to the Convention and the Israeli law would enable Israeli citizens, who had committed crimes abroad and who had been convicted there, to serve custodial sentences in Israel. This arrangement permitted making the extradition of an Israeli citizen conditional on his serving, in Israel, any term of imprisonment imposed on him by the foreign courts.

A further impetus for amending the law came with the Sheinbein case, in which a young Jew who had murdered a friend in the United States fled to Israel, and, because he was an Israeli citizen, could not be extradited to the United States. Instead, he was tried in Israel.

In 1999 the Extradition Law was again amended. In effect, the provisions that applied in the early years



of Israel's existence were reinstated, and it was once more possible to extradite Israeli citizens so that they could stand trial abroad.

The difference between the original law and the current version is this: a person who, at the time of committing the crime, was both an Israeli citizen and a resident of the country would serve in Israel any prison sentence imposed by the country to which he was extradited.

Since that provision came into force, a number of Israeli citizens have been extradited to stand trial abroad for crimes committed there.

How is the Rosenstein case different? It involves a new combination of two factors. The first is that Rosenstein allegedly committed the crimes while in Israel. Secondly, his extradition was requested to a country in which he had never been. Moreover, the Israeli courts definitely had jurisdiction in this case, and so he could have been tried in Israel.

This is a combination of factors that had not yet been tested in extradition cases.

The Supreme Court, in rejecting Rosenstein's appeal, noted that the two countries involved, the United States and Israel, have a territorial connection with the actions in question, but that the place where the conspiracy was to have been carried out, and was allegedly carried out, was the United States. The potential victims of the crime were Americans. The public order in the United States would have been the primary victim of the plot, and it is the United States that bears the social and economic costs associated with dealing with it. Therefore the court determined that the center of gravity in this case was the United States.

The court noted that the geographical location from which the appellant operated had no real importance in this case, and so the American system takes precedence. Thus the court also expressed its opinion regarding cases in which an individual is located in Israel, but from there carries out crimes that have consequences in other countries. The court's position was that such an individual would be considered a fugitive, and, in those instances in which the conditions set forth in the law are met, he would be extradited.

In its decision, the Supreme Court related particularly to offenses which, by their nature, are not limited to the territory of a single country. These would include terrorist offenses, money laundering, trafficking in human beings, trade in dangerous drugs, and computer and internet crimes. These offenses, the court said, generally include clearly extraterrito-

rial elements, and these also include conspiratorial actions where the conspiracy is made in country A for crimes to be committed in country B. In my opinion, even if the matter in question were a crime of a different nature, whose focus was in the country requesting extradition, there should not be any obstacle to the extradition of the suspect. In any event, the court further noted that drug offenses are the most significant of trans-border crimes, and that Israelis were involved in such crimes the world over. The court referred to Section 38 of the 1973 Dangerous Drugs Ordinance [New Version], which extended the application of that ordinance even outside the territorial confines of the State of Israel.

The court went on to say that criminals involved in trans-border crime enjoy a great advantage and that there is no doubt that this fact requires legal systems throughout the world to refine their approach to fighting crime. As part of this fight, all countries are called upon not to withhold their assistance from other countries when such assistance would be useful.

THE FIRST, AND perhaps primary, purpose of extradition laws is to create an effective tool for international cooperation in the fight against crime, particularly crime that transcends international borders. The need for international cooperation is a consequence of the changing times. The present point of view is that criminal law can no longer look only at what happens within the borders of its own jurisdiction.

This is further reinforced, said the court, in light of the activities attributed to the appellant, serious crimes in which the criminal infrastructure is more and more like an organized network of clearly international dimensions. This demonstrates the necessity of a cooperative international struggle against crime.

The appellant's claim, that his right to a due process would be prejudiced, was found to have no merit. The American legal system upholds the principle of due process, grounded in the United States Constitution and reflected in the decisions of its courts.

As to his argument that the prosecution in Israel had "ganged up" on him and made every effort to have him sent for trial in the United States, the court stated that having heard the reasons given by the prosecution for the steps that it took, the court felt that the prosecution's considerations were appropriate and need not be queried.

*Continued on page 44*

# Local residents may not be solicited as part of early warning procedure

*Seven human rights organizations petitioned the Supreme Court of Israel to consider the legality of the “Early Warning” procedure, in which Israeli soldiers wishing to arrest Palestinians suspected of terrorist activity sought the aid of local Palestinian residents to provide prior warning to the suspects. The Court decided unanimously that this procedure was contrary to international law and would be prohibited.*

Abstract by Rahel Rimon

HCJ 3799/02

Adalah – The Legal Center for Arab Minority Rights in Israel et al v. GOC Central Command, IDF et al

Before President Aharon Barak, Vice President Mishael Cheshin and Justice Dorit Beinisch

Judgment delivered 23 June 2005

JUDGMENT

President A. Barak:

## A. The Petition

The petitioners, seven human rights organizations, submitted this petition during the course of operation “Defensive Wall.” They contended that the Israel Defense Forces (hereinafter: IDF) was using the civilian population in a way that violated fundamental norms of international and constitutional law. They based their arguments on reports in the Israeli press and on reports of international human rights organizations describing cases in which the IDF had made use of local residents for military needs, for example, where the IDF had forced Palestinian residents to walk through and scan buildings suspected of being booby-trapped, and ordered them to enter certain areas before the combat forces in order to find wanted persons there. Other reports described cases in which the army used residents as a “human shield,” for example, residents were allegedly stationed on porches of houses where soldiers were present, in order to prevent gunfire upon the houses. Cases were also described in which local residents were asked about the presence of wanted persons and weapons, under threat of bodily injury or death. According to the reports, in cer-

tain cases relatives were taken as hostages in order to ensure the arrest of wanted persons.

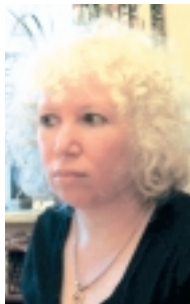
The petitioners alleged in their petition (submitted on 5 May 2002) that the respondents were violating Israeli constitutional law and the fundamental norms of public international law when the civilian population was used during operations in Judea and Samaria. Respondents responded (on 20 May 2002) that the Chief of the General

Staff had issued instructions to the IDF strictly forbidding the use of Palestinian civilians as a live shield (positioning civilians alongside army forces in order to protect the soldiers from injury); forbidding holding Palestinian civilians as “hostages” (seizing and holding civilians as a means to pressure others); and forbidding the use of civilians in situations where they might be exposed to danger to life or limb. Respondents did not rule out the possibility of being assisted by the local population in situations where this would allow avoidance of a military act liable to cause greater harm to local residents, soldiers or property.

Petitioners referred to the death of Palestinian civilian Abu Muhsan, killed in August 2002, while participating in “the neighbor procedure,” and contended that this death illustrated the illegality of using civilians to assist the security forces. Petitioners claimed that no reliance at all could be placed upon security authorities’ discretion in employing the procedures. Consequently, the High Court of Justice issued a temporary interlocutory injunction, ordering respondents to refrain from using Palestinian civilians as a “human shields” or as “hostages,” “including their use for any military acts such as ‘the neighbor procedure,’ absolutely, irrespective of the discretion of any military personnel.”

## B. The “Early Warning” Procedure

The respondents responded that IDF soldiers would continue to be absolutely forbidden from using civilians



as a “live shield” against gunfire or attacks by the Palestinian side, or as “hostages.” Regarding assistance by Palestinian residents in order to prevent loss of life, it was decided that an order would be issued that would clarify in exactly which situations it was forbidden or permitted, and under what restrictions. The eventual directive entitled “Early Warning” opened with the following statement:

#### General

“Early Warning” is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident’s assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves... Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow the innocent to leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life.

When operations are preplanned, the procedure must be approved... In the case of activity that was not preplanned, the approval of the brigade commander, his deputy, or of the brigade intelligence operations officer is needed. When the procedure is used, an effort is to be made to find a person, such as a relative or neighbor, who is acquainted with the wanted person or with the residents of the house, or who has influence over them. The procedure is not to be used to solicit the assistance of women, children, the elderly, or the disabled.

The “Early Warning” directive also included the details of the procedure for approaching a resident in order to receive his consent to provide assistance and emphasized:

- A. The civilian population has no obligation to assist the IDF in warning civilians of attack.
- B. Contact, and persuasion, shall be exclusively verbal.
- C. It is strictly forbidden to use force or violence toward a local resident or others, in order to secure said assistance.
- D. It is strictly forbidden to threaten a resident, or other people, that physical violence, arrest, or other means will be used against them.
- E. It is strictly forbidden to hold people

‘hostage’ in order to secure the assistance of a local resident.

- F. If a local resident refuses – **under no circumstances is provision of assistance to be forced** [emphasis in the original].

The operational directive included instructions regarding the use of the procedure, when the local resident agreed to assist army forces and emphasized:

- A. It is strictly forbidden to use the local resident in military missions (e.g., locating explosive charges, intelligence gathering).
- B. It is strictly forbidden to solicit the assistance of a local resident, when the commander of the force believes that the latter will be in danger – even with his consent.
- C. It is strictly forbidden to use a local resident as a “live shield” against attack. Thus, during the advance of the force, accompanied by the local resident, the latter is not to be positioned at the head of the force.
- D. It is strictly forbidden to equip the local resident with military equipment (uniform, weapon, battle vest, etc.).
- E. “Early Warning” is not to be employed when there is another effective way to achieve the objective, whose results are less severe.
- F. It is to be preferred that the local resident not be asked to enter the building... He shall be asked to enter the building only in those cases in which there is no other way to relay the warning, and only if the commander of the force believes that the local resident will not be exposed to danger as a result of his entry into the building.

#### C. The Arguments of the Parties

Petitioners claimed that the “Early Warning” procedure was illegal and contrary to the principles of international humanitarian law regarding the military activity of an occupying force in occupied territory. It entailed the use of a protected civilian as a “human shield” and put the protected civilian in real and tangible danger. It put him at the pinnacle of military activity, the objective of which was to arrest a person whom respondents themselves defined as most dangerous. Petitioners argued that the consent of the protected civilian could not absolve it of its illegality and was irrelevant. The protected civilian could not waive the rights granted him by international law, including the right not to be involved in the military activ-

ity of an occupying force. Further, the procedure created a certain and tangible injury to the dignity of the protected civilian, since it was used against the side with which he naturally identified. It could even cause him critical mental injury. Petitioners contended that various articles of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter: "Fourth Geneva Convention") prohibited the "Early Warning" procedure, including Articles 3, 8, 27, 28, 47 & 51 of that convention, as well as Article 51(7) of the 1977 Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter: "Protocol I").

Additionally, the procedure granted substantial discretion to military personnel, regarding the possibility of soliciting the local population's assistance and that discretion was regularly employed in violation of the interlocutory injunction. Thus, military discretion on this issue could not be relied upon. The procedure sent an inhuman message to soldiers, according to which instrumental use could be made of Palestinian civilians in order to succeed in the military activity, namely, to make an arrest.

According to respondents, these arguments were unfounded and did not fit reality and international law. Respondents pointed out the reality, in which the IDF was combating terrorists hiding among the civilian population. Respondents recognized the restrictions upon them in such combat. Army forces had to balance the need to arrest wanted persons against the need to protect the civilian population. In this context, the IDF preferred to arrest terrorists instead of killing them, as permitted by the laws of war, while granting an effective early warning. Past experience showed that soliciting the assistance of local residents in order to grant an effective early warning allowed the making of arrests while substantially reducing the need to resort to means of force. The procedure led to a reduction of the danger to civilians on site. Its use was likely also to prevent injury to the wanted person himself and to IDF soldiers, objectives which were also legitimate. Respondents stated that the attainment of these advantages, in a way that did not involve danger to the residents, was worthy, legal, and proportional.

### The Normative Framework

President Barak held that an army in an area under belligerent occupation was permitted to arrest local residents wanted by it who endangered its security (HCJ 102/82 *Tsemel v. The Minister of Defense*, 37 (3) PD 365, 369; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57 (2) PD 349, 365). In this context – and to the extent that it did not frustrate the military action intended to arrest the want-

ed person, the army was permitted – and at times even required – to give the wanted person an early warning. Thus it was possible to ensure the making of the arrest without injury to the civilian population (Regulation 26 of Hague Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Conventions 1907 (No. IV) (hereinafter: Hague Regulations); Article 57(2) of Protocol I; and also Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 171, 223 (hereinafter: Fleck); Rule 20 of 1 *Customary International Humanitarian Law Rules* 62 (2005) (hereinafter: International Humanitarian Law)).

Just as it was clear that an army was authorized to arrest a wanted person who endangered security, so it was clear that the army was not permitted to use local residents as a "human shield" (Article 28 of the Fourth Geneva Convention; Article 51(7) of Protocol I; see also Fleck, at p. 218)). Pictet correctly noted that the use of people as a "human shield" was a "cruel and barbaric" act (J. Pictet, *Commentary IV Geneva Convention* 208 (1958); Rule 97 of *International Humanitarian Law*)).

Was the army permitted to make a local resident relay an "early warning" to a wanted person in a place besieged by the army, against his will? All agreed that this was prohibited (cf. Regulation 23(4) of The Hague Regulations; Article 51 of The Fourth Geneva Convention; Pictet, at p. 292; Fleck, at p. 252). The "Early Warning" procedure explicitly stated that the assistance of a local Palestinian resident could be solicited in order to relay an early warning only when that resident had consented to provide such assistance. It was also agreed by all that early warning was not to be relayed by a local resident if doing so would endanger him. However, what was the law regarding the solicitation of a local resident's assistance for the purpose of relaying an "early warning," when that resident gave his consent, and damage would not be done to him by relaying the warning? No explicit provision applying to that issue, which would contain a solution to this problem, was to be found. The solution required a balance between conflicting considerations. On the one hand was the value of human life: Use of the "Early Warning" procedure was intended to prevent the need to arrest a wanted person through use of force. In this regard, the procedure was intended to prevent damage to the local residents who were in the same place as the wanted person. Safeguarding the lives of the civilian population was a central value in the humanitarian law applicable to belligerent occupation (Article 27 of the Fourth Geneva Convention; HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) PD 385, 39X; Fleck, at p. 212). The legality of the "Early Warning" procedure might draw its validity from the general duty of the occu-

pying army to ensure the dignity and security of the civilian population. It also sat well with the occupying army's power to protect the lives and security of its soldiers. On the other hand stood the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning. That was certainly the case when he did not consent to take upon himself the task he had been given, and when its performance was likely to cause him damage. But that was also the case when he gave his consent, and when performance of the role would cause him no damage. That was so not only because he was not permitted to waive his rights pursuant to the humanitarian law (Article 8 of the Fourth Geneva Convention; Pictet, at pp. 72, 74), but also because, *de facto*, it was difficult to judge when his consent was given freely, and when it was the result of overt or subtle pressure.

In balancing these conflicting considerations, which had to prevail? In President Barak's opinion, the considerations in favor of forbidding the army from using a local resident prevailed. First, a basic principle, which passed as a common thread through all of the law of belligerent occupation, was the prohibition of use of protected residents as a part of the war effort of the occupying army (Fleck, at p. 218). They were not to be "volunteered" for cooperation with the army (Regulation 23(b) of the *Hague Regulations* and Article 51 of the Fourth Geneva Convention; *see also* Pictet, at p. 292). From this general principle was derived the specific prohibition of use of local residents as a "human shield." Also derived from this principle was the prohibition of use of coercion (physical or moral) of protected persons in order to obtain intelligence (Article 31 of the Fourth Geneva Convention; Pictet, at p. 219). Prohibiting use of local residents for relaying warnings from the army to those whom the army wished to arrest could also be derived from this general principle. An additional principle of humanitarian law was that all was to be done to separate the civilian population from military activity (Fleck, at p. 169). Thus, a local resident was not to be brought, even with his consent, into a zone in which combat activity was taking place. Third, in the light of the inequality between the occupying force and the local resident, it was not to be expected that the local resident would reject the request that he relay a warning to the person whom the army wished to arrest. A procedure was not to be based upon consent, when in many cases the consent would not be real (Fleck, at p. 252). Last, it was not possible to know in advance whether the relaying of a warning involved danger to the local resident who relayed it. The ability to properly estimate the existence of danger was difficult in combat conditions, and a procedure was not to be based on the need to assume a lack of danger when

such an assumption was at times unfounded. On this issue, one had to consider not only the physical danger of damage from gunfire originating in the wanted person's location, or from various booby-traps, but also the wider danger which a local resident who "collaborated" with the occupying army could expect.

These considerations led President Barak to the conclusion that the "Early Warning" procedure was contrary to international law. It came too close to the normative "nucleus" of the forbidden, and was found in the relatively grey area (the penumbra) of the improper. The result was that the Court would turn the Order Nisi into an Order Absolute.

#### Vice President M. Cheshin (concurring):

Justice Cheshin held that the subject was a difficult one. So difficult, he wrote, that a judge might ask himself why he chose the calling of the judiciary, and not another profession. No matter which solution he chose, the time would come when he would regret his choice. There was no clear legal rule to show the way, and accordingly he would decide according to his own legal reasoning. The present case was similar to the "ticking bomb" issue (HCJ 5100/94 *The Public Committee Against Torture in Israel v. The Government of Israel*, 53 (4) PD 817), where interests and values of the first degree stood opposite each other, and deciding which interests and values would prevail, and which interests would retreat, was unbearably hard.

Justice Cheshin asked whether being aided, in good faith, by a neighbor, was disproportionate in *every* circumstance:

Here he is that dangerous terrorist whose hands have become covered with blood, and whose plans are only evil. The terrorist is hiding in the house, and the order is to apprehend him 'dead or alive'. That order is uncontroversial, and the question is merely what shall or shall not be done to carry out the order. Suddenly the father of the family living in the house appears on the scene. The father had previously gone to the store to buy food for his family, and he now returns to his home, which is surrounded by army personnel. And in the house are his wife and eight children. The startled and fearful father hears from the army personnel, and he immediately agrees to the army's offer – it might even be his own request – that he call his family to leave the house, all according

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to the written procedure. Yet here we forbid the army from allowing the father to protect his family in this way. Certainly, this is not the case every time. However, such a case – or a similar case – can occur.

Moreover, our assumption is that we have reached the last resort: that the army has made use of all other means at its disposal – except violently storming the house – and that the terrorist has not surrendered. We thus stand before the following choice: being aided by the father, who will warn his family, or storming the house, involving mortal danger to the residents of the house and to the soldiers.

Justice Cheshin held that non-recognition of the procedure in such circumstances was by no means simple. Yet, if despite this, he still concurred with the opinion of President Barak, it was because he adopted the formula accepted in *The Public Committee Against Torture in Israel* case.

Justice Cheshin also wholeheartedly agreed with the opinion of Justice Beinisch, and stated that there were two reasons which strengthened these conclusion. The first reason could be called “the written rule versus reality.” However clear and clean the written rule might be, it was carried out, *de facto*, in the field, under pressure, in tense circumstances, in conditions of mortal danger to residents and soldiers. Any slight deviation from the directive, misunderstanding, or incorrect reading of the conditions in the field, would result in a slide from the permitted to the forbidden. The second reason was found in routine. Routine, according to its very nature, diminished the sensitivity and caution needed to perform the procedure, and the concern that the special and rare would become regular and routine – even bureaucratic – was great.

**Justice D. Beinisch (concurring):**

Justice Beinisch held that this issue was one of the most difficult to come before the Court in recent years. The primary assumption was that the Court was dealing with the safeguarding of human life at a time of legitimate military activity the objective of which was the arrest of a wanted person who endangered the security of the region and the security of the civilians and the soldiers. An additional assumption was that the military commander of the area held under belligerent occupation was charged with the safety and security of all the residents in the area, including the security of the very protected resident who was asked to assist IDF forces. Another uncontested pri-

mary assumption was that the military commander had to honor the rules of international law and the constitutional principles of the legal system. The judicial review of the legality of procedures meant to safeguard human life was anchored in these primary assumptions.

The question to be decided was whether the “Early Warning” procedure was in fact legal; in other words, whether it could ensure the achievement of the worthy purpose of safeguarding the lives of the residents, through fitting and worthy means. The answer to that question was negative because it permitted the use of disproportionate means, and therefore could not prevent an unacceptable practice which respondents themselves wished to prevent. Moreover, even if the procedure was legal, the danger of sliding into the practice forbidden by a categorical prohibition was inherent in the means permitted by the procedure.

Respondents emphasized that the procedure revolved around two principal axes. The first was that the mission of assisting in “Early Warning” was not to be cast upon a resident, unless he had given his consent; the other was that the mission of “Early Warning” was not to be cast upon a local resident if it was likely to expose him to danger to life or limb. According to Justice Beinisch, both these axes were inapplicable and therefore could not serve to anchor the entire procedure. Beyond the prohibition, anchored in principles of international law, of involving the protected population in the war effort of the army holding the territory, it was difficult to see how, in the circumstances present in the area, the required consent could be obtained. When a local resident was asked by a military commander, accompanied by armed forces, to assist in an act performed against the population to which he belonged, even if the request was made for a desirable objective, the resident had no real option of refusing the request, and therefore his consent was not consent.

Regarding the danger to the resident asked to assist army forces, there was no way to ensure that his life would not be endangered by involving him in an activity with which he had no connection and into which he was being thrown against his best interest. Naturally, the military commander had wide discretion to make decisions in the field, and he had to do so under pressure. The burden was on him to estimate the level of danger to which the local resident was exposed, and at the same time to estimate the danger to those in the house against which the activity was directed. Additionally, the weighty burden of minimizing the danger to the lives of his soldiers rested on his shoulders. In these circumstances, the danger to the life of the resident was a real danger that did not stand in proper proportion to the purpose of the

*Continued on page 44*

## Advocate Baruch Geichman (of blessed memory)

On March 2, we accompanied Baruch Geichman, one of the founders of the International Association of Jewish Lawyers and Jurists, to his final resting place.

He began his legal career in Jerusalem and continued it in Tel Aviv after the War of Independence.

Baruch Geichman felt that an organization such as IAJLJ, with its center in Israel, would be important not just to the State of Israel but to the Jewish People.

He was a driving force behind the Association for many years, serving faithfully for many years during the presidencies of Justice Haim Cohn and Attorney Yehoshua Rottenstreich, and forging friendships with Jewish jurists around the world. Even after he retired, he made himself available to the Association and participated in its activities. Several years ago, he was elected an Honorary Deputy President.

Active in the Israel Bar Association, Baruch Geichman was also one of its founders and, prior to its

establishment, one of the heads of the Lawyers Association. Long ago, he saw to the purchase of land for the Bar Association building and was active in recruiting financial assistance for its construction from Bernard Katzen, of blessed memory, who later became chairman of the Association's American branch.

Beyond his judicial work, Baruch Geichman dedicated much time to public service, which he considered an obligation, and carried out every role he took upon himself with a sense of responsibility and dedication. He inspired a spirit of goodwill in all that he did and with all those he worked with. His personality was imprinted on an important chapter in the life of the International Association of Jewish Lawyers and Jurists.

May his soul rest in peace.

*Itzhak Nener, Honorary Deputy President, IAJLJ*

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## Israeli extradition law

From page 36

The court, in relating to the territorial question, emphasized that not every decision not to apply local law should be seen as relinquishing sovereignty. Not every act of extradition means a rejection of the fundamental principles of the local legal system. The opposite is, in fact, the case. As long as the decision to extradite someone is grounded in the purposes for which the court exists, not only is the decision consistent with the fundamentals of the legal system, but it even advances them. The very act of waiving the application of the law in certain circumstances grants reinforced validity to the principles of sovereignty. The power to restrict the law, where this is justified, derives directly from this principle, and such power is exercised voluntarily and not as a result of external coercion. The Extradition Law seeks, therefore, as one of its purposes, to give Israel the opportunity, on the basis of its sovereign power, to waive the application of its laws, where such a waiver is deemed to be justified.

*Irit Kohn is a member of the Israel Bar, Vice President Acting as Coordinator with International Bodies of IAJLJ and Editor of Justice.*

### Notes

1. This article is based on one that appeared in the Hebrew edition of *Ha'aretz* newspaper on 12 December 2005.
2. [1954] *Sefer Hahukim* (Statutes of the State of Israel) (No. 163) 174.
3. 45 *Kitvei Amana* (Israel Treaty Series) 1324.

## Early warning procedure

From page 41

procedure, i.e., minimizing loss of life of the innocent residents. The procedure severely violated the free will of the resident asked to assist army forces and, no less, violated his dignity as a human being.

### Afterword

On 27 February 2006, Justice A. Rivlin rejected a petition by the Minister of Defense to hold a Further Hearing in the High Court of Justice on this judgment. The State reiterated its arguments and its view that a complete prohibition on the application of the early warning procedure would lead to an unreasonable and undesirable result. Justice Rivlin held that the issues involved were indeed difficult with important ramifications for the way in which the army arrested suspects. They were also issues to which international law did not supply an unequivocal answer and therefore the Supreme Court had been compelled to draw a balance between weighty competing interests. Nonetheless, Justice Rivlin held that the outcome of that balancing did not warrant a Further Hearing. Such a hearing would only be permitted in rare and exceptional cases. The judgment had followed lengthy proceedings. The dilemmas were clear and had been brought out into the open and the Court's decision had been unanimous. The judgment had applied principles of international law and constitutional law and relied on a critical mass of factors which weighed against permitting the early warning procedure. The State's arguments in effect amounted to an appeal against the judgment of the High Court of Justice and this was not the purpose of a Further Hearing. The judgment was limited to the issues before it. It recognized the need for the utmost to be done to distance the local civilian population from military activities; however, this did not mean that in other contexts, even of a similar nature, the balance of considerations would lead to an identical result.

*Dr. Rabel Rimon, Adv., former co-editor of Justice, specializes in maritime law.*

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# Lawyers do dance tango

*Though life is increasingly difficult for the Jewish community of Argentina, a dedicated group has created the Association of Jewish Lawyers of the Argentine Republic. Drawing on Judaism's core values, it will promote democracy, pluralism and fair economic, social and cultural development.*

**Brenda Rapoport and Cesar Rosenstein**

If you will it, it is no legend," said Theodor Herzl.

The profound need for progress and the deep responsibility we feel as lawyers, citizens and Jews inspired us to create the Association of Jewish Lawyers of the Argentine Republic (*Asociación de Abogados Judíos de la República Argentina – AAJRA*).

The Jewish community in Argentina is undergoing times of great fragmentation, deterioration of life conditions and dilution. We firmly believe that the strengthening of democratic institutions and pluralism will allow us a peaceful coexistence in the Diaspora. In Judaism, this is reflected in respecting the way in which every person wishes to live, feel, and express his or her most intimate ideological, moral, political and religious beliefs.

The AAJRA is a new institution in Argentine society. Its principal aims are to gather Jewish lawyers and jurists from law firms, the judiciary, Congress and the corporate world. Our principal mission is the defense of the institutions that favor a life of peace, with fair economic, social, and cultural development and with the core values of the Jewish people as an endless source of democracy, pluralism and wisdom.

Recently, we have been admitted as a member organization of the International Association of Jewish Lawyers and Jurists, which entails both great pride and enormous responsibility. It is challenging to meet the legacy of respect and excellence that has distinguished the IAJLJ throughout the last half century.

Now in full motion, we are starting 2006 with a series of activities involving academic, social and political actions.

ON 21 AND 22 MARCH 2006, the AAJRA formally launched its activities with an inaugural conference in Buenos Aires dedicated to the international protection

of human rights. The first day's events included a lecture on that topic to be held at the country's most prestigious university, the *Universidad de Buenos Aires (UBA)*. On the second day, the AMIA – the most important Jewish social institution in the country – hosted a meeting for our members, special guests, authorities and political leaders. The conference concluded with a grand reception and dinner.

Invited guests included top law firm partners, members of the judiciary and Congress, outstanding scholars and Jewish political leaders.

Scheduled activities for the upcoming months include sessions on the development of Jewish Law and professional development topics. We also plan to deliver courses and seminars on other subjects and to create the first Jewish Law Library in Argentina.

Our *pro bono* clearinghouse will keep improving its services to the community. All members of the AAJRA may volunteer their services, either to provide free legal assistance to persons and institutions with limited financial resources, or to promote public interest actions. Whenever fundamental rights are at stake, the *pro bono* team will demand that state authorities address public opinion through institutional

declarations. It will also act as *amicus curiae* before national courts.

As a valuable service to our members, we are also planning to organize a job fair this year. In the unstable context of our country and the overabundance of legal professionals, the idea of creating a network where both employers and prospective lawyers can meet is critical.

Behind this agenda and our mission lies one single purpose: to promote the widespread knowledge of the essential values of the Jewish people, which will help support a pluralist and democratic state.

*Brenda Rapoport is Vice President of the Executive Board of AAJRA. Cesar Rosenstein is a Member of the Board of AAJRA.*



# Res ipsa loquitur

*The deed speaks for itself: A new book highlights the contributions of five Jewish scholars to Bulgarian jurisprudence.*

Veluna Yavorska

The temptations for the contemporary reader are many, ranging from books which offer the “wonder” of fortune-telling with cards to republished classic works of authors like Dostoevsky, Steinbeck and Remarque. In this enormous diversity of themes, authors and genres, relatively little has been written about the people who have worked in a field, deprived of a prima facie beauty – the judicial scholars.

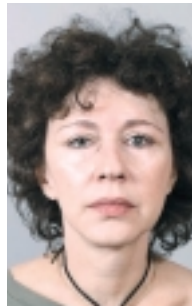
Prof. Snezhana Nacheva's introduction to the book *Jewish Names in the Bulgarian Judicial Science* makes even the greatest doubter of this type of literature read on with great interest.

She says, “The deed speaks for itself,” but adds: “A sense of hearing is needed to perceive the spoken. The contemporary, hurried man rarely listens to voices from the past and even more rarely comprehends that his knowledge, which has become his belonging, has been created by eminent predecessors.”

Following Prof. Nacheva's idea, Petko Dobchev, Prof. Alexander Dzherov and lawyer Dochka Bogdanova have collaborated to produce *Jewish Names in the Bulgarian Judicial Science*. The authors have portrayed the scholars as “complete” individuals, as professionals who played a significant role in the judicial science and as intellectuals who contributed to Bulgarian culture.

Five academics, who worked between 1897 and 2004, are presented in the book.

Academician Prof. Dr. Josif Fadenheht has been called by eminent Bulgarian lawyers “the earliest teacher of our jurisprudence.” After graduating from the University of Leipzig, Germany, his interests focused on civil law. He specialized in this field in Italy, where his teacher and tutor was the famous civil lawyer Prof. Giovanni Kironi. Prof. Dr. Fadenheht actively participated in developing Bulgarian legal terminology. He was also the first to clarify the jurisprudence, imported from other legal systems, while at the same time pointing out its faults and lacking elements. Prof. Dr. Fadenheht will always be remembered as one of the founders of contemporary Bulgaria.



Prof. Dr. Nissim Mevorah was a lawyer and a diplomat. His judicial pleadings, characterized by erudition, eloquence and aptitude, placed him among the best lawyers in Bulgaria. Prof. Dr. Mevorah took part in drafting Bulgaria's 1947 Constitution. With his textbook on family law, he made one of the greatest contributions to the development of this field. Under the pen-name Ahasfer Prof. Dr. Mevorah wrote many stories, feuilletons and literary articles.

Prof. Dr. Vitali Tadzher, who taught for more than 35 years, has been acknowledged as one of the best teachers of civil law. His textbook on civil law has been a principal source for many generations of law students, and has now become a classic in the Bulgarian judicial literature. He spoke German, English and Russian fluently, and also knew Spanish, French and Italian. These linguistic abilities enabled him to read the latest professional literature from around the world. In addition, Prof. Dr. Tadzher read lectures in the most prominent universities of Moscow, London and Paris, and therefore it can be said that he worthily represents Bulgarian legal science around the world.

Dr. Ilko Eskenazi is famous for his contribution to Bulgarian politics and the legislative process at the beginning of 1990, after the fall of the communist regime. He is one of the co-authors of the historic declaration stating Bulgaria's wish to become a member of the European Union. In 1992, he became vice-prime minister and was responsible for the talks on Bulgaria's accession to the Union. He was also the vice-president of the St. Cyril and St. Methodius International Foundation and played a significant role in preserving it in the years of uncertainty after the end of the communist regime.

Judge Solomon Rozanis has no academic titles nor did he teach at any university. Nevertheless, he has been acknowledged as a teacher for all generations by the lawyers themselves. He remains one of the most eminent Bulgarian jurists of all time. For 40 years he devoted his whole intellect to being a judge. The law has to be applied in an unequivocal way, he said, such that everyone is treated equally before it. Judge Rozanis has

always sought to apply the law as was intended by the legislators. His words on the role of a judge have been quoted on many occasions – “There is not a thesis that cannot be proved, but the court must rule that a crow is black, and not make it white.”

These five civil jurists have, with their books, monographs, articles and lectures, not only contributed to legal science in Bulgaria, but have also developed the law department at Sofia University and prepared generations of students who with their knowledge and talents honorably preserve the names of their teachers.

The creators of this book have avoided writing in a specialized, legal manner. Readers need not deal with difficult legal terminology or with long columns of dates, years and numbers. They have chosen a “bio-bibliographical” form for their book. The biographies are presented concisely, avoiding the pomposity with which many books of this type are written, overshadowing the deep sincerity, admiration and appreciation of the authors. Also noteworthy are the accuracy and effort with which the bibliographies have been written. With its up-to-date and in-depth information, *Jewish Names*



*Jewish Names in the Bulgarian Judicial Science* examines the work of five academics whose careers spanned the years 1897 to 2004.

in the *Bulgarian Judicial Science* enables legal and other professionals to find out facts with great ease.

Prof. Nacheva, Mr. Ognyan Gerdzhikov and Prof. Dimitar Tokushev's idea has been realized thanks to the Society for Friendship between Israel and Bulgaria (SFBIB), the Union of Bulgarian Lawyers (UBL) and the Bulgarian Section of the International Association of Jewish Lawyers and Jurists (BSIAJLJ).

A BOOK'S INITIAL presentation to the public is almost as important as the book itself. Despite a blustery January night, many people from different generations and of different professions – jurists, politicians, journalists and students – filled the UBL hall.

“Let us remember those who were with us. This memory is important both for the individual person and for society as a whole,” said UBL vice-chairman and president of the BSIAJLJ Yosif Geron in his welcoming speech. Greetings were also offered by the minister of justice and chairman of SFBIB, Georgy Petkanov; the president of the International Association



Vladislav Slavov, President of the Union of Bulgarian Lawyers (standing) addresses participants at the launching of *Jewish Names in the Bulgarian Judicial Science*, including Bulgarian Minister of Justice Georgy Petkanov (left) and IAJLJ President Alex Hertman (center).

of Jewish Lawyers and Jurists, Alex Hertman; UBL chairman constitutional judge Vladislav Slavov; and the president of Shalom, the organization of Bulgarian Jews, Emil Kalo.

A letter of greetings from the speaker of the Bulgarian parliament, Georgy Pirinsky, was also read to the guests.

I was expecting to hear formal greetings, but all the speeches were filled with feelings, warm and sincere, which made the event somewhat different from the typical presentations of such literature.

I would like to go back to 1946 and quote Prof. Dr. Mevorah. "We, the Jews of Bulgaria, would like to draw your attention to an extraordinary, prima facie fact – we, the Jews of Bulgaria, are all alive."

Today, in 2006, Alex Hertman added to Prof. Mevorah's words, saying, "Thanks to the Bulgarian people who saved their Jews, they will always remain large in history. Today we can talk about jurists who did not die in the Holocaust and lived to show their spirit and contribute to judicial science."

1946 and 2006. The words of two jurists from two generations whose common element is memory.

*Jewish Names in the Bulgarian Judicial Science* is about scholars with Jewish names, but they are Bulgarian Jews who will be remembered because they contributed to cultural, intellectual and judicial life in Bulgaria. "The book is evidence of the link between the two nations," said Minister Petkanov.

The event ended with the words of the great writer and poet Valery Petrov, son of Prof. Nissim Mevorah, who gave thanks on behalf of the scholars' descendants.

To quote Prof. Nacheva, "*Jewish Names in the Bulgarian Judicial Science* could be a good start." It is envisaged that the book would be the first in a series which would include a presentation of Bulgarian jurists educated at European universities and Russian names in the Bulgarian judicial science. It is hoped that the series would give contemporary jurists and future generations an idea of the architects of the third Bulgarian republic.

The strongest and most beautiful words are the shortest and most succinct. Prof. Nacheva has found them.

*Veluna Yavorska, a law graduate of Sofia University, is a jurist, journalist and writer.*



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# צדק

**ENGLISH:** 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory.  
[**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** ṣdq (= reliability, virtue), **ARABIC:** ṣadaqa (= he spoke the truth), **ETHIOPIIC:** ṣadaqa (= he was just, righteous)] Derivatives:  
**צדקה** **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתא (= justice). **PALMYRENE** צדקתה (= it is right).  
**צדק** 1. just, righteous. 2. pious.

*After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa*

Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.

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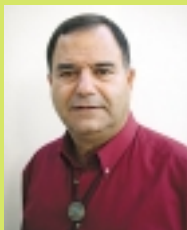
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