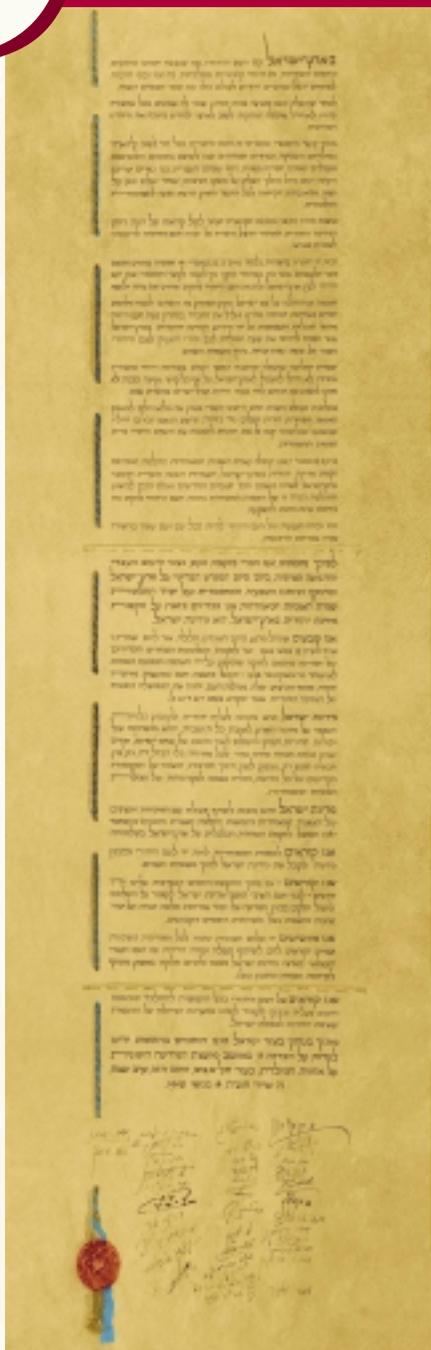


45 Spring 2008

Justice

THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS



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Israel celebrates 60 years

- Sixty years of Israeli law
- Sixty years of Jewish law

Human rights

- Srebrenica war crimes
- Human Rights Council

In the courts

- Almog v. Arab Bank
- German WWII trials



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President's Message

The publication of this issue of Justice coincides with a very special date – the 60th anniversary of the establishment of the State of Israel

On 29 November 1947, the United Nations General Assembly, voting 33 to 13 in favor with 10 abstentions, passed a resolution calling for the establishment of a Jewish state in part of Mandatory Palestine. On 14 May 1948, the day the British Mandate expired, the Provisional State Council, the new country's *pro tem* legislature, proclaimed Israel's Declaration of Independence. The joy of Jews around the world, thrilled at the first independent Jewish state in almost 2,000 years, was sharply dimmed when, on the following day, the armies of Egypt, Iraq, Jordan, Lebanon and Syria invaded, starting Israel's War of Independence. After many bitter battles and the loss of much life (one percent of its population), hostilities ceased with the signing of a series of armistice agreements in 1949.

While peace with its Arab neighbors proved elusive until the signing of peace agreements with Egypt in 1979 and with Jordan in 1995, it remains a difficult issue with other countries of the Arab world. Most of the larger Muslim world also remains hostile. Yet for many years Israel was much admired within the democratic world, and even in the communist world, as a thriving example of the many newly-independent countries born after World War II and the demise of the colonial era.

In recent years Israelis, and indeed Jews everywhere, have been disappointed, and are now worried, that our beacon of hope has become darkened, the target of vicious libels. We also see that what is called anti-Zionism is very often nothing but anti-Semitism masquerading under a different name.

How prescient, then, were those three great jurists – Justice Arthur Goldberg of the United States, Justice Haim Cohen of Israel and Nobel Peace Prize Laureate René Cassin of France – when they founded our Association. Back then, in 1969, Israel was basking in the glow of its victory in the Six Day War. The notion of anti-Semitism, although it existed, was far from the minds of decent people and Jews were seen, rightly, as champions of human rights by almost everyone.

Today we must gird ourselves anew, for human rights are being trampled in many places and Israel, in many quarters, has become the ever-despised Jew among the nations.

Who would have thought that 60 years after the Holocaust we would be facing so many denials of this atrocity. Our Association acted on this front when on the UN's Holocaust Remembrance Day it sent letters to the embassies of many countries in Israel, including Egypt.

Our Association was founded to address issues of importance to Jewish people everywhere, through our members' qualifications as jurists.

We are conferred with Category II status as a non-governmental organization in the United Nations, with representation at the General Assembly in New York and at the Human Rights Council in Geneva.

Unfortunately, the Human Rights Council is dominated by human rights' abusers and countries that have traditionally fought against the mere existence of the State of Israel.

In fact, the Second Lebanon War enabled the Human Rights Council to demonstrate once again its one-sidedness and lack of any intention to achieve objective goals. It attacks Israel at every opportunity, as if no human rights offenses are committed anywhere else in the world. Even when Israel's population is under attack, this is considered a matter for political "achievement" under the guise of human rights protection against which Israel is required to take a stand; in fact we must constantly take measures to oppose decisions of the Council that are legally baseless and morally outrageous.

Coupled with our opposing the United Nations' and the Human Rights Council's challenges and resolutions against Israel, we continue to serve and act as advocates for the Jewish people.

In recent years, our Association has addressed two fundamental issues that threaten Israel's right of existence. The first concerns Iran and its belligerent development of nuclear weapons and the venomous statements made by its president. As you know, Iran



has openly called for the destruction of Israel, while blatantly invoking anti-Semitic rhetoric and outrageously denying the Holocaust, all of which, of course, are incitements to genocide.

Our Association has not only protested publicly against such rhetoric wherever possible, but we also joined the Jerusalem Center for Public Affairs in a petition to the UN to impose sanctions and take other appropriate penalizing measures against Iran.

Our Association is also addressing the threat of terror that affects not only Israel and Jews, but also the entire world. Legal measures can be implemented to combat terror, for example, by fighting those who finance terror and by financially challenging those states that support it.

We have also successfully sought to increase our membership. Our Association held its first conference in Argentina, convened at the University of Buenos Aires and attended by 200 young Jewish lawyers from that country. Thereafter our members in Argentina celebrated the formation of the Argentinean Association of Jewish Lawyers and Jurists. During the conference, we met with Argentinean government officials, together examining the thorough work over the last few years investigating the bombing of Buenos Aires' Jewish community center, as well as the bombing of the Israeli embassy two years later that led to the death and wounding of hundreds of people, mostly Jews.

In May, our Association, together with the Latin American Forum of Jewish Lawyers created at that conference, will hold a conference in Buenos Aires that encompasses all Latin American countries.

We held our first congress in the United States, the opening session of which took place at a most auspicious location – the United States Supreme Court. This was a most memorable event not only for its venue, but also because Justice Aharon Barak, retired president of the Israeli Supreme Court, received the Pursuit of Justice award from our American Association in the presence of three associate justices of the United States Supreme Court.

We convened our first conferences in Hungary and Bulgaria. In Hungary, we remembered each of the 3,440 Jewish lawyers disbarred in 1944 by a governmental decree that resulted in their practices being taken away and many of them being sent to Auschwitz, where some 452,000 Hungarian Jews were murdered over a period of about six weeks in mid-1944. Following the conference, we asked that a special investigation be carried out by researchers at Yad Vashem, who managed to record the name of

each Hungarian Jewish lawyer who perished in the Holocaust.

The conference hosted by our Bulgarian section in Sofia differed in that we celebrated, with the Bulgarian minister of justice, the contribution of Jews to the establishment of Bulgaria's legal system. Bulgaria was different from all other European countries. The number of Jews on the eve of World War II remained the same at its end as, throughout this period, the Bulgarian people strongly protested against plans to send the Bulgarian Jews to the concentration camps, thus saving the lives of some 50,000 Jews.

We also celebrated the establishment of our new branch in Germany and plan to hold a conference in Berlin in late 2008.

Our Association, together with the College of Management in Rishon Letzion, Israel, and at the initiative of current Israeli Minister of Justice Daniel Friedmann and the College's Dean of Law Tamar Gidron, introduced an annual lectureship program in memory of our founder, Justice Haim H. Cohen. The first lecture was given by Justice Barak in 2006. In 2007 we were privileged to hear a lecture by our friend, professor of law and former Canadian justice minister Irwin Cotler.

These and all of our other activities, including the publication of Justice magazine, could not have been carried out without the enormous contributions and wonderful work of my colleagues – Irit Kohn (without whom the Association would not be as it is today), Haim Klugman, Yafa Zilbershatz, Avi Doron and our former executive director who left us after two and-a-half years, Arik Ainbinder, to name just a few. I must mention at this time the recent appointment of Ronit Gidron-Zemach as our new executive director.

The values of our Association have remained constant since its founding, and we continue to promote them as we believe necessary to accord with the legal needs of Jewish people everywhere in this difficult era. We hope that our continued growth will not only impact on Jewish lives, but also on all communities, societies and peoples, in an effort to rectify past injustices, combat present dangers and prevent new ones from emerging.

Lastly, I am sure I write for every one of our members and friends in congratulating Israel on its 60th anniversary and in wishing all citizens of the Jewish state peace and prosperity, and a world free of discrimination and human rights abuses.

Alex Hertman
President

Sixty years of Israeli law

Israeli has a modern, independent legal system based largely on Anglo-American and European law

Zvi Caspi

Israeli law reflects the history of the country in modern times, from the end of the nineteenth century to the present. The two powers ruling the land during the pre-state period – the Turks and the British – left their individual mark on the law. The State of Israel added its own contribution, creating what became known as a multi-layered system of law.

However, as time goes by, that description becomes less accurate. The last vestiges of Turkish law are all but gone. And, although significant remnants of English law still exist in important fields, on the eve of its 60th anniversary Israel can boast its own modern, independent, legal system.

From 1917 to 1948, the country was occupied by the British, who defeated the Ottoman Empire in World War I. In 1922 Britain received a mandate to rule it from the League of Nations. The term of the British Mandate coincided with a massive influx of immigrants that swelled the country's Jewish population from 55,000 at the end of World War I to more than 500,000 at the end of World War II. During this time, settlements were built, towns and cities grew and industries sprang up, laying the foundations of Israel's modern economy. Existing Turkish law was totally inadequate for this new reality.

The British were initially reluctant to make sweeping changes to the legal system of a territory that was not a true colony. Their solution was to accept the existing situation, while simultaneously creating the means for importing the norms of English common law and rules of equity. This was achieved through the King's Order-in-Council, 1922, the most important legislative act of the British period. It set up the second layer of the legal system, and laid the foundations of modern Israeli law.

Article 46 of the Order-in-Council provided that the law in force until the British conquest "Will remain in force to the extent that it does not conflict with the changes that occurred as a result of the conquest, and that in the event of a legal lacuna, the principles of the English common law and equity will apply, to the

extent that they do not contradict the conditions of the country and its inhabitants." Through Article 46, great parts of the English legal system were imported into the country.

At the same time, the British governor enacted many ordinances – legislative acts – some of which are still in force, though most have been so amended as to render their origin almost unrecognizable. They hold the same status as laws passed by the Knesset (Israel's unicameral parliament).

The State of Israel was founded on 14 May 1948. One of the first acts of the Provisional Council of State (superseded by the Knesset) was to issue the Administration and Law Ordinance,¹ which ordered the preservation of existing law, "providing that it shall remain in force insofar as there is nothing therein repugnant to this ordinance or to other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."²

Long after the issue of this ordinance, English law continued to influence the Israeli legal system through the continued effects of Article 46 of the Order-in-Council, which allowed for the application of English law whenever a lacuna was found in Israeli law. Thus, for example, the important fields of administrative and evidence law were developed entirely on principles of English law.

The basic principles and doctrines of the Anglo-American legal system continue to guide Israeli lawmakers and jurists. In this respect, one can point to such legal institutions as cross-examination, immunity from self-incrimination and the rules of civil procedure in Israeli courts.

Modern Israeli law repealed almost all vestiges of Turkish law. The mandatory application of English law was abolished when Article 46 of the Order-in-Council was repealed. However, those elements of English law already part of Israeli law remained in effect and continue their independent development through the judgments of the courts. Israeli courts closely follow English and American precedents, though they are not bound



by them, and when deemed fit create their own precedents and doctrines, which constitute an independent Israeli common law.

The Israeli legislature passed many new laws, particularly in the area of civil law. Most of these laws, while independent acts of the Knesset, have roots in western legal systems. For example, most of the body of commercial law, as well as the laws relating to contracts and to real property, are based on European legal systems. The Real Property Law³ contains principles derived from the German B.G.B; the Gift Law contains elements of Italian law; while the doctrine demanding behavior in good faith and due course in the negotiation and performance of a contract is an original Israeli application of German law doctrine and of the theories of German jurist Rudolf von Jhering.

Concurrently, one may find in today's Israeli legislation elements from the modern Anglo-American world, such as the sections of the new Companies Law⁴ that deal with liability of directors and protection of investors in public companies. Other laws reflect economic and legal concepts that have evolved out of the European Union and its institutions, such as the Value Added Tax Law.⁵

The echo of traditional Jewish Law can also be detected in some legislation and the occasional court judgment.

Legislative process

Israel has no formal written constitution, its main body of constitutional law having been formed over the years in the opinions and judgments of the Supreme Court. As will be explained, the validity of this statement is much in question. There is a separation of powers between the three powers of the state – the legislature, the executive and the judiciary.

The Knesset is the supreme legislative body and executive authority is vested in the Government. The judiciary acts independently of these bodies and may review their actions, although it is also bound by the laws of the Knesset. The extent of judicial review of Government or Knesset decisions has been subject to harsh and angry dispute.

The Knesset's 120 members are elected in democratic elections held at least once every four years. Citizens over 18 may vote if they are in the country. The electoral system is one of proportional representation. As a result, it is usual for ten or more parties to win seats.⁶

The Government comprises a prime minister who is a member of the Knesset and leader of his party, plus ministers appointed (and terminated) by him. The prime minister is required to present his ministers

before the Knesset and gain its approval.

The prime minister must form a coalition of parties (unless his party has gained a majority in the Knesset, something that in practice does not happen in Israel) to establish his Government and gain Knesset approval. Thus, the Government must operate under the general acceptance of most of the Israeli public and reflect the public's positions.

The president of the state fulfills a largely symbolic function. The president is elected by the Knesset for a five-year term and is limited to two consecutive terms. He must receive an absolute majority to assume his position.⁷

As the supreme legislative authority, the Knesset enacts laws. The Government, pursuant to laws passed by the Knesset, may make secondary legislation, known as regulations or sometimes as rules.

The authority to enact regulations is usually confined to technical matters such as establishing procedures. Sometimes, though, the authorizing law may merely establish a framework, while authorizing the minister to enact substantive rules. In many such cases, the authorizing law may provide for parliamentary supervision of the minister by adding a requirement that the regulations be approved by a Knesset committee.

Some laws grant local authorities powers of secondary legislation in matters pertaining to their jurisdiction. Legislative acts of the local authorities are known as "auxiliary laws" and require approval by the minister of the interior.

Secondary legislation is subject to judicial review and may be invalidated if the minister or other enacting body lacked authority, or if the legislation is unreasonable or constitutes an impermissible infringement of a fundamental right. A court of any instance may rule on the question of validity if such a ruling is necessary and incidental to the matter pending before it. Further, any interested party may directly challenge the legislation by filing a petition with the Supreme Court, sitting as the High Court of Justice.

A number of Supreme Court decisions have provided that lower courts have jurisdiction in matters that directly question the validity of secondary legislation.

In recent decades, the Knesset, often at the initiative of the Government, has embarked upon a codification of constitutional law, embracing recognized norms and establishing new ones. These enactments are called Basic Laws. Some deal with the authorities and the separation of powers, such as Basic Law: The Government⁸ and Basic Law: The Judiciary.⁹ Others are designed to protect basic rights, such as Basic Law: Human Dignity and Liberty.¹⁰

Some Basic Laws contain entrenched (“armored”) provisions that require a special majority of Knesset members, as stated in the particular basic law, to effect amendments.

Nevertheless, not all Basic Laws contain this provision. For example, a most important Basic Law, Basic Law: Human Dignity and Liberty, contains no such provision and may be amended by a simple majority of Knesset members. The general approach of most senior jurists, including judges of the Supreme Court, is that even if no formal provision is entrenched in the law, substantive protection inheres.

Accordingly, in view of Supreme Court decisions, the Knesset functions in two capacities: First, it is the general legislative body, as any other parliament. Second, it is the “Constituent Assembly,” a status conferred upon it on establishment of the state by the Declaration of Independence, which was drafted and signed by the “People’s Council” prior to the establishment of any state institutions. Pursuant to its role as the “Constituent Assembly,” the Knesset enacts Basic Laws.¹¹

Therefore, a Basic Law such as Basic Law: Human Dignity and Liberty contains a limiting provision allowing contrary legislation only under certain constitutional conditions.

Indeed, as noted, Basic Law: Human Dignity and Liberty has no formally entrenched provision. Were it to be amended by another Basic Law passed by only a regular majority of Knesset members, the Supreme Court may conclude that this latter Basic Law (amending the Basic Law: Human Dignity and Liberty), though also termed a Basic Law, was not enacted by the Knesset in its correct capacity as the “Constituent Assembly” and is therefore annulled and may not infringe the legal norms set out in Basic Law: Human Dignity and Liberty.

Thus Basic Law: Human Dignity and Liberty is evolving into Israel’s “Bill of Rights” and is the key force in transferring the state from one of “mere” law to that of a constitutional state.

It is also evident that a regular law, infringing the legal norms prescribed in Basic Law: Human Dignity and Liberty, may be invalidated by the court if the infringement fails to abide by the provisos stipulated in this Basic Law for legislation contrary to the legal norms of the Basic Law. This applies to all levels of courts, although when a court holds that any legal norm should be invalidated as it is contrary to a legal norm established by a Basic Law, this decision applies only to the parties involved in the action and has no general effect on the law. If this decision is made by the Supreme

Court, however, it will be binding.

The view of the Supreme Court that the Basic Laws create a formal constitution, and especially the assumption inherent in this view, that all Israeli courts have the authority to supervise and annul laws passed by the Knesset if the court finds them to be contrary to a Basic Law have, as noted above, become subject to bitter political and professional debate.

A further and different complication arises from the Government’s authority to enact emergency regulations that supersede all other legislation in times of national emergency.

While fascinating, and the subject of continuing parliamentary, academic and public argument, a full discussion of these issues is beyond the scope of this article.

The courts

Israel’s three-tiered general court system was “constitutionalized” by Basic Law: The Judiciary and the Courts, 1994. The highest court is the Supreme Court with its seat in Jerusalem. Below the Supreme Court are six district courts and the magistrates courts. Metropolitan Tel Aviv, with nearly half of the country’s population, is served by the District Court of Tel Aviv, the largest and busiest court in the country.

District courts and magistrates courts have jurisdiction in both criminal and civil law. Magistrates courts may decide civil claims valued at up to NIS 2.5 million (about \$700,000). They also have jurisdiction over all claims relating to the use and possession of land, regardless of value.¹² Jurisdiction over all family matters, including wills, inheritance, division of property, financial disputes, etc., lies with the Family Court, which operates as part of the Magistrates Court.

In contrast, matters of marriage and divorce remain under the jurisdiction of the religious courts, which have power over members of a specific religious community. For example, marriage and divorce matters of Jews are under the jurisdiction of the Rabbinical Court.¹³

In civil matters, district courts have original jurisdiction over all claims not within the exclusive jurisdiction of magistrates courts or any other tribunal. This includes, principally, civil claims valued at over NIS 2.5 million, claims affecting titles and other rights in real property, matters related to corporations, liquidations and bankruptcy.¹⁴ Additionally, the district courts hear appeals from judgments of the magistrates courts, as well as various tax appeals. Israel also has a small claims court system.

The Supreme Court has both original and appellate

jurisdiction. It hears appeals from original judgments of the district courts and second appeals from judgments of the magistrates courts. The latter are only heard upon the granting of leave to appeal by the Supreme Court itself, after review of a petition from the appellant stating the grounds for the appeal, or when the judgment of the District Court has so provided.

The Supreme Court's original jurisdiction is exercised in its capacity as the High Court of Justice. In this capacity, the court hears petitions relating to constitutional and administrative law, reviewing and examining the legality and reasonableness of acts of the Government and other administrative bodies. In certain circumstances, it will also review the legality and reasonableness of acts of the Knesset.

In fulfilling its function as the High Court of Justice, the Supreme Court has established itself as a dominant force in Israel's democratic system, earning widespread respect and admiration. In the absence of a written constitution, the Supreme Court has created a "Common Constitutional and Administrative Law," establishing, by way of judicial legislation, the constitutional norms of the State of Israel, the basic rights of residents, and the legal norms necessary for orderly administration. Some of the Supreme Court's jurisdiction over administrative law has recently been transferred to a new "Court of Administrative Matters," a unit of the District Court.

Israel has adopted a limited system of binding precedent, whereby decisions of the Supreme Court bind all lower courts. The Supreme Court is not bound by its own precedents, although it rarely deviates from them. Decisions of other courts are only persuasive and do not bind lower courts. Courts of all instances are authorized, in regard to civil matters that come before them, to award any remedy that appears appropriate under the circumstances, including specific performance, injunctions and declaratory relief, as well as temporary relief, including interim restraining orders, attachments and appointments of temporary receivers.

The Israeli public has historically placed great faith in the independence and integrity of the courts. The Supreme Court in particular has been recognized as the principal defender of human rights, condemning illegal or irregular acts by the public administration. This faith has to some degree been eroded in recent years, in part due to the debate over the role of the court vis-à-vis the role of the Government and the legislature.

There is no jury system in Israel. All court proceedings take place before judges who decide both matters of fact and law. Judges are traditionally independent of the

other branches of government and subject only to the authority of the law. This conception has been challenged, resulting in the establishment, by act of the Knesset, of a "Commissioner for Public Complaints against Judges," which, it has been argued, diminishes judicial independence.

Judges are appointed by the country's president upon recommendation by an appointment committee headed by the minister of justice and also including one other minister, the president of the Supreme Court and two other Supreme Court justices, two Knesset members (normally with a legal background), and two representatives of the Israel Bar Association. Appointments are permanent with compulsory retirement at age 70. Judges may not be removed from office by the executive. Criteria for membership in the appointment committee are currently under review.

A number of judicial and quasi-judicial tribunals function independently of the general court system. These are tribunals established under law for the purpose of resolving disputes in a number of specific areas. An important example is the Labor Tribunal, which has exclusive jurisdiction over all labor matters, including disputes between labor and employers' organizations.

Conclusion

It can thus be seen that Israeli law and the Israeli legal system are in most respects similar to their western counterparts. The exceptions are due to historical circumstance and a difficult dispute over the activist role of the courts in a modern society with ancient roots. It is to be hoped that the country's democratic character and a willingness to draw on diverse legal sources will ensure the resolution of this dispute, as well as the evolution and adaptation of Israeli law to new circumstances.

Zvi Caspi, LL.B. (Tel Aviv), is a judge in the Magistrates Court, Tel Aviv. He is Past First Senior Deputy to the Tel Aviv District Attorney (civil matters) and Past Chairman, Organization of State Attorneys in Israel.

Notes:

1. Law and Administration Ordinance, 5708-1948, 1 L.S.I. (Laws of the State of Israel) 7 (1948-9) (Isr.).
2. *Id.*, §11.
3. The Real Property Law, 1969, Sefer Hahukim (Statutes of the State of Israel) (No. 575) 259 (Hebrew; translation not yet published).
4. Companies Law, 1999, Sefer Hahukim (Statutes

See Israeli law, page 35

Halakha, Mishpat Ivri and the State of Israel

Traditional Jewish Law covers not just man's relationship to his Creator, but also man's relationship to his fellow man. To what degree have the man-to-man aspects of traditional Jewish Law been incorporated into modern Israeli law? What degree is desirable?

Amihai Radzyner

The meaning of the term *Mishpat Ivri* is not identical to that of the term *Halakha*. *Halakha* is a broader system than *Mishpat Ivri*, one that incorporates numerous commands that are not juridical. Its ultimate (albeit not sole) purpose is a religious one.¹

In fact, the term *Mishpat Ivri* was coined to create a distinction between this concept and the traditional term *Halakha*. The term first appeared in 1859, in Zechariah Frankel's "Darkei Hamishnah." However its use, in the sense commonly understood today, only began in the early part of the 20th century. At the time, the term was generally used by individuals who took pride in their declared secularism (although most had received an extensive religious education). Their foremost purpose was to establish a clear distinction between *Halakha* and *Mishpat Ivri*, a distinction whose purpose was to develop norms that were *halakhic* in origin for adoption by the secular Jewish state that would eventually come into being.² This, in turn, was based on the assumption that the national revival of a people also required the revival of its national legal system. In the case of the Jewish people, this national legal system developed in the framework of *Halakha*, which, however, if taken as a whole, would not be appropriate for secular-national life. Significantly, these individuals were well aware that even the legal portions of *Halakha* had religious significance; their intention was to dissociate the legal frameworks within Jewish law from their religious significance.

It might be said that the choice of the term *Mishpat Ivri* was particularly aimed at building a fence between itself and *Halakha*. This alienation is reflected in a number of characteristics, principal among them being an attempt to distinguish between the legal portions of the *Halakha* and its religious elements, and an extremely selective choice of those legal sources that would be compatible with the legal system of a modern state, a choice that obviously did not utilize established *halakhic* princi-

ples for choosing between competing laws. Thus the value of basing the laws of the state on *Mishpat Ivri* would be a cultural and national one, not a religious one.

It is not surprising, then, that many rabbis objected to the term *Mishpat Ivri* and avoided its use. They understood all too well that this was clearly an anti-*halakhic* term. And so, even someone like Chief Rabbi Isaac Herzog, himself a researcher of *Mishpat Ivri*, used the term sparingly. Indeed, Rabbi Herzog's proposal that *Halakha* be adopted as the basis for the Israeli legal system was based on religious motives.³



A national-cultural motivation

The number of secular jurists intensively involved in the question of integrating *Mishpat Ivri* into the laws of the state has declined over time, and today almost all are religious Jews. In fact, it is judges with a religious background who often make use of *halakhic* sources, while judges lacking this background, with the exception of a few noteworthy individuals, almost never do so. Regrettably, the last secular Jew to deal extensively with the question of *Mishpat Ivri* and its application in the State of Israel was the late Justice Haim Cohn.⁴ The reason is simple: the general public lacks familiarity with religious literature, and so the vast majority of those involved in *Mishpat Ivri* in Israel (like the majority of researchers in the field of the same name) are religious.

Apparently, however, the motive for such involvement among today's religious jurists is not a specifically religious one, i.e., one based on the assumption of a *halakhic* imperative that requires the integration of *Mishpat Ivri* into the laws of the state. Their main motivation is similar to that of the founders of the *Mishpat Ivri* movement: a national-cultural motivation. Consider former Supreme Court Deputy President Menachem Elon, who is the one most identified with the call to apply *Mishpat Ivri* within the state legal system, and who also wrote extensively on this topic. Some researchers have identified a religious leaning in Justice Elon's research and judicial activities.⁵

Justice Elon himself seemingly points out the religious value of integrating *Mishpat Ivri* when he states:⁶

It is clear that from the perspective of the *Halakhah* it is desirable and preferable for a dispute to be resolved in accordance with the substantive rules and the concepts of justice in the *Shulhan Arukh* rather than by rules of some other legal system.

However, a detailed reading of Justice Elon's writings shows that any claim that the integration of *Mishpat Ivri* has religious value would be relatively minor, compared with his other arguments. Both in his book and elsewhere, Justice Elon emphasizes the national-cultural value of *Mishpat Ivri* far more than its religious value. In his book, Justice Elon discusses at length the need to clearly distinguish between *halakhic* rulings and the use of *Mishpat Ivri* in Israeli law. He concludes:⁷

When the state, by statute or judicial decision, incorporates a principle of Jewish law, it does not do so in order to add another rule to the religious obligations mandated by the *Shulhan Arukh*; it does so in order to integrate the concept taken from Jewish law into the legal system of the state, which imposes legal obligations on all its citizens. Such an incorporation of Jewish law is fitting, proper, and desirable, even though it does not constitute a *halakhic* determination in the religious sense.

The same approach can also be seen in his judicial rulings.⁸

That being the case, it may be that there is no essential difference between the motives of those who advocate the use of *Mishpat Ivri* in our day and those who argued for its use in the past, most of whom were ideological secularists. The reason that a field which, in the past, attracted secularists, but today is almost exclusively the province of the religiously observant, relates more to areas of knowledge and identification than to any sense of *halakhic* obligation. If, prior to the establishment of Israel and in its early years there was broad consensus within its Jewish population regarding the need to integrate Jewish Law in the state and even enact legislation based upon it,⁹ today this demand is confined almost exclusively to religious circles.

Symbols have value

What value is there in the national-cultural motive for integrating *Mishpat Ivri*? Some would argue that there is none. This claim, for example, was made in a recent article by Rabbi Dr. Michael Abraham.¹⁰ Abraham's main argument against the cultural motivation is that, since *Mishpat Ivri* is not identical to *Halakha*, it is thus not the national legal system of the Jewish people, and hence its adoption cannot be viewed as having a national-cultural value. Abraham states that, "in general, drawing from *Halakha* has merely declarative value" and that this is "a rather questionable value." I have already stated that *Mishpat Ivri* and *Halakha* are not identical. I would even agree that any use of *Halakha* as a source is fundamentally declarative in value. But I disagree that it is a rather questionable value.

First, I would note that arguments similar to those made by Abraham have been made in the past. Followers of the *Mizrachi*¹¹ ideology, who identified *Mishpat Ivri* with *Halakha*, were very much opposed to an approach that argued against such an identity.¹² Their main argument was that it is especially those who are motivated by national concerns who must accept that the national legal system of the Jewish people is the traditional *Halakha*. To create a new entity, *Mishpat Ivri*, not identical to *Halakha*, misses the point. An editorial in *HaTor*, the *Mizrachi* movement's weekly, in Tamuz 5687 (July 1927), stated (emphasis in the original):

The revival of *Mishpat Ivri* and the national court system is undoubtedly an integral part of the national revival. In this there is no disagreement, and we would certainly fight for this decision. But what we say is that the **revival** of *Mishpat Ivri* is an integral part of the national revival, and not the **creation** of *Mishpat Ivri*.

Similarly, it was Member of Knesset Zerach Warhaftig who opposed the attempt by the secular Haim Cohn to formulate a "Jewish" inheritance law for the Jewish State. Extensive portions of Cohn's proposed law were based on pre-existing arrangements in *Halakha*, although other portions (particularly in regard to inheritance by a wife, a daughter, or a firstborn son) understandably advocated arrangements differing from *Halakha*. Warhaftig came out against this attempt to deviate from traditional *Halakha*. He argued that, even if amendments in the law were necessary, these should be made by the rabbinic bodies so authorized by *Halakha*, and not by the secular legislator.¹³

It would be unreasonable today to expect that Israel's legal system be based on *Halakha*. Does this mean we should avoid any action, even symbolic, that could influence the state's legal system to adopt even limited elements from *halakhic* sources, and with no concomitant religious value? Michael Abraham's response is that there would be no value in doing so. On the other hand, supporters of the integration of *Mishpat Ivri* believe that symbols do, in fact, have value.

Many ultra-Orthodox Jews see no value in a state that defines itself as a "Jewish State." They believe that a secular state cannot be considered a "Jewish State." At best it would be a state whose citizens or rulers are Jewish. Those who advocate the integration of *Mishpat Ivri* believe differently. One of the basic elements in the identity of a state is its legal system. Those who believe that the symbols of the state have a national-cultural value probably believe in the value of adopting *Mishpat Ivri*, even on the symbolic level alone.

I believe that many would prefer that the flag of Israel be blue and white (even if it is doubtful that the flag has religious value); that the state emblem be the Menorah (even if it is doubtful that the Menorah in the Temple appeared as depicted on the state's crest); that IDF soldiers receive a Hebrew Bible upon being sworn in (even if many of them will not treat it as *Halakha* demands); that the Bible and the Oral Law be studied in "secular" educational institutions (even if the students do not see them as a religious value); and so on. It is not surprising, then, that there would be those who advocate the value – granted, symbolic value – of integrating *Mishpat Ivri* in the laws of the Jewish State.

Two different concepts

Since we are talking of a national-cultural value, addressed to the whole of the Jewish population, and not a religious value which, by its nature, interests only those who are religiously observant, I do not accept the claim, sometimes made, that the general populace in Israel is not interested in the adoption of *Mishpat Ivri* (and I would emphasize: *Mishpat Ivri* and not *Halakha*). It is true that advocates of integrating *Mishpat Ivri* have not been particularly successful. However, the dominant reasons for this, in my opinion, are those that I mentioned above, and not ideology.

I would note that there are many who fail to distinguish between two different concepts: *Mishpat Ivri* and "religious legislation." These should be discussed in different frameworks. (This confusion may lie in the erroneous assumption that advocates of the integration of *Mishpat Ivri* are motivated by religious ideology.) I have

already defined *Mishpat Ivri* as a system that differs from *Halakha*, and which does not operate on the basis of religious motives. "Religious legislation" is another matter: religious legislation is the enforcement of *halakhic* law, generally on the basis of a religious motivation. This is how Justice Elon defined it:¹⁴

"Religious legislation" is any legislative act that, in the eyes of the non-religious public – and also in the eyes of the religious public, if they look upon it as the non-religious do – has a religious motive or interest, and that, absent such motive or interest, would not have been legislated, or would not have been legislated in the form in which it was.

Claims of religious coercion can of course be raised against "religious legislation," but not against civil legislation that makes use of suitable arrangements whose origin – historical, not normative – is in *Halakha*. Hence, to form a view regarding the inclusion of *Mishpat Ivri* on the basis of the negative attitude, held widely among significant portions of the public, toward marriage and divorce law in Israel (the most significant area of religious legislation in Israel), would be inappropriate. It is easy to understand the reservations that people have toward marriage and divorce laws that force people to submit to a system with which they do not identify and whose religious considerations they do not understand, a system that severely restricts their freedom to marry and divorce. But what does this have to do with the adoption by Israeli civil legislation of useful or efficient measures from *Mishpat Ivri*?

No legal distortion

In theory, the adoption of *Mishpat Ivri* within Israeli law could take a number of forms. In practice, however, an examination of Israeli legislation and judicial rulings indicates that the use of *Mishpat Ivri* within Israeli law is relatively limited. It may be that a particular section of a law adopts the corresponding legal arrangement in *Halakha* almost verbatim; the legal framework of a specific aspect of *Halakha* may be adopted only partially; it may be that a judge, in pondering a section of an existing law that requires an interpretation or a ruling, will turn to the sources of *Mishpat Ivri*; and it may be that an Israeli law dealing with a particular legal field is seen to adopt the socio-legal ethos underlying the aspect of *Halakha* dealing with a similar field, and its approach will be formulated accordingly.¹⁵

These approaches have been, at times, justly criti-

cized. For example, Michael Abraham is correct in saying with respect to the adoption of values found in *Mishpat Ivri*, “the most that we can expect is a creative and selective adoption of certain approaches in particular issues, done in accordance with the values of liberal democracy.” This is undoubtedly true. However I disagree with his conclusion, which he formulates in the form of a question: “If so, what is the Jewish significance of such an approach? Are we truly drawing from *Halakha* here?” It is clear that *Halakha*, as such, is not being drawn upon; we are not talking of the integration of *Halakha* along with the acceptance of its original, religious, character. I noted this above in indicating that, according to the advocates of integrating *Mishpat Ivri*, even though we are not drawing on *Halakha* as such, such integration still has “Jewish significance.”

Here I would like to consider another argument made against the integration of *Mishpat Ivri* within the laws of the state. It has been argued that the partial adoption of arrangements from *Mishpat Ivri* is not only a religious distortion but also a legal one. This argument has been put forward by, for example, Michael Abraham. The example that he uses to support his claim is the adoption of laws relating to the obligations of bailees, without the concomitant adoption of the system of oaths that would allow them to free themselves from certain other obligations (a paid bailee, for example, is required to make restitution in the case of theft or loss, but in the case of *force majeure*, he may take an oath and thereby be exempt from payment). Let us leave aside the question of religious distortion, irrelevant from the point of view of those advocating the use of *Mishpat Ivri*. Is there any legal distortion here? The answer is simple: no. We may assume that the legislator, in selectively choosing sources from *Mishpat Ivri*, will make intelligent use of them. The first two sections of the Israeli Bailees Law indeed include definitions and arrangements apparently drawn from *Mishpat Ivri*, among them the definition that a gratuitous (unpaid) bailee is liable only for loss or damage caused through his negligence, while a bailee for reward (paid bailee) is liable only for foreseeable damages that could have been prevented (Section 2). A judge, in applying this section, will apply the evidentiary rules that are appropriate to such cases, and it is unclear what legal wrong would be caused.

According to this logic, distortions would necessarily be created whenever the legislator adopts partial arrangements from any foreign legal system. Indeed, it is extremely common to create a law from provisions drawn from a number of legal systems. To unify those provisions

into an effective, self-consistent legal framework is the goal of those formulating the law.

A code appropriate to the ‘Jewish spirit’

Let us examine the distinctions that we have suggested between *Halakha* and *Mishpat Ivri*, and the application of the latter, by looking at the approach of a well-known Israeli judge.

Moshe Silberg, who was educated in the *yeshivot* of Lithuania, later served as deputy president of the Supreme Court. As a judge, he often made use of *halakhic* sources where, in his opinion, this was appropriate. However this use was not uniform. There were, indeed, instances in which he felt that *Mishpat Ivri* should be used as a binding source, particularly when interpreting terms that the Israeli legislator had apparently drawn from *Halakha*. For example, in discussing the interpretation of the term *halim*,¹⁶ as used in a section of the law that he was considering, he wrote:¹⁷

Let no one accuse me of legal anachronism, or accuse me of coming to interpret modern laws on the basis of the Sages of the Middle Ages... What I have attempted to do here is discover the meaning of the words used by the secular legislator. For the wonderful *halakhic* term, “*halut*,” so rich in meaning, has entered, as is, with its content and “interpretation,” into the scope of modern Hebrew legal nomenclature, and the Israeli legislator may be presumed to know the meaning of this expression.

However, in most instances, Justice Silberg turned to *Mishpat Ivri* purely as a source of inspiration, while emphasizing that it was not binding in most of the issues dealt with by Israeli law. Yet he also did not hesitate to ascertain general principles from *Mishpat Ivri*. Thus, for example:¹⁸

[W]hen the questioner asks... Whence the legitimacy of applying our perspective to a doctrine that originates in Turkish law? Then you shall say to him: The doctrine that a contract may be voided if it runs counter to public order we derive from Section 64(1) of the Civil Procedure Law, the Ottoman law. However, as to the specific question of what constitutes public order or how to achieve a more perfect world, this we must answer from within

our own moral and cultural viewpoint ... [W]hen the deciding question ... is one of *weltanschauung* – what constitutes “good” or “evil,” what constitutes “perfecting the world” or “damaging the world” – we are permitted – nay, obliged – to draw specifically from those ancient sources, for it is they alone that truly reflect the fundamental views of the Jewish people as a whole.

Justice Silberg called on the Israeli legislator to work toward the integration of *Mishpat Ivri*. For him, this was nothing new. It was in the 1930s that he first called for the creation of a legal codification based on *Mishpat Ivri*.¹⁹ To him, it was clearly necessary to create a new legal system for the nascent Jewish State. The adoption, en bloc, of a foreign legal code was out of the question. What was needed was a code that was appropriate to the “Jewish spirit.” Hence:

The only possible means, therefore, is to create for ourselves a new law – of ourselves and by ourselves. In this regard, we do not face a vacuum, in which we have to create *ex nihilo*. Fortunately, there exists the solid, historical basis of *Mishpat Ivri*, which contains all the necessary elements for creating a modern code to regulate the civilian life of the State.

Since “*Mishpat Ivri* in its present form cannot serve as an official code that will answer all the needs of our lives,” it follows that:

[E]ven if we accept upon ourselves all of the material content of *Mishpat Ivri*, we would still need to arrange a new codification of the law – an abstract, concise, precise codification, which will contain, in one to two thousand clauses, all the principles of civil law, along with all of its general institutions, and, in a separate volume, in some two to three hundred clauses, all the principles and rules of civil procedure.

Justice Silberg repeats this idea in greater detail in his “Talmudic Law and the Modern State.”²⁰ There he expands on the need to assume *Mishpat Ivri* into the Israeli legal system, since it is the national legal system of

the Jewish people. Justice Silberg emphasizes that the revamped code he was proposing would not necessarily adopt the decision-making principles of *Halakha*, nor all its fine details in regard to a given issue.

He presents his view of the process for integrating *Mishpat Ivri* within the law of the state as follows:²¹

The question, in its most concise form, is this: what are the ways and means to revive *Mishpat Ivri*, as the **law of the State**? ... This law, when it comes into being, will apply to **all** of the residents of the State, without distinction of creed or race, for it will derive its authority, not from the categorical imperative of the religion of Israel, but from the secular legislature of the State of Israel. And if it should be entitled “*Mishpat Ivri*”, then it will be because of the adoption – by the legislature – of the **fundamental principles and precedents** that derive from the world view and law of the Hebrew people.

That is, there is an enormous distance between *Halakha* and *Mishpat Ivri* that Silberg proposes adopting. This gap is also reflected in the scope of the legal solution, but particularly in the question of the source of authority for the law and the motives for obeying it.

From this we see that Justice Silberg was well aware of the enormous gap between the two concepts under discussion. This awareness can be clearly seen when we read the chapters prior to the concluding one in “Talmudic Law and the Modern State.” In these chapters he presents Talmudic law and several times emphasizes its uniqueness as a legal system, different in essence from other legal systems in that it is a system grounded in religion. He writes regarding the scope of the law (p. 1):

Jewish law, unlike practically all other legal systems, does not limit itself to the sphere of “between man and man.” It also places the relations between man and God in juridical categories...

And this is his view of the source and purpose of the law (p. 83):

Jewish jurisprudence is a religious jurisprudence, founded on the religious consciousness of the people. Even the offenses between man and man are also

religious offenses, and they affect man's relation to God.

Similar statements can be found in regard to other issues he discusses.

It is not this legal system, the *Halakha*, that Justice Silberg proposed integrating into the Israeli legal system. Justice Silberg proposed integrating *Mishpat Ivri*, a term whose meaning is completely different.

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Notes:

1. See, for example, Shmuel Shilo, *The Contrast Between "Mishpat Ivri" and Halakhah*, 20(2) TRADITION 91 (1982).

2. See, for example, Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, 46 Am. J. Comp. L. 339 (1998).

3. See, for example, Amihai Radzyner, *'Ha-Mishpat Ha-ivri' between 'National' and 'Religious': The Dilemma of the Religious-National Movement*, 25 BAR-ILAN LAW STUDIES (forthcoming) (hereinafter: Radzyner).

4. On Haim Cohn and his complex attitude to the question of integrating *Mishpat Ivri* in the State of Israel, see Amihai Radzyner & Shuki Friedman, *The Israeli Legislator and Jewish Law: Haim Cohn between Tomorrow and Yesterday*, 29 TEL AVIV U. L. REV. 167 (2005) (hereinafter: Radzyner & Friedman).

5. See, for example, Gidon Sapir, *Two Learned Scholars Among Us*, 25 TEL AVIV U. L. REV. 189 (2001).

6. 4 MENACHEM ELON, 4 JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1911-1912 (A. Philip & Muriel Berman eds., Bernard Auerbach & Melvin J. Sykes trans., 1994) (hereinafter: Elon). His claim is problematic, given that in the view of a number of *halakhic* authorities, it is forbidden to litigate before the Israeli

courts, even if elements of *Mishpat Ivri* are used in their rulings. This prohibition is even more severe than the prohibition against resorting to non-Jewish courts. Justice Elon attempts to answer this argument, *id.*, at 1914-1917 (see also the quotations cited there in note 46).

7. *Id.* at 1911.

8. For example: FH 13/80, Hendeles v. Bank Kupat-Am Ltd. et al, [1981] IsrSC (Reports of decisions of the Supreme Court of Israel, hereinafter: IsrSC) 35(2), 785, 794.

9. See Radzyner & Friedman, note 4 *supra*.

10. Michael Abraham, *Is Halakhah Mishpat Ivri? On Religion, Ethics and Law*, 15 AKDAMOT 141 (2004).

11. A religious faction, founded in 1902, within the World Zionist Organization. The term is based on the Hebrew words for "spiritual center."

12. See Radzyner, note 3 *supra*.

13. See Radzyner & Friedman, note 4 *supra*.

14. MENACHEM ELON, HAKIKA DATIT [Religious Legislation], 4 (5728).

15. For details and examples of the modes in which *Mishpat Ivri* is assumed, see Elon, 4, note 6 *supra*. For a fine example of the last approach, see Hanokh Dagan, *The Law of Unjust Enrichment: Between Judaism and Liberalism*, in LAW AND HISTORY 165 (Menachem Mautner & Daniel Gutwein eds., 1999).

16. *Halim* in this context means valid; *Halut* in this context means validity.

17. FH 13/58 Municipality of Tel Aviv-Yaffo v. Lubin, [1959] IsrSC 13, 118, 135.

18. CA 461/62, Zim et al. v. Maziar, [1963] IsrSC 17, 1319, 1332-1333.

19. Published in a collection of Justice Silberg's articles: 180-201 *Bain Ke'Echad* [Taken Together] (collected and published by Z. Tarlow & M. Hovav, 5742).

20. MOSHE SILBERG, TALMUDIC LAW AND THE MODERN STATE (Marvin S. Wiener ed., Ben Zion Bokser trans., 1973).

21. In his article in JEWISH LAW AND THE STATE OF ISRAEL 50 (Yaakov Bazak ed., 1969) (emphasis in the original).



AAJLJ Washington Chapter President Rhonda Lees



Retired Israeli Supreme Court President Aharon Barak



AAJLJ President Stephen R. Greenwald



Former U.S. Solicitor General Seth Waxman

IAJLJ and AAJLJ hold conference in Washington

In March 2007, IAJLJ co-sponsored its first-ever conference in the United States with the American Association of Jewish Lawyers and Jurists (AAJLJ). The conference, also held in conjunction with the American University Washington College of Law and Touro College Law Center, was held in Washington, D.C., under the title “Protecting Human Rights and Democratic Values in an Age of Terrorism.” Participants from around the world enjoyed panels on such topics as balancing civil liberties and security; the ethics and law of war; development of an Israeli constitution; Jewish Law and American jurisprudence; and battling terrorism with lawsuits.

The keynote address was delivered by former Solicitor General of the United States Seth Waxman, now in private practice, who discussed his involvement in litigation challenging the U.S. government’s detention of alleged enemy combatants. He urged the U.S. Supreme Court to learn from Israeli precedents and more vigorously protect

the rights of such detainees.

The highlight of the conference was a reception hosted at the U.S. Supreme Court by Justice Antonin Scalia, at which he presented retired Israeli Supreme Court President Aharon Barak with the AAJLJ’s annual Pursuit of Justice Award.

“The life of Aharon Barak, a child survivor of the Holocaust, symbolizes the victory of the Jewish people over those who tried to destroy them,” said IAJLJ President Alex Hertman. “His life exemplifies a victory of values over violence, a victory of excellence over mediocrity, and a life filled with hope for a Jewish society based on freedom, justice and human dignity as opposed to a society living by the sword.”

Former Canadian Minister of Justice Irwin Cotler also paid tribute to Justice Barak.

– *Eli Schulman*
Photos: *Hilary Schwab*

Ongoing German prosecution of World War II Nazi war crimes

Bringing Nazi war criminals to justice today raises vexing legal, moral and personal questions. Former war crimes prosecutor Judge Konstantin Kuchenbauer of the Munich Higher Regional Court believes that if we don't wish to forfeit the justification to investigate and prosecute future war crimes and genocide, we must continue to investigate and prosecute the war crimes of the past.

Konstantin Kuchenbauer

I. Introduction

The National Socialist (hereinafter: NS) war crimes of World War II were committed more than 60 years ago. However, the investigation and prosecution of such crimes still continues in Germany to the present day.

From 1945 through January 2005 public prosecutors investigated 106,496 war crime suspects, of which 6,498 were found guilty and sentenced as follows:¹

Death penalty	13
Life imprisonment	167
Imprisonment	6,201
Fine	115
Warning according to the law applicable to juveniles	1
No punishment	1

One of the most famous Nazi hunters, Simon Wiesenthal, stated at his retirement in 2003: "My job is done. I found the mass murderers I was looking for. I survived all of them. Those whom I didn't look for are too old and sick today to be pursued legally."²

On the other hand, in July 2002 the Simon Wiesenthal Center began its "Operation Last Chance" campaign to bring Nazi war crime suspects to justice. Dr. Efraim Zuroff,³ director of the Center's Israel office, stressed once more: "...despite numerous obstacles much can still be achieved in bringing Nazi war criminals to justice..."⁴

Therefore one may ask: Is it still possible to find and secure evidence, to find witnesses and suspects and to prefer public charges against suspects 85 to 90 years old? Should we even continue to investigate these crimes?

This article reflects on the difficulties in practice of prosecuting these crimes and will attempt to provide answers to those questions.⁵

II. Legal foundations

1. The principle of mandatory prosecution

The principle of mandatory prosecution is based on Section 152 subsection (2) of the German Code of Criminal Procedure (StPO).⁶ If there are sufficient factual indications for a crime of murder, German public prosecutors have no legal discretion but to open an investigation. However, they are not required to research history without probable cause; it is not their function to clear up history but rather to prosecute crimes.

How can we obtain such factual indications for a crime of murder? Some examples:

A newspaper article reported on massacres perpetrated by the 16th SS Division in St. Anna and Marzabotto, Italy, in 1943, and a suspect living near Munich was mentioned. We started investigations in cooperation with our Italian colleagues. Meanwhile public charges had been preferred and some of the German accused had been sentenced in absentia.

In 1999, a witness who had seen a TV report concerning Anton Malloth, a former guard of the "Kleine Festung Theresienstadt," went to a Czech police station and gave a statement against him. We received the written statement and started investigations.

2. Statute of limitations

The prosecution of murder in Germany was previously limited to 20 years after the commission of the crime. In March 1965 a very serious debate was held in the Bundestag (German Federal Parliament) on

whether or not to ban the prosecution of NS murder crimes by statute of limitations. The Bundestag found a compromise: the beginning of the period of limitation was fixed at 31 December 1949. On 26 June 1969 the previous period of limitation was extended to 30 years. Finally on 3 July 1979 it was abolished altogether. Today, in Germany the investigations of only the crimes of murder and, since 2002, certain crimes against International Law – including genocide, crimes against humanity and war crimes – are not precluded by a statute of limitations.⁷ The law also distinguishes between the crimes of manslaughter and murder. A person who kills another human being but without being a murderer commits the crime of manslaughter. A murderer is one who kills another human being for certain reasons or in a certain way, such as for base motives, treacherously or cruelly.

This means in practice that all crimes committed during World War II that are not murder (for example, manslaughter, rape, bodily harm and pillage), may no longer be prosecuted.

III. Agencies

In Germany different agencies investigate and prosecute NS World War II crimes.

1. Public prosecutors and police units

The investigations of such crimes cannot be undertaken by regular public prosecutors or regular police units. These crimes are unusual in that normally there is no murder weapon, no fingerprints or even the *corpus delicti*. One must investigate the structure of the combat unit and determine who ordered the mission or the killing of the civil population, as well as ascertain the political and historical background.

Thus to investigate these crimes properly, specialization is required: not only juridical but also historical skills; language skills; experience in conducting research in foreign archives; a sense of understanding of these crimes; and a knowledge of contemporary history.

To be successful in clarifying these crimes the public prosecutors must work closely with the relevant police units.

2. Central Office for the Investigation of National Socialist War Crimes

The Central Office for the Investigation of National Socialist War Crimes⁸ (hereinafter:

“Central Office”) was established by the state ministers and senators of justice of the Federal Republic of Germany on 1 December 1958, and is headquartered in Ludwigsburg, in the state of Baden-Württemberg.

At first its competence was restricted. The Central Office could only investigate NS crimes of violence committed beyond Germany’s borders and crimes against the civil population; regular war actions and crimes committed in concentration camps were excluded. In 1964/1965 crimes committed within Germany were added as well as investigations concerning the National Socialist Party and the highest offices of the “Third Reich” plus certain crimes against prisoners of war.

The Central Office is not a public prosecution authority but rather a special office that assists the law enforcement bodies. Its officials cannot apply for search or arrest warrants nor can they prefer public charges. It is their task to collect and evaluate all available evidence related to Nazi crimes in Germany and abroad.

Having collected evidence, the Central Office passes its files to the appropriate public prosecution office to initiate criminal proceedings. The public prosecutors must inform the Central Office about important results of their investigations and their final conclusion – termination of the case or preferring public charges.

IV. International co-operation

In order to successfully investigate Nazi crimes, German prosecutors are dependent on international cooperation as most of the crimes that are now being investigated were committed abroad. The best way to achieve cooperation is not only via a formal request for international legal assistance, but also by directly contacting colleagues abroad, by traveling abroad, and by interviewing the witnesses there.

There are a number of specialized offices abroad with which the German prosecutors cooperate, including the U.S. Office of Special Investigation, the Scotland Yard War Crimes Unit and the Chief Commission for the Prosecution of Crimes against the Polish Nation.

To investigate successfully, we must also rely on sources of information from non-governmental human rights organizations such as the Simon Wiesenthal Center, which produces the “Annual Report on Worldwide Investigation and Prosecution of Nazi War Criminals” and which, as noted above,

has initiated the “Operation Last Chance” for the purpose of finding the last NS war crime suspects.

V. Finding and securing evidence

The investigation of NS War Crimes relies on the following types of evidence:

1. Plea of guilty

This type of evidence is only a theoretical one. To the best of my knowledge no Nazi war crime suspect has ever confessed his atrocities. When we confronted suspects with overwhelming evidence, they denied they were even present at the scene or, if they admitted to being present, they minimized the significance of their actions or claimed they had been acting under orders.⁹

2. Witnesses

The German legal system permits both eyewitnesses and – in contrast to the Anglo-American law system – hearsay witnesses. This is a very important, but also a problematic type of evidence.

On occasion a witness independently contacts the police or the public prosecutor’s office and provides a statement. In other cases we can examine older court records concerning the same massacre or the same combat unit to find witnesses. We can also search in the newspapers or similar media.

Most of the witnesses are very old and suffer from various diseases. They have difficulty in recalling events that occurred decades ago. Usually they remember the central issues of a crime but not the details. On the other hand jurists, for sound legal reasons, need the facts in detail.

For some witnesses it is a psychological problem to recall the past, to bring to mind once again the massacres and cruelties; long lasting interrogations are a physiological burden for the witnesses as well. Sensitive skills are required to motivate them to provide their statement. One must be very patient and build up an atmosphere of confidence.

Most of the witnesses whom we located for the Malloth and Niznansky cases (see below) lived abroad and were infirm. German law requires witnesses to appear in court and give their statement during the main hearing. This means organizing their travel to Germany accompanied by relatives, physicians and policemen. If their appearance in person is impossible, the court can ask for legal assistance and interview them abroad or order an interrogation via audio conference. We did both in the Niznansky case.

If a witness has passed away, we can use earlier written statements given to the police, the public prosecutor or the court as evidence. Problems may arise if these statements were made in a jurisdiction whose legal system is quite different from ours, such as a communist one. Such statements must be checked very carefully to determine whether or not they had been created in a legal way. Merely the suspicion that the witnesses might have been influenced for political reasons could, in certain circumstances, affect the strength of the evidence, but there is no legal reason to reject the evidence completely. There is no consensus that evidence collected in countries of the former Eastern Bloc is per se second-rate evidence.

We had no single case where eyewitnesses gave a false statement. But we must assess the credibility of a witness very carefully because it is accepted that witnesses may be wrong and lose their way. On the other hand, we had some indications that witnesses close to the perpetrators contacted each other to coordinate their statements.

3. Documents

Documents might be the best evidence we have. But it is very difficult to find the relevant documents that may be dispersed around the world in different archives. Starting our search in Germany we first contact the archive of the Deutsche Dienststelle¹⁰ and the Berlin Document Center.

Since the fall of the Iron Curtain in 1989/1990, it has become much easier to search archives in the countries of the former Soviet Bloc, where a veritable treasure trove of evidence may be found. Unfortunately these archives are sometimes poorly organized.

We sometimes find new documents. The United States has declassified millions of documents in accordance with the Nazi War Crimes Disclosure Act 1998. In February 2003 the Vatican opened secret Nazi files, and in April 2006 Germany opened the huge International Tracing Service archive of Nazi records at Bad Arolsen relating to concentration camp inmates.

Other sources of documents include those found during a search of the domicile of suspects or witnesses based on a search warrant, which may include diaries, photos and letters from one veteran to another. Other useful evidence includes the records of former court hearings, for example the Nuremberg War Trials and the succeeding trials.

4. Historical Experts

The prosecution of Nazi war crimes cannot be suc-

cessfully undertaken without the help of historical experts.¹¹ However, we must realize that history and justice differ in their evaluation and use of evidence. While prosecutors and judges are interested in using evidence to prove the guilt or innocence of a suspect, historians interpret and analyze events. The *modus operandi* is different as well. If jurists cannot prove a suspect's guilt, they must invoke the principle of *in dubio pro reo* ('Giving the defendant the benefit of the doubt'); historians, however, can describe a truthful or possible narrative of historical events.

Public prosecutors and judges should give historians exact and detailed instructions, for example to search archives and to analyze documentary evidence, to authenticate documents or to assess the credibility of witnesses or of the suspect in the light of historical circumstances. The judge is not bound to accept the expert's statement; it is his task to verify the expert's conclusions.

5. Scene of the crime

To document the scene of the crime is very important in the investigation of ordinary murder prosecutions. However, in our cases, it is very difficult after decades to locate the exact place where the crime was committed, and we must consider that the surroundings may have changed. We thus must use old real estate registers, old photographs or the detailed descriptions of a witness.

VI. Investigations against Anton Malloth and Ladislav Niznansky

1. Anton Malloth

Anton Malloth, born in 1912, was a guard of the Kleine Festung Theresienstadt (a section of the Theresienstadt concentration camp) from 1940 until January 1945. Thousands of European Jews died there and thousands more passed through on their way to Auschwitz or other extermination camps.

In 1948 Malloth was sentenced in absentia to death by the People's Court of Leitmeritz, Czechoslovakia, for murder and various other crimes that he committed in and around the "Kleinen Festung."

In late 1948 Malloth was arrested in Austria based on a warrant of arrest filed by Czechoslovak authorities, but he was released because there had been insufficient evidence for his extradition. Because his place of residence was not known, the Austrian law enforcement bodies closed the case of Anton Malloth in 1963.

In Germany, the Dortmund Public Prosecution

Office investigated Malloth for suspicion of murder in 756 different cases. This investigation lasted for more than 20 years, starting in 1970, but in 1999 that office finally closed the case because of lack of evidence.

In 1988 Malloth was deported from Italy to Germany, after which he lived in a Munich nursing home.

In late 1999 we received a statement from a Czech witness, via legal assistance, that Malloth without any reason shot a harvester in a cauliflower field in September 1943.

We interrogated several witnesses in the Czech Republic, searched archives, took photos of the scene of the crime and investigated two more crimes inside the "Kleinen Festung." Malloth was suspected of having, in January 1945, ordered two inmates to disrobe and of ordering two other inmates to pour water over them so as to kill them slowly by freezing. Finally Malloth was suspected of having slain another inmate with a wooden club for having not stood properly during an inspection.

On 25 May 2000 Malloth was arrested based on a warrant of the Munich District Court and on 12 December 2000 we preferred public charges to the Regional Court Munich I for two crimes of murder and one crime of attempted murder. On 23 April 2001 the main hearing began and on 30 May 2001 Malloth was convicted of both murder and attempted murder and jailed for life. In the case of killing by freezing he was acquitted for factual reasons because a prosecution witness could not precisely describe whether Malloth ordered the execution or only stood nearby during this cruel event.

On 21 February 2002 the German Federal Court of Justice rejected Malloth's appeal of law and the Regional Court's verdict was upheld. Malloth died at the end of October 2002; some days earlier, he had been set free.

2. Ladislav Niznansky

Ladislav Niznansky, born in 1917, was a former Slovak army captain who at first supported the Slovak National Uprising in 1944; after his capture by German troops he changed sides and took charge of the Slovak section of an anti-partisan Nazi unit named Edelweiß.

In 1962 the Slovak District Court Banska Bystrica convicted Niznansky of the January 1945 shooting and killing of villagers of Ostry Grun and Klak, two small communities in the Slovak mountains, and of 18 Jews found hiding in three bunkers in a forest near the

Slovak village of Ksina. The court sentenced him to death in absentia.

In the 1960s the Public Prosecution Office Munich I opened an investigation against Niznansky because of both massacres, but terminated the case because of lack of evidence. In 2001 we received an inquiry from the Slovak authorities about Niznansky and reopened the case. Niznansky, meanwhile, had become a German citizen in 1996.

We traveled once to the Czech Republic and three times to Slovakia to interview several witnesses, to search archives and to examine the scene of the crime.

In January 2004 the District Court Munich filed a warrant of arrest against Niznansky and he was arrested. On 3 March 2004 public charges were preferred in the Regional Court Munich I. The main hearing started on 9 September 2004, lasted 46 days and concluded on 19 December 2005. During the main hearing Niznansky was released because a witness for the prosecution gave a contradictory statement. Although the public prosecution office demanded life imprisonment, he finally was acquitted for lack of sufficient evidence.

VII. Significant problems and lessons learned from the investigations

It is still possible to investigate NS crimes, to find and secure evidence, to prefer public charges and to get suspects sentenced. It might be difficult, but we have a moral and legal obligation to attempt to do so.

To prosecute NS crimes is a full time job. One must investigate not only at home but abroad. One must ask for international legal assistance and contact foreign governments. One must learn how to associate with journalists and the media and one must interview very old witnesses. A highly motivated and skilled team of investigators is essential.

Most of the crimes were committed abroad. To read foreign documents and interview foreign witnesses cannot be done without the help of translators and interpreters. This caused several problems as it is very difficult to properly interview a witness if you are not able to speak directly with him or her.

If the suspects are in pre-trial detention, they usually argue that they are unable to be held for medical reasons. During the main hearing they often claim that they are medically incapable of withstanding the proceedings. Thus medical experts must be called in to examine them.

Normally you cannot expect a plea of guilty.

There are problems not only in finding evidence but also in presenting the evidence to the court. To

motivate old and infirm witnesses to come to court, especially from abroad, demands great skill. One must develop a system to care for these people. Some of the witnesses were anxious because they did not understand court procedures. This means that the witnesses must be prepared, but not influenced. If you cannot motivate them to appear in court you could propose an audio or video conference or an interrogation in their homeland.

There is an increasing problem of whether to use evidence whose source is in a former communist country. This evidence should not be rejected out of hand; rather, each piece of evidence must be examined carefully to determine whether it was improperly influenced.

Another factor must not be underestimated: The courts no longer have practical experience in handling these cases.

The investigations and the main hearing will attract worldwide media attention. This attention may help in bringing forth additional evidence, but could just as well endanger the main hearing, especially by influencing lay judges.

Finally, it is a very heavy psychological burden for all persons involved in the criminal proceedings to investigate and prosecute these crimes of murder.

VIII. Should we continue investigating the last Nazi war criminals?

These crimes were committed more than 60 years ago. It may be very difficult to find evidence to prefer public charges. There may no longer be any reason to prosecute and sentence very old men or women. Public opinion may no longer take interest in these crimes. Yet these arguments are not convincing. Why?¹²

The principle of mandatory prosecution exists in Germany. If there is sufficient factual indication for a crime we must investigate; murder is not exempt due to a statute of limitations.

Advanced chronological age alone is not an acceptable reason to terminate our investigations.¹³ However, if the perpetrators are not able to defend themselves or if they cannot withstand the main hearing due to medical infirmity, the case must be terminated.

We have two reasons for punishment: first, to prevent the perpetrators from committing crimes again and to reintegrate them into the civilian community; and second, to dissuade others from committing comparable crimes. Neither reason is relevant in the case of NS war crimes.

That is because we have an obligation not only to the victims, but also to their survivors to do whatever is in our power to hold their murderers accountable.¹⁵ It is very important for the survivors and witnesses not to be silenced, but to give them the opportunity to be heard by a prosecutor and participate in a tribunal.

We have not only a moral, but also a legal obligation to restore justice. Justice is not a matter of time, not a matter of a chronological age, not a matter of how difficult it might be to find evidence. Justice under these circumstances is to bring the Nazi criminals to court, to make their crimes public and to demonstrate that they are personally responsible for their crimes. Last but not least, justice requires that these criminals be punished by a sentence commensurate with their personal guilt.

If we do not wish to forfeit the justification to investigate and prosecute future war crimes and genocide then we must investigate and prosecute the war crimes of the past.

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Notes:

1. Letter of the Central Office Ludwigsburg of 24 May 2006 to the author.
2. BBC News, 18 Apr. 2003, <http://news.bbc.co.uk/1/hi/world/europe/2959591.stm> (last visited 23 Dec. 2007).
3. EFRAIM ZUROFF, OCCUPATION: NAZI HUNTER: THE CONTINUING SEARCH FOR THE PERPETRATORS OF THE HOLOCAUST (1994).
4. Efraim Zuroff, *Too Late?* 45 SHALOM MAGAZINE, Apr. 2006 (<http://www.shalom-magazine.com>, last visited 16 Jan. 2008) (hereinafter: Zuroff, Shalom Magazine); Efraim Zuroff, *Can Nazi War Criminals Be Prosecuted in the 21st Century?* 41 JUSTICE 12 (2005).

5. See DIE JURISTISCHE AUFARBEITUNG DER NS-VERGANGENHEIT IN DER DDR UND DER BUNDESREPUBLIK DEUTSCHLAND (Ministerium der Justiz des Landes Sachsen-Anhalt et al. ed., 2004); NUREMBERG FORTY YEARS LATER: THE STRUGGLE AGAINST INJUSTICE IN OUR TIME (Irwin Cotler ed., 1995); ALLAN A. RYAN, QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA (1984); ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS (1993); *Probleme der Verfolgung und Ahndung von nationalsozialistischen Gewaltverbrechen* II DEUTSCHER JURISTENTAG, VERHANDLUNGEN DES 46. DEUTSCHEN JURISTENTAGES IN ESSEN 1966 C 7-65 (1967); Zuroff, *supra* note 3.

6. Strafprozeßordnung [StPO] [German Code of Criminal Procedure] as promulgated on 7 Apr. 1987, Bundesgesetzblatt [BGBl] [Federal Law Gazette] I p. 1074, 1319, section 152 subsection (2): "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses, which may be prosecuted, provided there are sufficient factual indications..."

7. Strafgesetzbuch [StGB] [German Penal Code] as promulgated on 13 Nov. 1998, BGBl. I p. 3322, section 78 subsection (2): "Serious criminal offenses under Section 211 (murder) are not subject to a statute of limitations"; Völkerstrafgesetzbuch [VStGB] [German Code of Crimes against International Law] BGBl. I p. 2254, section 5: "The prosecution of serious criminal offenses pursuant to this act and the execution of sentences imposed on their account shall not be subjected to any statute of limitations."

8. Willi Dreßen, *Die Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung von NS Verbrechen in Ludwigsburg*, 6 DACHAUER HEFTE 85 (1990).

9. See Allan A. Ryan, *supra* note 5, at 336.

10. See http://dd-wast.javabase.de/frame_e.htm

11. See Erich Haberer, *History and Justice: Paradigms of the Prosecution of Nazi Crimes*, 19 HOLOCAUST AND GENOCIDE STUDIES 487-519 (2005).

12. For some aspects see Zuroff, Shalom Magazine, *supra* note 4.

13. *Id.*

14. *Id.*

Bosnia, Serbia and the politics of international adjudication

The Bosnian Genocide case represented a unique challenge for the International Court of Justice, while its judgment brought forth mixed reactions and not a small amount of controversy

Yuval Shany

The judgment of the International Court of Justice (hereinafter: ICJ) in the *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter: *Bosnian Genocide*), issued on 26 February 2007,¹ has become the source of considerable controversy. Whereas some commentators have viewed it as one of the most important decisions of the court in recent memory,² others have disparagingly labeled it as one of the court's worst ever blunders.³

This difference of opinion can perhaps be attributed, in part, to the mixed nature of the outcome – while it was the first ICJ judgment ever to pronounce that genocide had been committed, it exonerated Serbia from direct responsibility for the genocide in Srebrenica (holding, instead, that it 'merely' failed to prevent genocide). Some commentators were impressed with the 'half full' glass – its innovative interpretation of the substantive provisions of the Genocide Convention,⁴ whereas others pointed at the 'half empty' part – the timid stance it took towards actually assigning state responsibility for genocide.

This article discusses some of the most significant 'half-way' conclusions reached by the ICJ in *Bosnian Genocide* and offers a possible explanation for the court's proclivity for mixed outcomes – the tendency of the ICJ to try to partly satisfy all parties to the case before it. Although international judges often deny that they resort to such calculations, I have little doubt that considerations relating to the acceptability of the judgment are factored into the judicial process. Moreover, from a normative perspective, such considerations probably represent under current international conditions a 'lesser evil': in a world in which international courts do not always enjoy compulsory jurisdiction and almost never enjoy significant enforcement

capabilities, some catering to the interests and sensitivities of the litigating states may be unavoidable. Still, acknowledging the inevitability of 'judicial politics' does not solve the serious problems associated with the practice: strategic considerations may interfere with the adequate fulfillment of judicial functions by international courts; moreover, engaging in 'judicial politics' may adversely affect the perceived legitimacy of judicial institutions. As in many other areas of law and politics, some form of balancing between competing policy considerations and interests is warranted.

This article comprises three segments: Part one describes the main issues presented in *Bosnian Genocide* and analyzes some of the 'half-way' positions taken by the court on them. Significantly, I argue that the controversial nature of some of the court's key holdings could, perhaps, be best explained as a conscious attempt to preserve a delicate balance between the litigation interests of the two states involved in the case. Part two introduces some general observations on the inclination of international courts to strive for a balance between the litigation interests of the disputing parties and part three concludes.

Part one: striking the balance

The questions

There is little question that *Bosnian Genocide* represented unique challenges for the ICJ. It was the first ever contentious case brought to the court on the basis of the Genocide Convention;⁵ it raised complicated jurisdictional and factual issues; and it required the court to elucidate the relations between its work and that of another international court – the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) – which had reviewed the same events and pronounced copious factual and legal conclusions on them. Specifically, the ICJ had to address three principal questions:



JURISDICTION: Could Bosnia have brought the case against Serbia (at the time, Yugoslavia) to the court in 1993, notwithstanding the uncertain status of membership of the latter state in the UN Charter and the ICJ Statute appended thereto (which is the basis of the court's jurisdiction)? This question received added significance following the 2004 judgment of the ICJ in the *NATO Bombing* cases,⁶ where it was held that Yugoslavia was not a UN member throughout the 1990s, and therefore could not bring a case to the court against several NATO member states in connection with the 1999 NATO bombing campaign against Yugoslavia.

SCOPE OF GENOCIDE: Did genocide take place in Bosnia, and if so, what specific atrocities constituted genocide? An associated question was what weight, if any, should the court assign to the factual and legal conclusions of the ICTY on the nature of the events that took place in Bosnia.

RESPONSIBILITY OF SERBIA: If genocide did take place, did Serbia carry direct or indirect legal responsibility for its commission? A complicating factor was the need to reconcile inconsistent decisions of the ICJ in *Nicaragua*⁷ and the ICTY in *Tadić*⁸ on the standard for attributing crimes by non-state militias to states (in this case, whether Serbia bore responsibility for crimes perpetrated by Bosnian-Serb militias).

The answers

The court decided these three questions as follows:

JURISDICTION: The court accepted jurisdiction over the case through reliance on its earlier 1996 decision,⁹ which rejected Yugoslavia's preliminary objections to its jurisdiction. The ICJ determined that its 1996 judgment on jurisdiction was final (and hence constituted *res judicata*) and the court was unable to revisit it.¹⁰ This led to a rather strange outcome: While Serbia was deemed not to be a state party to the ICJ Statute for the purpose of bringing cases to the court as an applicant in the *NATO Bombing* case, it was estopped from contesting its membership in the ICJ Statute during the same period in *Bosnian Genocide*, where it was the respondent party.¹¹

SCOPE OF GENOCIDE: In its judgment, the ICJ adopted a narrow interpretation of what constitutes genocide, reversing, in effect, some international authorities that had equated *ethnic cleansing* with genocide.¹² The ICJ held: "Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide."¹³ Applying this standard, the court held that all incidents of killings, sexual violence, imposition of inhumane living conditions,

deportations, harm to cultural property and other crimes committed by the Bosnian-Serbs did not meet, separately or cumulatively, the definition of genocide as they lacked a showing of special intent (*dolus specialis*) to destroy the protected group – the only exception being the massacre in Srebrenica.¹⁴

RESPONSIBILITY OF SERBIA: The court rejected the 'overall control' standard for attributing acts of irregular militias to the state backing their activities that the ICTY laid down in *Tadić*,¹⁵ and re-affirmed the earlier standard of attribution adopted by the ICJ in *Nicaragua* – the 'effective control' standard.¹⁶ Applying this latter standard, it held that '[t]he Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the Former Republic of Yugoslavia, to commit the massacres.'¹⁷ The court further held that it had not been proven that the authorities in Belgrade knew of the genocidal intent of the Bosnian-Serb irregular forces. Hence, they could not meet the definition of accomplices under customary international law.¹⁸

Concerning Srebrenica, the court held that Serbia should have anticipated the risk of genocide occurring there, and that its failure to apply its restraining influence on the Bosnian-Serb forces violated its obligation to prevent genocide under the Genocide Convention (the court held that this obligation also applies to events taking place outside the state party's territory).¹⁹ The court further held that by failing to arrest and surrender to the ICTY the commander of the Bosnian-Serb militias, General Ratko Mladić, Serbia violated its obligation under the Genocide Convention to punish perpetrators of genocide.²⁰

With regard to remedies, the court held that, given the absence of a clear causal link between Serbia's failure to prevent and punish genocide and the injuries sustained by Bosnian citizens, no order for reparations should be issued. Instead, a declarative statement, asserting violation of the Genocide Convention by Serbia, would be an appropriate remedy under the circumstances.

The controversial nature of the court's conclusions

The conclusions of the court on the three questions before it are anything but uncontroversial. First, as far as the jurisdictional part of the decision goes, the court has been severely criticized for unjustifiably over-stretching the concept of *res judicata* to decisions on jurisdiction rendered at an earlier stage of the same proceedings; for over-relying on legal conclusions that were decided at earlier stages without serious consideration; and for narrowly construing its powers of revision.²¹ Indeed, seven out of

the fifteen judges on the bench expressed varying degrees of unease with this particular outcome.²²

Second, as for the actual findings on the commission of genocide, some writers have criticized the court for refusing to look at the 'bigger picture' of the events in Bosnia – a picture that seems to suggest that the various atrocious crimes meted out by the Bosnian-Serbs were all part of the same 'master-plan' of creating an ethnically homogeneous Serbian state.²³ Others have questioned the court's readiness to rely on the absence of individual convictions in genocide by the ICTY (except with relation to the massacre in Srebrenica), without properly considering the difference between standards of liability under criminal law and state responsibility²⁴ or fully appreciating the limited probative value of reduced charges as the result of plea bargains.²⁵

Third, with respect to the question of Serbian responsibility, the court's legal analysis of attribution standards, the reluctance to find Serbia to be an accomplice to genocide, and the decision to refrain from ordering reparations, have all been criticized as excessively conservative.²⁶ At the same time, the court's expansive reading of Article 1 of the Genocide Convention as potentially imposing on all states a duty to prevent genocide, even if committed outside their territory, has been noted for its remarkable boldness.²⁷ Still, some writers have criticized the court for not clarifying whether Article 1 can provide an independent basis for exercising of universal jurisdiction against individual perpetrators of genocide.²⁸ So, arguably, the court construed broadly the duty to prevent genocide while narrowly construing the duty to punish its perpetrators.

Part two: possible explanations for the judgment's internal contradictions

How can one explain these contradictions in the judgment, which at times appear to go out of their way to clear Serbia of genocide charges yet at other times represent a clear effort to attribute to it some degree of legal responsibility? One possible explanation for some of the court's more controversial conclusions relates to its limited fact-finding capabilities:²⁹ Since the court was not able to engage in extensive fact-finding (independently of the factual findings already reached by the ICTY), it had to develop 'imaginative' legal constructions on some of the issues at hand, such as the duty to prevent genocide, as a way to compensate for its inability to reach direct factual conclusions on the issues at the heart of the case (e.g., were the massacres in Bosnia committed with the intent to commit genocide? Did Serbia actually control the Bosnian-Serb militias? Was it aware of their genocidal

intent? etc.). In this way, the court was able to impose some degree of responsibility on Serbia despite the absence of a 'smoking gun' – established facts that could have tied it directly to the genocide.

Still, limits on fact-finding capabilities cannot fully explain some of the court's more controversial legal conclusions on jurisdiction, the interpretation of the Genocide Convention and the lack of reparations. In particular, problems in fact-finding cannot satisfactorily account for what appears to be a 'convulsive' effort throughout the judgment between controversial legal conclusions, which would seriously compromise the litigation interests of Serbia (e.g., on issues of jurisdiction, duty to prevent and punish) and equally controversial conclusions, which would undermine the Bosnian case (e.g., on definition of genocide, allocation of state responsibility and reparations). Hence, the explanation to the judgment's internal inconsistencies is, to my mind, different.

Arguably, the specific holdings in *Bosnian Genocide* can be viewed as an attempt by the court to strike a balance between the litigation interests of the two parties: Serbia lost on jurisdiction, but was not designated a genocidal state; Serbia did not commit genocide or serve as an accomplice in its commission, but was guilty of not preventing genocide; Serbia did not prevent genocide in Srebrenica, but did not violate the Genocide Convention with respect to other atrocities committed in Bosnia (which the court refused to characterize as genocide); and, finally, although Serbia violated the Genocide Convention, it was not required to pay reparations. So, the court accommodated Bosnian litigation interests by pronouncing that genocide took place in Bosnia and that Serbia was involved therein, but, at the same time, accommodated Serbian litigation interests by downplaying Serbia's involvement in the genocide and minimizing the practical consequences of the judgment.

Significantly, this 'balancing' exercise can be identified in many other contentious ICJ cases. For example, in *Oil Platforms*³⁰ the United States lost the case but was exempted from paying reparations; in *Avena*,³¹ again the U.S. lost, but U.S. courts were entrusted with wide discretion concerning the implementation of the judgment; in *Danube*,³² the Court found both states in violation of their obligations, refused to adopt any practical measures and sent the parties back to the negotiating table; and in boundary delimitation cases a compromise line of demarcation is often resorted to.³³ This has led some commentators to identify in ICJ litigation a trend of 'conciliarization' or preference for 'transactional justice.'³⁴

What can international courts hope to achieve, insti-

tutionally, when engaging in this sort of balancing act? First, for a court, such as the ICJ, whose jurisdiction over contentious cases depends on party consent, ‘conciliarization of adjudication’ may be an important way to increase the likelihood of acceptance of its jurisdiction. In addition, ‘compromise judgments’ are more likely to be executed by the parties. Hence, the voluntary nature of the judgment enforcement process, and the need for party cooperation at this stage, militate in favor of some degree of ‘conciliarization’ of judgments. This is especially so because compromise outcomes may meet the parties’ preference for distributive justice.³⁵ Moreover, compromise judgments often serve the practical need of reaching wide agreement among the different judges, and are therefore reflective of a higher degree of judicial consensus and, probably as a result, improved judicial legitimacy.³⁶

Finally, engaging in some trade-offs enables courts to accept politically sensitive cases (sometimes, as in *Bosnian Genocide*, on dubious jurisdictional foundations) while adopting mild conclusions on the merits. In this way, the court remains relevant as a judicial forum that addresses some major issues of the day, without overly upsetting the immediate parties to the case and the larger international community.³⁷

So why is the strategy of ‘judicial conciliarization’ not always employed by the ICJ? (For example, this strategy was not selected in *NATO Bombing*,³⁸ where the court seems to have done everything within its power to decline jurisdiction over the cases, nor was it adopted in the *Wall* case,³⁹ where the opinion produced clear ‘winners’ and ‘losers’). One can speculate that the interests in increasing party-satisfaction and expanding the court’s influence may sometimes conflict with one another; moreover, both policy considerations might succumb, at times, to overriding policy considerations of greater importance. Finally, excessive engagement in ‘conciliarization’ – e.g., in circumstances where the facts and law clearly point in one direction – may ultimately undercut the court’s fact-finding and law-applying functions and undermine its institutional legitimacy.

So, for example, in *NATO Bombing*, the ICJ found itself in the middle of a difficult geopolitical situation and probably sacrificed the litigation interests of Serbia in order to avert collision between the court and the main western powers over the politically explosive doctrine of humanitarian intervention (which is *prima facie* inconsistent with the prohibition on the use of force in the UN Charter).³⁰ Similarly, in the *Wall* case, the party whose level of satisfaction mattered most for the court was the General Assembly, which actually referred the case to the

ICJ (and could generate more business for the court on important international issues, were it to feel that the referral was worth its while, i.e., that the court offered a strong legal backing to political processes taking place at the UN). Hence, accommodating Israel’s litigation interests – like Serbia’s interest in *NATO Bombing* – may have been a consideration of lesser importance in the eyes of the court.

Part three: concluding remarks

It is hard to make sense, from a legal perspective, of some of the key conclusions reached by the ICJ in *Bosnian Genocide*; nor is it always possible to understand the substantive legal policies they seek to promote. I suggest that the explanation for some of the judgment’s more tenuous legal constructions is found not in the substantive legal policy sphere, but rather in institutional considerations and judicial politics.

Whereas, to my mind, such considerations are, generally speaking, relevant and proper – in fact, inevitable⁴¹ – the degree to which the law can be stretched and bent in order to accommodate the court’s institutional or political considerations is never unlimited. At the end of the day, the court’s primary mission is not to entice more cases, secure compliance or maintain its relevancy. Its primary mission is to uphold the law in cases brought before it.

Regrettably, it appears that these limits were not always preserved in *Bosnian Genocide*. Whereas some aspects of the judgment can be justified on either substantive or institutional grounds (e.g., standards of attribution or the expansive duty to prevent), in other parts of the judgment (e.g., jurisdiction, reparations) law may have been sacrificed for expediency.

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Notes:

1. *Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia-Herzegovina v. Serbia), Judgment of 26 Feb. 2007, www.icj-cij.org/docket/files/91/13685.pdf (last visited 10 Feb. 2008) (hereinafter: *Bosnian Genocide*).

2. Paola Gaeta, *Foreword to Symposium on the ICJ Judgment on Genocide in Bosnia: A Missed Opportunity?*, 5 J.I.C.J. 827, 827 (2007); Vojin Dimitrijevic & Marko Milanovic, *The Strange Story of the Bosnian Genocide Case*, 21(1) L.J.I.L. (forthcoming in 2008), available at SSRN:

<http://ssrn.com/abstract=1015469>, at p. 1 (last visited 12 Feb. 2008).

3. Jose Alvarez, *Notes from the President: Burdens of Proof*, 23(2) ASIL NEWSLETTER (2007), www.asil.org/newsletter/president/pres070625.html (last visited 12 Feb. 2008).

4. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277.

5. The court has already dealt with the Genocide Convention in an advisory opinion case: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 (May 28).

6. *Legality of Use of Force* (Yugoslavia v. Belgium), 2004 I.C.J. 279.

7. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), 1986 I.C.J. 14, 64-65 (June 27).

8. Case IT/94-1, Prosecutor v. Tadic, Appeals Chamber Judgment of 15 July 1999, at para. 145.

9. *Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia-Herzegovina v. Yugoslavia), 1996 I.C.J. 595 (July 11).

10. Although art. 61 of the ICJ Statute permits revision of judgments upon the discovery of important new facts, the court held in 2003 that this only applies to facts that had existed before judgment was rendered and not to subsequent factual developments (such as the new application for UN membership submitted by Yugoslavia in 2000, which arguably constituted an implicit acknowledgement of its lack of UN membership during the 1990s). *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Yugoslavia v. Bosnia-Herzegovina), 2003 I.C.J. 7.

11. Another interesting contradiction between the *NATO Bombing* and *Bosnian Genocide* judgments relates to the interpretation of art. 35(2) of the ICJ Statute, which permits states not parties to the statute to appear before the court (subject to several conditions), in accordance with "special provisions contained in treaties in force." Whereas the 1993 I.C.J. Provisional Measures Order in *Bosnian Genocide* suggested that the 1948 Genocide Convention could serve as a proper jurisdictional basis under article 35(2), the ICJ held in *NATO Bombing* that the term "treaties in force" only pertains to pre-1945 treaties and could not cover the 1948 Genocide Convention. *Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia-Herzegovina v. Yugoslavia), 1993 I.C.J. 3, 14 (Provisional Measures); *Legality of Use of Force*, 2004 I.C.J. 324 (April 8).

12. UN Doc. GA/Res./47/121 of 18 Dec. 1992; Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (1994), at Part III(B); *Bosnian Genocide*, 1993 I.C.J. 325, 431 (May 12) (Order on Further Requests for Provisional Measures) (separate opinion of Judge Lauterpacht); *Prosecutor v. Blagojević*, Trial Chamber Judgment of 17 Jan. 2005, at para. 657-666.

13. *Bosnian Genocide*, *supra* note 1, at para. 190 (emphasis in original text).

14. *Id.*, at para. 376.

15. *Tadic*, *supra* note 8, at para. 146 ("given that the Bosnian Serb armed forces constituted a 'military organization,' the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.").

16. *Nicaragua*, *supra* note 7, at 64-65 ("All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed").

17. *Bosnian Genocide*, *supra* note 1, at para. 413.

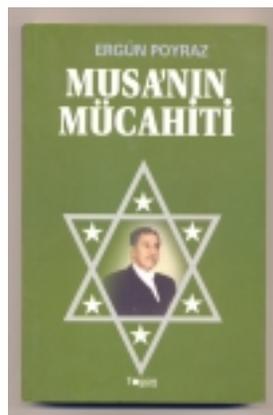
18. The most authoritative expression of customary law on this point is found in the Draft Articles on State Responsibility. International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 16, UN GAOR, 56th Session, Supp. No. 10, art. 8, UN Doc. A/56/10 (2001) ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State").

19. *Bosnian Genocide*, *supra* note 1, at para. 438.

20. *Id.*, at para. 449.
21. Stephen Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 E.J.I.L. 591, 595-596, 604-608 (2007).
22. Bosnian Genocide, *supra* note 1, dissenting opinion of Vice-President Al-Khasawneh, at para 4-29; *Id.*, joint dissenting opinion of Judges Ranjeva, Shi and Koroma, at para. 1-19; *Id.*, separate opinion of Judge Tomka, at para 5-23; *Id.*, declaration of Judge Skotnikov, at pp. 1-4; *Id.*, separate opinion of Judge *ad hoc* Kreća, at para. 1-78.
23. *Id.*, dissenting opinion of Vice-President Al-Khasawneh, at para. 40-49; Martin Shaw, *The International Court of Justice: Serbia, Bosnia and Genocide*, www.opendemocracy.net/globalization-yugoslavia/icj_bosnia_serbia_4392.jsp (last visited 12 Feb. 2008).
24. Bosnian Genocide, *supra* note 1, dissenting opinion of Vice-President Al-Khasawneh, at para 42; Alvarez, *supra* note 3; Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 E.J.I.L. 631, 646 (2007).
25. Bosnian Genocide, *supra* note 1, dissenting opinion of Vice-President Al-Khasawneh, at para 42; Alvarez, *supra* note 3.
26. Bosnian Genocide, *supra* note 1, declaration of Judge Keith, at para. 6-16; Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J.I.C.J. 875, (2007); Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J.I.C.J. 9 05, (2007); Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 E.J.I.L. 695, (2007).
27. Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 E.J.I.L. 669, (2007); Gattini, *supra* note 26, at 699-700.
28. Orna Ben-Naftali & Miri Sharon, *What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle*, 5 J.I.C.J. 859, (2007).
29. The classic discussion of international courts' fact-finding capabilities and shortcomings is found in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS (Richard B. Lillich, ed., 1992).
30. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).
31. Avena (Mexico v. U.S.), 2004 I.C.J. 128 (Mar. 31)
32. Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7 (Sep. 25).
33. North Sea Continental Shelf (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands), 1969 I.C.J. 4 (Feb. 20); Gulf of Maine (Canada v. U.S.), 1984 I.C.J. 246 (Oct.12); Continental Shelf (Tunisia/Libya), 1982 I.C.J. 18 (Feb. 24).
34. Georges Abi-Saab, *The International Court as a World Court*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 11-12 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); THOMAS M. FRANK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 318-319 (1995).
35. Frank, *supra* note 34, at 8-9.
36. Iain Scobbie, *Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall*, 5 (9) G.L.J. 1107 (2004); Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in THE INTERNATIONAL COURT AT A CROSSROADS 123,129 (Lori F. Damrosch ed., 1987).
37. Another way to conceptualize these competing considerations is as follows: where the court accepts jurisdiction on dubious basis for institutional reasons, half-way judgments may represent a form of corrective justice for the party adversely affected by the jurisdictional decisions.
38. *Legality of Use of Force*, 2004 I.C.J. 279.
39. *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 136
40. Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 (4) AM.J.INT'L. L. 824 (1999).
41. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 3-5 (4th ed., 2006).



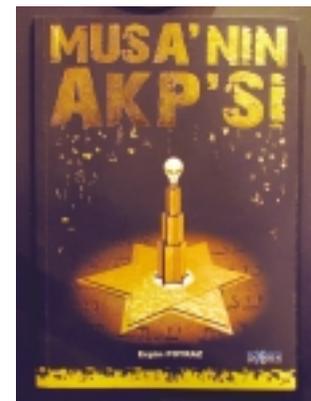
"The Rose of Moses" ("rose" in Turkish being "gül," the title is also a reference to Abdullah Gül, the president of Turkey; it can thus also be read as "Gül of the Jews").



"The Warrior of Moses" (i.e., "The Warrior of the Jews"). The photograph is of Bülent Arınç, speaker of the Turkish parliament until 2007.



"Is There a Hidden State of Israel in Ankara?"



"The AKP of Moses" (i.e., Justice and Development Party, the ruling party of Turkey, controlled by the Jews).

The Protocols of the Elders of Turkey

For many years we Jews, and indeed the western world, have turned a blind eye to the gigantic spread of hate literature used as a political tool to incite whole nations to perpetrate and support a civilization of violence. Without this constant brainwashing, one couldn't expect hundreds of millions of frenzied people to swarm into the streets in support of causes that don't concern them and incite to violence against people and nations about whom they know only what has been fed to them by radical Islamic fundamentalists who spread wild stories of dark conspiracies and cynically use democratic freedoms to destroy civil democratic societies.

This is a worldwide phenomenon that we cannot ignore. In fact, it is always "the Jews" and Israel and their so-called satanic plan to dominate the world, as described in the "Protocols of the Elders of Zion," that are at the center of this hate.

Turkey may well serve as an example of this development.

In recent years, anti-Semitic publications have become increasingly popular in that country, where the "Protocols of the Elders of Zion" and "Mein Kampf" have long been widely available. Last year, five new books appeared that might well be described as mutations of the Protocols. Set in an internal Turkish context, these books, boldly displayed in major bookstores, strongly criticize the current Islamic government, including the Turkish president, the prime minister and the ruling party, describing them as pawns in the Jewish scheme to take over Turkey and the world. They claim that political power

in Ankara is in the hands of the Jews and that the ruling Islamic government complies with Jewish dictates. According to the Washington Post,¹ the books have sold about 520,000 copies through October 2007.

This literature is used as a strategic weapon that we ignore at our peril.

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

Note:

1. <http://pqasb.pqarchiver.com/washingtonpost/access/1359111151.html?dids=1359111151:1359111151&FMT=ABS&FMTS=ABS:FT&fmac=&date=Oct+7%2C+2007&author=Mustafa+Akyol&desc=The+Protocols+of+the+Elders+of+Turkey> (last retrieved 3 March 2008).



"The Children of Moses – Tayyip and Emine" (referring to the Turkish prime minister, Tayyip Erdoğan, and his wife Emine).



Israeli Minister of Justice Daniel Friedmann and IAJLJ President Alex Hertman



Honorary Vice President Dr. Oreste Bisazza Terracini of Italy and Israeli Supreme Court Justice Edna Arbel



Israeli Supreme Court President Dorit Beinisch



Jemina Bronfman of Chile, IAJLJ First Deputy President and Coordinator with International Bodies Irit Kohn of Israel, and Barbara Levy of South Africa

Jerusalem and Dead Sea congress: Coping with changing realities

More than 200 members and friends of IAJLJ convened in Jerusalem and at the Dead Sea during November 2007 to participate in IAJLJ's Thirteenth Annual Congress and vote in the Association's elections. (See inside front cover for complete list of officers.)

Israeli Supreme Court President Dorit Beinisch and Israeli Minister of Justice Daniel Friedmann spoke at the inaugural session, held at the Israel Bar Association's Jerusalem Conference Hall, as did Hebrew University political science professor Shlomo Avineri.

Presentations during the "Hitting Them in the Pocket" session examined how terror is financed and legal methods by which terror victims can claim compensation. Another session was devoted to academic boycotts of Israel and the continuing disappointment

of the UN's behavior towards Israel, and especially that of the new Human Rights Council.

Panelists also discussed Jewish secularism and the role of traditional Jewish law in Israeli law.

Appearing on the following pages are several of the lectures and addresses delivered at the congress as well as the congress' closing resolutions.

A number of changes were approved to IAJLJ's Articles of Association, a summary of which appears on Page 47. The full text of the revised Articles of Association is available at www.intjewishlawyers.org.

JUSTICE thanks the Nadav Foundation for its generous assistance and congratulates members of the organizing committee for their outstanding work in organizing the congress.

– Paul Ogden
Photos: Roni Herman

Neither redeemable nor reformable

The image of the United Nations as human rights leader is a delusion, while the new Human Rights Council, ignoring real human rights abuses, is a sham that promotes unabated Israel-bashing. We must campaign to deny the UN's Durban II conference credibility.

Anne Bayefsky

Human rights are dear to the hearts of most Jewish lawyers and jurists. The specter of Nazi Germany and its consequences is never far from our minds. We worry about an Iranian president vowing to repeat a Holocaust he denies. We see anti-Semitism thriving in both democracies and non-democracies. And we know that the self-determination of the Jewish people, realized in the State of Israel, remains subject to a constant struggle for legitimacy.

In our uniquely Jewish situation we now, as in the past, care not only for our own welfare, but for that of others also facing hardship and persecution. Human rights are our rallying cry, our *cri de coeur*, our common cause. Our stance is to reach out, not in – to seek engagement with the world beyond – both as a matter of self-preservation and of the empathy that courses the collective veins of Jewish communities everywhere.

It is not surprising, therefore, that the project of the United Nations was a source of inspiration to a generation of Jews and has commanded allegiance from Jewish leaders active across the human rights movement. The *raison d'être* of the organization took root in the ashes of the Jewish people and its human rights principles were formulated with key Jewish voices like that of René Cassin.

It is therefore a joyless task to have to announce that the image of the UN as human rights leader or the centerpiece of the effective promotion and protection of human rights is a delusion. It is not redeemable, reformable or entitled to an inevitable role as the only game in town. But that is not the worst of it. Not only is the organization inept, inefficient, wasteful, neglectful, cumbersome and unable to fix itself. The UN has taken our dearest values and corrupted them utterly. It has turned human rights victim into villain and villain into victim. It has trashed the sacred trust of universal values and replaced them with phony particularities. It has provided a platform for anti-Semites and abusers and silenced the voices of the tortured and abused.



The moral relativism of the United Nations is not theory. Nor, as many in Israel and the United States believe, is it irrelevant. Topping its list of targets are the Jewish people and its state. There are many, Jews included, who resist this conclusion as if somehow their own stature depended on the UN's blessing. In some respects, they are correct. A \$20 billion per year operation exercises a great deal of power when it comes to identifying friends and foes. But this is a Rubicon it is time to cross.

I am here, therefore, to bear witness to UN-driven efforts to destroy Israel – gross anti-Semitism by any other name. And the vehicle for this activity is, ashamedly, human rights.

The statistics are incontrovertible.

The lead UN human rights body for six decades was the Human Rights Commission. For 40 years, until it was abolished in 2006, it adopted resolutions critical of specific states. One-third of them were directed at Israel (another third at apartheid South Africa). Not one was ever directed at the likes of Syria or Saudi Arabia or China or Zimbabwe.

The only UN human rights committee without a generic theme, such as civil and political rights, children's rights or freedom from torture, is the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories. It was created in 1968.

The only division of the UN Secretariat devoted to the claims of a single people champions Palestinians and an explicitly anti-Israel historical and political narrative. This has been true since 1977.

The only UN human rights investigator or rapporteur with a mandate prejudging its sham of an "investigation" and permitted to report about only one side of the conflict is directed at Israel. The mandate¹ of the rapporteur reads: "To investigate Israel's violations of the principles and bases of international law, international humanitarian law and the Geneva Convention relative to the Protection of Civilian Persons in Time of War..." It dates from 1993.

The only country not permitted to participate in any of the UN's five regional groups and their meetings, which negotiate resolutions, dole out human rights jobs, and share information and strategic thinking in any of the myriad Geneva-based bodies, is Israel. (Participation in one regional group in New York is limited and temporary.) This has been true since the 1970s and 1980s when regional groups first became significant UN actors.

The only agenda item of the UN Human Rights Commission (and its successor Council) focused on a single state is about Israel. Every other state is listed under a general item on human rights issues. The Commission agenda item on Israel first appeared in 1970.

These UN activities, webcast around the world, translated into six languages and spawning dozens of events annually across the globe, have one odious result. The country subject every year to the most human rights criticism across the UN system is Israel – almost twice as much as its nearest competitor (which for the moment is Sudan, despite Sudan being a country where unfettered genocide is the norm.)

Into this morass came the phenomenon of UN “reform.” In its most recent guise it is a creation of Kofi Annan, a secretary general who wanted to save himself from the legacy of the Oil-for-Food Scandal – the biggest heist of humanitarian aid in world history and in which he and his son were directly implicated. Annan wanted “reform” at all costs.

The Human Rights Commission was the perfect target. It satisfied no one. Human rights abusers disliked its country-specific criticism, occasional and weak as it was. Many democracies disliked it because abusers were also members and used the Commission to wreak havoc with real attempts to protect human rights. Wrapping himself in the cloak of human rights allowed Annan to avoid the consequences of his manifold failures and profound anti-American and anti-Western predilections.

The original UN reform agenda was long. Other than a few minimalist changes, none of the list has reached fruition save the abolition of the Commission and the creation of its successor, the Human Rights Council. The reason was a virulent combination of Annan's running from Oil-for-Food plus General Assembly President Swede Jan Eliasson, apparently seeking his own place in world history. Eliasson forced the resolution creating the Council to a vote over American (and Israeli) objections because, “the alternative...was in my mind continued negotiations and no Human Rights Council in a long time. It is worth remembering that the foun-

ation for our work with human rights within the United Nations, the 1948 Universal Declaration of Human Rights, was also adopted by a vote.”² Eliasson's analogy of the creation of the Council to the adoption of the Universal Declaration on Human Rights was breathtaking in its arrogance. It is also a striking example of the danger the UN represents to healthy relationships between democratic allies, especially the European Union and America.

The resolution creating the Council³ was adopted by a vote of 170 in favor to four against (Israel, Marshall Islands, Palau, United States), with three abstentions (Belarus, Iran, Venezuela). But the likes of Sudan and Saudi Arabia were not alone in their applause over the creation of the Council. Right behind them were the world's leading human rights NGOs. Immediately following the vote, Kenneth Roth, executive director of Human Rights Watch, said: “The new Council should be a great improvement over the old Commission on Human Rights...Today's resolution marks an historic step towards enhanced human rights protection within the UN system.”⁴

Blinded by a deeply-entrenched anti-Americanism, this human rights NGO, along with many others, preferred the fairy tale of human rights blossoming over the grave of the Bush administration to an admission that then-U.S. Ambassador John Bolton and others skeptical of the *bona fides* of the “moral” majority at the UN General Assembly might be right.

The Council was doomed from the start. The only hope for real change had been altering the criteria for membership in the UN's lead human rights body. The General Assembly resolution, however, contained no conditions for membership other than geography – the number of states permitted from each regional group. As a result, human rights abusing states joined the Council from the start. The Council now includes, for example, Angola, Azerbaijan, China, Cuba, Egypt, Qatar, Russia and Saudi Arabia. Fewer than half its members, using the Freedom House⁵ yardstick, are fully free democracies. Furthermore, the Organization of the Islamic Conference (hereinafter: OIC) took over a majority of seats of the African and Asian regional groups, which in turn hold a majority of the Council. The OIC therefore holds the balance of power.

Secretary-General Kofi Annan, the European Union and human rights NGOs knew the fate that would befall Israel before such a body. They just didn't care. In an online debate run by the Council on Foreign Relations between myself and Human Rights Watch spokesperson Peggy Hicks, held shortly after the Council's birth and in

the midst of last year's Lebanon war, the place of Israel in the global human rights calculus was made unusually plain. Hicks said: "It would be a mistake...to judge the Council on the basis of its actions on the occupied Palestinian territories...Ms. Bayefsky condemns the Human Rights Council for being preoccupied with Israel, but it should be judged on how it addresses human rights challenges worldwide, not only on how it treats Israel..."⁶ In other words, in the human rights world of today, egregious discrimination against the Jewish state is not grounds for condemnation or renunciation of the Council. It is tolerable for human rights to be built on a foundation of Jew-hatred; Jews are evidently supposed to pay the price of "reform" and the possible protection of other people's human rights. Hicks continued with what she obviously thought was a serious fault with my argument: "Anne Bayefsky wants to write off the Human Rights Council because of its flawed consideration of Israel at its first session." The date of her writing was 28 July 2006 – thousands of rockets having rained down on the Israeli population and the only action by the Human Rights Council having been a special session on Israel to "dispatch an urgent fact-finding mission headed by the Special Rapporteur on the situation of human rights in the Palestinian territories."⁷ But from the Human Rights Watch perspective, treating the Jewish state differently than all other countries was a problem for a small proportion of the world's population, and any concern was narrow-minded and parochial.

A year later we find ourselves with a new and ugly set of UN statistics – worse than that of the Commission:

The Council has confirmed Israel as the only state subject to a permanent agenda item called "Human rights situation in Palestine and other occupied Arab territories." Of course currently there is no Palestine – except the one on the letterhead of the UN Palestinian delegation that contains a map showing all of Israel as Palestine. The rest of the world? All other states will theoretically come up under an agenda item entitled "Human rights situations that require the Council's attention."

Of all the country-specific resolutions or decisions concerning human rights situations adopted by the Council to date, 70 percent have been directed at Israel, and the remainder at Sudan and Myanmar/Burma. That's 40 percent more than at the Commission.

In addition to the six regular sessions of the Council, there have already been five special sessions – three of which have been about Israel alone. (The Commission had five special sessions in its history, one of which was on Israel.)

Israeli delegates remain the only ones precluded from attending any meeting of a regional group associated with the Council. They are left in the hall while the anti-Israel resolutions and voting patterns – and all other Council matters – are negotiated behind closed doors. Even UN observers like the Palestinians are permitted to attend regional group meetings.

The sole UN country-specific human rights investigator to have his mandate extended *ad infinitum* is the one reporting on Israeli human rights violations. The other country-specific human rights investigators are slowly being eliminated. In March 2007, for example, the Council decided to discontinue the confidential closed-door consideration of the human rights situations in Iran and Uzbekistan. In June 2007 the investigations on Belarus and Cuba were terminated.

The mandate of the Special Rapporteur on Israel, created by the Commission on Human Rights and extended by the Council, specifically excludes any consideration of violations of international law or human rights by Palestinians. Though earlier mandate holders objected to the bias of the predetermined exercise, incumbent and lawyer John Dugard has never been concerned. He boasts: "It does not fall within the mandate of the Special Rapporteur to comment on the state of human rights in Gaza under the administration of the Palestinian Authority" and "[t]he Special Rapporteur's mandate does not extend to human rights violations committed by the Palestinian Authority."⁸

The reports of UN investigator Dugard are a testament to how far the UN has veered off course from its original purpose and the current inversion of human rights principles. According to Dugard, Israel is engaged in apartheid. In other words, Israel is a racist state. Paradoxically, Dugard objects to the presence of Jews in what he says is Arab territory; he calls it the crime of "Judaization."⁹ In other words, Jew and Arab living intermingled is a responsibility only of the Jewish state. Dugard also deliberately invokes Nazi imagery, saying of the security fence "This wall...is an exercise in social engineering, designed to achieve... Judaization..." He plays the role of historical revisionist, making no mention of Arab rejection of Israel's existence or the UN partition plan, while alleging that "the right of the Palestinian people to self-determination has been denied and obstructed for nearly 60 years by Israel." The inevitable consequence of the Jewish crime of denying Palestinian self-determination, according to this UN authority figure and a current member of the International Law Association's Human

Rights Committee, is for Palestinians to murder Israelis. He reports:

Terrorism is a relative concept... French resistance fighters were viewed as terrorists by the German occupation, and members of the South West Africa Peoples' Organization that opposed South Africa's occupation of Namibia were seen as terrorists by the South African regime. Today such resistance fighters are seen as heroes and patriots. This is the inevitable consequence of resistance to occupation.¹⁰

On 24 October 2007 Dugard told the General Assembly:

(T)errorism is a relative concept... Two Israeli terrorists became prime ministers of Israel – Prime Minister Shamir and Prime Minister Begin... the point that I wish to make is that there is a tendency in Israel and in other countries to concentrate so much on terrorism that the 'real issues' are ignored... so I urge the Israeli delegate to address the real issues and not to focus too much on the question of terrorism because it doesn't help to find a solution to the problem.

Dugard has consistently used his UN platform to ridicule Jewish values, demonize the Jewish state with wild accusations, undermine the equal application of the law of self-defense to Israel and provide sustenance to terrorists. His 2006 UN General Assembly remarks include:

The litany of human rights violations... is difficult to reconcile with Israel's... claim to be 'a light unto the nations'... I wish we could get rid of the word 'terror' in this debate... I appeal to the Israeli government:... If you label your opponent a terrorist, it becomes very difficult to start negotiating with him... I appeal to the Israeli government to discontinue using this term...

Referring to Palestinians:

(I)n other countries this process might

be described as ethnic cleansing but political correctness forbids such language where Israel is concerned... IDF soldiers... seem to regard all Palestinians as terrorists... Israel's desire for Palestinian land is insatiable.¹¹

Perhaps the most grotesque effect of Dugard's human rights façade is the hero status given him by the world's worst human rights abusers. As the Libyan representative responded:

When it comes to commending Professor Dugard, I find myself running out of words... [W]hen I heard his speech, I felt as if I am seeing a very symbol of an honest man in the 21st century... I feel like adding more to what has been said earlier is like adding more salt to a very delicious dish. So, all I can say is thank you, Mr. Dugard, and God bless you.¹²

As Israelis know only too well, Dugard's sentiments – whereby Jewish self-determination, self-preservation and self-defense are not real issues – are not idle chit-chat. The UN Rapporteur has become today's pre-eminent Western legal spokesperson for terrorists. The monstrous role was created by the Human Rights Commission and promoted by the Human Rights Council.

The UN pathos has also infected democratic states. In July 2006 the EU voted against the decision of the Council to hold a special session on Israel and the resolution the Council adopted critical of Israel. But resolutions soon sprouted to "follow-up" the first resolution. The EU then voted in favor of following-up a resolution with which it vehemently disagreed in the first place. The EU representative¹³ explained its action: "...the EU was not in a position to support S1-1 and S3-1 [the previous resolutions] as they were unbalanced, did not reflect all relevant aspects of the situation and failed to call upon both parties to cease violence." But then went on to say:

However, we agree that it is of vital importance that all States fully cooperate with the mechanisms of the HRC. Only then can the HRC effectively carry out its duty to ensure the promotion, protection and implementation of human rights. For this reason, we... will not oppose the present draft...

In other words, according to Europeans the substance of a Human Rights Council decision has no bearing on the duty to implement it. Walking into the UN Human Rights Council somehow means checking your moral compass at the door.

Other notable Council developments include:

A new “universal periodic review” mechanism was created. It was supposed to encourage only states with good human rights records to run for Council membership, since the review was to start with current Council members. As it turns out, this will consist of three-hour conversations once every five years with fellow human rights abusers. In September the Council came up with the order of examination. Israel – with virtually no chance of ever being on the Council – will be among the first to be reviewed. Current members Saudi Arabia, China, Cuba, Russia, and Azerbaijan will come only later. Iran is three years away, and Syria, Sudan and Zimbabwe will be reviewed in 2011. If they play their cards right, they can run for office in 2008 and rotate off the Council before the review even gets around to them.

A resolution – led by Egypt – was adopted in September 2007 entitled “From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance.”¹⁴ Adopted over the objection of all Western and Eastern European democracies it decided that “henceforth the Anti-Discrimination Unit in the Office of the United Nations High Commissioner for Human Rights...shall be known as ‘The Anti-Racial Discrimination Unit,’ and that its operational activities shall focus exclusively on racism, racial discrimination, xenophobia and related intolerance, as defined in...the Durban Declaration.” (That’s the declaration that decided Israel was the only country in the world guilty of racial discrimination.)

A general theme runs through the Council’s operations. Pakistan, on behalf of the Organization of the Islamic Conference, has championed numerous resolutions on racism, xenophobia and related intolerance – and then turned around and objected to “Jewish holidays” being used as a pretext for violating the human rights of Palestinians. Egypt alleged cartoons of Muhammad “hurt the religious feelings of more than a billion people.”¹⁵ Pakistan has said “The international community must address the root causes of terrorism, such as the situations of grave injustice and repression involving Muslims, and conditions of poverty and lack of opportunity, which fuel extremism and terrorism.”¹⁶ Syria has complained that “Freedom of opinion had been utilized to humiliate Islam and to cause hatred and instigate violence.”¹⁷ In the Council session of September

2007, Pakistan, on behalf of the OIC, said, “Islamophobia is also a crude form of anti-Semitism,” to which Algeria added “...there is an upswing in anti-Semitism that now targets Arabs...and Muslims.”¹⁸ In sum, what passes for human rights promotion and protection at the UN is this: Arabs are the victims of anti-Semitism, Jew-hatred is off the radar screen; a billion people have been gravely wounded by a few cartoons in a newspaper published some two-thirds of the way to the North Pole; freedom of expression is legitimately curtailed for just about every imaginable offense, particularly in Islamic dictatorships; and terrorists are driven by poverty and lack of opportunity.

All this occurred during the first 17 months of the Council’s operation. Lying ahead is a second UN “anti-racism” conference now scheduled for 2009 – Durban II. There is no doubt that Durban II will be a repeat of the anti-Semitic hatefest of Durban I. Chairing the Preparatory Committee for Durban II is Libya, Cuba is rapporteur, and Iran is a vice-chair of the organizing committee’s inner circle, the Bureau. On opening day of the first preparatory committee session, Pakistan – speaking on behalf of the OIC – said, “The Conference should move the spotlight on the continued plight of the Palestinian people and non-recognition of their inalienable right to self-determination.”¹⁹ Recall that Durban II is supposed to focus – even according to the EU – on implementation of Durban I and that the only victims of racism specifically linked to a state villain in the Durban Declaration were Palestinians. According to the OIC, the Durban II agenda will be: Israelis are racists. Arabs are victims of anti-Semitism. And, in the words of Pakistan on behalf of the OIC, “The defamation of Islam and discrimination against Muslims represent the most conspicuous demonstration of contemporary racism and intolerance”²⁰ – not genocide by Arabs of non-Arabs in Sudan, not attempted genocide by Iran and Hezbollah against Israel, and not the intolerance of murdering in a few hours 3,000 people in the United States. As if to make their intentions clear, the next session of the preparatory committee for Durban II has been scheduled to coincide with Passover 2008 and the second with Yom Kippur 2008, making the participation of Jews even more difficult.

As we cannot change the anti-Israel and anti-Jewish platform that will be provided by Durban II, we must mount a campaign to deny it credibility from the start. Western democracies and non-governmental donors should not pay for it. Western democratic governments should not agree to attend. Durban II must be deprived of any claim to represent the views of freedom-loving people.

It is imperative that we understand the political strat-

egy of the very real enemies of the Jewish people – a strategy that runs through the entire UN apparatus. Their game is to divide Jews from Israel, to pretend that anti-Zionism is not a form of anti-Semitism²¹ and that their unique condemnation of Israel is not discrimination but merely commensurate with Israeli crimes.

An example of the strategy of dividing Jews from Israel is the recent UN embrace of Holocaust remembrance activities. Sixty years late there is now a beehive of activity at a sub-section of the UN secretariat; there have been two Holocaust remembrance days; Holocaust survivors come to the UN to speak; once a year the General Assembly Hall fills with Jews so that they can listen to each other, though few state representatives attend; there has been an art exhibit by Yad Vashem at UN Headquarters; a few UN officials have received training at Yad Vashem, and packages of materials on the Holocaust have been sent to UN offices in various countries.

As a result, we now have the following spectacle. On November 8th the UN holds a seminar on Kristallnacht. On November 29th the UN celebrates UN Day of Solidarity with the Palestinian People at which the creation of the State of Israel is considered al-Naqba – the Catastrophe. On January 27th the UN holds an international day commemorating the victims of the Holocaust. On January 28th through the following January 26th, the UN holds hundreds of meetings worldwide, produces hundreds of reports and press releases, and adopts dozens of resolutions that demonize Israel and deny it the equal right of self-defense. The UN provides a platform for a Holocaust survivor one day and for Ahmadinejad, promoter of another Holocaust, the next. The message is that concern about the death of Jews 60 years ago is quite different than murdering Jews in Israel in the here and now.

Remembrance is not an end in itself. We are naïve in failing to appreciate that Holocaust remembrance at the UN is being used to cast the demonization of Israel as legitimate criticism.²² This is too high a price to pay for a history lesson totally lost on the UN's inhabitants.

In conclusion, the UN Human Rights Council is worse than its predecessor. The UN is an organization owned and operated by non-democracies. It pushes democracies within the organization apart in the pathetic struggle for a very small piece of the pie. And in the dust-up the bits left on the floor are the cries of the real victims of human rights.

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Notes:

1. UN Human Rights Commission resolution 1993/2 A of 19 Feb. 1993.

2. Statement by the President of the General Assembly to the First Session of the Human Rights Council, 19 June 2006, [www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/15C3826DA3630BB7C125719200463471?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/15C3826DA3630BB7C125719200463471?OpenDocument) (last retrieved 6 Feb. 2008).

3. A/RES/60/251, UN Document A/60/L.48. The resolution was adopted on 15 March 2006.

4. Human Rights Watch, "U.N: New Human Rights Council Offers Hope for Victims," 15 March 2006, <http://hrw.org/english/docs/2006/03/15/global12991.htm> (last retrieved 6 Feb. 2008).

5. www.freedomhouse.org

6. Council on Foreign Relations, Online Debate: The U.S. Role in UN Human Rights Reform, 24 July 2006 and 26 July 2006. www.cfr.org/publication/11139/us_role_in_un_human_rights_reform.html?breadcrumb=%2Fpublication%2Fpublication_list%3Fgroupby%3D3%26type%3Donline_debate%26filter%3D2006 (last retrieved 6 Feb. 2007).

7. Human Rights Council Resolution A/HRC/S-1/RES/1 adopted on 6 July 2006.

8. "Decides to appoint a special rapporteur with the following mandate: (a) To investigate Israel's violations of the principles and bases of international law..." Question of the violation of human rights in the occupied Arab territories, including Palestine, Commission on Human Rights resolution 1993/2, adopted 19 Feb. 1993.

9. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/62/275, 17 Aug. 2007, paras. 1, 26, 30.

10. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/62/275, 17 Aug. 2007, paras. 5, 24, 30.

11. Statement by John Dugard, Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory, Third Committee of the UN General Assembly, 19 Oct. 2006.

12. Third Committee of the UN General Assembly, Special Rapporteur John Dugard, 19 Oct. 2006, New York, transcription of UN recording.

13. Germany on behalf of the European Union Explanation of Vote, Human Rights Council Resolution 4/2, adopted without a vote, 27 March 2007, www.eyeforjustice.org

ontheun.org/assets/attachments/documents/4872_EU_on_OPT_reso_at_HRC.pdf (last retrieved 6 Feb. 2008).

14. A/HRC/RES/6/22, adopted on 28 Sept. 2007. http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_22.pdf (last retrieved 6 Feb. 2008)

15. Statement by Ambassador Sameh Shoukry, Permanent Representative of the Arab Republic of Egypt on behalf of the African Group, before the sixth session of the Human Rights Council, 13 Sept. 2007. www.un-eye.org/assets/attachments/documents/5397_Egypt_statement_jahangir_9.pdf (last retrieved 6 Feb. 2008).

16. Statement by Ambassador Masood Khan, Permanent Representative of Pakistan on behalf of the Organization of Islamic States, before the sixth session of the Human Rights Council, 13 Sept. 2007. www.un-eye.org/assets/attachments/documents/5437_OIC_Diene_report_9-14-07.pdf (last retrieved 6 Feb. 2008).

17. Human Rights Council Video, 10, 13, 14, 25 Sept. 2007, www.eyeontheun.org/view.asp?l=16&p=437 (last retrieved 6 Feb. 2008).

18. Statement by Ambassador Masood Khan, Permanent Representative of Pakistan on behalf of the

Organization of Islamic States, before the sixth session of the Human Rights Council, 21 Sept. 2007. www.un-eye.org/assets/attachments/documents/5939.pdf (last retrieved 6 Feb. 2008); Human Rights Council, sixth session. Summary record of the seventh meeting, 25 Sept. 2007 (A/HRC/6/SR.7).

19. Statement by Ambassador Masood Khan, Permanent Representative of Pakistan on behalf of the Organization of Islamic States, before the organizational session of the Preparatory Committee of the Durban Review Conference, 27 Aug. 2007. www.eyeontheun.org/assets/attachments/documents/oic_first_day.pdf (last retrieved 6 Feb. 2008).

20. *Ibid.*

21. *See* for example, the August 2007 report of the UN special rapporteur on racism Doudou Diène. Diène opines about “a crucial distinction between Judaism...and Israel” and then objects to “reducing” “anti-Zionism” to anti-Semitism as a “trivialization of anti-Semitism.” He claims “anti-Zionism” cannot be “reduced...to a refusal to recognize the right of the Jewish people to a state,” desperately (and incoherently) trying to maintain that anti-Zionism could still be justified.

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of the State of Israel) (No. 1711) 189 (Hebrew, translation not yet published).

5. Value Added Tax Law, 5736-1975, 30 L.S.I. (Laws of the State of Israel) 46 (1975-6) (Isr.)

6. Basic Law: The Knesset, 5722-1964, 18 L.S.I. (Laws of the State of Israel) 111 (1963-4) (Isr.) §4-5.

7. Basic Law: The President of the State, 5718-1957, 12 L.S.I. (Laws of the State of Israel) 85 (1957-8) (Isr.)

8. Basic Law: The Government, 2001, Sefer Hahukim (Statutes of the State of Israel) (No. 1780) 158 (Hebrew; translation not yet published).

9. Basic Law: The Judiciary, 1984 (hereinafter: The Judiciary), Sefer Hahukim (Statutes of the State of

Israel) (No. 1110) 78 (Hebrew; translation not yet published.)

10. Basic Law: Human Dignity and Liberty, 1992, Sefer Hahukim (Statutes of the State of Israel) (No. 1391) 150 (Hebrew; translation not yet published).

11. 6821/93 The Mizrahi Bank v. Migdal [1995] IsrSC (Reports of Israel Supreme Court) 49(4)221, 286.

12. Courts [Consolidated Version] Law, 1984, Sefer Hahukim (Statutes of the State of Israel) (No. 1123) 198 (Hebrew; translation not yet published) §51 (hereinafter: Courts [Consolidated Version] Law, 1984).

13. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 L.S.I. (Laws of the State of Israel) 139 (1953-4) (Isr.) §1.

14. The Courts [Consolidated Version] Law, 1984, §40.

Privatizing justice

*The case of **Almog v. Arab Bank**, in which predominantly Israeli citizens sued the Arab Bank in a U.S. federal court for abetting terrorism, bears important implications for the future of anti-terrorism litigation*

Allan Gerson

On 29 January 2007, a very important decision – *Almog v. Arab Bank* – was rendered in a United States federal court in Brooklyn, N.Y.,¹ upholding the jurisdictional basis of the claim by Iris Almog and over 1,600 Israeli family members of victims of suicide bombings who charged the Arab Bank with “incentivizing” those bombings that claimed more than 600 lives and seriously injured more than 6,000. Iris Almog, the lead plaintiff, lost her mother and father and five other family members in the horrendous suicide bombing at the Maxim restaurant in Haifa on 4 October 2003, which killed 21. The Palestinian Islamic Jihad, working closely with Hamas, claimed credit for the bombing.

Soon after that bombing, the suicide bomber’s family – in what had become routine in more than 100 other bombings, received a cashier’s check from the Arab Bank for about \$5,500 drawn on an account in Saudi Arabia. The account, known as Account 98, was set up with governmental blessing to support *Intifada 2*. Unlike *Intifada 1*, which featured tire burnings, stone throwing and occasional bombings, *Intifada 2*, beginning in September 2000, was a concentrated campaign of terror aimed at the murder of Israelis wherever they could be targeted and whether located in the Palestinian territories or in Israel proper was of no consequence.²

The plaintiffs in the complaint against the Arab Bank (which included about a dozen American citizens asserting a different jurisdictional basis) refused to be doubly victimized: first, by bombing and secondly by paralysis from redressing the horror they had suffered. On 21 December 2004, they filed suit against the Arab Bank for aiding and abetting the campaign of suicide bombings. Like the families of Pan Am 103 who sued Libya for the 1988 Lockerbie bombing, and like the families who filed suit against various Saudi entities for assisting in the financing of the 9-11 attack, they took accountability seriously through the only tool available to them: the civil suit.



Twelve years earlier, one courageous individual, Bruce Smith, whose wife was killed on Pan Am 103, initiated the first lawsuit by victims of terrorism against a foreign state, Libya. I was his attorney. At that time, holding governments sponsoring terrorism accountable in U.S. courts was a novel idea. Sovereign immunity was presumed to be an insurmountable barrier insofar as sovereign states were presumed impervious to the reach of law, accountable only to themselves and obligated to no one.

Twelve years later, Libya agreed as a result of that suit and others that followed in its wake to a massive \$2.7 billion settlement with the Pan Am 103 families. Yet, from the outset, it seemed clear that *Almog* would be different from that of Pan Am 103. First, it would focus on holding accountable aiders and abettors, not the principal perpetrators or their governmental sponsors. Secondly, unlike the Pan Am 103 case, *Almog* would largely be on behalf of aliens rather than U.S. citizens.

The only link of the Arab Bank to the United States – to the extent it mattered – was its branch office in Manhattan, which had been converting Saudi money destined for suicide bombers into Israeli shekels, the currency of the West Bank. There were other problems as well. Unlike Libya, the Arab Bank was not listed by the U.S. government as a sponsor of terrorism. Rather, it was a major financial institution with its main office in Amman, Jordan, and 400 branches throughout the Arab world. On the other side of the ledger, however, was the fact that the Arab Bank, not being a sovereign entity, could not raise the sovereign immunity defense.

Not being confronted with the sovereign immunity defense affected the litigation approach of the *Almog* case. Allow me to elaborate.

For Bruce Smith, as the first Pan Am 103 family member to bring suit against Libya, there was no precedent to rely on in suing Libya insofar as it was protected from the exercise of U.S. jurisdiction by the 1976 Foreign Sovereign Immunities Act (hereinafter: FSIA). There was also the 1789 Alien Tort Claims Act, but its application seemed dubious. In fact, Libya had

been sued once before in the United States over a terrorist attack – the bombing of a bus in Israel allegedly masterminded by the Palestine Liberation Organization (hereinafter: PLO) with support from Libya. The parents of one of the victims had sued both Libya and the PLO, in U.S. District Court for the District of Columbia. The suit, known as *Tel-Oren*,³ was dismissed on the grounds that American courts had no jurisdiction over foreign governments or quasi-national organizations such as the PLO. Accordingly, government-sponsored human-rights abuses weren't yet recognized as grounds for suits against foreign governments.

To be sure, there had over the years been movement in the U.S. Congress to limit sovereign immunity. But it had been done primarily for the benefit of American businesses, and certainly not for victims of terrorism. The FSIA incorporated specific exceptions to sovereign immunity. One covered purely commercial dealings having a "direct effect" inside the United States; another, property taken in violation of international law.

A third exception denies immunity in situations where torts were committed by foreign countries within the United States. Neither of these exceptions benefitted the Pan Am 103 families.

In 1992, when the Pan Am 103 families sought relief in the U.S. courts, they had to fashion an entirely new remedy after failure of efforts to claim that there is an implicit waiver of immunity when a state engages in terrorism against another. That remedy took the form of an amendment to the 1976 FSIA, popularly known as the 1996 Antiterrorism and Effective Death Penalty Act (hereinafter: ATEDPA). That act allows American citizens to sue foreign governments thought to be complicit in terrorism – providing, however, that the State Department has seen fit to put them on its list of state sponsors of terrorism.⁴

Yet, despite passage of the ATEDPA, the State Department has never taken kindly to the idea of lawsuits against foreign governments or associated entities. The State Department has stressed that diplomacy requires flexibility, not adherence to legal standards. Thus, where foreign governments invoke the act of state doctrine, the sovereign immunity defense, or the related political question doctrine, the State Department is more than likely to side with the foreign governments to save it from the embarrassment of being hauled into U.S. courts. Presumably, adoption of this posture will assure protection against reciprocal action in foreign courts against the U.S.

government.

The *Almog* plaintiffs opted to avoid the shoals of the ATEDPA. Instead of relying on it, they relied on the Alien Tort Claims Act (hereinafter: ATCA or ATS), enacted by the first U.S. Congress as part of the Judiciary Act of 1789. They claimed that the ATS enables aliens subjected to gross human rights abuses to seek redress justice in U.S. courts regardless of where the act occurred.

The entirety of the ATCA text is extremely short. It states: "The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The legislative history does not make clear precisely what Congress had in mind in giving aliens such redress. Clearly, however, "violation(s) of the law of nations," was something Congress then took very seriously, particularly with regard to then-rampant piracy.

For nearly 200 years, between 1789 and 1980, the ATS statute hibernated, awakening in 1980 when the Second Circuit for the Southern District of N.Y. opened the way for the pursuit of violations of the law of nations in U.S. courts regardless of where the atrocity occurred. The case concerned Joelito Filartiga, a teenager in Paraguay in 1976 who was abducted, tortured, and killed by the police on a remote suspicion that he was connected with an insurgent group. His death was no different from hundreds of others at the hands of the Paraguayan police. But one aspect of the case was different. The officer who tortured Joelito Filartiga, Americo Norberto Pena-Irala, became known to the Filartiga family. They followed him all the way to New York City, where he had fled and was living in 1979. They then decided to pursue him in the courts.

However, when Joelito Filartiga's father began contacting American lawyers, they all told him the same thing: forget about ever getting a hearing in a U.S. court. As the criminal acts were committed abroad, they will be considered outside American jurisdiction. Undeterred, Joelito Filartiga's father persisted. When he contacted the Center for Constitutional Rights in Manhattan, they agreed to take up his claim. Intent on expanding the reach of international law, they invoked the nearly 200-year-old ATS in filing their suit against Pena-Irala in 1979. The judge in the U.S. District Court promptly dismissed it. Whatever may have been the intention of Congress in 1789, he ruled, American courts have long since held that the "law of nations" is not a basis for judicial review of the treatment of U.S.

citizens, let alone of aliens, and certainly not their treatment at the hands of a foreign state.

The Center for Constitutional Rights appealed, and in 1980 the Second Circuit Court of Appeals ruled that times had changed. International law, it said, now required courts to give greater consideration to the dignity of the individual and less to the prerogatives of government officials using torture. Reversing the district court ruling, the appeals court held that “deliberate torture perpetrated under the color of official authority violated universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”⁵

Financially, it was a hollow victory. Pena-Irala was found to be in the United States illegally and was deported back to Paraguay. As a result, he never contested the suit, but neither was there any way to make him pay. So, the \$10 million default judgment awarded to the Filartiga family remains uncollected to this day. Nevertheless, the case has been a springboard for international human-rights lawyers who viewed it as a kind of *magna carta* for victims of official torture and killing. As Yale Law School Dean Harold Koh has written, “Even uncollected judgments serve important functions: namely – deterrence, denial of safe haven in the United States to the defendant, and the affirmation of a code of conduct that civilized nations share.”⁶ Indeed, this was what the Second Circuit Court of Appeals had in mind in writing, “Our holding today, giving effect to a jurisdictional provision enacted by our first Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”⁷ In 1989, the *Filartiga* decision became the basis for a successful lawsuit against the estate of Philippine dictator Ferdinand Marcos involving more than 10,000 claims of torture, summary execution, and disappearance.

Thus, while progress in suits against foreign governments has often proven difficult despite passage of the 1996 Antiterrorism and Effective Death Penalty Act, *Almog v. Arab Bank* provided an opportunity to sidestep sovereign immunity defenses insofar as a private individual rather than a governmental institution was being sued. As expected, the Arab Bank vigorously argued in its defense that assumption of U.S. jurisdiction would constitute overreaching insofar as the acts occurred far away from the United States, the claimants were aliens, and the defendant was charged with aiding and abetting, rather than perpetration.

As the *Almog* case is now before the courts, there are

limits imposed on what I can write. However, within those limits, I would like to make some observations about invocation of the ATS.

As Judge Nina Gershon noted in her ruling of 29 January 2007 in the *Almog* case, “Any discussion of the ATS must begin with the Supreme Court’s 2004 decision, *Sosa v. Alvarez-Machain*.”⁸ *Sosa* involved the kidnapping by U.S. Drug Enforcement Agency (hereinafter: DEA) agents of a Mexican physician, Alvarez-Machain, who was held and questioned for one day with regard to his suspected role in the murder of a DEA agent. He was then handed over to a U.S. court which found no basis for instituting proceedings against him. Upon his release, Alvarez-Machain then sued Sosa (and indirectly, the U.S. government) for violating the “law of nations” through his arbitrary arrest and detention. The Ninth Circuit Court of Appeals affirmed the District Court’s judgment against Sosa for violating the ATS. The U.S. Supreme Court reversed that decision in 2004. In doing so, it nevertheless upheld the legitimacy of aliens initiating claims in U.S. courts under the ATS. Relief was limited, however, to cases where there were clear violations of customary international law and where prudential considerations did not require deference to the Executive Branch to avoid injury to U.S. foreign relations.

Within these parameters, Iris Almog and the other plaintiffs in the Arab Bank case contended that the Arab Bank, in acting as the banking agent of Hamas and arranging to provide money to families of suicide bombers on lists provided to them by Hamas officials, fell within the narrow class of egregious violations of customary international law which the U.S. Supreme Court reserved for suits under the ATS. On 29 January 2007, Judge Gershon ruled in favor of the plaintiffs’ position. On 7 May 2007, she denied the defendants’ move for an interlocutory appeal, and the case will go to trial.

Following the trial, the Arab Bank would be free to appeal the pre-trial rulings as well as any other adverse rulings. It will have to contend, however, with the recent decision of the U.S. Court of Appeals for the Second Circuit (which encompasses the EDNY) of 12 October 2007, *Khulumani v. Barclays National Bank*,⁹ which reversed a lower court’s dismissal of a claim by various victims of South Africa’s apartheid regime against about 50 banks and institutions alleged to have “actively and willingly collaborated with the Government of South Africa in maintaining a repressive racially based system known as apartheid.” The

plaintiffs had also argued that the South African regime was involved in genocide, but that claim was never sustained by the Court of Appeals. Nor, significantly, did the Court of Appeals defer to the views of either the U.S. State Department or South Africa that adjudication of this matter should be avoided because (in the words of the State Department letter), “it risks potentially serious adverse consequences for significant interests of the United States.”

Instead, the Second Circuit Court of Appeals ruled that victims of those who aid and abet apartheid as a “repressive racially based system” are entitled to their day in a U.S. court pursuant to the ATS. The case was remanded to the District Court to allow it to address the pleadings in this light. At the District Court, the U.S. Government and that of South Africa will have an opportunity to argue that the case should be dismissed on grounds of prudential considerations, akin to invocation of the “political question” doctrine. The District Court was reminded of its need to be mindful of its “duty to engage in vigilant door keeping” as called for by the U.S. Supreme Court in the *Sosa* decision. “Not every case touching foreign relations,” the majority opinion concluded, “is non-justiciable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.”

Thus, the U.S. Court of Appeals in its *per curiam* decision in *Khulumani* recognized that aiding and abetting violations of the “law of nations” is itself an international law violation giving right to private causes of action, regardless of whether the defendant is a corporation or an individual. This, the opinion concluded, is consistent with the recent jurisprudence of the International Criminal Tribunal for Yugoslavia and the Rome Statute of the International Criminal Court. It is also consistent, it noted, with Judge Gershon’s decision in *Almog v. Arab Bank*.

The Second Circuit ruling, coming as it does from a divided court on a controversial issue, may be subject to further appeal either through an *en banc* hearing by the entire Second Circuit or by a writ of *certiorari* to the U.S. Supreme Court.

Regardless of what happens, it is clear that we are on the cusp of new developments dealing with the rights of individuals to hold accountable human rights abusers, and those who aid them, irrespective of where the atrocities occurred or the nationality of either the perpetrator or the victim. For far too many years, the doors of justice have closed at national borders. Today, neither foreign governments nor their agents, nor indi-

viduals or corporations, can expect to be shielded from accountability for gross human rights violations. If private causes of action serve as an intrusion into the well-ordered world of economic and political relations, this is a price that U.S. courts increasingly believe to be justified.

Using the rubric of diplomacy to cloak governmental indifference to redress of egregious human rights violations is a derogation of state responsibility. In fact, public and private aspirations at deterring terrorism are best served when governments support rather than impede victims’ civil suits aimed at achieving accountability. In the struggle against the scourge of terrorism, failure to utilize every tool at our disposal can lead to insufferable consequences.

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1. *Almog v. Arab Bank PLC*, 04-CV-5564 E.D.N.Y. (2007).
2. As of November 2004, 6,297 Israelis had been seriously injured and 647 Israelis had been killed in that campaign. Figures from National Insurance Institute of Israel, for the period 10 January 2000 to 1 November 2004.
3. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir., 1984)
4. See ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR: HOW THE FAMILIES OF THE VICTIMS OF PAN AM 103 BROUGHT LIBYA TO JUSTICE (New York, 2001).
5. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir., 1980).
6. Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).
7. See note 5 *supra*.
8. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
9. *Khulumani v. Barclays National Bank Ltd.*, 2007 WL 2985101 (2d Cir., 12 Oct. 2007).

The unique case of Jewish secularism

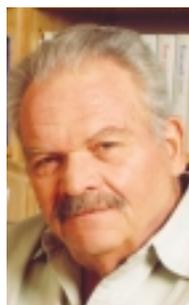
*Judaism as a confessional faith compatible with membership in any nation
and Judaism as a nationality indifferent to the issues of faith and
observance of religious law never existed before modern times*

Menachem Brinker

The Jewish secularist is peculiar and unique in comparison with European secularists. The reason for this peculiarity is the long history of Jewish life and culture in pre-modern times. For many generations Jewish identity was the only collective identity in which national components and religious components were held together in a kind of symbiosis. Prior to the last two centuries you could not ask a Jew if he looked upon belonging to the Jewish community in national or religious terms.

The question would not make sense to him, as separating religion from nationality was as inconceivable to Jewish self-consciousness as it was for the image of the Jew in the mind of the gentile. Converts to Judaism were often called Ben-Avraham to stress that in becoming Jewish they were not accepting abstract principles of faith but were joining a historical family. At the same time, being called Ben-Avraham also meant joining a family whose first patriarch was also the first prophet, indeed the founder of a specific faith. No other ethnic-historical group had its own religion nor was there a religion that only members of a specific historical group were called to practice.

This symbiosis of religiosity and nationalism broke down in modern times in two ways. First came the Jewish thinkers and leaders of the community in France, Germany and other countries of western Europe who were eager to join the new nation-states predicted by Enlightenment thinkers and then realized by the French revolution. Here was a new deal that offered Jews full civil rights on the condition that they give up their claim to be a separate nation and declare their loyalty to the country in which they live. Many individuals and communities accepted the offer. They responded by re-interpreting the meaning of Jewishness, which in fact amounted to inventing something that had never before existed. According to this modern interpretation, the Jews are full-fledged members of the territorial nations in which they live (French, German, etc.) and their uniqueness is just a



cultural matter: it is a confessional religion, just like Catholicism or Protestantism, or it is an ethical school or a philosophy of life not necessarily bound to a specific ethnicity. As a result of this wholly new conception certain prayers were cut from the prayer book and the new liberal state of the emancipation period was interpreted as the advent of messianic times.

The Reform movement, more passionate than the new orthodoxy in accepting the new ideology, re-named its synagogues "temples," as if to manifest that the term "temple" has nothing to do with the restoration of national political independence, an independence lost to the Jews in ancient times. The new "Judaism" that emerged in the countries of emancipation of western Europe soon spread all over the Jewish world, including not only many Jews in the New World, but also many in oriental countries such as Morocco and Iraq.

About a hundred years later came a counter-movement initiated mostly by Hebrew-writing intellectuals and thinkers in Russia. They rejected angrily the new, western philosophy of Judaism. Their criticism of its attempt to exorcize any nationalist trait from Jewish identity resulted in a new re-interpretation of the meaning of Jewishness. Like the other modern re-interpretation, this too was a new invention. According to this second modern outlook, the Jews are above anything else a separate and distinct people. Religion is only one of their cultural possessions (for some authors one of their cultural creations) and a Jew is a member of this distinct nationality even when he is not a believer and when he does not practice religion. A shared history, a specific calendar, common languages, shared hopes for a better future and, above all, the self-consciousness of belonging to a distinct and broad national family defined the Jew even when he lost his religion.

From the point of view of pre-modern Judaism both of these new interpretations seem arbitrary new "inventions" that annihilate all tradition. And indeed both are revolutionary new conceptions. Taken as representations of historical Judaism, they may be regarded as ide-

ological falsifications of its “essence.” Judaism as a confessional faith compatible with membership in any nation and Judaism as a nationality indifferent to the issues of faith and observance of religious law never existed before modern times. But identity of communities as well as identity of individual persons is not created from the outside by a neutral observer but from the inside by self-understanding and self-interpretation. They are also not necessarily established once, at one historical moment, for all time to come. They may change in the life of the individual or the history of the community. New interpretations of identity create new identities. Contemporary confusion concerning the nature of “Jewish identity” derives from the fact that different Jews today see their communal identity in three different ways. There are the followers of the two modern conceptions (the older one is acceptable to the majority of diaspora Jews and the recent, nationalistic conception is acceptable to most Israelis). There are also those who adhere to the oldest, traditional view, according to which you cannot separate nationality and religion from the concept of Jewishness. Since these three different conceptions are very much alive today there is no end to the confusion.

As a result of this, Jewish secularism was the most recent to appear in European history. All other peoples and all other great cultures of Europe – and Judaism was a European culture despite its birth in the Middle East – had secularists, and even secularist traditions for centuries, beginning in the late Renaissance during the 15th and 16th centuries. In Judaism – as with Islam – secularism was a latecomer. This late arrival signified another anomaly in Jewish intellectual history: the Jewish enlightenment (known as the *Haskala*) in both central and eastern Europe never questioned the value of tradition. This motif, so typical of radical Enlightenment enthusiasts across Europe, was never expressed by the Jewish writers who gave expression to the new values in their Hebrew, Yiddish, German and Russian essays. Their criticism of Jewish society was no less severe than the social criticism of their gentile colleagues. In the domain of education, they were even more severe critics of the establishment, condemning the narrowness of an educational curriculum that excluded any object of study other than *Halakha* (Jewish religious law) and its never-ending interpretation. Still, the refrain echoed by radical students of the Enlightenment all over Europe, that the truth of tradition should be put in doubt, that I, as a being endowed with reason, should judge everything according to my own powers, was never heard in the Jewish

enlightenment. Only later, when some of the *maskilim* (followers of the *Haskala* movement) began developing other forms of nationalistic ideologies was that motif heard in Jewish intellectual history. With the ascent of nationalism after the crisis of 1891-1892, thinkers like Moshe Leib Lilienblum and Ahad Ha’am (Asher Ginsberg), more moderate in their social criticism than many *Haskala* writers, dared for the first time to express skepticism concerning the value of the entire tradition.

In his famous short essay “Slavery in Freedom,”¹ Ahad Ha’am expressed the view that he need not hold the views of his father and grandfather in order to be their loyal son or grandson. Hence he need not “praise Jewish cultural tradition above all other cultures.” By this he suggests that the correct paradigm for Judaism or Jewishness is not that of a philosophical school or a confessional faith where all members share certain doctrines or principles, but rather the paradigm of a family shaped by the consciousness of continuity despite changes of opinions and beliefs. He declared himself “agnostic” in any matter relating to faith and advocated a secularist approach to all national issues.

Here we can clearly see the historical peculiarity (or even anomaly) of the Jewish secularist. This thoroughly secular approach to Judaism pronounced itself in a period we may call “romantic nationalism” and not in the period dominated by the rationalism of the *Haskala*. As is well known, in most other (or “normal”) European cultures, the age of romanticism and nationalism collided with a return to religion and with conservative restoration. The reason for the Jewish “anomaly” is not hard to guess. Those ardent champions of the *Haskala* could not recommend a full break with the authority of Jewish tradition as this would mean leaving all doors open for complete assimilation. On the other hand, the nationalistic paradigm of Jewish identity that stresses the sentiment of belonging to (a historical) family rather than shared faith or doctrine produced enough assurance of the continuity of the Jewish people and could predict its intergenerational unity without the need to define this unity in terms of a common faith or common doctrine.

This historical peculiarity has many implications for the contemporary Jewish secularist. Without any deeply entrenched tradition of secularism, he must find his own way against the background of a powerful tradition rich with shared symbols and rituals. To him is the task of creating his individual identity with

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The Jewish identity of the State of Israel

Is there room for compromise on the part of “religion”?

Six approaches to resolving the issue.

Yuval Cherlow

The definition of the State of Israel as a “Jewish, democratic state” has created an entity that is hybrid in nature. Two sources of authority have been mixed together: one source is classic democracy, while the other source is “Judaism” – however we may choose to interpret the term.

Various approaches may be used to reduce the tension between these two sources of authority. “Judaism” might be brought closer to democracy by showing the importance of majority rule within Judaism; by showing that the principles of human or individual rights have their basis in the Torah; by arguing that the definition of “Judaism” is largely dependent on interpretation, and so it is man who ultimately is the sovereign interpreting God’s Torah; and so on. On the other hand, “democracy” might be brought closer to Judaism if we argue that the list of rights that are a part of democracy also includes the right of the majority to national self-determination. Other attempts at reconciliation might also be valid.

Notwithstanding any mutual rapprochement between these two sources of authority, however, they will at times clash, particularly where democracy argues that Jewish collective identity must give way when it clashes with individual rights, as in the case of marriage and divorce, or public transportation on Shabbat.

The strongest formulation of the position that forbids compromise is that of Rabbi Menachem Hameiri.¹ Significantly, it is Hameiri who is considered one of the most open-minded of the *Rishonim*, the medieval Jewish commentators. He had a strong interest in science and philosophy, as well as a positive attitude toward non-Jews. That it is he who represents the uncompromising position is therefore significant. He writes:

Even though compromise is the preferred approach in regard to monetary

matters, this is not the case in regard to matters of religious observance; a *dayan* [judge] should not say “Let us permit this to him, so that he will not eat that,” or the like...²



According to Hameiri, notwithstanding that Jewish law supports, or even requires, compromise as the primary approach to resolving disputes between individuals, he categorically rejects compromise when it comes to matters of *Halakha*. The representatives of “Judaism” may not compromise their principles simply to reach any kind of consensus. For example, according to this approach it would not be legitimate to allow public transportation to operate on Shabbat

in exchange for the closure of large commercial centers, or to agree to the recognition of civil unions between men and women on condition that the Law of Return be applied exclusively to those who are *halakhically* Jewish.

This issue is complicated further by the fact that *Halakha* does not recognize the legitimacy of secularism. While it may have to acknowledge its existence, the status of “secular” has no place in Jewish law; *Halakha* does not grant individuals the right of self-determination. Indeed, the very starting point of *Halakha* is that every Jew in the world is obligated to fulfill the commandments, and that it is forbidden to assist another Jew to transgress them, even if the transgressor does not himself view his acts as such. Furthermore, *Halakha* does not acknowledge the principles of secularism, as these did not develop within the *Halakha* itself.

The present article is not an attempt to find a workable solution to this contradiction. Instead it will examine the type of dialogue that takes place when this contradiction arises and turns into a matter of public dispute. In this dialogue, the two participants are generally on an unequal footing. The “secular” side generally comes into the discussion armed with declarations about multiculturalism and pluralism, with a sense of being open to compromise or conces-

sion (even though, at times, the declarations are meaningless). The side representing “Judaism” generally comes into the dialogue from a position that is unwilling to accept compromise under any circumstances. Since that position is grounded in a tradition that is divine in origin, one that views itself as continuing the tradition of the Revelation at Sinai, the representatives of “Judaism” do not actually “own” or control the position they espouse, and hence cannot abandon it. Thus, the “religious” side expects that any concession should be made unilaterally by those who are prepared to compromise. It is democracy that advocates compromise and tolerance, and so it is democracy that should in fact make use of them.

The purpose of this article is to examine the assumptions underlying the “Jewish” position, and ask whether indeed it cannot compromise on *halakhic* issues. I would emphasize that I am not arguing in favor of compromise, or saying that it is appropriate from a political or legal perspective. My starting point is religious and philosophical; my central question is only whether compromise is possible from a religious perspective, and whether it is thus possible to have real dialogue between two sides that are both, theoretically, willing to change their views.

Model A: Redefining the problem

The first model requires a more precise analysis of the issues under discussion. In any dialogue over the character of the State of Israel, the “religious” side assumes that this is fundamentally a religious question. Consenting, for example, to public transportation on Shabbat would constitute a *halakhic* compromise, even if it would lead to genuine achievements such as the closure of shopping malls on Shabbat. Yet from an analytic perspective, this assumption is incorrect. The question under discussion is not, “What is the attitude of *Halakha* to public transportation on Shabbat?” but whether the State of Israel and its laws should be used to enforce this element of *Halakha* or otherwise shape the public domain in light of the prohibition against traveling on Shabbat. The question is thus not a religious one, but rather a political and social one. It does not prevent an individual from being fully committed to strict observance of the Torah and its laws. The fact is that, even today, the State of Israel does not enforce most of the Torah’s laws, including those touching on the public observance of *Halakha*. Therefore, there is no position in this discussion that is illegitimate; no religious individual is required to compromise his beliefs in any

way. If one believes that compromise on public transportation on Shabbat is appropriate, this does not violate one’s religious beliefs, since it is not these that are being discussed but the character of the State.

This model works only if we view the State itself as an independent entity, one that *Halakha* does not expect to impose observance of the Torah. Paradoxically, it is actually the *Haredi* (ultra-Orthodox) wing of Jewry that can live with this position. The *Haredim* have no great expectations of the State, which plays no major role within their religious universe. Religious Zionism, on the other hand, would find this model difficult to accept. The State plays a significant role in its religious *weltanschauung*, and there is an expectation that the State will ultimately become a Jewish State in the fullest sense of the term.

Model B: Negating the significance of religious acts based on the laws of the state

The first of the Ten Commandments, which are the foundation of the Torah, is the statement, “I am the Lord, your God, who brought you out of the land of Egypt.”³ This verse contains no action verb, and the practical import of this statement is not clear. It is commonly argued that this verse establishes the source of the Torah’s authority – the Master of the Universe, who liberated the Israelites from Egypt.

Such an interpretation necessarily gives rise to the following question: Is there any real meaning to keeping the Torah’s commandments (*mitzvot*) on the basis of some other source of authority? In terms of the character of the State, the question may be phrased in religious terms: Is there religious significance to the observance of *mitzvot* – whether positive or negative – if such observance results only from Knesset-imposed laws? If the answer to this question is negative, it may be argued that religious coercion offers no real advantage. Even if the general public obeys a Knesset-mandated “religious” law out of a belief in democracy, these citizens’ actions would not have any religious significance.

Therefore, those who hold the religious position may yet be able to make compromises, not because they recognize the legitimacy of compromise but because they have no choice: Since they cannot effectively coerce observance – indeed, there would be no real religious meaning in such observance – whatever can be obtained by agreement becomes, for them, a real achievement. They needn’t compromise their principles one iota, for conduct that is not the result of agreement would not have any real religious signif-

icance anyway. All this is, of course, if we assume that there is indeed no religious value in religious behavior that ignores a divine source of authority.

Model C: *Pikuach nefesh* on the national level

Pikuach nefesh (saving lives) is an overriding principle in *Halakha*, one that supersedes the vast majority of commandments. It may be possible to extend this principle to the national plane: The State of Israel cannot exist without a shared national ethos, so either we reach agreement through dialogue or we endanger our very existence. A similar notion is the supra-halakhic principle of “*darchei shalom*” (the ways of peace). Even though, in theory, there may be issues about which the “religious” position should not agree, it may nonetheless be necessary to make concessions on some of these matters because of *darchei shalom*. This is of course a tactical retreat, when there is no other choice, but this is the situation in which we find ourselves. In effect, we are having to choose between two bad options. When faced with such a choice, it is better to choose to survive rather than to resolve issues of content but ultimately not survive.

Of course, this model itself has shortcomings. First, the model itself is questionable. We previously quoted Hameiri: “Even though compromise is the preferred approach in regard to monetary matters, this is not the case in regard to matters of religious observance.”⁴ Furthermore, a general principle in *Halakha* is “It is preferable to sit and do nothing,” rather than actively compromise on halakhic issues.

Model D: Domestic harmony

There are a number of far-reaching statements by the Talmudic rabbis that speak of the importance of unity within the Jewish people. One of the most significant is: “Rabbi said: How great is peace, for even if Israel practice idolatry but manage to maintain peace among themselves, the Holy One, blessed be He, says, so to speak, ‘I have no dominion over them since peace is with them.’”⁵ Domestic harmony is essential for the existence of both the Jewish people and the Torah.

Domestic harmony cannot exist in the absence of dialogue, nor can it occur without some measure of compromise or concession. In light of the rabbinic statement above, such dialogue and compromise may be an imperative, even in the case of idol worship. Although it may be difficult to derive positive, unequivocal principles from this concept, the principle enunciated here may serve as a basis for true dialogue.

Model E: *Kiddush Hashem* and *Chilul Hashem*

Both *Kiddush Hashem* (sanctifying God’s Name) and the prevention of *Chilul Hashem* (desecrating God’s Name) may also be supra-*halakhic* principles. In the words of the Sages: “It is better that a letter be rooted out of the Torah than that the Divine name be publicly profaned.”⁶ That is: there are situations in which an individual commandment may be uprooted from the Torah, while the process itself is nevertheless one of *Kiddush Hashem*. This principle suggests a further basis for dialogue that may lead to compromise or concession: Division and civil strife among the Jewish people lead to the desecration of God’s Name in the world, since it is His people who cannot live together in unity. Another reason is the fact that religious controversies lead many to conclude that religions, in general, do not behave morally; they impose themselves on people, sometimes by force, while not permitting the freedom to choose or acknowledge individual moral frameworks.

Model F: The process

This model was, in fact, developed by the Rashba.⁷ In offering guidance to one of his young students who had been sent to serve as a rabbi in Tulaytulah (Toledo), the Rashba advised that he “should proceed from lighter matters to more serious ones, rather than attempting to take up the whole package together.”⁸ In other words, that which one can correct, he should correct, while that which one cannot yet correct – he should be patient, until the time comes when he can rectify the situation. Use of this model in dialogue between religious and secular may lead a religious person to say something along the following lines: “I still retain an uncompromising long term view of creating, in the State of Israel, a Torah state in the fullest sense of the word. But it is *halakhically* legitimate to proceed slowly – to try to achieve what I can, while accepting that which cannot yet be achieved.” For example, a religious political party that feels that it cannot prevent the operation of public transportation on Shabbat may be willing to compromise by having nothing written in the law regarding the issue. Public transportation would thus be permitted, *de facto*, to operate on Shabbat.

In spite of the advantages of removing the discussion from the level of principle to the level of tactics, it is not so simple. The secular partners to this dialogue may not be comfortable with such a position, since its unstated assumption is that should the reli-

gious side obtain sufficient power, it will then be able to ignore the consensus reached through dialogue and impose its position by force.

Conclusion

Are any of these theological models of compromise likely to gain acceptance?

One could say that the chances are extremely slim. The “religious” position seeks to realize its vision, without compromise or concession. Religious rhetoric, particularly *Haredi* rhetoric, is not open to true dialogue, especially since there is no real recognition of the legitimacy of secularism.

Are we then doomed to endless conflict? It would seem so, and perhaps this is necessarily another outcome of the unique definition of the State of Israel as a Jewish and democratic state. But two situations could bring about significant change. The first – worse – option is one of crisis, in which both sides realize the cost of not achieving some kind of consensus. The second – better – option would be to adopt one of the European models. Complete separation of religion and state is impossible in the State of Israel; to my mind, it is not even desirable. But rather than having to choose between two extreme options – which we might call the “Iranian” and the “American” options – the Israeli dialogue might benefit from one of the var-

ious models that operate in Europe. In this type of model, the state recognizes a legitimate role for religion in public life but does not seek to impose normative religious law upon its citizens. I believe that such an approach would permit us to remove the conflict over the state’s constitutional identity from the political arena, and bring religious-secular-democratic dialogue to where it belongs – the public domain.

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Notes:

1. Rabbi Menachem Hameiri Ben Shelomo, Provence, 1249-1315 CE.
2. Beit Habechira, *Sanhedrin*, 7a.
3. Exodus, 20:2.
4. *See* Beit Habechira, *supra* note 3.
5. Bereshit Rabbah, 38:6; translation from www.hillel.org/jewish/textstudies/learn_love/truth_peace.htm (last visited 20 Jan. 2008).
6. Yevamot 79a.
7. Rabbi Solomon Ben Avraham Iben Aderet, Spain, 12th century CE.
8. *Id.*, Responsa of Rashba, V, 238.

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no possibility of reliance on a spiritual identity that is assured for him by his being born Jewish. The most significant creators of modern Hebrew literature as well as other creators of modern Jewish culture were aware of this difficulty. Yet this awareness is what had filled their hearts with a sense of great responsibility and helped them shape most of the elements that are alive and vivid in contemporary Jewish culture.

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Notes

1. AHAD HA’AM, SELECTED ESSAYS (Leon Simon trans., 1912)

Resolutions adopted at 13th International Congress

Resolution denouncing the boycott of Israeli academics and scientists

Endorsed by the International Advisory Board for Academic Freedom (IAB)

The IAJLJ and IAB, in denouncing the call to boycott Israeli academics and scientists, recall that it is inspired by the same promotion of national, religious or racial hatred constituting incitement to discrimination, hostility and violence banned by Article 20 of the International Convention on Civil and Political Rights as motivates the Arab economic boycott against Israel.

This unprecedented assault on academic freedom is a direct challenge to the fundamental right to freedom to exchange information across frontiers in the international marketplace of ideas, enshrined in the freedom of intellectual creativity and scientific discovery and innovation, in the same way that the economic boycott seeks to discriminate against freedom of trade and commerce.

Accordingly the IAJLJ and the IAB:

Call upon all institutions of higher education and their members as well as all other relevant bodies to oppose academic and scientific boycotts of any kind as well as all forms of economic coercion and boycott;

Consider discrimination against scientists and academics based on nationality and political views as an affront to the principles of academic freedom and the pursuit of knowledge;

Point to the danger of replacing the criteria of merit by those of nationality and political opinions;

Point to the danger of the creation of a climate of mistrust in the peer review processes created by lack of objectivity and detachment of professional colleagues involved in "silent boycotts" leading to the deterioration and destruction of the entire academic process;

Endorse the principles adopted by the International Council for Science in 1998 including the universality of science, freedom of association, access to data information and communication relating to international scientific activities free from discrimination based on nationality, religion, ethnicity, race, color, language, age or gender;

Urge continuing scientific cooperation instead of boycotts, promotion of higher education and research,

including initiation of joint programs between Israel, the U.K. and Palestinians.

In conclusion the IAJLJ and IAB endorse the 1989 Statement of the American Physical Society stating that "Science belongs to humanity and transcends national boundaries...it can serve as a bridge for mutual understanding across political and ideological divisions and as a vehicle for the enhancement of peace."

Resolution on the report of the first year of activity of the Human Rights Council

The International Association of Jewish Lawyers and Jurists at its meeting on 7-10 November 2007 considered the record of the UN Human Rights Council's first year of activity from June 2006 to September 2007.

It deplored the disappointing and highly negative performance of the new 47-member body replacing the discredited UN Commission on Human Rights whose extremism and politicization of human rights issues it has far exceeded.

The UN Human Rights Council (HRC), has institutionalized the practice of singling out Israel for a special agenda item for alleged human rights violations with another agenda item reserved for such human rights situations as may arise for consideration elsewhere in the world.

Seventy percent of the time devoted to country-specific criticism of human rights situations at regular sessions of the HRC was devoted to the egregious vilification and demonization of Israel and three out of the five special sessions were called for alleged emergency situations with regard to Israel with the two other special sessions reserved for the incomparable human rights cataclysms in Sudan and Myanmar (Burma).

The mandate of the Special Rapporteur for the Palestinian territories has been extended indefinitely until "the end of the occupation" while the Special Rapporteurs for Cuba and Ukraine have been discontinued with the probable cancellation of the system of Special Rapporteurs being entirely terminated, leaving solely the Special Rapporteur for the territories in existence.

The Durban II conference on racism scheduled to

be held in 2009 is proceeding apace, and with Libya presiding the Preparatory Committee, with Cuba Rapporteur and Iran as a member, the repeated performance of Durban I is thereby assured with the Declaration and Program of Action ensuring particular concentration on discriminatory singling out of Israel and the allegations of Islamophobia under the guise of action against terrorism receiving prominent attention.

The IAJLJ calls on all democracies to abstain from attending Durban II and to withhold financial support for a conference whose outcome will ensure the promotion of racism and discrimination in stark contrast to its proclaimed purpose.

It urges in consequence member states of the UN to act on the legitimate criticism of its Secretary General Ban Ki-Moon and take appropriate action in the light of the Human Rights Council's disastrous and unacceptable performance over the past year.

Resolution on Israeli soldiers held captive in

Lebanon and the Gaza Strip

The IAJLJ calls on all humanitarian bodies within and without the United Nations and especially the International Committee of the Red Cross to take all necessary steps to determine the whereabouts and the status and treatment of the Israeli soldiers Gilad Shalit, taken prisoner in the Gaza Strip, and Eldad Regev and Ehud Goldwasser, captured by Hezbollah on the border between Israel and Lebanon, whose fate and place of detention are still unknown, contrary to all the applicable provisions of the relevant Geneva Conventions.

In addition to the concern for the welfare for these soldiers, particular compassion is felt for the anguish of the parents and relatives of these soldiers whose fate is still unascertained more than one year after their capture.

The IAJLJ urges all persons and competent entities on these urgent and compelling humanitarian grounds to take all possible steps to obtain the necessary information to ensure their location, proper treatment and release and return to their loved ones at the first opportunity.

IAJLJ holds elections, amends Articles of Association

Elections for membership in the Executive Committee and the Board of Governors of the International Association of Jewish Lawyers and Jurists were held at the Thirteenth International Congress, Jerusalem and the Dead Sea, November 2007. (See inside front cover for complete list of officers.)

In addition, after tabling before the Presidency, members of the Executive Committee voted in favor of three amendments to the Association's Articles of Association. This first change to the Articles since amendments voted and carried at the Fifth International Congress in 1981 will enable the Association to carry out its objectives more effectively.

The first amendment, to

Article 10, mandates the establishment of a Board of Governors to replace the Council and the Presidency. The Board of Governors will consist of up to 40 members, up to 20 from Israel and up to 20 from abroad. The Articles previously stipulated that the Council would have 121 members and the Presidency 41 members.

The Executive Committee, responsible for the daily work of the Association, will now have eight members: the President; the Deputy President; three Vice Presidents from Israel, of whom one will serve as General Secretary, the second as Treasurer and the third as Coordinator with International Organizations; and three Vice Presidents from abroad.

The second amendment, to Article 11, regularizes the Association's elections. The third amendment, to Article 2c, Article 4 and Article 8, prescribes rules of membership in the Association.

These substantive amendments required technical amendments to Articles 12 to 19 regarding changes to the numbering of the Articles of Association and the names of the Association's organs.

The amendments were proposed by a special committee appointed at the Association's International Conference, held in Eilat, Israel, in November 2005. Members of the committee were Itzhak Nener, Daniel Lack, Stephen Greenwald and Michal Navoth. Haim Klugman chaired the committee.



הארגון הבינלאומי של עורכי דין ומשפטנים יהודים

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| <input type="checkbox"/> Intellectual property law | <input type="checkbox"/> Labour/social security law | <input type="checkbox"/> Law of tenders |
| <input type="checkbox"/> Libel law | <input type="checkbox"/> Local government law | <input type="checkbox"/> Mediation and conciliation |
| <input type="checkbox"/> Medical malpractice law | <input type="checkbox"/> Member of the Judiciary | <input type="checkbox"/> Military law |
| <input type="checkbox"/> Planning and construction law | <input type="checkbox"/> Private international law | <input type="checkbox"/> Public international law |
| <input type="checkbox"/> Real estate and property law | <input type="checkbox"/> Representation and litigation | <input type="checkbox"/> Tax law |
| <input type="checkbox"/> Tort law | <input type="checkbox"/> Traffic law | <input type="checkbox"/> Trust law |
| <input type="checkbox"/> Wills | <input type="checkbox"/> Notary | <input type="checkbox"/> Other: |

Languages: שפות:

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Name on Card: שם בעל הכרטיס:

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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** צדקתה (= 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: Carnit/University of Haifa

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