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Justice

46 Spring
2009

THE INTERNATIONAL ASSOCIATION
OF JEWISH LAWYERS AND JURISTS

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President's Message

IAJLJ is acting to counter the new threats to Israel's existence

Our Association is the only group out of all the NGOs that comprises jurists whose objective is to employ legal means to protect the rights of the Jewish People and the State of Israel. In so doing, we make use of our comparative advantage as jurists, lawyers and judges. Indeed, global realities require us to combine our efforts to confront the many challenges of the present times. The underlying objectives and values of our Association have not changed since its establishment in 1969 by many jurists, led by the late Justice Arthur Goldberg of the United States Supreme Court, the late Nobel Prize laureate and president of the European Court of Human Rights René Cassin and the late Haim Cohen, Deputy Chief Justice of the Supreme Court of Israel, but our activities change and our agenda is adapted according to the challenges posed by changing realities.

The State of Israel faces new threats to its existence. First and foremost is the Iranian threat, a country whose leaders openly declare their wish to wipe Israel off the map and who aid those who seek to harm Israel and the Jewish people – led by Hamas and Hizbollah. In addition to the financing and aid which Iran provides to these organizations, Iran is acting to develop nuclear weapons that will threaten not only Israel, but the entire free world. Iran's activities necessitate a legal response.

First, in the realm of the United Nations' Security Council, our Association turned to that body and demanded it impose sanctions on Iran due to its calls for the destruction of the State of Israel.

Second, our Association is active in the realm of the legal systems of various jurisdictions, both in countries where Jews and non-Jews were victims of the activities of Iran (such as Argentina) and in countries where victims of terror perpetrated by organizations sponsored or financed by Iran are entitled to sue for damages. Our Association is acting to reinforce the legal rights of those harmed by Iran and terrorist organizations aided by Iran and to increase awareness of those rights.



Third, our Association is acting to promote a worldwide dialogue on the legal actions against terror and the countries aiding terror, such as Iran. This activity is not only a concern of the Jewish people and the State of Israel, but of the whole free world.

In parallel with these activities the Association continues to serve as an NGO with special status at the United Nations. Most of our activities take place at the Human Rights Council in Geneva. A year ago our Association was the first to urge a boycott of the Durban Review Conference held recently in Geneva. This conference, a continuation of the ignominious conference that took place eight years ago in Durban, South Africa, under the pretext of the protection of human rights and the rights of minorities, served in large measure as a forum for assaults on the State of Israel. We are pleased that many countries chose to boycott the conference and that many more marched out of the room when the Iranian president delivered his hateful tirade against our people.

Finally, this coming June a legal conference will take place in Madrid, Spain, to be attended by representatives of our Association and by prominent Spanish jurists. This conference will be in collaboration with Casa Sefarad Israel (www.casasefarad-israel.es). The topics to be discussed are at the forefront of the worldwide legal agenda, including issues involving changes to the Laws of War, Universal Jurisdiction, and crimes against humanity. At the conference we will have an opportunity to present the Israeli legal system, of which we are proud, and familiarity with which will foster a better understanding of the moral values of the State of Israel and the need to protect them.

In order to further our activities, we need the help of all our members worldwide, and indeed, the Association's existence since 1969 has been possible only through the commitment of the Jewish and non-Jewish jurists who support us.

Alex Hertman
President

Gaza and proportionality: When do the numbers embarrass the values?

Israel's recent incursion into Gaza was condemned by many as being disproportionate to Hamas' provocations. An examination of the values international law seeks to protect, and those which Israel and Hamas sought to further, enables a clearer picture

By Allan Gerson

Writing in The New Republic during the recent Gaza war, Leon Wieseltier asks a good question: “When do the numbers embarrass the values? So far in this war, 1,060 Palestinians and 13 Israelis have been killed. I am grateful for that low number.... Yet, the disparity between the numbers is troubling, and surely it, too, is morally pertinent.”¹

Of course, gross disparities in civilian casualties are morally pertinent. They also engender potentially serious legal consequences. Nevertheless, what is and is not a legitimate response in such situations is far from clear. This is certain: any serious inquiry into proportionality necessarily begins with an examination of which values are to be measured against the loss of civilian lives. International law examines the issue in two contexts that operate independently of each other: *jus in bello*, the law in the battlefield on protecting one’s soldiers and balancing military needs with humanitarian costs; and *jus ad bellum*, the law on justified resort to war.

A battlefield decision (*jus in bello*)

Assume for purposes of analysis a situation in which a platoon is pinned down by a sniper who has surrounded himself with 100 school children (clearly in violation of the basic premises of the laws of armed conflict). Assume too that the platoon commander has reason to believe that a retreat will result in the loss of at least two men; one has already been killed. That leaves the commander with the choice of ordering an aerial attack on the sniper, knowing that 100 children will be killed, or retreating even though it will mean sacrificing the lives of his soldiers.

Assuming the commander has the presence of mind to consult the relevant laws of armed conflict, he will discover that they provide little guidance. He will learn

that it is immaterial whether resort to war was just or not, provoked or unprovoked: he is still bound by the same laws of armed warfare. Regardless of provocation, he may not deliberately target civilians: this is a war crime. He must avoid an attack if enemy civilian casualties



“would be excessive in relation to the concrete and direct military advantage anticipated.”² And, in order to prevent civilian deaths, he should attempt escape if he can do so without incurring casualties to his own forces, albeit at the price of leaving a military target in place. Even the rule on protection of children is held not to be absolute.

Until recently, the learned commentators on the laws of war, particularly on the 1907 Hague Conventions Respecting the Laws and Customs of War on Land and its subsequent codifications, have tended to leave the decision to the commander’s conscience. That is to say, they can point to no decision of a court holding a commander liable for war crimes in an analogous situation. See, for example, the conclusion reached by the highly respected authority on the laws of war, Yoram Dinstein:

Pursuant to Article 57(2)(a)(ii) of Additional Protocol I [to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)], those who plan or decide on an attack must take all feasible precautions (taking into account all circumstances prevailing at the time), if not to avoid altogether, at least to minimize incidental losses to civilians or civilian objects. Yet, the aspiration to minimize collateral damage cannot trump all other military inputs. Minimizing the costs to civilians, yes; but not at all costs to the attacking force. **There is no obligation incumbent on the**

attacker to sustain military losses only in order to minimize incidental losses to enemy civilians or civilian objects. ‘Survival of the military personnel and equipment is an appropriate consideration when assessing the military advantage of an attack in the proportionality context.’³ (*Emphasis added.*)⁴

As Dinstein points out, the laws of armed conflict do not require the commander to lay down the lives of his own men to prevent losses to human shields.

Law, being a dynamic process, provides no guarantees of how courts may rule in any particular future case dealing with the exigencies of a specific incident. This is especially true with the advent of the International Criminal Court. Judges are not unaffected by widespread revulsion. In this context, numbers do matter – legally, as well as morally. Although I am unaware of any case that holds the commander accountable for war crimes in the hypothetical case discussed above, in the politically charged atmosphere of the Gaza operation, judges may well stretch existing law to new limits.

This is especially so if the ratio of civilian to military deaths, or civilian to civilian deaths, becomes enormously disparate. In this spectrum, no one really knows where the threshold of legally actionable disproportional conduct begins and ends. And, a judge trying the case will not necessarily accept the commander’s version of the facts. Where the commander saw no room for retreat, a judge operating on the basis of hindsight may draw a different conclusion. Under the Rome Statute of the International Criminal Court there is a procedure for reviewing the reasonableness of the assumptions that underpin the commander’s decision.

Admittedly, other situations, not involving the thorny issue of proportionality, may present less formidable challenges. For example, the use of white phosphorus explosives – if established and used to incur civilian suffering – would probably present little question about abuse of international law, customary or otherwise.

Jus ad bellum: Resort to war

The Palestinian Authority, despite its reputed private expressions of dismay that Israel did not go far enough in uprooting Hamas, has publicly condemned the Israeli action in Gaza as “aggression against the Palestinian people.”⁵ The charge, if sustained, would also impair the argument of the commander in the hypothetical example to have acted lawfully. Although

formally speaking, the regulation of the means of the conduct of hostilities is to be independent of whether the war was just or unjust, in practice context is nearly invariably taken into account.

It therefore becomes necessary to examine the values Israel sought to protect or further in the Gaza operation. Was the value at stake preventing Hamas from gaining a bargaining chip in a negotiation over what goods, and in what quantity, could be shipped during a period of tenuous ceasefire? Or, was the value at stake more related to overcoming a foe encouraged, trained, and armed by a significant foreign power, Iran, whose joint ultimate purpose is the destruction of Israel as a political entity?

For Wieseltier, “The premise of Israel’s campaign seems to be that suffering will change the Palestinians.” Presumably, if he thought that Israel had a less banal motive, one more closely linked to survival, he would be less discomfited by the numbers.

Israel largely based its defense of the Gaza operation on the grounds that no state is required to allow itself to be victimized by hundreds of rockets being fired into its territory, and that this is true regardless of the grievance. Articles 2:4 and 51 of the UN Charter⁶ prohibit resort to force except in the event of an armed attack.⁷ Thus, whatever harm Israel caused Gaza’s population in imposing a blockade – and certainly, there was no mass starvation, lack of essential medical supplies, or other gross humanitarian deprivation – can by no stretch of the imagination justify Hamas’ use of rockets. This is true regardless of whether Hamas is correct or wrong in claiming that Gaza remains occupied territory, presumably governed by the laws of belligerent occupation. Any other conclusion would free any state to attack another on the flimsiest of excuses when grievances could not be resolved amicably, and removes any restraints on the occupied population’s duty of restraint vis-à-vis the occupying power. The UN Charter would be relegated to the dustbin of history.

More than that, it is indisputable that Hamas’ rocket attacks were themselves a war crime: an unpardonable violation of the laws of armed conflict prohibiting the use of weapons fired indiscriminately at civilian targets. Inexplicably, in its justification of the war, Israel failed to press the larger point that the rockets were a continuation of the campaign of “genocidal terrorism” waged by Hamas over the last five years in which over 1,500 Israeli citizens have been killed or seriously maimed or injured within Israel proper – not any occupied territories, but in Israel of the pre-1967 lines. Recently, an American court held in a preliminary ruling

that a *prima facie* case had been established by victims of Hamas-directed suicide bombings that Hamas had in fact engaged in “genocidal terrorism” (genocide within the meaning of the UN’s 1948 Convention on the Prevention and Punishment of the Crime of Genocide) directed at destroying Israel as a political entity and using terrorism as a means toward that end.⁸ That is to say, genocide was not merely an expression of the intent of Hamas, but had taken manifest form through promotion of a suicide bombing campaign. The fact that the suicide bombings have largely halted is a matter of tactics, not strategic ambitions. Accordingly, as a matter of international law, quite independently of rocket attacks, Israel had no less a basis to go into Gaza to abort genocidal terrorism, which was merely held in abeyance by a short-lived truce, than the United States had in going into Afghanistan to hunt Al Qaeda in the aftermath of 9/11.

This point seems to have been totally lost on former U.S. president Jimmy Carter. In an op-ed piece, “An Unnecessary War,” written shortly after the start of the fighting, Carter lambasted Israel for having launched “an unnecessary war.”⁹ He reasoned that Israel could have avoided war by yielding to Hamas’ demand that, in exchange for a cessation of rocket fire, Israel open the crossings into Gaza for regular trade. Instead, “The Israeli government informally proposed that 15 percent of normal supplies be possible if Hamas first stopped all rocket fire for 48 hours. This was unacceptable to Hamas and hostilities erupted.” However, an armed attack across the borders of a sovereign state, using forbidden weapons indiscriminately aimed at civilians is no mere case of “hostilities erupted,” as President Carter euphemistically put it. Rather, it is an act of belligerence unequivocally forbidden by the UN Charter. And, insofar as Hamas’ resumption of rocket attacks was linked to its commitment to genocidal terrorism, its actions enter into the realm of aggression and crimes against humanity.

Who is to judge? The problem of adjudication

Recently it was reported that the International Criminal Court “has received more than 200 requests to look into allegations of war crimes during the recent fighting between Israel and Hamas militants. They include accusations from individuals and organizations that Israel violated the rules of war by singling out civilians and nonmilitary buildings, and by using weapons like white phosphorus illegally.”¹⁰ The crux of the charges against Israel’s Gaza operation, however, centers on the vastly disproportionate ratio of

Palestinian to Israeli civilian casualties. This has moved the Palestinian Authority and others to characterize Israel’s operation as “a crime against humanity.”¹¹

In every war there are individual cases of abuses. But individual abuses pale in comparison to the larger affront to the rule of law posed by situations where war is foisted on another country through persistent, indiscriminate rocket attacks, or through resort to suicide bombings and terrorism generally as an ostensible means of national liberation.

Because allegations involving the conduct of hostilities should ideally be examined independently of the context of entry into war, it has been left primarily to local courts to examine war crimes charges. Thus, it was the responsibility of U.S. courts to deal with the Mai Lai massacre in Vietnam. The Supreme Court of Israel has shown itself particularly adept at restraining government policy, driven by the dictates of the rule of law.¹² Its record of putting soldiers on trial for alleged war crimes may well be found by outside observers as less impressive, creating additional impetus for an international tribunal to intervene. Moreover, the assumption that has prevailed in international jurisprudence, that only when local courts prove incapable of impartial justice is it fitting for international tribunals to step in, may have given way to a new understanding. Under the Treaty of Rome the International Criminal Court may well assert jurisdiction that runs concurrently¹¹ with those of local courts.

One reason for first resort to local tribunals is the fact that were the International Criminal Court, or any other international tribunal, to exercise jurisdiction over such matters the inevitable result would be a politicization of the legal process. In some instances, like the former Yugoslavia, that is the only option. In the case of the Israeli-Palestinian dispute, it is a formula for resumption of war by other means. Once incident is no longer disassociated from context, impartiality becomes an increasingly more daunting task as the issues become mired with charges and counter-charges of who provoked war. Although, the ICC currently has no jurisdiction over the crime of aggression, charges and countercharges will invariably be heard as protagonists press their case, and judges become only too willing to provide room for context even though not ruling on questions of aggression. Thus, impartial examination of the factual issues becomes the first casualty when politically sensitive issues regarding first use of force rise to the fore.¹³

In “The Guide to the Perplexed,” the great medieval Jewish philosopher Moses Maimonides warned that

See Gaza and proportionality, page 46

Statement by the International Association of Jewish Lawyers and Jurists (IAJLJ) on the appointment of a Commission of Enquiry by the UN Human Rights Council with regard to the events of the recent conflict in the Gaza Strip

This statement is submitted 26 April 2009 following Iranian President Mahmoud Ahmadinejad's appearance before the Durban Review Conference on 21 April 2009, where he called for eradicating Zionism and alleged that Israel was created "on the pretext of Jewish suffering" during World War II.

BACKGROUND

On 3 April 2009, the United Nations Human Rights Council announced the appointment of South African jurist Richard J. Goldstone "to lead an independent fact-finding mission to investigate international human rights and humanitarian law violations related to the recent conflict in the Gaza Strip." The appointment followed the adoption of a resolution by the Human Rights Council at the conclusion of its Special Session on 9 and 12 January, addressing "the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip." Council President Ambassador Martin Ihoeghian Uhomoibhi expressed confidence that the mission "will be in a position to assess in an independent and impartial manner all human rights and humanitarian law violations committed in the context of the conflict that took place between 27 December 2008 and 18 January 2009 and provide much needed clarity about the legality of the thousands of deaths and injuries and the widespread destruction that occurred."

POSITION OF THE IAJLJ

The IAJLJ rejects this mission for the following basic reasons:

1. The Commission of Enquiry's mandate is *a priori* biased and totally one-sided.
2. Palestinian and Hamas violations are ignored.
3. Israel, the only democracy in the Middle East, with a vibrant system of internal checks and balances and active NGOs functioning freely, is eminently capable of investigating its own behavior objectively and critically.

THE FACTS

The events in Gaza that occurred in early 2009 cannot

be evaluated in a vacuum, as the mandate of the Mission stipulates. The following facts furnish the essential and indisputable backdrop to the situation:

Between January 2001 and December 2008, 8,165 rocket and mortar attacks were launched by Hamas and other terrorist groups in Gaza on civilian communities in southern Israel.

In August 2005, Israel unilaterally withdrew completely from the Gaza Strip, with a view to promoting peace in the region.

Following this disengagement, the Hamas terrorist regime that seized control in Gaza proceeded to pursue the goals explicitly stated in its 1988 Charter of murdering Jews and obliterating Israel. It escalated its unprovoked and indiscriminate attacks against civilian targets in towns and population centers in undisputed Israel territory, with the number of attacks rising from 1,255 in 2005 to 2,774 in 2006.

The six-month truce period negotiated by Egypt in June 2008 was repeatedly breached by Hamas, which fired 362 missiles and rockets into Israel during the period of the so-called truce. On 19 December 2008, Hamas unilaterally abrogated the "truce" and over the following seven days launched 280 indiscriminate rocket attacks aimed at civilian population centers in southern Israel. It thereby left Israel with no alternative other than to implement its right and duty to protect its population from naked aggression as expressed in Article 51 of the United Nations Charter.

THE LEGAL POSITION

In the exercise of its inherent right of self-defense under Article 51 of the UN Charter, Israel initiated its military operation against Hamas and the other terrorist groups in Gaza on 27 December 2008.

Israel has the unquestionable right to have recourse to legitimate and proportionate use of force, which it was compelled and duty bound to use in defending its population against Hamas and other terrorist attacks from Gaza.

The terrorist actions of Hamas fully correspond to the generally accepted definition of terrorism as being acts indiscriminately directed against a country's civilian

population with the intent to kill and maim as many victims as possible and thereby create widespread terror and panic.

Israel has adhered to the basic principles of international humanitarian law, has respected the distinction between combatants and civilians and has observed due proportionality in the course of its precise and accurate counter-strikes, as confirmed by world renowned international law experts.

Hamas and other terror groups, by disguising themselves as civilians and shielding themselves, together with their weapons, missiles and missile-launchers, among the civilian population, flagrantly violated Article 28 of the Fourth Geneva Convention.

Hamas terrorist militias have committed grave breaches of international humanitarian law, in total disregard of the rules incumbent on combatants (see appendix).

CONCLUSION

The Human Rights Council is not an objective body capable of credible investigation in the case of Israel. Since its inception, the Council has consistently obscured the fact that Israel conducted its military operations in the exercise of its legitimate right of self-defense, with due advance warning to civilian populations unavoidably affected by a terrorist enterprise aided and abetted by Iran's endorsement, support and encouragement.

Confronted by the genocidal aims of Hamas, a racist, terrorist, criminal organization, no state in the world would have hesitated to remove the intolerable aggression which Israel has tolerated with restraint for seven years.

The IAJLJ feels duty-bound to bring these facts and observations to the Commission's attention, in the expectation that the rule of law and equality of all states will be respected.

APPENDIX: Hamas Activities in Breach of International Law

1. Indiscriminate use of missiles and rockets directed at Israel's population centers launched without even the pretence of any aiming device and therefore clearly intended to cause death, injury and damage to civilians and civilian targets, whether homes, hospitals, shopping malls, schools, factories or business premises.

2. Launching attacks from densely populated areas, storing missiles and rocket launchers under houses of worship, homes, university premises and other protected areas to develop weapons and explosives.

Such conduct systematically abuses protection to civilians and civilian objects under international law, while putting the safety and welfare of such civilians at acute risk. Such reprehensible acts, in grave violations of the Laws of Armed Conflict, constitute war crimes, as well as crimes against humanity.

3. Disregard of the fundamental principle of distinction at all times between civilians and combatants as expressed in Article 48 of Additional Protocol I to the Geneva Conventions of 1948 and Relating to the Protection of Victims of International Armed Conflict of 1977. Such conduct is considered a war crime under Article 8 (2)(b)(i) of the 1998 Rome Statute of the International Criminal Court, which criminalizes "intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities."

4. Contravening the prohibition of the commission of acts or threats of violence with the primary purpose of spreading terror among the civilian population, a serious violation of an express prohibition stipulated by the Laws of Armed Conflict, notably under Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflict (1977), which provides: "The civilian population as such, as well as individual citizens shall not be the object of attack. Acts or threats among the civilian populations of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited."

5. A party to the conflict, in this case a terrorist militia, is also accountable for violating basic provisions of international law for the protection of civilian populations under its own control by using the presence of civilians to make certain locations, areas or military forces immune from military operations. Making use of civilian facilities such as universities for weapons development and making systematic use of homes and places of worship for hiding and storing rockets, explosives and ammunition undermines the protection afforded to civilians in armed conflict, placing such civilian locations in grave risk of attack. This practice is in direct contravention of the Laws of Armed Conflict, which prohibit the use of the presence of civilians to render certain points, areas or military units immune from military operations. Such practices constitute a war crime, such as a violation of Article 8(2)(b)(xxiii) of the Rome Statute of the ICC, which features in the listing of "war crimes," "utilizing the presence of a

See Gaza Enquiry, page 16

Holding terrorist states accountable using civil litigation

Frustrated by their inability to receive justice through criminal prosecution, victims of state terrorism have found that civil litigation in the United States – and perhaps too in the European Union – may provide relief

Stuart H. Newberger
Aryeh S. Portnoy
Joshua Dermott

Over the last 25 years the world has confronted a type of violence fairly new to modern civilizations – “state-sponsorship” of terrorist acts directed at citizens and officials of certain western countries. In the United States legal system, as with most western democracies, sovereign states have enjoyed immunity from civil suit for centuries, which has insulated the state from domestic court

suits for damages by the victims. Historically, the only legal “remedies” were those that the victims’ home state could bring against the wrongdoer, either through international law, international venues, diplomacy or even war.

The possible narrowing of sovereign immunity is a concept that began to receive attention after World War II, when countries engaged in commerce and other activities outside their borders acted less like traditional states and thus became potentially liable for their “non-sovereign acts” in domestic courts. In the U.S., the Foreign Sovereign Immunities Act (“FSIA”)¹ was enacted in 1976 to codify the conditions of when a state could be sued for damages in U.S. courts, mostly in the areas of commercial activities, arbitration and trans-border actions. Since that time, U.S. courts have applied the FSIA to allow recovery of damages from many countries in a wide range of cases.

In 1996, Congress expanded the FSIA’s exceptions to immunity to allow U.S. victims of state-sponsored terrorism to use the domestic federal courts to directly

sue countries for damages if the country (1) was on the U.S. Department of State “list of terrorist states” and (2) was responsible for the terrorist act, or had provided “material support” for the attack. That law was principally supported by the victim families of the Pan Am 103/Lockerbie attack that had murdered 262 U.S. and British civilians in December 1988 as Libyan-

backed terrorists detonated a suitcase bomb destroying a jumbo jet flying from London to New York. Libya was condemned universally by the United Nations, and the U.S., the United Kingdom and France for that notorious attack.

But Libya was not the only state sponsor of terrorism captured by the 1996 “terrorism exception” to the FSIA. Iran, Iraq, Sudan and North Korea were also listed as state sponsors of terrorism by the U.S. State Department. Significantly, other terrorist groups – including al-Qaeda, the Palestine Liberation Organization (“PLO”), Abu Nidal Organization (“ANO”), Red Brigades, Red Army, Taliban, Irish Republican Army and many others – have not fallen within the scope of this law because they are not considered “state sovereigns” for purposes of the FSIA. Legal remedies against members of these groups have been more episodic, and with very limited results, and are not the subject of this article.

This article summarizes the efforts to hold Libya and Iran responsible for their support of terrorism in the 1980s through today, how U.S. courts have responded to such claims, and how the U.S. Congress has continued to enact additional measures to add more legal and technical weapons for terrorist victims to employ in this “world-wide” battle to hold states accountable for their actions.



Stuart H. Newberger



Aryeh S. Portnoy



Joshua Dermott

With Libya, this strategy has achieved a large measure of success, for victims and international diplomacy alike. With Iran, there has been partial success but also many false starts and incomplete/unsatisfactory results, and at least one firm has recently expanded that battle beyond the U.S. courts to determine if the judicial systems of the European Union can be employed to “bring the battle” to Iran outside the U.S. legal system.

I. Libya: The “Success Story”

From early in the 1980s, Libyan dictator Colonel Qaddafi was considered one of the world’s most dangerous terrorist sponsors, using his nation’s oil wealth and strategic location to attack the “interests of the West and Zionism.” But Libya’s role in these early attacks was unknown for many years, as they generally were carried out by “hired guns” such as ANO.

December 1985 Airport Attacks

For example, in December of 1985 four ANO gunmen opened fire at the ticket counter for Israel’s El Al airlines at Rome’s Leonardo Da Vinci International Airport, killing 16 people and wounding 99 others. Minutes later, at Vienna International Airport, ANO terrorists threw hand grenades at passengers waiting for a flight to Tel Aviv, leaving two dead and 39 wounded.

Pan Am 73

In September of 1986, ANO terrorists, with the support of Libya, hijacked Pan American Airlines Flight 73, a jumbo jet with over 300 passengers, as it sat on the runway in Karachi, Pakistan en route from Bombay to New York. The terrorists had planned to fly the plane into the Israeli Defense Ministry in Tel Aviv in a September 11th-style suicide attack, but the pilots were alerted to the hijacking and escaped, thwarting that plan. Instead, the hijackers gathered the passengers into the center of the plane and opened fire on the crowd with machine guns and grenades, killing over 20 and wounding over 100. The five hijackers were captured, convicted and sentenced to death in Pakistan, never revealing Libya’s supporting role in their actions.

In 2001, the leader of the hijackers was released from prison – the result of a series of amnesties granted by the Pakistani government. The leader, Zayd Hassan Abd al-Latif Masud al-Safarini, was captured by the FBI immediately upon his release, and brought to Washington, D.C., to stand trial for his role in murdering the U.S. citizens on board Flight 73. At his sentencing, more than 50 victims and family members from around the world came to the federal court to testify. Safarini

pled guilty and was sentenced to 160 years in prison. He also agreed to cooperate “whenever, and in whatever form, the U.S. shall reasonably request,” including by testifying against co-defendants.

When it became apparent that Libya actually had sponsored this horrific act of terrorism, the victims and families banded together to sue Libya in United States District Court in the District of Columbia in a case styled *Patel v. Socialist People’s Libyan Arab Jamahiriya*.² The U.S. victims sued Libyan officials and the terrorists in their individual capacities, but also invoked the “terrorism exception” to the FSIA to sue Libyan officials in their official capacity, and the Libyan government itself. Non-U.S. victims also were able to sue the Libyan officials and the terrorists in their individual capacities using the Alien Tort Claims Act (“ATCA”).³

Pan Am 103 and UTA 772

In December of 1989, Libyan-backed terrorists carried out what would become their most infamous attack, blowing up Pan American Flight 103 over Lockerbie, Scotland, killing all 259 people on board, and another 11 on the ground in Scotland. This attack triggered a major international criminal investigation into Libya’s sponsorship of terrorism. Although two Libyans were charged in a special Scottish criminal court set up in The Hague, one was found innocent, and the other, although convicted, may see his conviction overturned by an appellate court sometime in 2009.

Nine months later, Libyan terrorists detonated another bomb, this time on board UTA Flight 772⁴ as it flew from North Africa to Paris, killing 170 passengers and crew. Following the UTA attack, an intensive eight-year investigation by world-renowned French investigating magistrate Jean-Louis Bruguière produced much more proof of Libya’s direct responsibility for that attack than was ever found for Lockerbie. As a result of Judge Bruguière’s efforts, in conjunction with U.S. and other authorities, six Libyan officials, including Qaddafi’s brother-in-law, the head of Libyan intelligence, were indicted, tried, and convicted in absentia in Paris for murder.

It was the one-two punch of Lockerbie and UTA 772 that caused the United Nations to put Libya on a unique and gripping sanctions program, isolating the regime and ultimately causing Qaddafi to entirely change his approach to foreign policy. He eventually gave up terrorism as a tool of foreign policy, surrendered his nuclear materials, cooperated in the war on al-Qaeda, and opened up Libya’s oil resources to the West.

Not lost in Qaddafi's shifting focus away from terrorism was the impact of the victims' efforts to hold the General and the Libyan government accountable for their actions. The best known example is the lawsuit brought by victims of the Lockerbie attack, in which Libya ultimately agreed to pay \$2.7 billion to settle the matter and avoid trial. The settlement stipulated that 40 percent of the money would be released when United Nations sanctions against Libya were cancelled; another 40 percent when U.S. trade sanctions were lifted; and the final 20 percent when the U.S. State Department removed Libya from its list of states sponsoring terrorism.

Notwithstanding the lawsuits and legal settlements, Libya has never expressly accepted responsibility for the attacks. In 2003, Libya's UN Ambassador, Ahmed Own, formally accepted "responsibility for the actions of its officials," related to the Lockerbie tragedy, but it is widely assumed that this acceptance was simply a concession to secure the lifting of sanctions.

Libya's refusal to admit responsibility is best illustrated by its aggressive defense of each case brought against it. Unlike Iran, Libya has retained counsel to fight each of the lawsuits brought against it, and currently is represented by White & Case, one of the world's largest corporate law firms. Through counsel, Libya has sought to employ a variety of technical and jurisdictional tactics to escape liability and payment on judgments.

As one example of Libya's unique approach to terrorism-related lawsuits, in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*,⁵ Libya and Iran both were defendants in a case involving an American citizen who was kidnapped and murdered by Libyan and Iranian-backed terrorist groups. Iran refused to show up at the trial, defaulting on the case, as it has done with all other terrorism cases brought against it. Libya, on the other hand, appeared and filed a motion to dismiss the case. The D.C. Federal District Court denied Libya's motion and Libya then appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. There, too, Libya vigorously argued that (a) the terrorists were not agents of the Libyan state, (b) Libya did not directly cause the torture, and (c) Libya should be immune from liability in any event pursuant to the FSIA.⁶ Adopting a broad reading of the terrorism exception to the FSIA, the Court rejected Libya's arguments, and held that foreign states can be liable for actions of non-state actors, even through merely "general" support, if that support was a proximate cause of the terrorist event.⁷ While Libya has been unsuccessful in *Kilburn* and other

cases, Qaddafi has maintained his strategy of delay at all costs, consistent with his "one foot in, one foot out" approach to dealings with the West.

Libya's tactics were put to the ultimate test in the UTA 772 litigation⁸ – a case that represented a breakthrough in terrorism-related jurisprudence, and played a critical role in Libya's finally succumbing to the pressures imposed by its victims through the U.S. legal system. Using the extensive forensic evidence and witness testimony compiled by the French authorities, and with the support of the U.S. government (including the testimony of Ambassador Robert McNamara – an expert in Libyan terrorism and related sanctions), the UTA plaintiffs proceeded to prove their case, obtaining summary judgment from the court on liability and taking the case to trial for a calculation of damages. Following the first-ever contested terrorism trial, the Federal District Court in Washington, D.C., in January 2008 ordered the Libyan government and the individuals responsible for the attack to pay approximately \$6 billion in damages. This case was especially notable because Libya appeared in court and was represented by counsel through final judgment. It thus became the only contested case to result in a clear verdict against Libya – or any state for that matter – holding a sovereign state responsible for a notorious act of terror. Following the judgment, Libya announced that it would honor the decision as part of its desire to establish normal diplomatic and economic relations with the U.S.

The "Lautenberg Amendment" and the Libya Claims Resolution Act

The same month the UTA decision was announced, Congress passed the "Lautenberg Amendment" to the FSIA.⁹ This legislation provided new weapons to terrorism victims to access foreign sovereign assets to satisfy judgments obtained in U.S. courts. The impact of this amendment, combined with the substantial \$6 billion judgment awarded in UTA, raised concerns within the Bush administration. They feared that enabling victims to recover foreign government assets in the United States to satisfy huge judgments could discourage nations like Libya from continuing to cooperate with the U.S. in the war on terror. At the same time, Congress had sent a message to foreign sovereigns, and Libya in particular, that coveted access to western markets comes with a price. This led to unprecedented and rapid discussions between the Bush administration and Libya to seek a global resolution of all outstanding claims against the Libyan state. The

result was the Libyan Claims Resolution Act. Signed into law in August, 2008, this act required Libya to pay \$1.5 billion into a fund to compensate U.S. victims of Libyan terrorism. In exchange, all pending claims against Libya are required to be dismissed – including the claims by the victims of Pan Am 103 and UTA 772.

On 31 October 2008, Secretary of State Condoleezza Rice certified to Congress that the United States had received the full \$1.5 billion to compensate victims of Libyan terrorism under the Libyan Claims Resolution Act. President Bush concurrently issued an Executive Order to implement the claims settlement agreement between Libya and the United States and committed to move expeditiously to arrange for the distribution of funds in lieu of the pending claims against Libya in U.S. courts.

In the case of Libya, law and diplomacy merged to create an environment where victims of Libya's state-sponsored terrorism finally could receive compensation for their suffering. Cases like UTA show that the U.S. court system can be a powerful tool in shaping the behavior of state sponsors of terrorism. Foreign governments recognize that if they support terrorism against U.S. nationals, they could be subject to multi-billion dollar judgments, which can be satisfied against their assets in the U.S. This forces foreign governments to make a choice – give up terror, or give up the economic opportunities presented by participation in western markets.

The Libyan Claims Resolution Act¹⁰ likewise illustrated that when a country like Libya renounces terrorism and actively participates in the U.S. legal process, diplomacy can yield benefits for both sides. Ultimately, the case of Libya has been a success, and the FSIA contributed greatly to that success.

II. Iran: A more challenging target

In contrast to Libya stands Iran – the former an isolated and fairly non-religious dictatorship; the latter a much larger, and more complex, “Islamic” theocracy where foreign policy is multi-dimensional and widespread throughout the government.

In the years immediately following the 1979 Islamic Revolution, Iran embarked on a mission to support Shiite Muslim movements around the world. Iran recognized that by supporting subversive and radical movements, it could weaken and destabilize those governments it deemed illegitimate. Thus, much of Iran's energy in the early 1980s was focused on Lebanon and the creation of Hezbollah. Iran believed that by providing material support, training and funding for

Hezbollah, it could establish a Shiite stronghold in what had become a multi-cultural, pro-western Arab state.

Lebanon attacks and hostage-takings

Like Libya, Iran turned to terror as its primary method of promoting its political agenda, including especially hostage-takings and terrorist attacks on western targets. In April 1983, Iranian-backed Hezbollah terrorists committed a suicide attack on the U.S. Embassy in Beirut, killing 63 people. Six months later, Hezbollah struck again, bombing the U.S. Marine barracks in Lebanon, killing 241 U.S. servicemen, and the French paratrooper barracks, killing 58 French soldiers. The Iranians, through Hezbollah, also took many western hostages throughout the 1980s, including 25 Americans, 16 Frenchmen and 12 Britons. Most of these hostages were journalists, diplomats or teachers, and many were tortured or killed.

In contrast to Qaddafi's ad-hoc, often reactionary “ego-terror” strategy, Iran's approach was better financed, more complex, more serious, and far less episodic. Thus, in addition to the wide-reaching attacks identified above, Iran also targeted, on a more individualized basis, political opponents in the U.S., the Middle East and Europe. For example, in January 1984, Iran and Hezbollah assassinated Malcolm Kerr, the president of American University of Beirut, a long-time supporter of moderate Arab causes and a leading Middle East scholar. The goal was plain – only extremists could be tolerated in Iran's view, and anyone suggesting a more moderate road was to be eliminated.

Default judgments against Iran

After Congress removed sovereign immunity for state sponsors of terrorism in the 1996 amendment to the FSIA, victims of terrorism started bringing suits against Iran. Among those who brought the first suits were former hostages and torture victims David Jacobsen and Joe Cicippio, who worked at the American University in Beirut; Frank Reed, a private school operator in Beirut; the family of Alisa Flatow, a college student killed by a suicide bomber in Israel; and the spouse of Colonel William Higgins, who had been held hostage for 18 months, tortured and murdered by Iranian-backed terrorists.

Despite being properly served and notified, Iran never appeared in U.S. court to defend these charges. In Iran's absence, the Federal District Court in Washington, D.C., entered default judgments against Iran and awarded the victims and their families large sums in compensatory and punitive damages.

Still, justice for the victims was elusive. While the victims held judgments in their hands, they found themselves unable to collect any compensation from the absent Iranian state because, since the Iranian hostage crisis during the Carter Administration, attachment of Iranian assets was precluded by the executive branch, which exercised exclusive control over Iranian property in the United States.

Among the most prominent of the terrorist victims to pursue a claim was Terry Anderson, the former chief Middle East correspondent for the Associated Press, who was kidnapped by Hezbollah in Beirut in 1985 and not released until almost seven years later – the longest held hostage in Lebanon and the last to be released. In 2000, he obtained a large default judgment against Iran in a highly-publicized case in Washington, D.C., at which prominent journalists such as CBS anchor Dan Rather testified. But even his judgment could not be enforced when it first was issued.

The victims of trafficking and the Violence Protection Act of 2000

The first glimmer of hope came in 2000 when Congress passed the Victims of Trafficking and Violence Protection Act of 2000.¹¹ That act specifically authorized recovery in those handful of cases against Iran that already had proceeded to judgment. Thus, this limited group of plaintiffs (including Terry Anderson) was able to recover multi-million dollar judgments directly out of Iranian assets held by the U.S. Treasury. In 2001 and 2002 those judgments were paid, but cases that had not yet reached the judgment phase were left without recourse. Still today, the rest of those judgments remain unpaid – and are the focus of some of the most recent efforts to collect against Iran for its support of terrorism.

Unlike the case with Libya, it has proven far more difficult to incentivize Iran to honor these judgments or to negotiate a resolution. Even the recent Lautenberg Amendment may not help those with judgments against Iran, as the total lack of commerce and diplomacy between Iran and the U.S. not only has isolated Iran, but has also effectively protected Iran's assets from attachment. Thus, about 30 case judgments remain outstanding since the pre-2001 cases were paid, leaving victims frustrated and unable to hold Iran accountable.

Courts of the European Union: A new frontier

Recognizing the likely dead end of a U.S. based enforcement strategy, Crowell & Moring – the Washington, D.C., law firm that represented the UTA

plaintiffs, as well as numerous other victims of Libyan and Iranian terror attacks – recently has opened a new front, taking six default judgments against Iran to the courts of European Union countries. The firm's goal is to (1) domesticate those judgments under local law as if they were issued under local authority, and (2) attach assets of Iran to satisfy those judgments, and thus hold Iran accountable under the rule of law.

The firm began this process in Italy. Why Italy? For three reasons: First, Italian law is similar to U.S. law in this field, as Italy has narrowly applied the doctrine of sovereign immunity and has even cited the FSIA and some of the Libya and Iran cases favorably as a policy matter. Second, Italy has a significantly independent judiciary, less susceptible to diplomatic and political pressure than many of its neighbors. Third, Italy is Iran's leading trading partner with billions of dollars worth of long-term commerce and trade to target.

Of course, any success in the Italian courts will open the door to enforcement of judgments throughout the EU since the new EU system requires "full faith and credit" to sister legal systems. Thus success in Italy will mean success throughout the EU, and the goal of holding Iran accountable will have great legal, financial and moral meaning.

The internationalization of enforcement efforts is especially appropriate in the case of Iran because of the unique nature of its attacks. One case in particular, *Damarell v. The Islamic Republic of Iran*,¹² demonstrates this point. The Damarell case arose from the 1983 bombing of the U.S. Embassy in Beirut. This bombing was condemned worldwide, not only because of the massive loss of life, but also because it violated numerous international treaties and protocols designed to protect diplomats. Iran is a signatory to numerous treaties and protocols, including the 1955 Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran,¹³ and the 1961 Vienna Convention on Diplomatic Relations.¹⁴ Both agreements stress the historic inviolability of consular offices and diplomatic personnel, a concept that Iran flagrantly violated when it attacked the U.S. Embassy in Beirut. It has not been lost on the countries of the world that all share responsibility for making certain that international agreements such as these are respected.

Of course, international pressure already has begun. The U.S. Treasury has restricted trading in U.S. dollars by Iranian banks. In addition, the UN and EU have imposed sanctions on Iran regarding their nuclear ambitions. As a result of these actions, Iran's internal economy is suffering. Thus, even amidst its continued

defiance, Iran has been progressively weighted down by this global opposition to its history of terrorist attacks.

If Iran finally is held accountable in the EU to the victims of its support for terrorism, it may find that the “Libya approach” is a better way to proceed. It took many years to convince Qaddafi to change his ways and enter into a broad global settlement, and Iran poses a range of complex political, legal and diplomatic challenges that were not present with Libya. But a clear path has been blazed, and over the next few years, it is very possible that an “Iran Claims Resolution Act” might result from the efforts of these U.S. victims to hold Iran accountable under U.S. law.

Until then, victims of terrorism must continue to prosecute their claims in any forum that potentially raises a threat to state sponsors of terrorism’s economic interests. With enough pressure, this approach will, as with Libya, help reduce the threat of state-sponsored terrorism.

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Iran cases, including the families in the UTA 772, Pan Am 73, and Kilburn cases against Libya, as well as the Terry Anderson case, the Malcolm Kerr case, and the Dammarell case against Iran. This article is based on a presentation by Stuart H. Newberger at the Annual Meeting of the IAJLJ held November 2007 at the Dead Sea, Israel.

Notes:

1. Foreign Sovereign Immunities Act, 28 U.S.C. (1976).
2. Patel v. Socialist People’s Libyan Arab Jamahiriya, No. 06-626 (D.D.C. filed 5 April 5 2006).
3. Alien Tort Claims Act, 1789, 28 U.S.C. § 1350.
4. Union des Transports Aériens was a French airline that became part of Air France.
5. Kilburn v. Socialist People’s Libyan Arab Jamahiriya, 363 U.S. App. D.C. 87.
6. *Id.*, 91-92.
7. *Id.*, 93.
8. Pugh, et al v. Socialist People’s Libyan Arab Jamahiriya, 530 F. Supp. 2d 216.
9. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605A (amended 2008).
10. Libyan Claims Resolution Act, Pub. L. 110-301 (2008): www.govtrack.us/congress/billtext.xpd?bill=s110-3370 (last visited 4 February 2009).
11. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C.A. §§ 7101 (2000).
12. Dammarell v. The Islamic Republic of Iran, 281 F. Supp. 2d 105.
13. Treaty of Amity, Economic Relations and Consular Rights, United States-Iran, 15 Aug. 1955, 284 U.N.T.S. 93.
14. Vienna Convention on Diplomatic Relations, 4 Apr. 1961, 500 U.N.T.S. 95.

IAJLJ, AJLA host second international conference in Buenos Aires

Cesar Rosenstein

More than 200 lawyers, judges and civil servants from Argentina, other countries of Latin America, Europe, Israel and North America attended the second International Conference organized by the International Association of Jewish Lawyers and Jurists (IAJLJ) and the Association of Jewish Lawyers of Argentina (AJLA), held in Buenos Aires on May 27-28, 2008.

On the agenda were the major challenges of global and Latin American geopolitics, and national efforts to strengthen democratic processes and combat terrorist threats. As well, themes relating to Judaism and Israel were also deliberated, as were ideas about the new kind of leadership that is required when the world suffers from social and political crises. Scholars, judges and political leaders shared their views about how to deal with complex and sophisticated situations in an atmosphere that, while at times heated, was collectively enriching.

Lectures and panel discussions included International Scenario: Global Threats; Latin America: Security and Human Rights; Terrorism and Economic Crimes; Jewish Law: Current Status and Effectiveness; Criminal Law of the Enemy; the AMIA bombing case in the National and International Contexts; and Sixty Years for the State of Israel.

Speakers included the Vice President of Argentina, Julio Cobos; the President of the Supreme Court of Justice of Argentina, Ricardo Lorenzetti; Supreme Court Justice Raúl Zaffaroni; former ambassador of Israel to Argentina, Rafael Eldad; and the attorney general in charge of the AMIA bombing case, Alberto Nisman. Among other personalities who lectured at the conference were IAJLJ President Alex Hertman; IAJLJ Vice President and Senior Vice President of the National Court of Appeals in Criminal-Economic Matters of Argentina, Marcos Grabivker; Director of the Latin American Jewish Congress Claudio Epelman; the rabbi of the Bet-El Community, Daniel Goldman; and the rector of the Latin American Rabbinical Seminary, Abraham Skorka. Since there were a variety of topics to tackle, other specialists were called. They included Dean of the Department of Law and Political Science of the National University of La Matanza Alejandro Finocchiaro;



Argentinean Vice President Julio Cobos addresses the conference

former Secretary of Justice and former Judge of the Federal Criminal Chamber Ricardo Gil Lavedra; former congressional representative Marcelo Stubrin; Director of the Center for International Studies and Education for the Globalization of Universidad del CEMA Carlos Escudé; political columnist and former Director General of Strategic Planning of Argentina Luis Tonelli; Argentine representative to the Groupe d'Action Financière Internationale Alejandro Strega; researcher and professor at the University of Buenos Aires and at the Argentine University of Business Agustin Romero; National Judge on Criminal-Economic Matters Alejandro Catania; Executive Secretary of the Groupe d'Action Financière of South America Alejandro Montesdeoca; and Director of the Center for Social Studies of Delegación de Asociaciones Israelitas Argentinas Marisa Braylan. The closing session of the conference was given by President of the Supreme Court of Justice of Argentina Ricardo Lorenzetti, President of the Executive Committee of AJLA Rodrigo Luchinsky, IAJLJ President Alex Hertman and IAJLJ Vice President Judge Marcos Grabivker.

Keynote speakers at the closing reception were Vice President of Argentina Julio Cobos and now former Israeli Ambassador to Argentina Rafael Eldad. The ambassador delivered a well-received speech celebrating Israel's 60th anniversary.

Vice President Cobos showed his appreciation for lawyers and the Argentinean Jewish community, emphasizing the spirit of struggle and Israel's efforts at building a successful state. In this context, he stressed the progress of our community, commenting on his

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A civil approach to the AMIA bombing in Argentina

As the criminal investigation of the Iranian government's complicity in the bombing moves slowly through the judicial system, a group of victims is seeking justice through the civil courts

Rodrigo Luchinsky

On 18 July 1994 at 9:53 a.m. a Lebanese national and active member of Hezbollah drove a van carrying between 300 and 400 kilograms of explosives to the front of a building on a crowded street in the center of Buenos Aires and detonated it. As a result of the explosion, the front of the building collapsed and many neighboring buildings were damaged. Eight-five people were killed and at least 151 were injured. The building was that of the Asociación Mutual Israelita Argentina (“AMIA” – Argentine Israelite [i.e., Jewish] Mutual Association).

After years of a highly problematic investigation that included the dismissal of a judge and pending indictments against several Argentinean government officials, a newly appointed team of prosecutors is now finally directing the investigation at the involvement of Iran in the worst terrorist attack on Argentinean soil and the worst anti-Semitic attack outside Israel since the Holocaust.¹

The investigative report issued by the federal prosecution's special unit, led by Alberto Nisman, underlines the direct and multifaceted participation of the government of Iran at the highest levels. The acting judge, Hon. Rodolfo Canicoba Corral, has already issued arrest orders against Iranian government officials and its embassy staff in Buenos Aires.² Under Argentinean law there is no trial in absentia, meaning that to impose a criminal conviction it is necessary to bring the defendant to court.³

The prosecutor's report delineates evidence that highest-echelon Iranian government officials were directly responsible for the AMIA attack. Those officials decided to carry out the attack, defined the manner in which it was to be implemented, and instructed the terrorist organization Hezbollah to carry out the operation in its capacity as a mere instrument, in this case, fulfilling the will of the Teheran government.

An analysis of the gathered information shows that

the execution of this and other terrorist acts abroad was not the outgrowth of an unusual foreign policy instrument, but was instead based on the principles of the Iranian revolution of 1979, the ultimate goal of which is to propagate Iran's fundamentalist view of Islam throughout the world.



According to the report, the decision to undertake the bombing was made by the Committee for Special Operations, composed at that time of Iran's spiritual leader Ali Khamenei, President Ali Akbar Rafsanjani, Foreign Minister Ali Akbar Velayati and Intelligence Minister Ali Fallahijan. The decision was made at a meeting held on 14 August 1993 in the Iranian city of Mashad. Two individuals central to the event were specially summoned to the meeting: Mohsen Rabbani, at the time sheikh of Buenos Aires' al-Tauhid mosque, and Ahmad Reza Asghari, at the time third secretary of the Iranian embassy in Buenos Aires. Both men played key roles in the intelligence infrastructure that the Iranian government maintained in Buenos Aires at the time of the attack, and without which an operation of the magnitude of the AMIA bombing could not have been successfully undertaken.

Once the decision had been made to carry out the attack, the information flow between Iran and its Argentinean embassy increased substantially, largely via functionaries and diplomatic couriers. At the same time, substantial amounts of money were transferred from Iran to one of the bank accounts held by Sheikh Rabbani, indisputably the chief representative of the Iranian community in Argentina. These sums were considerably larger than other sums transferred during comparable periods that were assessed by the investigation.

As the criminal investigation continues, a new parallel path has been forged to fight terrorism using Argentinean civil law. A group of victims' families has decided to sue Iran and its former officials in a civil action, attempting to have the court find the defendants liable for the terrorist attack and thus hit them in their pockets.

In a civil case under Argentinean law, as opposed to a criminal action, a plaintiff need not bring a defendant to court, and discovery is much more flexible. The downside is that because class actions are not permitted, and because a civil court cannot award punitive damages, the financial blow to the defendants in any individual case would likely be limited. It also means that there will be as many civil actions as there are victims or their relatives deciding to sue, making the process harsh for people trying to get on with their lives some 15 years after the attack. In theory, though, successful suits by the more than 200 victims or their families could ultimately mean a very significant monetary charge to the defendants.

The Argentinean government⁴ and its judiciary have finally understood that the only way to preserve our democracy (the 25-year period to date is the longest democratic term since independence from Spain in 1810) is to fight terrorism and terrorists with all the available legal tools, making them accountable

criminally and now also economically, providing an interest from the victims or their heirs.

Rodrigo Luchinsky is professor of Corporate Law at the School of Law, University of Buenos Aires. He was Undersecretary of Justice within the Local Government of the City of Buenos Aires (2006-2007) and is a member of the Executive Committee of the Asociación de Abogados Judíos de la Republica Argentina, which is affiliated with IAJLJ.

Notes:

1. www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1196847376211 (Last visited 21 Dec. 2008).

2. Issued on November 9th, 2006. The ruling included an international arrest order.

3. National Criminal Proceedings Code, Sec. 290.

4. On 5 March 2005, the Government acknowledged its responsibility at the Inter-American Commission of Human Rights for failing to adopt measures to prevent the bombing and for not providing an adequate investigation (Organization of American States, Petition # 12.204, Washington, D.C.).

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civilian...to render certain points, areas or military forces immune from military operations.”

6. A particularly horrendous practice, even exceeding the storing of weapons and launching attacks from within civilian areas, is the increasingly widespread use of civilians as “human shields” by Hamas terrorist units. Extant video footage documents the call to men, women and children to assemble and form “human shields” at military targets where imminent attack is expected. Such conduct is undoubtedly a war crime.

7. Abuse of the flag of the insignia of the UN and the distinctive emblem of the Geneva Convention as in the use by Hamas of ambulances for transporting terror groups actively participating in hostilities or for seeking refuge in hospitals. Such conduct jeopardizes medical personnel, the sick and the wounded and also undermines the special protection given them by international law. These acts are particularly forbidden under the Laws of Armed Conflict as formulated in Article 23(f) of the 1907 Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of the War on Land.

Similar prohibitions are to be found in Article 44 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1949) and similarly under Article 38 of the Additional Protocol I to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflict (1977).

8. An additional and reprehensible practice is the use of children by the Hamas terrorist organization to participate in hostilities. Children have been recruited and employed for hostile activities, including carrying out suicide attacks, digging tunnels and smuggling weapons. Such exploitation of children is specifically barred under Article 77(2) of the Additional Protocol I to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflict (1977), which prohibits children of less than 15 years from participating in hostilities or being recruited into armed forces. Furthermore, Article 8(2)(b) (xxvi) of the ICC’s Rome Statute enumerates the following as a war crime: “conscripting or enlisting children under the age of 15 into the national forces or using them to participate actively in hostilities.”

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belief that peace will be achieved, and on Israel’s development of advanced technologies.

The president of the Argentine National Institute against Discrimination, Racism and Xenophobia

(INADI), María José Lubertino, and the president of the Delegación de Asociaciones Israelitas Argentinas (DAIA), Aldo Donzis, also attended the event.

Cesar Rosenstein is Director of International Affairs and a member of the board of the Association of Jewish Lawyers of Argentina.



IAJLJ panel debates media influence at Tel Aviv dinner

More than 150 members and friends of IAJLJ listened attentively as Philippe Karsenty, owner of a French media ratings agency, presented his findings on the notorious September 2000 al-Durra affair at a successful fundraising evening held 24 February 2009 at Tel Aviv's Azrieli Center.

IAJLJ, which has been committed since its 1969 founding to issues on the agenda of the Jewish people, wished to examine more closely the al-Durra affair and the increasingly censorious and discriminatory coverage of Israel. The event was titled "The media: objective reporter or setter of the public agenda?"

On 30 September 2000 France 2 television broadcast scenes ostensibly showing a Palestinian boy being killed by Israel Defense Forces gunfire in Gaza.¹ Karsenty has since argued forcefully that the broadcast was a fabrication and in 2004 he was sued by France 2. Though France 2 won the case, the Paris Court of Appeal set aside the judgment, saying that Karsenty had presented a "coherent mass of evidence" and had "exercised in good faith his right to free criticism."²

David Witzthum, foreign affairs commentator for the Israel Broadcasting Authority's Channel One television station, Nahum Barnea, senior political columnist for Israeli daily Yedioth Ahronoth, and Arnon Feldman, deputy chairman of the board of Israeli daily Ma'ariv, moderated by retired Mossad chief Efraim Halevy, continued the discussion.

Jews have in recent years felt a tide of negative reporting about Israel coming from major media outlets, especially in Europe. While criticism of Israeli policies is of course legitimate, the severe condemnation of Israel's defensive actions written into nominally objective reporting is cause for grave concern.

Media objectivity has been debated since at least

the dawn of the mass-circulation newspaper in the early 19th century. In the early decades of the 20th century, William Randolph Hearst, with his San Francisco Chronicle and later the New York Morning Journal and other newspapers, published wildly exaggerated stories, earning his style the epithet 'yellow journalism.' His objective, though, was simple: sell more newspapers, make more money. Other newspapers publishers have often been called to task for suppressing news unfavorable to major advertisers. This too is a commercial interest. In both cases, the public is effectively denied information that may be important or useful.

At times, though, some newspapers and broadcast outlets appear to go out of their way to promote an ideological agenda – not merely by their commentators, an acceptable approach – but as a regular part of their news content. This not only denies the public honest information, it can defame individuals, organizations, ethnic groups and even states. It is this ideological agenda that must be fought.

At the conclusion of the panel discussion, IAJLJ President Alex Hertman thanked the Association's First Deputy President Irit Kohn, Rachel Ben-Porat and others who organized the evening.

Paul Ogden

Notes:

1. Google returns more than 3.5 million links to the story. Karsenty's French-language website, www.m-r.fr, contains copious detail (last visited 12 March 2009).

2. *Al-Durra Case Revisited*, WALL STREET JOURNAL, 27 May 2008. See online.wsj.com/article/SB121183757337520921.html (last visited 12 March 2009).

The new anti-Semitism

Jews may no longer be denied equal housing, but they are now being denied an equal homeland

Irwin Cotler

Reflecting on the contemporary surge in anti-Semitism, Holocaust survivor Elie Wiesel has stated, “I have not felt the way I feel now since 1945. I feel there are reasons for us to be concerned, even afraid ... Now is the time to mobilize the efforts of all of humanity.” This sentiment is what brings together parliamentarians from around the world, for the first conference of the International Parliamentary Coalition to Combat Anti-Semitism.

What we are witnessing today is a new sophisticated, virulent and even lethal anti-Semitism, reminiscent of the atmospherics of the 1930s, and without parallel since the end of the World War II. This new anti-Jewishness found early juridical expression in the United Nations’ “Zionism is Racism” resolution, but has gone beyond that. Traditional anti-Semitism is the discrimination against, denial of or assault upon the rights of Jews to live as equal members of whatever host society they inhabit. The new anti-Semitism involves discrimination against the right of the Jewish people to live as an equal member of the family of nations – the denial of, and assault upon, the Jewish people’s right even to live – with Israel as the “collective Jew among the nations.”

Observing the complex intersections between the old and new anti-Semitism, Per Ahlmark, former deputy prime minister of Sweden, pithily remarked that the new anti-Semitism is marked by attacks on the “collective Jews – the State of Israel,” which then “start a chain reaction of assaults on individual Jews and Jewish institutions.” In and around my home city of Montreal, I have witnessed chilling examples of these phenomena – from the firebombing of my own high school, to the physical assault of Jews in the Laurentians, to the vociferous chants against Israel during recent Gaza hostilities.

Let me be clear: I have never argued that Israel should be immune from criticism. But the protesters at purported anti-Israel rallies who cry “Jews are our dogs” are of common ilk with traditional anti-Semites. The whole underscores Ahlmark’s conclusion: “In the past, the most dangerous anti-Semites were those who

wanted to make the world *Judenrein*, ‘free of Jews.’ Today, the most dangerous anti-Semites might be those who want to make the world *Judenstaatrein*, ‘free of a Jewish state.’”

The indices of this new anti-Semitism are different from those of the old. Today it may be uncommon for a Jew to be refused service in a restaurant. But now Israel remains the standing object of genocidal threat from Iran and its terrorist proxies Hezbollah and Hamas; the Jewish state is singled out in the international arena while the major human rights violators of our time enjoy exculpatory immunity; the legitimacy of Israel is discriminatorily scrutinized to the extent that, for the purpose of country groupings at the United Nations, it is considered not even to “exist” in Asia; and less sophisticated voices spread rumors of Israelis injecting Palestinians with the AIDS virus. Jews may no longer be denied equal housing, but they are now being denied an equal homeland.

As New York Times commentator Thomas Friedman put it: “Criticizing Israel is not anti-Semitic, and saying so is vile. But singling out Israel for opprobrium and international sanctions, out of all proportion to any other party in the Middle East, is anti-Semitic, and not saying so is dishonest.”

It is this escalation of anti-Semitism that necessitates the establishment of an International Parliamentary Coalition to confront this oldest and most enduring of hatreds. Silence is not an option. The time has come to act. For as history has taught us only too well: While it may begin with Jews, it does not end with Jews. Anti-Semitism is the canary in the mine shaft of evil, and it threatens us all.

Irwin Cotler is a member of parliament and former minister of justice and attorney-general of Canada. He is a professor of law (on leave) from McGill University who has written extensively on matters of hate, racism and human rights. With U.K. MP John Mann, he is a co-founder of the International Parliamentary Coalition to Combat Anti-Semitism; the Coalition’s first meeting was held in London 15-17 February 2009. This article first appeared in Canada’s National Post newspaper on 17 February 2009 (www.nationalpost.com/related/links/story.html?id=1296433).



Supreme Court of Brazil defines crime of racism

Inciting to hatred and publishing of anti-Semitic tracts are considered crimes of racism and are not subject to Brazil's statute of limitations, ruled Brazil's Supreme Court after lengthy deliberations

Jacksohn Grossman

two constitutional freedoms: the freedom of expression
vs. the freedom from racial incitement.

In 2003, the Supreme Court of Brazil, in a landmark 8-3 decision, held that the publishing and distribution of anti-Semitic books and tracts constituted the crime of racism, and that such crime was not subject to Brazil's statute of limitations.¹

The conviction of Siegfried Ellwanger for the crime of racism followed a lengthy legal path through the Brazilian court system. This path began with the adoption of a new Brazilian Constitution in 1988. Among the basic freedoms guaranteed in Article 5 of the new Constitution is the freedom of expression.² Section IV of that article states:

"The expression of thought is free, anonymity being forbidden."

Section IX of that same article states:

The expression of intellectual, artistic, scientific, and communications activities is free and is not subject to censorship or license.

The same Article 5 of the new Constitution likewise set out the freedom from racial incitement, with Section XLII stating:

The practice of racism is a crime that is not subject to bail and for which the statute of limitation does not apply, and it shall be subject to a penalty of imprisonment, under the terms of the law.

Complementing this constitutional provision, Brazil passed a law one year later (Law #7.716/89) that defines and regulates as well as provides penalties for offenses that are commonly referred to as the crime of racism.

Thus, the case of Ellwanger presented the Brazilian Supreme Court with a head-to-head conflict between



Background of the case

Siegfried Ellwanger is an editor and author in Porto Alegre, a city in the south of Brazil, who dedicates himself to the systematic publishing and distribution of manifestly anti-Semitic books such as "The Protocols of the Elders of Zion"; "The International Jew" by Henry Ford; "Brazil's Secret History" and "Brazil, a Banker's Colony" by Gustavo Barroso; "Hitler – Guilty or Innocent?" by Sérgio Oliveira; "The World Conquerors – The

Real War Criminals" by Louis Marschalko; "Holocaust – Jewish or German? – Behind the Lie of the Century," under the pseudonym S. E. Castan. Ellwanger, himself, was the author of "Holocaust – Jew or German? The Backstage of the Lie of the Century," which denies the historic fact of the crime of genocide.

In 1991, charges were filed against Ellwanger at the Rio Grande do Sul State Court, under Brazil's Racism Law, for deliberately inciting discrimination and prejudice, in violation of the racism law – Law #7.716/89. These charges had been filed as a result of campaigns against racism by various movements, including the Jewish Federation of Rio Grande do Sul State which served as an Assistant Prosecutor.

The first decision of the State Court acquitted Ellwanger of the charges, on the grounds that the texts of the published books constituted the expression of opinion and reports of historic facts "told from another viewpoint," and holding that "historic facts do not have one single version." This decision held that "the other opinions presented by the books, in reference to the Jews, are nothing but simple opinion, in the exercise of the constitutional right of freedom of expression."

The prosecutor's assistants, the Jewish Federation of Rio Grande do Sul and Mauro Juarez Nadvorny (as a member of the Jewish community), appealed this decision. On the appeal, Ellwanger was convicted

in October 1996 of the crime of racism by the Court of Justice of the State of Rio Grande do Sul, and sentenced to two years in prison. His sentence was suspended, as this was his first offense, with the obligation to perform community service.

On this appeal, the rapporteur of the appeal, Justice Fernando Mottola of the Rio Grande do Sul Court of Justice, filed a long 47-page decision that thoroughly analyzed each of the edited and published books. He concluded that these books preached racial discrimination, inducing hatred towards Jews, held Jews responsible for all the evils of the world, and in this manner described their inferiority and segregation. In several portions of the decision, references to the “Jewish race,” the “Jewish racial inclination,” the “parasitic inclination that forms part of the Jewish character” and the “tendencies that take root in Jewish blood” were pointed out. Besides constituting a violent attack on Jews, the books “Holocaust – Jewish or German? – Behind the Lie of the Century,” and “The World Conquerors – the Real War Criminals,” defend the Nazi regime, with the intent of denying the Holocaust and transforming the Jews into the real culprits for World War II and “its only beneficiaries.”

The rapporteur concluded that “those who distribute and sell to the public books that defend prejudicial and discriminatory ideas (whether of others or their own) with the obvious intent of generating discrimination and prejudice commit the crime set out in Article 20 of Law #7.716/89.”

After extensive analysis of the published texts, the appeals judges concluded that there had been racial discrimination, “the execration of a race” as pointed out by the Rio Grande do Sul Court of Justice. The appeals examiner, Justice Jose Eugenio Tedesco, pointed out that this suit demanded “a serious consideration about the role of the press, and the performance of the judicial power related to it in a state of law and in a democracy.” He also highlighted that:

(W)ithout question, examining the works edited, distributed, written and commercialized by the appellant, easily shows the sole intention of imposing another truth, which is the execration of a race. On top of historic facts, there was thrown another presumed reality, without basis or reliable elements, except the imagination of the writers... (T)he mentioned works try to deny the Holocaust, blaming it on the Jews, as a

consequence of the Allies’ action. As a result of this twist of character, the forgery of documents and manipulation of photographs and films, the presenting of episodes that could not have happened in Germany and in the occupied territories, presented a criminal distortion of the historic reality, a reality that is publicly known and officially admitted in Germany itself...(B)y the examination of the files, I am sure that the sole intention of the appellant is to propagate a reality based on ideology on the verge of fanaticism, without any proven historical basis. It cannot be accepted as revisionism.

Ellwanger filed a petition for habeas corpus with the Superior Court of Justice in November 2000. This is the highest court in Brazil before the Supreme Court. It is the highest court that does not deal in constitutional matters.

In his petition, Ellwanger claimed that the crime of which he was accused was against the Jews, and as the Jews are not a race, he could not be convicted of an offense under the Racism Law. As the Brazilian Constitution provides that the racism crime is not subject to a statute of limitations, the purpose of this petition was to avoid conviction under this crime by claiming that the time limit under the statute of limitations had already passed.

This petition for habeas corpus was denied by a majority of the 5th Panel of the Superior Court of Justice in December 2001. The rapporteur, Justice Gilson Dipp, emphasized that “the conviction of the defendant was for a crime against the Jewish community – not separating racism from such behavior.”

Ellwanger appealed this decision denying habeas corpus to the Brazilian Supreme Court. He argued in his appeal that as the Jewish people are not a race, then the provision of the Constitution setting out that the racism crime is not subject to the statute of limitations would not be applicable to this case, and his prosecution would be barred under the statute of limitations.

The Supreme Court decision

The Brazilian Supreme Court had before it a case in which it had to decide on two fundamental issues. The first issue was whether the actions of Ellwanger in the publishing and distribution of anti-Semitic books and pamphlets constituted the crime of racism as set out

in the Brazilian Constitution and law. If so, then in accordance with the Constitution, there would be no statute of limitations applicable to the crime with which Ellwanger was charged. The second major issue before the Supreme Court was the need to balance the values of the two freedoms guaranteed by the Constitution – the freedom of expression and the freedom from racial incitement – and to determine which freedom should prevail in the present case.

Did Ellwanger's actions constitute the crime of racism?

The Supreme Court rapporteur, Justice Moreira Alves (now retired), voted to approve the habeas corpus petition and dismiss the conviction of Ellwanger. He based his vote on the fact that several Jewish authors do declare that the Jews are not a race, such as the anthropologist Miguel Asheri ("The Living Judaism – The Traditions and the Laws of the Acting Jews"); Rabbi Morris Kertzer ("What is a Jew"); writer Moacyr Scliar ("The Jewish Condition"); Rabbi Henry Sobel, in a conference at the Presbyterian Church at the Mount of Olives held on 2 February 1998; Fred E. Foldvaruy (in an article *Zionism and Race*); and Dr. Mordecai M. Kaplan, according to whom "We, Jews, are a people with a developed religious civilization." Therefore, supporting his decision through the literal and strict interpretation of the constitutional text, and accepting the argument in the petition for habeas corpus that the constitutional provision for non-application of the statute of limitations could not apply to the present case, the justice held that as the deadline had passed Ellwanger's sentence could not be executed.

The rapporteur of the Supreme Court has the task to initially study and analyze all the materials in the case before the Court and bring his report before the full Court. If his report is approved by the full Court, it becomes the Court's decision. In the present case, the majority of the full Court did not accept this first report by Justice Moreira Alves. Justice Mauricio Corrêa became the second justice of the Supreme Court to study the materials of the case and disagreed with the report by first rapporteur. Justice Corrêa presented at another session of the Court a long report that was eventually adopted by the majority of the Court in an 8 to 3 decision. Thus Justice Correa became the author of the majority opinion of the Court.

On the question of whether Ellwanger's actions constituted the crime of racism, the majority held that it had been proven that Ellwanger had deliberately performed anti-Semitic acts, which are included in the concept of racism as set out in the Constitution and in

the special law on the crime of racism.

Justice Mauricio Corrêa analyzed the various theories regarding race definition, as well as the latest scientific discoveries about human gene sequencing, concluding that in the scientific-anthropological sense, there are no longer "races," but only one race – the "human race," and that, in the same way that the Jews are not a race, neither are whites, blacks, mulattos, Indians, Gypsies, Arabs and any other component of the human species. Everyone, nonetheless, can become a victim of racist practices. For this reason, in discussing the crime of racism, using the term "race" is to empty the juridical contents from the constitutional principle. In his opinion the actions of Ellwanger constituted the crime of racism.

Several members of the Supreme Court quoted parts of an *amicus curiae* brief filed by Professor Celso Lafer. Lafer wrote that the authors published by Ellwanger show that "race" is a historic-social construction, aimed at justifying differences. If the Jews are not a race, wrote Lafer, then so are not the Pariah of India, victims of origin prejudice, as discussed in the Durban Conference on Racism. He further observed that anti-Semitism is paradox racism, as, differently from racism against blacks, it is not even based on apparent differences. In fact, the racist must allege imaginary psycho-cultural differences to undermine the Jews when marking the Jews as members of a race considered inferior to the Aryan race. Anti-Semitism condemned Jews inherently and permanently, since it was not enough for Jews to deny their religion and become Christians in order to rid them of their "condition." In other words, the Jews would be, essentially, different from non-Jews in that they would not belong to the same mankind as the Aryans. Such disparagement, for Lafer, provided the important and essential ideological conditions for the Nazis to discriminate against, segregate and physically eliminate the Jews. It is fundamental, according to him, that these considerations are always vivid in our memories, for anti-Semitism has not disappeared. Finally, Lafer quoted court decisions from the United States Supreme Court and the United Kingdom's House of Lords, which provided deeper legal content to the dignity of the human being and to the repression of racism.

Professor Miguel Reale, Jr., a renowned jurist, also submitted an *amicus curiae* brief. In his brief, he set out arguments by Congressman Carlos Alberto Caó (representative of the Black Movement) at the time of the adoption of the present Brazilian Constitution. Professor Reale clarified that Congressman Caó had

first pointed out the importance in a fully democratic state of overcoming all racial discriminations – in the plural. For that reason, it is not acceptable to adopt a minimalist interpretation that would establish a difference between discrimination against blacks (as being an offense not subject to a statute of limitations) and discrimination against Jews, Gypsies, Armenians and Arabs (which would be subject to a statute of limitations) and that such a distinction would be an absurdity under the 1988 Brazilian Constitution.

In a separate opinion, agreeing with the majority, Justice Cezar Pelluso objected to a narrow interpretation of the term “racism.” Not only would such a narrow interpretation prove useless, it would also be very useless as the racism laws would then be limited to the protection of very small segments of the population. Justice Pelluso understood that the objective intention of the constitutional norms could not have been so narrow when, in fact, it had been intended to be so generous in the guarding of those segments of the human population.

The basic intention of the constitutional norms is to preserve the fundamentals of the Republic, i.e., preserving the integrity and dignity of the people. Furthermore, he presented as the basis for his vote the undisputed fact that Ellwanger became, as editor and author, an expert in the publication, composition and broadcasting of books hostile to the Jewish community. Justice Pelluso concluded that if Ellwanger had been presented just as a casual editor of such works, or even as an editor of eccentricities, he would have regarded this habeas corpus from a different perspective. However, in fact,

(H)e had dedicated himself to edit and, as author, to publish a series of books, continuously and with the clear goal of promoting and broadcasting anti-Semitism, as a manifesto of a racist ideology, provoking and reinforcing prejudice and historic hatred. Such activities have an obvious meaning: It is, as I see it, a practice against our Constitution and, therefore, according to our law, it is presented as an offense that is not prescribed by lapse of time, since it trespasses the limits of freedom of expression.

Justice Marco Aurélio, writing in the minority on the Supreme Court decision, had asserted that the Federal Constitution was written having in mind that discrimination focused on black people, and not against

other ethnic groups.

Justice Maurício Corrêa, writing for the majority, referred to the above assertion by Justice Aurélio. Justice Corrêa had participated in the negotiations for the 1988 Constitution, and he asserted that discrimination was not meant to refer to only one particular ethnic group. This position was also supported by other justices. In this regard, Congressman Carlos Alberto Caó, who had authored the amendment that became Article 5, Section XLII, stressed that the “democratic state begins with overcoming racial discriminations.” This reference is clearly in the plural referring to racial discriminations. For this reason, the social values of the community, fruit of history and its memory, indicate that the term “racism” can never be interpreted as excluding the discrimination of all other ethnic groups and should never be restricted to the discrimination only of Indians or descendants of Africans, characterized by skin color, eye shape or hair type.

Last to present his decision, Justice Sepúlveda Pertence concurred with the majority, declaring he was convinced that the books in question serve as an “instrument for the practice of racism,” adding “I cannot understand this as a subjectively serious attempt at a historical revision of nothing.”

Thus, the ample debate among the Supreme Court justices resulted in the recognition of the principle that there is no statute of limitations applicable to the offense committed by Ellwanger, the author and publisher of the works with their racist implications, including a markedly Nazi and anti-Semitic character.

Balancing the values of the constitutional freedoms

Having determined that the actions of Ellwanger constituted the crime of racism and were not subject to the statute of limitations, the Supreme Court then had to decide on the balancing of two freedoms set out in the Constitution: the freedom of expression vs. the freedom from racial incitement.

In the Supreme Court decision, Justice Ayres Britto, writing a dissenting opinion, presented one side of the question, stating Ellwanger should be free to present “another version of facts that caused and characterized World War II.” He pointed out that in some books (such as Marschalko’s), there were assertions of the pretended Jewish racial supremacy, and there were especially assertions against Zionism. He voted, therefore, for the acquittal of Ellwanger and the granting of the habeas corpus.

Also writing for the minority, Justice Marco Aurélio commented at length in support of the importance of

the freedom of the press, quoting John Stuart Mill's "On Liberty," whose central idea was that there is no absolute truth that would justify limitations to the freedom of individual expression. Protection of the freedom of expression, for Mill, is not only to speak in favor of the liberty of ideas and expression, but mainly to continuously fight against those who want to restrict it. According to Justice Marco Aurélio, for humanity's intellectual welfare, freedom to express all opinions must be protected, even if we disagree with such opinions or even if they are totally wrong. For him, the only possible justifiable restriction to the freedom to express ideas is the way in which they are expressed, or the manner in which such ideas are broadcast. As an example, he said, the crime of racism would be clear if Ellwanger, instead of publishing a book where he presents his ideas about the relationship between the Jews and the Germans in World War II, he had handed out pamphlets on the streets of Porto Alegre that said "Kill the Jews," "Let's push them out of the country," or "Let's take up arms and be finished with them." However, Justice Marco Aurélio contended "None of it happened in the case on trial. The defendant limited himself to writing and broadcasting the version of the history as seen by him. And he did so from scientific research, with unique elements such as method, object, conjecture, theoretical justification, photographs, several types of documents, and quotations." Although admitting that the principle of freedom of expression, along with all other principles that form the set of fundamental rights, is not absolute, the damage that may be caused to such freedoms demands an attitude of consideration of what is at stake in order to form a decision based in the actual case. Based on the same reasons presented by Justice Ayres Britto, Justice Marco Aurélio quotes Voltaire, to declare that he does not agree with the writings of Ellwanger, but defends his right to make public his thoughts.

On the other hand, the majority held that it is necessary to take into account the need for proportionality between the two basic rights, and it is up to the judge in each case to decide which rights must be preserved, balancing one against the other in order to make a determination as to which is most important for a harmonious life in society and human dignity. It requires only a reading of the list of rights and fundamental guarantees set out in the Brazilian Constitution, which constitute the basis for life in society, together with the establishment of limits, to realize that the purpose of the constitution was to provide for a compromise between these rights, and in

appropriate circumstances, even the cancellation of one right in favor of another one. Otherwise, how would it be possible, for example, to reconcile the freedom of expression with the right to an inviolable intimacy, a private life, honor and the image of people, as well as the prohibition of anti-Semitic practices? All are rights that are constitutionally guaranteed.

Using the technique of common sense, which allows the coexistence of different constitutional rights, it is possible to understand that coexistence between the freedom of expression and the prohibition of anti-Semitic acts infers that the right of expression will need to be restricted whenever it affects the legal rights of minority groups in the society.

Along the same line as Justice Corrêa, Justice Gilmar Mendes, agreeing with the majority, thoroughly examined the issue of protection of the right to freedom of expression, and defended the application of the principle of proportionality. Justice Mendes said "freedom of expression is not imperative in our constitutional text," for there were exceptions such as the freedom of information, which should be carried out in a manner compatible with the right to a public image, honor and private life:

In the same manner, one cannot attribute priority to freedom of expression, in the context of a pluralistic society, in face of other values such as equality and human dignity. That is the reason that the 1988 Constitution sets out, in a clear and unequivocal manner, that racism is a crime not subject to prescription and without right to bail (Federal Constitution, Article 5, Section XLII), as well as having determined that the law establish other manners of repressing discriminatory manifestations (Article 5, Section XLI).

He concluded that "the Rio Grande do Sul Court of Justice condemnation was adequate and proportional, achieving the desired end, which is that of safeguarding a pluralistic society where tolerance reigns." According to Justice Mendes, racial discrimination based on freedom of expression compromises one of the bases of the democratic system – the idea of equality itself.

Another justice writing for the majority, Justice Carlos Velloso, argued that "if you have an apparent conflict

See Supreme Court of Brazil, page 47

Tel Aviv, the first Hebrew city,



David Ben-Gurion reads the Declaration of Independence of Israel in the Tel Aviv Museum, formerly the home of Tel Aviv's first mayor, Meir Dizengoff, on May 14, 1948. (Photo: Zoltan Kluger)



Founded in 1871, the German Templar community of Sharona in central Tel Aviv has been handsomely restored. (Photo: City of Tel Aviv)

Hugging Tel Aviv's miles of sand and sea is the "Tayelet" beachfront promenade. (Photo: City of Tel Aviv)



celebrates its 100th birthday



The old city hall on Bialik St. hosts one of the many annual White Night events celebrating Tel Aviv's Bauhaus architectural heritage. (Photo: City of Tel Aviv)



New and old: The Hadassah Hospital on Nahalat Binyamin St. opened in 1918. Today, the Sourasky Medical Center, including the Arison Medical Tower (pictured) is on Weizmann St. (Photos: Tel Aviv Sourasky Medical Center)



A leafy arbor shades Rothschild Blvd., the first street of the first Hebrew city. (Photo: City of Tel Aviv)

Tel Aviv 100

IAJLJ challenges Lithuania's refusal to jail Nazi collaborator

In March 2006, the Vilnius Regional Court found Algimantas Mykolas Dailidė guilty of committing crimes against humanity, specifically of persecuting and arresting two Poles and 12 Jews while he was a member of the Lithuanian Security Police during World War II. Dailidė has for many years been on the Simon Wiesenthal Center's ten-most-wanted list. Yet the court also decided not to jail him, saying he was too old, "no longer a threat to society," and that he had to care for his sick wife.¹ The decision not to implement his sentence was appealed by the Lithuanian prosecutor. The appeal was rejected on 4 July 2008.

Dailidė, now about 87, served during World War II as a member of Saugamas, the Nazi-sponsored Lithuanian Security Police, which, according to the U.S. Department of Justice, "systematically arrested and turned over for punishment and execution Jews who attempted to escape confinement from the Vilnius ghetto, as well as any person who tried to help them. Jews arrested by the Saugamas were shot at execution pits at Paneriai, a wooded area outside Vilnius where some 50,000 Jews were murdered during the war."² The Simon Wiesenthal Center says 70,000 Jews lost their lives there.³

A native of Lithuania, Dailidė moved to the United States in 1950

See *Algimantas Dailidė*, page 28



הארגון הבינלאומי של עורכי־דין ומשפטינים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

30 October 2008

Her Excellency, Mrs. Asta Skaisgiryte Liauskiene
Ambassador of Lithuania to Israel

– By registered mail –

Your Excellency,

Re: Algimantas Dailidė – Punishment in Lithuania

The International Association of Jewish Lawyers and Jurists ("the Association") respectfully appeals to you regarding the above issue, as follows:

1. On August 31, 2008, it was brought to our attention through the media that a Lithuanian citizen, **Algimantas Dailidė**, had been convicted by a Lithuanian court in 2006 of having carried out crimes against the Jews during the course of the Second World War (by assisting the Nazis in capturing Jews and Poles).
2. Dailidė had also been tried in the United States for having concealed his service in the Lithuanian security police, and, as a result, his American citizenship was subsequently revoked. He was ordered to be deported from the United States, but, by the time the order was issued, he had already left the country voluntarily and moved to Germany – where he has lived till now.
3. To the best of our knowledge, Dailidė, now 85 years old, has acknowledged that the Lithuanian courts have convicted him and ordered the appointment of a medical committee to examine the state of his health and determine whether or not he is fit to serve his sentence (5 years imprisonment). It was later revealed that at no time did the medical team examine Dailidė. Moreover, Dailidė is in good health, and is caring for his wife.
4. We would note that the medical team did indeed summon Dailidė to undergo a medical examination in Lithuania, but, following an application by Dailidė's attorney to the court to cancel that summons, they made no further approaches to Dailidė, and so he has never been examined by the medical team. Thus, the court's ruling has not been enforced and, to the best of our knowledge, no attempts are being made to enforce it.
5. Considering the fact that we are dealing with a person who has been convicted of such serious crimes, among them assisting the Nazis in capturing Jews during the course of the Second World War, we fail to understand why, following the conviction in the Lithuanian court, there has been no attempt to enforce the court's judgment.
6. For many years, Dailidė has been on a list of the ten most-wanted Nazi war criminals, issued from time to time by the Simon Wiesenthal Center. The fact of Dailidė's conviction in Lithuania raised the hope that, so many years later, it was recognized that such a criminal should finally be behind bars and receive his well-deserved punishment. That these positive activities should be ignored serves only to undermine the efforts made previously to try him.
7. The International Association of Jewish Lawyers and Jurists – having been established with the goal of fighting Holocaust denial, providing a memorial for its victims, and fighting terror and racism – can only protest and express its disappointment at the helplessness of the Lithuanian legal system in this matter.
8. The Association therefore asks that you pass our request to the Lithuanian authorities, that they request the extradition of Dailidė to Lithuania, where he will serve the sentence imposed on him by the court. It is our hope that – in the spirit of renewal brought by the New Year, the Government of Lithuania will understand the importance of this issue, and will ensure that Dailidė's sentence is carried out.

Yours most sincerely,
Alex Hertman, Adv.
Deputy President

Irit Kohn, Adv.
President

Cc: Dr. Efraim Zuroff, Simon Wiesenthal Center, Jerusalem

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LIETUVOS RESPUBLIKOS GENERALINĖ PROKURATŪRA PROSECUTOR GENERAL'S OFFICE OF THE REPUBLIC OF LITHUANIA

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Deputy President
International Association of Jewish Lawyers
and Jurists

Our ref.: 17.2.-551
Your ref.

10 Daniel Frisch St., Tel-Aviv 64731

CC:
Her Excellency Asta Skaistgirytė Liauskienė
Ambassador of Lithuania to Israel

Date: 13 January 2009

Re: ALGIMANTAS MYKOLAS DAILIDĖ

Dear Sirs and Madams,

Further to your letter of 30 October 2008 we herewith inform you that on 4 July 2008 the College of Judges of the Criminal Cases Division, Lithuanian Court of Appeals, passed a ruling in a criminal case rejecting the appeals of the prosecutor of the Prosecutor General's Office and the lawyer of Algimantas Mykolas Dailidė, the person exempted from criminal liability, and left the 27 March 2006 ruling of the Vilnius Regional Court in power. The latter found Algimantas Mykolas Dailidė guilty of committing crimes against humanity and having established that the accused person became not dangerous due to the changed circumstances closed the case and exempted Algimantas Mykolas Dailidė from criminal liability.

The court established that during the 1941-1944 Algimantas Mykolas Dailidė being the officer of the Vilnius district Division, Lithuanian Security Police (the latter being subordinate to the Nazis), implementing orders of the Nazi occupational regime deliberately persecuted civil Jews. In the autumn 1941 together with the officers of the Lithuanian Security Police deliberately arrested civil Jews who had escaped the Ghetto and were persecuted by the Nazis and brought them to the Vilnius headquarters of the Security Police. Arrested persons were incarcerated and deprived of their freedom. Algimantas Mykolas Dailidė was also accused of the fact that in the spring 1942 he deliberately arrested civil persons on the suspicion that they were members of an underground Polish organization in Vilnius.

On 27 March 2006 Vilnius Regional Court passed a ruling that Algimantas Mykolas Dailidė committed a criminal act specified in the article 100 (Treatment of people prohibited under international law) of the Criminal Code, however, as Algimantas Mykolas Dailidė became not dangerous due to the circumstances changed, the criminal case was closed and exempted the accused person from criminal liability. On 14 April 2006 Prosecutor General's Office appealed against this ruling at the Lithuanian Court of Appeals and requested to reverse the said ruling as illegitimate and ungrounded. The lawyer of the accused person also pledged an appeal requesting to acquit the defendant.

On 8 June 2006 Lithuanian Court of Appeals when hearing the said appeals passed a ruling and imposed a forensic examination by commissioning the experts of the Forensic Institute Vilnius division to conduct health examination of Algimantas Mykolas Dailidė and provide conclusions. Having received and examined the conclusions of the 21 February 2008 forensic examination as well as all the other circumstances of the case, regarding the provisions of the criminal and criminal procedure laws stated that Algimantas Mykolas Dailidė became not dangerous: due to his age, nature of illnesses he suffers from, absence of information that he had committed any new criminal acts. According to the

conclusions of the forensic experts and explanations thereof the illnesses Algimantas Mykolas Dailidė suffers from are progressing, punishment of imprisonment could result in worsening his health and cause his death. The Court stated that Algimantas Mykolas Dailidė is no menace to society or other persons. According to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Lithuania no punishment can be imposed that could result in physical suffering or would constitute unreasonably cruel treatment of the said person.

The Court also stated that failure to impose a means of punishment upon the accused person was not in contravention of the Law because the Criminal Code provides for the fact that imposition of penal measures upon an adult person exempted from criminal liability is a right rather than an obligation of the Court.

Lithuanian Court of Appeals rejected the appeals of the prosecutor of the Prosecutor General's Office and the lawyer of Algimantas Mykolas Dailidė. Decision of the Court should be respected and implemented not only by the parties of the said criminal procedure but also by other persons as well. The said ruling has been valid since the day it was passed, i.e. 4 July 2008. Validation thereof means that the previous ruling passed on 27 March 2006 by the Vilnius Regional Court in respect of Algimantas Mykolas Dailidė has also come into force. Upon failure to establish factual and legal grounds in order to pledge a cassation appeal against a valid court ruling the ruling of the Vilnius Regional Court remains valid. According to the Law on Criminal Procedure, after a court ruling came into force the criminal procedure is regarded finished and no pre-trial investigation or other procedural acts (e.g. repeated examination, extradition, etc.) whatsoever are possible in respect of Algimantas Mykolas Dailidė.

Respectfully,

[signature]

Prosecutor
Special Investigations Division

Alvydas Valiukevičius

Translation from Lithuanian into English is done by Povilas Monkus the translator, Prosecutor General's Office.
Translation corresponds to the original text.

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Algimantas Dailidė ***from page 26***

where he gained U.S. citizenship and lived quietly for many years. In February 1997, his citizenship was revoked because of his involvement in Nazi persecution. He appealed the ruling but lost. In May 2002, a U.S. immigration judge ordered him deported to Lithuania. A further appeal by Dailidė also failed.⁴

IAJLJ strongly rejects the decision of the Lithuanian courts not to incarcerate Dailidė, and indeed appealed to the Lithuanian Prosecutor General's Office in this matter.

On these pages are IAJLJ's letter to the Lithuanian ambassador to Israel, a response from the Lithuanian Prosecutor General's office, and a letter from Efraim Zuroff, director of the Simon Wiesenthal Center office

in Jerusalem. Zuroff's letter indicates that it is most unlikely that Dailidė was ever examined by the doctors who ruled on his health in the appeal.

Lithuania, a member of NATO and the European Union, has yet to punish a single Lithuanian who was complicit in Nazi-era war crimes.

Paul Ogden

Notes:

1. <http://news.bbc.co.uk/2/hi/europe/4849524.stm> (last visited 22 March 2009).

2. www.usdoj.gov/opa/pr/2004/January/04_crm_017.htm (last visited 22 March 2009).

3. Efraim Zuroff, personal correspondence, 30 March 2009.

4. *Id.*



Simon Wiesenthal Center
Snider Social Action Institute

מרכז שמעון ויזנטל
מכון סניידר למעורבות ציבורית

Israel Office: 1 Mendele St., Jerusalem 92147 מנדלי 1 ירושלים
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29 Shevat 5768
23 February 2009

09-27

Dear Deputy President Kohn,

I would like to bring to your attention another troubling aspect of the conclusion of the Dailidė case in Lithuania last July.

Several months ago, I met in Vilnius with Special Prosecutor Rimvydas Valentukevičius, who is responsible for all cases regarding Nazi and/or Communist crimes. In the course of our meeting, I inquired regarding the status of the Dailidė case and was told that the matter had been finally concluded in the wake of the decision by the Lithuanian court, based on the opinion of local doctors who said that Dailidė was too ill to be punished. To the best of my knowledge, however, Dailidė had not been examined personally in Lithuania prior to that decision, but when I asked Valentukevičius whether the doctors whose opinion served as the basis for the ruling of the court had actually personally examined Dailidė, the prosecutor refused to reply, and thereby confirmed my worst suspicions.

This outrageous decision, which we publically protested and which has never been denied by the Lithuanian authorities is the final straw in the total failure of the Lithuanian judicial authorities to punish any of the thousands of Lithuanians who actively participated in the crimes of the Holocaust.

We urge the IAJLJ to protest this abysmal state of affairs and help in bringing this outrageous legal behavior by the Lithuanian judiciary to the attention of the international legal community.

With best wishes

Sincerely yours,

Dr. Efraim Zuroff
Director

■ International Headquarters: Los Angeles ■ Branches: New York Toronto Miami Paris Buenos Aires

IAJLJ calls for rescinding high treason charge against Panayote Dimitras

IAJLJ has called on the Greek government to cancel a charge of high treason against Panayote Dimitras, a human rights champion whose testimony contributed to the conviction of Greek Holocaust denier Kostas Plevris.¹ Dimitras' alleged crime was to speak of Macedonians in Greece and he faces life in prison if convicted. The complainant in the case is none other than Plevris, who says that Dimitras violated Article 138, Paragraph 1 of the Greek Criminal Code, which states that "one who attempts by force or by threat of force to detach from the Greek State territory belonging to it or to include territory of the Greek State in another state shall be punished by death" (another article commutes death sentences to life sentences).² Dimitras was a prosecution witness at Plevris' trial.

Plevris filed the complaint following a document Dimitras wrote on the Macedonian minority in Greece. The document included references to the European Commission against Racism and Intolerance and the United Nations Treaty Bodies Concerns and Recommendations on the Matter. Thus Dimitras allegedly violated the Greek Criminal Code and is "deemed" a traitor because he supports a minority group in his own country. Plevris' said that Dimitras committed treason against the "Fatherland."

Greece does not recognize the existence of a modern Macedonian ethnic group because many Greeks self-identify with the Macedonians of antiquity. Only in 1995 did Greece recognize the country to its immediate north, which declared its independence from Yugoslavia in 1991 and calls itself the Republic of Macedonia. Ostensibly to avoid confusion with its northern district of Macedonia, Greece lobbied successfully at the United Nations and other international bodies for the new



הארגון הבינלאומי של עורכי־דין ומשפטים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

29 October 2008

Mr. Sotirios Hatzigakis
Minister of Justice of the Hellenic Republic

– By registered mail and fax–

Dear Mr. Hatzigakis,

Re: Mr. Panayote Dimitras

We are writing to you on behalf of the International Association of Jewish Lawyers and Jurists ("the Association"). We have been informed that Mr. Panayote Dimitras is currently being investigated on suspicion of allegedly committing treason¹.

1. The Association was founded in 1969 by the Deputy President of the Israel Supreme Court, the late Justice Haim Cohn, and by Nobel laureate, Prof. René Cassin. Its objectives include combating Anti-Semitism, racism, Holocaust denial, terror, and unacceptable discrimination against Israel and the Jewish people.

2. For some years our Association has been familiar with the work of Mr. Panayote Dimitras as a fighter for human rights. Most recently, his actions contributed to the conviction of Mr. Konstantinos Plevris, a known Holocaust denier, for publication of his book, *The Jews – The Whole Truth*, which, for the most part, is an incitement to racism against the Jewish people.

3. Our Association is amazed that, in the Hellenic Republic, a democratic state and member of the European Union, whose human rights record is renowned, such an investigation could be conducted against an individual who is so dedicated to the struggle for human rights, in particular the rights of minorities in Greece.

4. We therefore call on you, as Minister of Justice, to use your every effort to ensure that the proceedings instituted against Mr. Dimitras be withdrawn.

Sincerely,

Alex Hertman, Adv.
Deputy President

Irit Kohn, Adv.
President

Cc: Dr. Efraim Zuroff, Simon Wiesenthal Center, Jerusalem
Ms. Aviva Raz-Schechter, Director, Department for Combating Anti-Semitism, Ministry of Foreign Affairs

1. Mr. Konstantinos Plevris (see section 3 to this letter for additional details) filed the complaint against Mr. Panayote Dimitras following a text he wrote on the Macedonian minority in Greece – which include references to the European Commission against Racism and Intolerance and the United Nations Treaty Bodies Concerns and recommendations on the matter – accordingly, Mr. Panayote Dimitras allegedly violated Article 138 paragraph 1 of the Criminal Code. i.e., Mr. Panayote Dimitras is "deemed" a traitor because he is supporting the minority in his own country and therefore considered to commit treason against the "Fatherland" (as Mr. Konstantinos Plevris said).

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See *Panayote Dimitras*, page 47

Israel and the family of nations: The Jewish nation-state and human rights

Israel's detractors treat the right of national self-determination as if it were a club with a "no Jews allowed" sign hanging at the entrance. Yet there is no contradiction between a 'Jewish state' and 'a state of all its citizens'

Alexander Yakobson and Amnon Rubinstein

The legitimacy of the Jewish state, which has never ceased to be an issue since the establishment of the State of Israel in 1948, has come under a particularly persistent attack in recent years. It is often claimed that there is an inherent contradiction and incompatibility between a Jewish state and the principles of liberal democracy.

We strongly object to this view. It is a view that has grown into an orthodoxy of sorts both in Israel (in the circles that are usually defined as "post-Zionist") and abroad, among those who deny the legitimacy of Israel as a Jewish state (as opposed to those who – like the authors – are critical of various aspects of the Israeli reality and official policies). We therefore decided to examine the concept of a 'Jewish state' and the principal features that determine the Jewish character of the State of Israel in the light of international law, the principle of self-determination and the norms of human rights accepted in the modern democratic world. Our findings are presented in the book, "Israel and the Family of Nations: The Jewish Nation-State and Human Rights," recently published in an English version and summarized in this article.

Those who deny the democratic legitimacy of the idea of a Jewish nation-state do so ostensibly in the name of the principle of equality, alleging that this concept is inherently discriminatory. In fact, we submit that this position amounts to trampling underfoot the principle of equality under the guise of upholding and protecting it, since it denies the Jewish people the right that opponents of the Jewish state both readily acknowledge as universal and particularly insist on applying to the Palestinian Arab people – the right to national self-



Alexander Yakobson



Amnon Rubinstein

determination. These opponents treat the right of national self-determination as if it were a club with a "no Jews allowed" sign hanging at the entrance. There are, indisputably, two peoples, that is two distinct national identities with rival national aspirations, in the historic Land of Israel/Palestine. Both have a right to national independence in the form of two nation-states – Jewish-Israeli and Arab-Palestinian. This is both the practical and the moral basis of the two-state solution, which we strongly support. The Arab citizens of Israel are thus a national minority in a Jewish state, and should be officially recognized as such. As a national minority in a democratic state, Arab citizens of Israel are entitled to full civil equality and also have a right to preserve their distinct cultural identity. Israel's character as a Jewish state and the status of its Arab community as a national minority are in fact two sides of the same coin. In principle, the same would apply to a Jewish minority in a future state embodying the national independence of Palestinian Arabs; in practice, however, Jewish minorities have been unable to survive throughout the Arab world, and there seems to be little room for optimism that a Jewish minority could survive in Arab Palestine.

We submit that both peoples in the land from the Mediterranean to the Jordan are entitled to self-determination and independence. In this article, and in far greater detail in our book, we examine the attacks on the idea of Jewish independence as embodied by the State of Israel, and analyze and reject the various Israeli objections (now much less common than in the past) to the Palestinian right to self-determination.

We also address the claims that the defining characteristics of Israel as a Jewish state are incompatible with modern democratic norms by an examination of

the norms that actually prevail in contemporary liberal democracies. We do so by looking at issues such as the definitions of national identity and nationhood and the rights of national minorities, “ethno-cultural” and “civic” nationalism and the relevance of these terms to Israeli conditions, religion and state (and the separation thereof), religion and national identity, the cultural neutrality of the state (which is sometimes presented as a liberal-democratic norm but is in fact an exception rather than a rule in real-life modern democracies), homeland and Diaspora, and bi-national and multi-national entities.

Though space limitations prevent us from expanding here, our book reviews modern nationalism and ancient culture and tradition, partition and its effects in countries that have undergone it, and group rights versus personal rights. It also examines international conventions, constitutions, laws and court cases from contemporary democracies – mostly, though not exclusively, in Europe – as well as European conventions on human rights, various normative European documents and the case-law of the European Court of Human Rights. All point to the legitimacy of Israel as a Jewish and democratic state.¹

Jewish peoplehood

Opponents of the Jewish state have often argued that the Jews are merely a religious community and not “a people” entitled to national self-determination. The usual rule that identity should be left to the people belonging to the group in question, rather than determined for them from outside, does not, apparently, apply to the Jews. But in fact the international community has repeatedly recognized the Jewish people as a people with national aspirations – in the League of Nations Mandate for Palestine, which incorporated the Balfour Declaration and called for the establishment of “a national home for the Jewish people in Palestine,” as well as in the 1947 United Nations Partition Plan, providing for a “Jewish state” alongside an “Arab” one, and in the arguments raised by its supporters during the UN debates. Moreover, as regards Israeli Jews, the whole debate on Jewish peoplehood is meaningless. They constitute a national community according to all the usual and uncontroversial definitions, including language, culture, and common territory – all connected to a nation-state. The Palestinian Arabs have never claimed that the country’s Jews are a religious (or ethnic) community within the Palestinian people (whom they define as Arab and as part of the wider “Arab nation”

– according to the definitions accepted throughout the Arab world). Thus, however one chooses to regard the question of Jewish identity and peoplehood (a question which, as all questions of this kind, is best left to the people concerned), there is no way to deny the reality of Jewish-Israeli peoplehood and thus to deny the legitimacy of Israel as a Jewish state.

The 1947 UN debate

The UN partition debates clarify what the international community meant when it voted for a “Jewish state” alongside an “Arab State” in Mandatory Palestine in 1947: a state that would bestow on the Jewish people its national independence, i.e., realize its right to self-determination in the form of an independent state. The detailed case for the Jewish state as part of partition is presented in the report submitted to the UN General Assembly by the United Nations Special Committee for Palestine (UNSCOP):²

The basic conflict in Palestine is a clash of two intense nationalisms. Regardless of the historic origins of the conflict, the rights and wrongs of the promises and counter-promises [to both sides] and the international intervention incident to the Mandate, there are now in Palestine some 650,000 Jews and some 1,200,000 Arabs who are dissimilar in their ways of living and, for the time being, separated by political interests. [...] Only by means of partition can these conflicting national aspirations find substantial expression and qualify both peoples to take their places as independent nations in the international community and in the United Nations. [...] Jewish immigration is the central issue in Palestine today and is the one factor, above all others, that rules out the necessary co-operation between the Arab and Jewish communities in a single State. The creation of a Jewish State under a partition scheme is the only hope of removing this issue from the arena of conflict. It is recognized that partition has been strongly opposed by Arabs, but it is felt that that opposition would be lessened by a solution which definitively fixes the extent of territory to be allotted to the Jews with its implicit limitation on immigration [...]³

Further,

A partition scheme for Palestine must take into account both the claims of the Jews to receive immigrants and the needs of the Arab population, which is increasing rapidly by natural means. Thus, as far as possible, both partitioned States must leave some room for further land settlement. The proposed Jewish State leaves considerable room for further development and land settlement and, in meeting this need to the extent that it has been met in these proposals, a very substantial minority of Arabs is included in the Jewish State.⁴

The UNSCO report, on which the subsequent Partition Resolution of the General assembly was based, thus recognized the Jewish people as a people with national aspirations. The Committee took it for granted that the Jewish state would encourage massive Jewish immigration, and stated that they were allotting it enough territory to make that possible. The principle of Israel's Law of Return, 5710-1950,⁵ which is often attacked as discriminatory, is in fact envisaged in the UNSCOP report – the same report that required both the Jewish and the Arab state to ensure full civic equality to their minorities.

Two arguments against Zionism

Opponents of Zionism use two main arguments to deny it the legitimacy of a national movement striving for its people's independence: that it was a colonialist phenomenon, and that Jewish nationalism was 'invented' by the Zionists, hence lacks historical continuity and genuine connection with Palestine.⁶

With respect to colonialism, one of our several arguments is that the Zionist case lacks the most crucial element of modern colonialism – that of a colonial mother country. Modern colonialism, as distinguished from many other instances of conquest and migration in history, was a process by which European powers appropriated broad swathes of what today is known as the Third World, in some instances settling (colonizing) them with their own nationals. In sending their citizens to these countries, the European states in question sought to strengthen their hold on the countries concerned and to improve their settlers' lot. If, then, Zionism is to be defined as a colonial phenomenon, on the grounds that the Jews came to Palestine mostly from European countries and settled

there, the following question naturally arises: which colonial mother country sent its Jewish citizens to Palestine for their own good, in order through them to exploit its resources, and to assure its rule over it? Given the origins of the great majority of those who came to Palestine, the inescapable conclusion is that initially the Zionist settlers served as the colonial 'long arm' of Tsarist Russia; subsequently they acted primarily on behalf of the Polish Republic; and in the 1930s they were on assignment for Nazi Germany. This is hardly the most convincing explanation for Zionism as a historical phenomenon.

Zionism and international norms

All strands within the pre-state Zionist movement, left and right, favored a Jewish state that was based on modern liberal principles, ensuring full civic equality for the Arab minority and religious freedom for all. A Jewish state as envisaged by Theodor Herzl (who spoke of a State of the Jews), David Ben-Gurion, Ze'ev Jabotinsky and other early leaders was a nation-state for the Jewish people, but it was neither exclusively Jewish nor dominated by the Jewish religion and governed according to Jewish religious law. Their vision of the future state was thus similar to the one adopted by the international community in the Partition Plan, which provided for two nation-states, while requiring both of them to ensure equal rights and religious freedom for all citizens, including minorities. The Jewish state, like any nation-state with national minorities, is inevitably, and legitimately, influenced by the culture of the majority people, but it does not belong exclusively to members of that people. Sovereignty belongs to all its citizens, Jews and non-Jews, and only to them; Jews outside the country have a right to come, but have no political rights within it while they continue to live abroad. Indeed, the Israeli Supreme Court has ruled that "every democratic state is, in an important sense, a state of all its citizens."⁷ Thus, contrary to what is often claimed or assumed, there is no contradiction between a 'Jewish state' and 'a state of all its citizens.'

The Jewish State and Israeli democracy

What is Israel's actual record in the two fields that are usually claimed to create the incompatibility between a Jewish and democratic state? We refer to Israel's Arab minority and the degree of separation between religion and state. We acknowledge that Israel – in fact all multi-ethnic or multi-religious states – face dilemmas in these areas. The status of Israel's Arab minority has improved over time, despite the highly problematic

situation of an ongoing national conflict between the state and the people – the national group – to whom the Arab minority in Israel belongs. In fact, several Israeli Supreme Court decisions imposed the principle of full civic equality as obligatory on all state agencies.⁸ The principle of civic equality is part of Israel's constitutional and administrative law, protected now in practice much better than in the past, due to increased judicial activism.

We reject the interpretation of a Jewish state favored by the Orthodox Jewish establishment in Israel: a state governed according to, or at least heavily influenced by, Jewish religious law. Various aspects of the Israeli religious status-quo, above all the absence of civil marriage and divorce, are indeed contrary to modern democratic norms. However, in recent decades, despite some victories of religious parties in coalition politics, the tendency has been towards a more modern, liberal and secular society in many respects – including the massive erosion of Sabbath observance in public life, wide availability of non-kosher food, creative ways to circumvent the Orthodox monopoly on matters of personal status such as the “Cyprus marriage,” and radical liberalization as regards homosexual rights (strikingly symbolized by gay pride parades in Tel Aviv and even in Jerusalem). We submit that an institutional separation between religion and state would not at all affect Israel's character as a Jewish nation-state, and thus there is no reason to oppose this idea on the grounds that it is incompatible with Israel being a Jewish state.

Various arrangements that fall short of full church-state separation have been adopted by many contemporary democracies. The European Commission for Human Rights has explicitly ruled that an official or established church, of a kind that exists in England, in Scandinavian countries and in Greece, does not violate European human rights norms, provided that freedom of conscience for everyone and civic equality regardless of religious affiliation are guaranteed.⁹

Either Jewish or democratic?

Israel's detractors often point to the country's characteristics as a Jewish nation-state and the norms prevailing in contemporary democracies, implying that states should be neutral on matters of culture and identity. The Jewish character of Israel is obviously incompatible with this notion, salient examples of which are the Israeli Law of Return¹⁰ and, more broadly, Israel's official ties with the Jewish Diaspora, which give strong official expression to its Jewish character

and thus its “non-neutrality.”

Yet cultural “neutrality” (as opposed to civic equality) in a modern democracy is a myth. A country with an official or state language is already fundamentally ‘non-neutral’ on an issue that is rightly regarded as crucial to most modern national identities. The Israeli flag, with its dominant Star of David is not neutral, but neither are the flags of the various liberal democracies that feature the Cross, to cite just one example of symbolic ‘non-neutrality.’

Israel's official ties with the Jewish Diaspora are sometimes objected to. Yet numerous other cases of official links between homeland and diaspora exist and they are much more widespread than is sometimes realized; they are, in fact, on the ascendancy in recent years and decades. The Israeli Law of Return is comparable to the national repatriation laws of several other democratic countries, which are seen as fully compatible with international and European human rights norms. According to these norms, including the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, while a state is forbidden to discriminate among its citizens, it has a right to give preference in immigration and naturalization to foreign citizens whom it regards as belonging to its national diaspora.

In sum, the detractors of Israel as a Jewish state are denying that which some of their own states, and the supra-state bodies of which they are members (including the European Union), accept as a norm for themselves.

Alexander Yakobson is a senior lecturer at the Department of History at the Hebrew University of Jerusalem. Israel Prize winner Amnon Rubinstein is an Israeli legal scholar who served as a member of the Knesset between 1977 and 2002, where he also held several ministerial positions. He is currently professor of law at the Radzyner Faculty of Law at the Interdisciplinary Center (IDC) in Herzliya, Israel. Israel and the Family of Nations: The Jewish Nation-State and Human Rights was published in July 2008 by Routledge.

Notes:

1. ALEXANDER YAKOBSON AND AMNON RUBINSTEIN, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* 119-123; 126-133; 200-217 (2009). This work was published in Hebrew as *Yisrael U-Mishpachat Ha'amim* (2003).

2. *United Nations Special Committee for Palestine, Report to the General Assembly*, 1 OFFICIAL RECORDS OF THE SECOND SESSION OF THE GENERAL ASSEMBLY (Supplement No. 11) 28-47 (1947).

See Israel and the family of nations, page 45

The role of international law in negotiations between states

Lawyers involved in negotiations between states must know precedents and how to apply them, be able to provide legal arguments bolstering the legitimacy of claims, choose words carefully, and provide the negotiator with options when a crisis is reached

Robbie Sabel

It is, I believe, a legitimate question as to whether there is a substantive role for international law in foreign policy negotiations or is its use, as Werner Levi, late professor at the University of Hawaii, argued, only “in justification, not initiation of a foreign policy.”¹ Levi earlier pointed out that

References to law are virtually absent in papers of statesmen responsible for the shaping of foreign policy, whether they be official correspondence with diplomats abroad, intra-office notes and messages, or personal writings in diaries and memoirs. International law usually occurs as an afterthought, when for a number of reasons the formulation of a policy decision in legal language appears desirable before its public appearance.²



to which foreign ministers so love to attach their signatures. Not only is the end result of negotiations subject to the scrutiny of international law but also the very act of negotiating a binding international agreement inevitably involves the craftsmanship of international law.

I use the word craftsmanship deliberately since the practitioner of international law needs to be both a fellow of a recognized academic discipline and at the same time a practical legal craftsman. The international lawyer should be capable of conducting, one would hope, an intelligent discussion on the various schools of thought of legal philosophy and yet also be capable of giving an on the spot answer to a query such as whether international law requires the labor attaché at an embassy to pay VAT on gasoline purchases. One inevitable result of this dichotomy is that true academicians tend to regard international lawyers as dreary technicians while our “striped pants cookie-pusher” colleagues regard us as ivory tower academics. In other words we can’t win.

Be that as it may, international law is an essential element of diplomacy and negotiations. This craftsmanship involves three major elements.

The first is that of knowledge and application of precedents. Real life precedents are a vital element in negotiations, since governments, political leaders and negotiators are inherently conservative. Following precedents means following a well-trodden path, which has already been subjected to public and legal scrutiny. Every young bureaucrat is, with good reason, instructed to abide by the old platitudes of, “don’t reinvent the wheel,” and “if it ain’t broke don’t fix it.” If a legal formula has been used and accepted by states, preferably the states involved in the negotiations, then it shouldn’t be changed. What is required are real life modern precedents: Not the *Schooner Exchange*³ and not the *Caroline Incident*⁴ but recent incidents that a

modern politician can relate to. Academic learned articles have little role to play. Cornell Law School professor Annelise Riles writes that practitioners “treat the treatises and articles that academics churn out as largely irrelevant curios that one might cite from time to time for extra flourish.”⁵ The only political leader whom I have known to be interested in quotations from academic legal opinion was the late Israeli Prime Minister Menachem Begin, who had great reverence for the opinions of international lawyers and particularly that of the late International Court of Justice Judge Sir Hersch Lauterpacht. However, on one memorable occasion when I happened to be present, Begin began quoting to Egyptian President Anwar Sadat from Sir Hersch’s classic treatise on international law. The Egyptian president’s total lack of interest was immediately and obviously apparent; when Begin reached Lauterpacht’s footnotes an observant aide saved the day by interrupting with an “urgent message.”

In my experience when negotiating with the Arab states and with the Palestinians, precedents often saved the day. When with Egypt we wished to refer to normalization of relations, both sides adapted, with alacrity, quotations from the UN Charter and from the 1970 Declaration of Principles on Friendly Relations Between States.⁶ It might quite well have been possible to negotiate more appropriate language than that of the UN documents but it would have extended negotiations considerably. When both sides reported home to their governments, one can assume that they would not have been subject to criticism for agreeing to a text that was taken verbatim from basic UN documents. For this reason one will find references to UN Security Council Resolution 242⁷ and quotations from it in every major agreement signed between Israel and the Arabs. Not that Resolution 242 is a panacea but rather because the negotiators are aware that it is a formula that has been accepted by all parties concerned and hence can be quoted or referred to without fear of incurring the wrath of one’s home government or parliament.

One must point out that, technically, any incorporated quotation from precedents will be unacknowledged. As Riles points out in reference to legal documents produced at conferences:

Delegates’ usage of quotation also differs considerably from the conventions of academic writing. The text of the document makes numerous implicit references to language negotiated at

other conferences as set out in other international instruments. These direct but unacknowledged quotations, it is understood, reaffirm language negotiated earlier and also provide firm grounding for the claims of the new text.⁸

When negotiating a bilateral treaty on any subject, the international lawyers on both sides will equip themselves with previous texts agreed to by either of the parties on the same or similar subjects. The peace agreement with Jordan very closely follows the wording of the earlier peace agreement with Egypt, even though both sides were aware that some of the earlier phrasings, such as the dispute settlement clause, had aroused problems of interpretation. The Jordanian position was that if it had worked, albeit imperfectly, for Egypt, then they preferred that to negotiating a new formula.⁹ The onus of persuasion will be on the side that wishes to deviate from previously negotiated texts and often they will find it to be an impossible task. Hence although precedent is not legally binding, in practice it carries enormous weight and it is up to the international lawyer at the negotiating table to be ready with the necessary precedents stored in his laptop.

The craftsmanship of international law is equally required for decisions as to use of words and phrases. For example the phrase “equitable utilization of joint water resources,” which appears in the “Oslo” accord,¹⁰ may have seemed to the political negotiators as an anodyne euphemism for good neighborly behavior. The international lawyers involved knew that it was a technical term that carried with it the baggage of numerous rules and precedents of the international law relating to water resources. Woe betide the negotiator who bandies phrases such as “equitable,” “reasonable” and “foreseeable” without knowledge of their forensic interpretations. There are of course times when the only way out of an impasse is by deliberate use of “constructive ambiguity.” The emphasis should be on the qualifier “deliberate.” Ambiguity usually means postponing a problem to a later time, which can be useful, though it may well exacerbate a problem that would have been easier to solve during the actual negotiations.

A further task of the international lawyer involved in negotiations is to provide his side with legal arguments bolstering the legitimacy of claims. In most negotiations there is a desire to garner third-party support for the positions advanced by the parties involved in the negotiations. Even where the third party may have

political sympathy for the position of one of the sides, it is important that such third party also be assured that it is supporting a position that is legally correct. Neutral and disinterested states, kibitzing on negotiations, will find it easier to support a claim they consider to be legal and a positive precedent; conversely, they will be reluctant, at least openly, to support a claim they consider to be illegal. Roger Fisher, emeritus professor of law at Harvard Law School, wrote, correctly, that “legitimacy and lawful authority are key components of political power.”¹¹ Robert Bowie, founder of Harvard University’s Center for International Affairs and former U.S. State Department director of Policy Planning Staff, wrote that, as regards the 1956 Suez crisis, “by resting its access to the Straits of Tiran on the general right under international law, Israel enabled the U.S. to commit itself to vindicating that right before Israel withdrawal without seeming to undercut Hammarskjöld or the United Nations.”¹² Many legal arguments addressed to the other side during negotiations are in fact intended for third parties and for world public opinion in general. However, there is even utility in directing legal arguments at the opposite side. Admittedly the most cogent legal arguments will not lead the other side to tearfully admit that they have no answer and that they were wrong in their claims. Nevertheless, effective legal arguments sometimes do have effect, though never immediate and never acknowledged: one can sometimes sense, in counter offers and suggestions made by the other side, that certain legal arguments have been taken into account.

There are times when legal argument is useful in bolstering the self-confidence of one’s own side. It can be important that negotiators sense that not only are they representing their state’s interest but also that of a just, defensible cause.

It can, however, often be the task of the lawyer to advise the negotiators against using a specific legal argument on the grounds that such an argument might boomerang in a different context. The late Harvard law professor Abram Chayes noted that the U.S. did not rely on a claim of self-defense during the Cuban missile crisis since “it would set a dangerous precedent.”¹³ Often political negotiators will be interested principally in the results of an ongoing negotiation and are sometimes willing to be reckless as to the future dangers of creating a precedent. It will be the task of the lawyer to foresee and enunciate future ramifications of a specific argument in a different context.

States may have a genuine interest in promoting international law for the sake of international law.

Bowie wrote on the Suez Crisis, that as regards the United States,

One of its major purposes was to maintain and strengthen the legal order embodied in the UN Charter, and two obligations in particular: (1) to refrain from the threat or use of force, and (2) to settle disputes by peaceful means in conformity with the principles of justice and international law.¹⁴

The American Society of International Law’s Committee on the Role of the Legal Adviser to the State Department commented that, “It was a specific responsibility of the Legal Adviser to promote respect for and observance of international law.”¹⁵ Former President of the International Court of Justice, Judge Stephen Schwebel, who was at one time the U.S. State Department’s deputy legal adviser, writes that where international law is not clear “there is an opportunity to contribute to the establishment of new norms.”¹⁶ Schwebel adds that the legal adviser should act as “an enunciator of the law” and “adviser of what the law ought to be...as the conscience of the Foreign Ministry.”¹⁷ Schwebel refers later on to the “fact that the legal adviser should be concerned with ‘international progress,’ ‘promotion of a better world’ and a ‘measure of concern for the international interest.’”¹⁸

I would not however, suggest overstating this line of thought. It is not a normal goal of negotiators to advance the role of international law in improving the world. I must admit that in this respect I envy my U.S. colleagues. No Israeli decision-maker has ever asked me what is best for the development of international law. I shudder to think of the reaction of an Israeli government decision-maker were my advice to him to include my personal contributions to making a better world and to developing international law.¹⁹

The sagacious lawyer will use his legal knowledge to provide the negotiator with various options when the inevitable crisis is reached in the negotiations. Decision makers usually welcome a presentation of options. Former U.S. Secretary of State Henry Kissinger in his inimitable fashion is said to have described this process as regards the U.S. State Department, by giving the example of a theoretical incident involving the then USSR. Kissinger said he would normally be presented with three options for action:

The first would be to instruct the Strategic Air Command to drop nuclear bombs on Moscow.

The second option would be to send the Russians an abject letter of apology with an offer to revoke any U.S. action and pay immediate compensation.

The third option was to “stand firm on issues of principle but nevertheless endeavor to reach a negotiated settlement that would not compromise U.S. interests.”

Surprisingly enough, the State Department supported the third option, but of course left the choice among the three options to the complete discretion of the secretary of state.

Finding a legal procedure for administering a crisis can be as important as or more important than the actual outcome of the procedure. It can be a Madrid Conference, which although only a platform for set speeches, nevertheless provided the key for the Arab states to commence direct negotiations with Israel.

In the Taba dispute between Israel and Egypt, Israel insisted on a process of conciliation and Egypt demanded immediate arbitration. A convoluted legal formula was worked out whereby the arbitration was to commence, then be suspended to enable a conciliation commission to function, and should conciliation fail, arbitration would automatically continue. Both sides claimed a legal victory.²⁰

When negotiating the Oslo Declaration of Principles with the Palestinians the question arose as to whether the final result would be a legally binding treaty, which would then require registration with the UN. The problem was that only agreements signed by sovereign states can be registered with the UN and Israel was not about to acknowledge the PLO as a sovereign state. On the other hand, both Israel and the PLO intended the declaration of principles to be a binding legal instrument. The legal formula found was to have the document attested to as witnesses by the leaders of the U.S., Russia and the EU and then request the secretary general of the UN to circulate the accord to all members of the UN. Thus there was no formal act implying that it was an international agreement but a very effective declaration by the parties that they intended to abide by what they had signed.

Former president of the American Society of International Law and professor emeritus at Columbia Law School Louis Henkin wrote that, “All international relations and all foreign policies depend in particular on a legal instrument – the international agreement – and on a legal principle – that agreements must be carried out.”²¹ The preparation, drafting and legal consequences of international agreements require real life application of international law. The acid test is

whether there can be international negotiations without applying rules of international law and I believe the answer is clearly in the negative. Diplomats and lawyers may approach issues from different perspectives but they have no choice but to cooperate when they find themselves at the international negotiating table.

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Notes:

1. WERNER LEVI, LAW AND POLITICS IN THE INTERNATIONAL SOCIETY 187 (1976).
2. *Id.*
3. The leading U.S. Supreme Court decision in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812).
4. The leading definition of the conditions justifying self-defense in international law, the 1837 Caroline Incident, 29 BRITISH FOREIGN AND STATE PAPERS 1137-1138.
5. Annelise Riles, *Models and Documents: Artifacts of International Legal Knowledge*, 48 INT'L & COMP L Q 805, 823 (1999).
6. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *Annex to U N G A Resolution 2625 XXV* (1970).
7. UN Security Council Resolution 242 Concerning the Establishment of Peace in the Middle East, adopted 22 November 1967.
8. Riles, *supra* note 5.
9. Daniel Reisner, *Peace on the Jordan*, 4 JUSTICE 3, 4 (1995).
10. Article (1) of Annex III to Declaration of Principles on Interim Self-Government Arrangements, signed 13 September 1993, 32 I.L.M. 1525 (1993).
11. ROGER FISHER, INTERNATIONAL CRISES AND THE ROLE OF LAW, POINTS OF CHOICE 12 (1978).
12. ROBERT R. BOWIE, SUEZ 1956 – INTERNATIONAL CRISES AND THE ROLE OF LAW 110 (1974).

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Divorce, updated Israeli style

*Recent amendments to Israeli divorce legislation may ease
the equitable distribution of marital assets*

Edwin Freedman

On 1 January 1974 a law went into effect in Israel which made the already complex divorce proceedings even more difficult. On 27 October 2008, the noisome conditions of that law were vitiated by an amendment to the law. In order to appreciate the significance of the amendment, it is necessary to understand the unusual arrangement that regulates family law matters in Israel. Matters of personal status, including marriage and divorce, are adjudicated in a dual system of religious and civil courts. The various religious courts co-exist along with a civil court system invested with concurrent jurisdiction over family law matters under Article 51 (1) of the 1922 Palestine Order-in-Council (hereinafter “the Order”) legislated during the British Mandatory period and which is still in effect today. The religious communities enumerated under Article 2 of the Order are not automatically granted autonomous jurisdiction. Specific enabling legislation is required to establish and confer jurisdiction on religious courts. For example, the Rabbinical Courts Jurisdiction Law (Marriage and Divorce) 5713-1953,¹ established the legal system that has jurisdiction over Jewish family matters.

In the absence of specific legislation, until 1974 case law presumed that assets acquired during the course of the marriage were joint property. It was based on the supposition that all assets acquired during the marriage were the result of a joint effort by the parties within the marital framework. Such property was to be evenly distributed and there was no significance to the name in which ownership was registered. The interest of either party could be realized at any time by requesting distribution of assets. There was no requirement for the parties to divorce before the division of assets took place.

This may appear unusual to attorneys practicing in jurisdictions with no-fault divorce. Since religious law controls divorce in Israel, the ability to obtain court-ordered distribution of assets prior to divorce was of great significance for Israeli Jews, who constitute 80 percent of the population. Unless both parties agree,

obtaining a decree dissolving the marriage (a *Get*), is often a long and difficult procedure.

The grounds for a *Get* are very narrow (e.g., adultery, abandonment, extreme physical violence) and the standards of proof are very demanding. Even with sufficient grounds and adequate evidence, the rabbinical courts will often issue decisions that do not amount to an obligation to give or accept a *Get*, such as “the parties should get divorced” or “the court recommends” that the parties divorce. That falls short of an actual obligatory order to divorce. Thus, in many instances a *Get* may take years before being issued, during which the parties no longer live together and have long ceased to function as an integrated economic unit.

As noted, prior to 1 January 1974 the division of marital assets was determined by case law as there was no statute that addressed the issue. During that period, the courts developed the doctrine of community property. Under this doctrine, all assets acquired during the course of the marriage belonged to both parties equally, unless received by inheritance or gift, under the assumption that all property acquired during the course of the marriage is the result of a joint effort by both parties. This doctrine became a legal presumption. Further, no weight was attributed to the fact that one spouse was the wage earner while the other cared for the children and tended to the household chores. Since this partnership in the property was an ongoing one, the rights vested with the acquisition of the asset. This meant that the division of assets could be demanded at any time. It did not depend upon the parties getting divorced.

Note that in most jurisdictions where the division of marital assets is predicated upon divorce, those jurisdictions are either no-fault or have far more flexible standards for divorce than Israel’s rabbinical courts.

On 1 January 1974, the Spouses (Property Relations) Law² (hereinafter “the Law”) went into effect. The Law encoded many of the principles existing under the relevant case law but introduced a significant and very problematic change. Marital property was to be distributed under the doctrine of balancing of assets.



The principle underlying this doctrine states that there is a complete separation of each spouse's property during the course of the marriage. The parties' assets, with certain specified exceptions, are considered in total at the time of divorce and divided between them. The division, however, only takes place "with the dissolution of the marriage."

Under Israel's dichotomized legal system, the consequences of this new limitation were of great significance. A spouse whose marriage had broken down was unable to liquidate his or her interests in the marital property until a *Get* was issued or at least held to be obligatory by a rabbinical court. This became a loophole for unscrupulous parties who used the *Get* as a bargaining chip. The spouse whose economic position was weaker, usually the wife, would make concessions in order to obtain the agreement of the other spouse to divorce.

The courts developed various approaches in an attempt to circumvent the untenable situation in which many spouses were placed by the adoption of the Law. One such approach, which produced a partial solution, held that the community property presumption could co-exist along with the application of the Law. Although the Supreme Court, in a split decision, ruled that the two doctrines do not exist simultaneously, the minority opinion in effect offered a partial solution.³

The minority held that even where the Law controls, there can be an intent to apply community property presumptions to specific property within the marital framework. Courts have held that while the community property presumption cannot form the basis for ruling that the property is not subject to the Law, they found other legal bases for their conclusions. Courts have used contract law, fiduciary law and the law of agency on which to base their conclusion that a specific property was to be divisible, even though the marriage had yet to be dissolved. The theory was that the presumption of community property could be proven to apply to a specific asset, even though the couple's assets were subject to the Law. In that event, the specific asset would be distributed prior to the divorce and the remainder of the parties' assets would be distributed after the divorce.⁴

This circuitous and contrived attempt to circumvent the Law often resulted in drawn out and unnecessary litigation whose outcome was highly unpredictable. In order to alleviate the difficulties imposed on parties seeking to dissolve their marital assets, various bills were proposed over the course of the years to amend the Law. The proposals sought in various ways to weaken the linkage between distribution of assets and the dissolution of the marriage.

Due to Israel's fractious political system, any statutory change which is seen as weakening the status of the rabbinical courts is met with immediate opposition by some of the religious parties. During the 17th Knesset, several members, including religious MKs, submitted a proposed amendment to the Law which had failed to pass in various versions during previous legislative sessions. The bill proposed that the division of marital assets could occur after a certain period of time, without the prerequisite of a *Get*.

The proposal, which was supported by the Israel Bar Association and several women's organizations, earned the immediate and determined opposition of the ultra-Orthodox parties. Their opposition was formulated as being based on the protecting of women's rights. They argued that the equitable division of marital assets takes into account the needs of the custodial parent. In order to gain an advantage in dividing the assets, the amendment will encourage husbands to wage custody battles instead of agreeing that the mother be the primary custodial parent.

The proposal that was finally brought to a vote contained several amendments. The primary change was the addition of Paragraph 5a to the Law, which states that the rights to equitable distribution will be vested in either spouse even before the dissolution of the marriage if a petition for dissolution is filed and certain conditions are met. The conditions are as follows:

1. A year has passed since one of the following actions was filed:

- a. An action for dissolution of the marriage
- b. An action for the equitable distribution of property between spouses in all its various permutations

2. There are irreconcilable differences between the parties, or the parties are living apart, even if under the same roof, for a period of at least nine months within a consecutive period of a year. This period can be shortened by the court if a judicial ruling has been made regarding irreconcilable differences.

The court is authorized to shorten the above periods if it determines the existence of one of the following circumstances:

- a. An order of protection was issued after a hearing in the presence of both parties
- b. An indictment was filed for violence against the other spouse or against their children
- c. The court has ordered the arrest of the petitioner's spouse after being convinced that he/she constitutes a danger to the petitioner or their children.

The courts are given additional authority to prevent a spouse from exploiting this amendment to perpetuate

the “chained-spouse” phenomenon (*Aguna*). The distribution of assets can be made contingent by the court upon depositing a written consent to give or receive a *Get*. The purpose of this provision is to prevent a party from obtaining his or her demand to divide marital assets while refusing to dissolve the marriage. A signed consent to grant or receive a *Get* is not binding under Jewish Law. However the breach of good faith in not following through on such an undertaking can be grounds for staying the execution of the order to distribute marital assets.

Those opposing the changes raised two main objections:

1. Custody battles will increase
2. A proliferation of unfounded requests for orders of protection will result.

The first is not a very compelling argument and did not succeed in deterring the broad support the amendment received both within the Knesset and from the many non-profit organizations that worked for its passage. Custody battles are still determined for the most part by court appointed professionals. Husbands who are motivated by financial considerations are highly unlikely to be successful in convincing court-appointed psychologists that they are the preferable custodial parent.

As to the second argument, while there may be an increase in such allegations, false allegations of family violence are possibilities regardless of the impact on the distribution of marital assets. The increase in unfounded accusations of family violence in order to bring forward the date of equitable distribution does not appear to be a serious concern. As pointed out, an ex parte order is not sufficient to trigger this condition. Furthermore, the court still has discretion in applying this option. Finally, the actual difference in the date of distribution in the event an order of protection is issued will not be significant enough to encourage a flood of unfounded allegations.

In addition to uncoupling the distribution of assets from the issuance of a *Get*, the recent amendment to the Law contains another revision. Under Paragraph 8 of the previous version, the courts were authorized to order that the division of family assets was not to be made on an equal basis. The court had discretion to distribute the assets according to its interpretation of what is equitable under the circumstances. The Law did not specify any guidelines for the court’s implementation of its discretion.

The revision of Paragraph 8 (2) of the Law adds a specific dimension to this formula. The court is now

authorized, when balancing the assets, to consider “future assets, including the earning capacity of each spouse.” The issue of future earnings, which is related to reputation, has been addressed by the courts in Israel with much hesitation and lack of clarity. Courts have generally rejected the concept of future earnings as a divisible family asset. The rare decisions that were willing to recognize this concept would only do so where the gap between the assets and abilities of the parties was extremely pronounced.

One of the most significant decisions regarding future earning capacity as an asset was made in 2004 by Supreme Court Justice Elyakim Rubinstein on a motion for leave to appeal.⁵ Justice Rubinstein rejected the wife’s claim that her husband’s reputation as a lawyer is a distributable asset. He did hold, however, that it is possible in certain circumstances to consider reputation as a distributable marital asset. Israeli courts have not developed this possibility. There has been a handful of cases where consideration was given to the discrepancy in potential earnings between the spouses. Unfortunately, this asset has been recognized more in theory than implemented in fact.

The amendment to Paragraph 8 (2) of the Law now removes any hesitations that the courts have had in considering future earnings as a distributable asset. It still remains to be seen how the courts will implement this amendment. Will it be based on the current difference between the parties’ earnings and extrapolate as to the future? Will it use average income statistics for those of similar age and profession? How far into the future will the parties’ earnings be considered? Will it be an amortized lump sum or linked to actual future income? These questions have been addressed in other jurisdictions and hopefully the courts in Israel can learn from them and avoid some of the pitfalls in making their determinations.

The recent amendment to the Law is the most significant legislative change in Israeli marital law in the past 35 years. It is now up to the courts to implement those changes in a way that will correct some of the inequities that have made divorce in Israel a highly complex and unnecessarily burdensome process.

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Redux: Membership in IAJLJ no proof of judge's partiality

A unanimous decision by the House of Lords affirmed a decision of Scotland's supreme civil court determining that a Scottish judge's membership in the International Association of Jewish Lawyers and Jurists is no proof of her alleged partiality

Michal Navoth

On 22 October 2008, the House of Lords of the United Kingdom issued a unanimous judgment, dismissing the appeal of Fatima Helow (the "appellant")¹ against an earlier decision of the Extra Division of the Inner House of the Court of Session (Scotland's supreme civil court).² That Court had held, in a decision issued on 16 January 2007, that the membership of a judge in the International Association of Jewish Lawyers and Jurists (the "Association") was not proof of partiality on the part of the judge.³

The appellant had sought asylum in the United Kingdom and had petitioned against removal from the U.K. under Section 101(2) of the Nationality, Immigration and Asylum Act, 2002 (the "Asylum Act").⁴

The basis of the appellant's claim to asylum was that she had been living with other family members in the Sabra-Shatila refugee camp in Lebanon in September 1982 when it was attacked and numbers of her relatives were killed after Lebanese Phalangist militia entered the camp. She further averred that she had maintained publicly that Ariel Sharon, former Israeli prime minister, at that time minister of defense, had been implicated in the attack. More particularly, in the early 2000s she had been engaged in a criminal complaint brought in Belgium against Sharon by survivors of the attack. She claimed that she and her family were involved politically with the PLO and that, as someone seen to hold anti-Israeli, anti-Lebanese and anti-Syrian political views, would be at risk from those countries' authorities were she required to return to Lebanon.

Under those circumstances the appellant claimed asylum in the United Kingdom, but her application was refused by the home secretary and, on appeal, by an adjudicator. Her permission to appeal was refused



by the Immigration Appeal Tribunal ("IAT"). The appellant then lodged a petition in the Court of Session seeking a review of that refusal under section 101 of the Asylum Act. The petition was considered by the Lord Ordinary, Judge Lady Cosgrove (the "judge").

In her interlocutor of 24 November 2004 (the "interlocutor") the judge affirmed the decision of the IAT to refuse permission to appeal and dismissed the petition. No criticism was made of the judge's reasoning or decision as such.⁵

After the judge's refusal of the petition under Section 101(2), the appellant's legal advisers undertook an Internet search and discovered that on 30 November 2004 the judge had been a member of the Association.

Moreover, they learned that the judge had been a member since the Scottish branch of the Association was founded in 1997.⁶

On the basis of that search, her legal advisers made a submission regarding the judge's possible bias. The appellant did not criticize the judge's reasons for dismissing her petition. Instead, in a petition to the *nobile officium*, she requested that the Court set aside the judge's interlocutor on the ground that it was vitiated by "apparent bias and want of objective impartiality."⁷

In its long opinion of January 2007 (the "opinion"), the Court examined whether, by reason alone of the judge's membership in the Association and in considering material published by the Association, there was a real possibility of apparent partiality on her part, albeit unconsciously, in her determination that the petitioner's application for statutory review should be refused. The Court refused the prayer of the petition.⁸

Against that opinion the appellant appealed to the House of Lords, which in a unanimous judgment of 22 October 2008 (the "judgment") dismissed the appeal.⁹

The House of Lords noted that Lady Cosgrove's being Jewish was rightly, of itself, not relied upon.

The appellant rather contended that, by virtue of her membership in the Association, the judge seemed to be a supporter of Israel who could not be expected to be impartial in a petition for review concerning a claim for asylum, due to the petitioner's engagement in the legal proceedings against Sharon, as well as the petitioner's support for the PLO.¹⁰

It was further submitted that the Association had been strongly committed to causes at odds with those endorsed by the appellant, and that the Association was "anti-Palestinian ... anti-Moslem ... anti-pathetic to the PLO (and) supportive of Ariel Sharon ...". Those epithets were alleged to be justified by the contents of the Association's president's messages, different policy statements and contributors' articles published or reproduced in the Association's quarterly publication *Justice* in years ranging from 1994 to 2004.¹¹

The legal test applicable in cases of apparent bias was that of a fair-minded and informed observer. "The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association ... The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time."¹² Yet, the court would pay no attention to any statement by the judge regarding the impact of any knowledge on his or her mind and would not allow cross-examining the judge on that statement.

It would be inappropriate for a judge to join an anti-Palestinian and anti-Moslem campaigning Jewish organization, still less so for such a judge who is to decide a case of this type involving an activist Palestinian Muslim such as the appellant.¹³

However, the express aims and objects of the Association, which were referred to throughout the judgment, were considered to be unexceptionable and very different from those suggested by the stated epithets. The objects, which could be discovered from the home page of the Association's website under the heading "Pursuing human rights," were reproduced twice (once in full) by the House of Lords. The House of Lords held that there was nothing objectionable about them.¹⁴

The appellant claimed that the material exhibited and relied upon in support of the petition indicated that in practice the Association had acquired an unbalanced character.¹⁵ The House of Lords, however, held that much of the material from *Justice* that had been shown

to it, although it could be described as highly partisan, was selective rather than representative. It seemed to be an artificial exercise to read that selection all at once. The lists of contents of the different issues of *Justice* showed that they included many other articles of a different character, as would be expected in a journal of an organization with the purposes set out above.¹⁶ Those other articles were also on matters of legal interest, the type of articles that one would expect to find in a periodical for lawyers and judges. Accordingly, it was necessary to be cautious about drawing general conclusions from such material about the Association's character or about its significance regarding any individual member. Moreover, it would be quite unlikely to assume that a member of the Association would have read all or even most of the selected material. Usually he or she would read only the occasional item appearing to be of particular interest. The fact that *Justice* appeared quarterly would decrease the chances of its cumulative impact on the reader.¹⁷

Despite the above observation, Lord Mance, a judge hearing the appeal who wrote the major part of the judgment, analyzed the material that had been selected and exhibited. He divided it into three main categories: speeches or messages by the Association's president, at that time Judge (retired) Hadassa Ben-Itto; "policy statements," in most cases by the Association's permanent representative to the UN in Geneva, Daniel Lack; and speeches made and reproduced or articles written by third-party contributors. With respect to the last category Lord Mance maintained that each of the contents pages of *Justice* carried a disclaimer. Apart from that the articles published in *Justice* did not exceed legitimate expression of reasoned views. Similarly, neither did those articles justify any criticism of the Association for publishing them nor did they imply that the Association might have espoused them.¹⁸

Issue No. 30 of *Justice* reproduced the text of six presentations at an international conference organized by the Association and the Jewish Agency in Jerusalem in December 2001 (the "Jerusalem Conference"). The appellant relied on three of these presentations. The House of Lords held that the senior Israeli officials who gave those presentations protested against the unfair treatment in the international arena, especially the UN, that Israel had received. Yet, such expressions of view, backed by specific instances, were legitimate. They would not justify a description of such officials or of the Association "as anti-Moslem."¹⁹

The appellant also relied on articles by third parties that referred to Sharon and to the Belgian legal

proceedings against him. These were covered by the disclaimer. Yet, although they were written in forceful terms, they remained within the scope of legitimate expression of view. Lord Mance found it difficult to see what influence a fair-minded observer would think they had on a professional judge in the U.K. charged with the resolution of an issue such as that put before the judge even if she happened to have read them.²⁰

Lord Mance distinguished between that category and the two other categories: the president's speeches or messages and the policy statements. Those two categories were not subject to any disclaimer and they were either made on the Association's behalf or came from the Association's leading figure. He claimed that it might be true that one underlying theme was that Israel should be accorded a fair treatment. That demand was based on the fact that Israel had become the only target of blame for any wrong rather than on the claim that Israel had never done any wrong. According to Lord Mance, the speeches, messages and statements were very pro-Israel and were not confined to legal issues. He elaborated on that point, noting that most of the policy statements on the Association's website concerned the Association's activity as an NGO with Category II Status at the UN enabling it to participate in the deliberations of such bodies as the former Commission on Human Rights. Thus, in 2000-2004, the Association's permanent representative to the UN in Geneva issued a number of policy statements, i.e., against racist or anti-Semitic statements about Israel. Two of the policy statements were made jointly with the World Jewish Congress (WJC). Yet, to deduce from that connection of the Association with the WJC any conclusion relevant to Lady Cosgrove's suitability to adjudicate on the appellant's petition seemed to Lord Mance "to go ... too far into remote considerations."²¹

The House of Lords mentioned several times and quoted parts of the Association's president, Judge (retired) Ben-Itto's address delivered at the Jerusalem Conference and reproduced in Issue No. 30 of *Justice*, as it represented "...perhaps the highpoint of the appellant's case..."²² Inter alia, the president criticized the Belgian prosecution of Sharon. The House of Lords ruled that a judge who expressed the views put forward at the Jerusalem Conference would be unable to determine the appellant's case. However, with regard to other parts of Judge Ben-Itto's speech, Lord Mance rendered the following observations. When the president said that she was speaking personally, when she asked for support and when she recognized the split of opinions within Israel, she was, according

to Lord Mance, rightly acknowledging that she could not reflect the views of any individual member. Thus, with the exception of membership in the Association, there could be no linkage between Lady Cosgrove and the president of the Association. Further, Lord Mance observed that "[t]here is no question of Lady Cosgrove having committed herself expressly to any such views as the President or any other spokesperson for the Association expressed. There is nothing to show that she was even aware that they were being expressed. Lady Cosgrove is in these respects, and apart from her membership, in no different position to any judge, who may or may not have private views about issues which come before the court, but who is expected to put them aside and decide the case according to the law."²³ Thus, Lord Mance could not envisage "...that a fair-minded and informed observer would, in the light of Lady Cosgrove's continuing membership alone conclude that there was a real possibility... that Lady Cosgrove was in any way endorsing or associating herself with statements ... made by the President or Mr Lack ... speaking on the Association's behalf in public..."²⁴

The House of Lords also rejected the assumption that as a member of the Association and a recipient of *Justice*, the judge might have been influenced, albeit subconsciously, by the content of the magazine.²⁵ It claimed that her reaction to the articles – supposing that she had read them – was quite unknown. Judges were trained to reject or accept as appropriate a great deal of material they read, without enabling it to have any impact on them.²⁶

Lord Mance referred to two other submissions. The first was the judicial oath that appeared to him more as a symbol rather than of itself a guarantee of the impartiality expected from a judge. The judicial oath was only one factor that a fair-minded observer would consider when judging the risk of bias.²⁷

The second submission pertained to the fact that the judge had not disclosed her membership in the Association. Her disclosure could have been considered by a fair-minded observer as a 'badge of impartiality.' However, according to Lord Mance such a disclosure could only be one factor, and a marginal one at best. It seemed to him, that in the case of Lady Cosgrove, a fair-minded observer would be much more likely to conclude that she never thought that being a member of the Association involved anything relevant to disclose.²⁸

For the above reasons the House of Lords unanimously dismissed the appeal and affirmed the opinion refusing the prayer of the appellant's petition.²⁹

The importance of the judgment is not only for the reasons pointed out rightly by Lord Rodger of Earlsferry, another of the Law Lords hearing the appeal, who added that "...the challenge in the case is to the integrity of the justice system in Scotland. This is a matter of general concern..."³⁰ The judgment is also important because it sheds light on ideas stated in *Justice* and the policy statements of the Association, whose objects and activities have now been brought to wider attention through the looking-glass of the United Kingdom's final court of appeal, the House of Lords.

Adv. Michal Navoth is Editor-in-Chief of Justice.

Notes:

1. Helow (Ap) v Secretary of State For The Home Department and Another (Scotland) Appellate, House of Lords, SESSION 2007-08, [2008] UKHL 62. See www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd081022/helow-1.htm (Last visited 25 November 2008).

2. The Court sits as a court of first instance and as a court of appeal. An appeal lies to the House of Lords. For the purposes of hearing cases, the Court is divided into the Outer House and the Inner House. The Outer House consists of 24 Lords Ordinary. The Inner House is essentially an appeal court. See www.scotcourts.gov.uk/session/index.asp (Last visited 25 November 2008).

3. [2007] CSIH 5 P2135/05 Fatima Helow, petitioner, to the nobile officium of the Court of Session. See www.scotcourts.gov.uk/opinions/2007csih05.html (Last visited 25 November 2008).

4. *Supra* note 1, at para. 32.

5. *Id.*, paras. 11, 32-34.

6. *Id.* para. 38. The Association website is: www.intjewishlawyers.org.

7. *Supra* note 3, para. 1. As to the power of the Court of Session to provide the remedy of *nobile officium*, see *id.*, para. 2.

8. *Supra* note 3. For a review of this Opinion, see Michal Navoth, *IAJLJ membership no proof of judge's partiality*, 44 JUSTICE 46 (2007).

9. *Supra* note 1.

10. *Id.*, para. 13.

11. *Id.*, para. 38.

12. *Id.*, paras. 39, 14. On the legal test of a fair-minded and informed observer see also *id.*, paras. 1-3.

13. *Id.*, para. 43.

14. *Id.*, paras. 15, 28, 43, 45.

15. *Id.*, para. 45.

16. *Id.*, para. 22.

17. *Id.*, paras. 6, 22, 28, 45.

18. *Id.*, para. 46.

19. Paras. 46-47.

20. *Id.*, paras. 48-49.

21. *Id.*, para. 50.

22. *Id.*, paras. 51-52. See also paras. 17, 26.

23. *Id.*, para. 53.

24. *Id.*, para. 55.

25. *Id.*, paras. 18, 29, 56.

26. *Id.*, paras. 18, 56.

27. *Id.*, para. 57.

28. *Id.*, para. 58. See also *id.*, paras. 29, 41.

29. *Id.*, para. 59.

30. *Id.*, para. 10.

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3. *Id.*, Ch., VI, Pt., I, arts. 1-9).

4. *Id.*, Ch., IV, Pt., II, arts. 3 and 5.

5. Law of Return, 5710-1950, 4 LSI (Laws of the State of Israel) 114 (1949-50) (Isr.).

6. On Zionism as a form of colonialism see, for example, Ilan Pappé, *Zionism in the test of the theories of nationalism and the historiographic method*, ZIONISM: A CONTEMPORARY CONTROVERSY 223-263 (Pinchas Ginossar and Avi Bareli eds., 1997) (Hebrew). On the Jewish people as a modern "invention" see, recently, Shlomo Sand, *When and How the Jewish People was Invented* (2008) (Hebrew).

7. Civil Appeal 2316/96 Eizekson v. Registrar Associations, 50 (2) *Piskei Din* 529 (Reports of the

Supreme Court of Israel; hereinafter: "P.D.") (1996).

8. See, for example, HCJ (High Court of Justice) 6924/98 Association for Civil Rights in Israel v. the Government of Israel, 55 (5) P.D. 15 (2001); HCJ 6698/95 Adel Kaadan and Imane Kaadan v. Israel Lands Authority, 54 (1) P.D. 258 (2000).

9. On the case law of the European Commission and the European Court of Human Rights (in which the Commission was subsumed following its reorganization in the 1990s), see S. Stravos, *Human Rights in Greece: twelve years of supervision from Strasbourg*, 17 JOURNAL OF MODERN GREEK STUDIES 7-9 (1999); N. C. Alivizatos, *A new role for the Greek Church?* 17 JOURNAL OF MODERN GREEK STUDIES 26, 35, n 14 (1999).

10. *Supra* note 5.

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it would be illusory to believe that the most difficult moral decisions lend themselves to clear guidance. “Do not imagine,” he wrote, “that these most difficult problems can be understood by any of us. This is not the case.”¹⁴ The warning is particularly apt when it comes to decisions on the battlefield in urban areas like Gaza where Hamas makes a habit of using human shields and fails to discriminate between combatants and civilians. To be sure, moral issues are posed by the Israeli entry into Gaza. And, they may translate into legal issues. But, it would be a mistake of historic proportions to treat these very difficult issues as if ripe for international adjudication by judges capable of divorcing themselves from the sway and pull of international politics and emotions that surround these issues.

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Notes:

1. Leon Wieseltier, *Washington Diarist: Changes Arrives*, THE NEW REPUBLIC, 4 Feb. 2009, www.tnr.com/politics/story.html?id=b88b8198-e8cb-4e50-96c2-34f35d67d126 (last visited 19 Feb. 2009).
2. The 1977 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art. 51:5.b, 1125 U.N.T.S. 609.
3. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 462 (2005).
4. Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, ISRAEL YEARBOOK ON HUMAN RIGHTS 38 (2008). See also T. Franck, On Proportionality of Countermeasures in

International Law, 102 AJIL 715 (2008).

5. Jim Clancy, *interview with the Palestinian Authority's Ambassador to the United Nations, Riyan Mansour*, CNN NEWSROOM, 3 Jan. 2009, (<http://edition.cnn.com/TRANSCRIPTS/0901/03/cnr.07.html>) (last accessed 19 Feb. 2009).

6. 1945 Charter of the United Nations, in THE UNITED NATIONS AND HUMAN RIGHTS 1945-1995. Department of Public Information, United Nations, New York 10017 (1995).

7. Even if one were to assume, as Hamas contends, that Gaza remains under Israeli occupation, the same restriction on the use of force would certainly apply insofar as the laws of belligerent occupation require that the occupied population respect the authority of the governing power until such time as a peaceful resolution of the dispute is possible.

8. See Allan Gerson, *Privatizing Justice*, 45 JUSTICE 36 (2008) citing *Almog v. Arab Bank PLC*, 04-CV-5564 E.D.N.Y. (2007).

9. Jimmy Carter, *An Unnecessary War*, THE WASHINGTON POST, Op-Ed, 8 Jan. 2009. See generally the critique of proportionality as invoked by Carter and others: Ruth Wisse, *Now, About that 'Proportionality'* COMMENTARY 27 (Mar. 2009).

10. Marlise Simons, *Palestinians Press for War Crimes Inquiry on Gaza*, NEW YORK TIMES, 11 Feb. 2009, www.nytimes.com/2009/02/11/world/middleeast/11hague.html (last visited 19 Feb. 2009).

11. Clancy, *supra* note 5.

12. See, for example, HCJ (Israel High Court of Justice) 769/02 *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, para. 30 (Not Published, 14 Dec 2006).

13. The record, for example, of the International Court of Justice in handling cases involving the use of force – the Nicaragua Harbor case, the Mine Platform case (U.S.-Iran), and the more recent Israel Wall decision – speaks badly of the role of international courts in freeing themselves from politics when examining use of force issues.

14. MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 6 (2000).

Divorce, updated Israeli style
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Notes:

1. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953, 7 *Laws of the State of Israel* (hereinafter: LSI) 139 (1953-4) (Isr.).
2. Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1973-4) (Isr.).
3. C.A. (Civil Appeal) 1915/91 Yacobi-Knobler

v. Yacobi-Knobler 39 (3) *Piskei-Din* (Reports of the Supreme Court of Israel; hereinafter: “P.D.”) 529, 607-623 (1995) (opinion of Justice Tova Strassbourg-Cohen).

4. See C.A. 8672/00 Abu-Romi v. Abu-Romi, 46 (6) P.D. 175 (2002); C.A. 4358/01 Bar-El v. Bar-El, 55 (5) P.D. 856 (2001); C.A. 7687/04 Sasson v. Sasson, 49 (5) P.D. 596 (2005).

5. F.M.A. (Family Motion to Appeal) 5879/04 Anonymous v. Anonymous, 59 (1) P.D. 193 (2004).

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between basic fundamental rights, the question should be resolved by deciding in favor of that right which best preserves the system of protection of rights and guarantees inscribed in the constitution.”

In this same vein, Justice Celso Mello observed that freedom of expression, no matter how encompassing it should be, cannot legitimize expressions of racial hatred. Such expressions of racial hatred unacceptably transgress the values defended by proper constitutional order. When declaring his vote against the habeas corpus application, Justice Mello emphasized the important commitment Brazil had undertaken when it signed and ratified the Universal Declaration of Human Rights. In his opinion, it is time for the Supreme Court to include in its agenda the clear intention to affirm the Brazilian commitment and to show the concern of the Supreme Court for the defense and maintenance of the essential rights of the human person, represented by values that should never be disrespected or forgotten.

Conclusion

Following extended debate, the Supreme Court held the actions of Ellwanger, the author and publisher of the works with their racist implications, including a markedly Nazi and anti-Semitic character, constituted the crime of racism for which there is no applicable statute of limitations. The Court further held that in the present case, where there is an apparent conflict between the Constitutional guarantees of the freedom of expression and the freedom from racism, the freedom

from racism must prevail.

The trial took months to conclude, as several justices requested the files for revision and to prepare their decisions. The proceedings were broadcast by the Supreme Court television channel, and were viewed with great interest by a large number of viewers.

On the basis of this decision of the Federal Supreme Court, accepting the principle that there is no applicable statute of limitations for the offenses set out in Law # 7.716/89, the Brazilian Lawyers' Institute approved Indication # 049/2003³, as well as an Opinion by the lawyer Oswaldo Barbosa. Copies of both of these were transmitted to all justices of the Court.

The Brazil-Israel National Association of Lawyers and Jurists (ANAJUBI) sent a memorandum to all the Supreme Court justices, supporting the denial of the habeas corpus application. This was mentioned in the decision by Justice Nelson Jobim.

Jackson Grossman is a former president of ANAJUBI and currently Legal Coordinator of the Jewish Federation of Rio de Janeiro State.

Notes:

1. For a summary of the Ellwanger Case see www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=61291&caixaBusca=Nju (in Portuguese).
2. www.planalto.gov.br/ccivil_03/Constituicao/Constituicao_Compilado.htm (in Portuguese).
3. By the author of this article.

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from page 38

13. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS, INTERNATIONAL CRISES AND THE ROLE OF LAW* 65 (1974) (Reprint 1978).

14. Bowie, *supra* note 12 at 99.

15. *The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association*, 85 A. J. I. L. 360 (1991).

16. Stephen M. Schwebel, *Government Legal Advising*

in the Field of Foreign Affairs, JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL 609 (1994).

17. *Id.*

18. *Id.* at 610.

19. On the role of a legal adviser to a foreign ministry see also Robbie Sabel, *The Role of the Legal Advisor in Diplomacy*, 8 (1) DIPLOMACY & STATECRAFT 1 (1997).

20. See, *inter alia*, E. Lauterpacht, *The Taba Case: Some Recollections and Reflections* 23 ISRAEL LAW REVIEW 443 (1989).

21. LOUIS HENKIN, *HOW NATIONS BEHAVE, LAW AND FOREIGN POLICY* 319 (2nd ed. 1979).

Panayote Dimitras
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jurisdiction's designation, at least provisionally, to be the "former Yugoslav Republic of Macedonia."

Paul Ogden

Notes:

1. On 27 March 2009 Plevris was acquitted on appeal. See www.ejpress.org/article/35616 (last visited 30 March 2009).

2. See cm.greekhelsinki.gr/uploads/2008_files/ghm1053_omct_hrd_harassment_english.doc (last visited 23 March 2009).



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ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [ARAMAIC: צדק (he was righteous), SYRIAC: זדק (it is right), UGARITIC: *šdq* (= reliability, virtue), ARABIC: *šadaqa* (= he spoke the truth), ETHIOPIC: *šadaqa* (= 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: Carta/University of Haifa

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