

JUSTICE

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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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Collage of memorial gathering in front of the Jewish Museum, Brussels, following the terrorist attack on May 24, 2014

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President's Message

As I write the President's Message, Israel is being attacked by Hamas missiles throughout the country. They aim for civilian population centers in order to kill and spread panic. We want to express our support to the IDF and the Israeli Government and wish them a speedy end to this unbearable situation without many casualties. I cannot help but address the tragic events in Israel at the end of June and beginning of July 2014: the brutal murder of the three boys whose bodies were uncovered by Israeli security forces and brought to rest, and the murder of the Arab youth by Jewish radicals. The murderers of the three young Israeli Jews have yet to be apprehended. I addressed these issues in my letters to IAJLJ members and I trust you all read them. I received positive feedback and I am gratified by the reaction of IAJLJ members.



In this Issue

You will read about the boycott against the State of Israel, which unfortunately is gaining momentum in various places around the world. The boycott is of growing concern to us and IAJLJ is trying to learn how to counter it. We also include in this issue an article dealing with historical aspects of the International Court of Justice, as presented at our last conference at The Hague. Robbie Sabel's article on the Arab-Israel conflict analyzes the challenges from a legal perspective. An analysis of a U.S. Supreme Court decision, as it impacts on Israel, is also included in this issue.

Eilat—November 2014

The IAJLJ has been very active, and its future plans are far-reaching. Our next Conference: "International Human Rights and Israel – Politicization or a Complex Reality?", which will include presidential and Board elections, will take place this time in Israel's southern-most city of Eilat. Your attendance at this conference is especially important due to these elections. Details regarding election procedures for key posts will shortly be sent to you. In addition, please follow our web site for further updates in this regard. You can also find in this issue the conference brochure and registration forms. We call upon you all to register before August 15, 2014 and enjoy a special rate.

Recent Activities

Among recent IAJLJ activities which I consider

particularly important: In March 2014, under the kind auspices of the Herzog, Fox Ne'eman Law Firm, we held a seminar on the implications of corporate responsibility to abide by human rights standards. The subject of human rights has been raised lately on the agenda of the UN Human Rights Council and the UN General Assembly, and was regulated by the OECD and other organizations, as a condition of proper business practices. In an era when human rights practices are examined in corporations, banks, and other businesses, this new sphere of responsibilities is gaining prominence. During the seminar, we examined how this new obligation on companies impacts on many aspects of the global economy and how it is developing in Israel. The article in this issue by Gavriel Mairone, an IAJLJ member who represented our Association at the Human Rights Council, addresses these issues.

On May 19, 2014, for the first time, IAJLJ, together with the AAJLJ, its member organization, held a "side event" at UN Headquarters in NY, on UNRWA. This event concluded a year of activities on the subject, which included meetings with Ambassadors of donor States supporting UNRWA and the transmission of petitions to governments on problematic aspects of this body. The event was broadcast live. The next issue of JUSTICE will be devoted to problematic UNRWA practices raised during this event, with a view to influencing future policies and practices.

On May 27, 2014, at the annual Conference of the Israel Bar Association in Eilat, IAJLJ was invited to organize two panels: "How to Beat BDS," with the participation of British lawyers to address legal responses in the UK; and "Countering Cyber-Terror: An Integrated Technological Legal Approach." Both these subjects are at the heart of contemporary legal investigation and practice.

Lately, IAJLJ activities at the UN Human Rights Council in Geneva have grown substantively – including statements by our representative and letters by IAJLJ on a wide range of relevant issues. These can be followed on the IAJLJ web site www.intjewishlawyers.org.

Recruiting New Members

I attribute utmost importance to recruiting new members to the IAJLJ and strengthening contacts in various States. In this context, IAJLJ members invited me to Italy in March 2014 for meetings with Jewish lawyers. The large number

of participants at the Rome event, mostly young lawyers, surprised even the organizers. Some of them joined the IAJLJ at this interesting meeting, and some plan to attend our forthcoming Congress in Eilat. In Milan, my meeting with Jewish lawyers was naturally smaller and thus more personal, and all participants joined IAJLJ.

I continue to urge you to recruit additional IAJLJ members. This would allow us to expand activities, which are increasingly significant in the legal community.

In May 2014, the State of Israel celebrated 66 years of Independence. We all hoped that by this time we would live in peace with our neighbors and ensure a brighter, harmonious future for the next generation. Unfortunately, negotiations with the Palestinians have lately been discontinued. The divergences between the parties were too great, and foremost was lack of trust. Consequently, incitement against the State of Israel is mounting, and there are manifestations of anti-Semitism in many places around the world. We witness devastating stories about Israel and the Jewish people being disseminated in cyber space. It is particularly troubling that such reports are also circulated by the UN. A view of the contemporary Middle East exposes a different reality, which we must study and counter.

Manifestations of extremism on both sides inhibit the parties from reaching a solution. We are deeply concerned

by extremist forces in Israel that may lead to an uncontrollable conflagration. IAJLJ condemned the "Tag Mechir" phenomenon in a symposium it held on September 16, 2013, as well as at a meeting with the Israel Attorney-General and in an amicus curiae opinion addressed to the Israel Supreme Court sitting as the High Court of Justice. The Court has not yet rendered its opinion on this case. I addressed this subject in previous newsletters.

On May 24, 2014, at the Jewish Museum in Brussels, four innocent victims were shot in cold blood, including an Israeli couple, parents of children cruelly orphaned. In early June, I joined a World Jewish Congress delegation to Brussels to express solidarity with the local Jewish community. We attended a memorial service, met with the Prime Minister, Elio Di Rupo, as well as with other ministers.

The world does not allow us and we refuse to forget or forgive crimes of anti-Semitism anywhere. We will continue with all our strength to fight these dangerous manifestations. This was one of the founding principles of the IAJLJ, and we shall not forget!

Irit Kohn
IAJLJ President

NOTICE OF ELECTIONS

The International Association of Jewish Lawyers and Jurists will hold its 15th Congress on November 20, 2014 in Eilat. In accordance with the Articles of Association of the IAJLJ, elections for the Presidency, Executive Committee and Board of Governors will take place during the course of this congress.

Please note that according to Article 11 of the IAJLJ's By-laws, persons wishing to exercise their right to vote and stand for election must pay their 2014 membership fees **by August 15, 2014 ("determining date")**. Anyone failing to pay membership fees by the determining date will be ineligible to vote or stand for election.

Other notices in connection with the elections will be published on our website www.intjewishlawyers.org and sent separately via email. Please follow these updates.

The International Court of Justice: Historical Perspectives, Current Realities¹

Michla Pomerance

In an old Scottish graveyard, there is a tombstone upon which the following epitaph appears:

Stop, all ye passers-by.
As ye are, so once was I,
As I am, so will ye be,
So be prepared to follow me.

More recently, one of those passers-by attached a note, which read:

To follow you, I'd be content
If I only knew which way you went!

To better understand which way the International Court of Justice (ICJ) went, it is important to place the critical issues in historical perspective. Our ancient Jewish sages long ago admonished: "Know whence you came, where you are heading, and before whom you will be required to account for your deeds."² Transplanting this dictum from the sacred and individual to the profane and institutional, we should ask:

First, what are the historic roots of the ICJ?

Second, where has the Court been heading, as reflected in some of its major pronouncements – in its operative as opposed to its merely rhetorical doctrines, in its reasoning and not only its conclusions?

And finally, to what extent are current judicial trends influenced by the composition and perspectives of the states and organs to which the judges sense that they are accountable? This last question is particularly important, not only in light of the 2004 "Wall" opinion,³ but also in view of some "farewell" suggestions proffered by Richard Falk, the departing UN Human Rights Council's "Rapporteur on the situation of human rights in the Palestinian territories". Falk would have the UN force Israel to comply with the "Wall" opinion and seek a further ICJ opinion designed to brand Israel's "occupation" as "apartheid" and "ethnic cleansing".⁴

Historical Roots: The League-PCIJ Legacy

The ICJ is the direct successor to the first World Court, the Permanent Court of International Justice (PCIJ), which operated in the interwar period, from 1922 until 1940. Although the PCIJ was not officially an organ of the League, its judges were selected by the League Council

and Assembly, thus satisfying both the big and the small powers. The Court was given two functions: It was to decide disputes submitted to it voluntarily by states; and it was authorized to give non-binding advisory opinions to the League Council or Assembly. A state's membership in the Court did not endow the Court with automatic compulsory jurisdiction. For that purpose there had to be a further act of consent to jurisdiction – specific, or more general.

Whereas the contentious jurisdiction of the Court was clearly a continuation and institutionalization of a long-standing arbitral tradition, the advisory jurisdiction was an innovation, and it was surrounded with acute controversy. On the one hand, if advisory opinions were treated as political statements and freely discarded, the Court would be discredited and its primary function would be adversely affected. But if, conversely, they were seen as binding, that would be tantamount to a furtive introduction of compulsory jurisdiction without state consent.

The first horn of the dilemma was overcome primarily by the PCIJ's steady assimilation of the advisory to the contentious procedure. The second part was resolved, in the main, thanks to the general League Council practice of requesting opinions on disputes only with the consent



1. The present article is an expanded and updated version of my lecture at the IAJLJ conference on "Three Aspects of International Justice at The Hague: ICJ, ICC and ICTY", held at the Peace Palace in The Hague in October 2013.
2. Tractate *Avot*, Chap. 3, Mishna 1 (author's translation).
3. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004 I.C.J. (July 9).
4. Falk's report appears on the website of the Human Rights Council. For discussion of the report and of Falk's address in February 2014 at Princeton University, see Falk: *ICJ should rule on Israeli 'occupation' as 'ethnic cleansing'*, JERUSALEM POST, Feb. 20, 2014.

of both parties.

In the United States, the advisory jurisdiction, more than any other factor, prevented the United States from becoming a party to the PCIJ Statute. All four interwar presidents sought to have the United States join the Court – even Calvin Coolidge, about whom Elihu Root once ungenerously said that he had not “an international hair in his head”.⁵ But in the Senate, the advisory jurisdiction aroused deep suspicions. It was not part of the American judicial tradition, the American Supreme Court having refused early on to render an opinion sought by George Washington. Moreover, America’s vital interests and policies, it was feared, might readily be affected by a kind of back-door compulsory jurisdiction. Judges whose names Americans could not even pronounce would express themselves upon such matters as America’s immigration policies, the Panama Canal, and payment of war debts.

The curtain on American accession to the PCIJ was drawn finally in January 1935. Notwithstanding American non-membership, the bench always included an American judge. Russia never joined the Court and never had a judge on the bench.

For purposes of comparison with the ICJ, several facts regarding the role of the PCIJ in its brief existence might be noted.

The PCIJ was in its composition, clientele, and case material, predominantly a European court, applying consensual international law, as enshrined in treaties and custom. Much of its work entailed umpiring the complex web of agreements that constituted the post World War I peace settlement. Since the Court’s involvement in the disputes was almost always preceded, even in advisory cases, by the consent or acquiescence of the states directly concerned, compliance with the Court’s pronouncements did not pose a great problem. Nor was there any difficulty in characterizing the issues before the Court as “legal” in nature. And charges of “politicization” of the tribunal were not generally voiced in the aftermath of adjudication.

Two main exceptions to these propositions should be mentioned – one on the issue of consent, the other on the “politicization” charge.

On the issue of consent: In 1923, the League Council requested an advisory opinion pertaining to the status of Eastern Carelia, a matter in dispute between Finland and Russia, a non-member of the League. The Court declined to give the opinion, primarily because Russia had never agreed to the Council’s intercession in the dispute, rendering that body incompetent to request judicial advice in the matter. As another “cogent reason” for not granting the opinion, the Court cited the difficulty of elucidating disputed facts in Russia’s absence.⁶

Consent was not the problem in the 1931 advisory

opinion on the Austro-German Customs régime,⁷ but the accusation of “politicization” of the Court was. The projected customs union had aroused great anxiety in several European capitals where it was viewed as but a first step toward Anschluss and the overturning of the carefully crafted post-war balance of power. Unable to resolve this volatile issue on its own, a divided League Council dumped it into the Court’s lap; and in an inadequately reasoned opinion, and by a vote largely reflecting the divisions in the Council, the Court declared the proposed customs union illegal. Criticism of the opinion as a “political” statement abounded, and it played a role in the final U.S. Senate rejection of any association with the now “tainted” Court.⁸

In retrospect, the 1931 episode was a harbinger of things to come. Although the opinion was complied with, and the customs union project was abandoned, the underlying tensions persisted, as would be apparent several years later. Once the peace settlement frayed and failed, political and not legal solutions became the order of the day.

Transformations: The ICJ-UN Nexus

The PCIJ was not itself seen as a failure, and it might well have been resurrected after the war. But several considerations, including the fact that neither the United States nor the Soviet Union had joined that first World Court, prompted the post-World War II planners to opt for a new Court as a direct successor to the older one.

On the surface, the continuity seemed almost complete. Compulsory jurisdiction was still not automatic; treaties and Optional Clause declarations still in force were to be transferred to the new court; the advisory function was retained and access to it was expanded; and the 1946 ICJ Statute essentially replicated the contours and wording of the 1936 PCIJ Statute.

5. Cited in Philip C. Jessup, *ELIHU ROOT*, Vol. 2, p. 433 (1938).

6. *Status of Eastern Carelia, Advisory Opinion*, 1923 P.C.I.J. (ser. B) No. 5 (July 23).

7. *Customs Régime Between Austria and Germany, Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5).

8. See Michla Pomerance, *THE UNITED STATES AND THE WORLD COURT AS A SUPREME COURT OF THE NATIONS* pp. 123-127 (1996).

The term “any legal question” – which appeared in both the UN Charter⁹ and the ICJ Statute¹⁰ in the provisions governing the advisory jurisdiction – was intended to ensure non-repetition of an *Austro-German Customs Régime* dumping maneuver by the UN. Political, non-justiciable questions would be off-limits. This was, of course, a predictably vain hope, easily overcome by meaningless mantras repeated unthinkingly in ICJ jurisprudence.

Additionally, the new Article 65(1) of the Statute that stipulated that the Court “may give an advisory opinion on any legal question” at the request of authorized organs, seemed to underscore the Court’s right, at its discretion, *not* to give an opinion to duly authorized organs. Though the provision is frequently cited, the Court has never seen fit to exercise the right, either on an *Eastern Carelia*-type or Customs Union-type basis.

Why was this so, and more generally, why did the ICJ operate from its earliest days, and increasingly as time progressed, as a new court, departing in many ways from the legacy bequeathed to it by its predecessor? The answers lay in the changes in the new World Court’s status vis-à-vis the new World Organization; the changes in that Organization’s voting procedure and attitude to the Court; and the new political contexts in which the political and judicial organs both functioned.

The ICJ’s status as a principal organ of the UN led the Court to spawn new judicial doctrines. Time and again, the Court asserted that, in exercising its advisory function, it had a “duty to cooperate” with the UN political organs (in practice, the General Assembly) barring “compelling” countervailing reasons. However, none of the reasons that were adduced for rejecting Assembly requests were ever found to be compelling enough. The “duty to cooperate” doctrine readily translated into the “duty to cooperate at all costs” doctrine.

Thus, on the issue of non-consent of an interested state (as, for example, Israel’s objection to the rendering of an opinion regarding the security fence/“Wall”), the Court has regularly denied the applicability of *Eastern Carelia* as a bar to *jurisdiction*. All UN members, it has held, are presumed to have accepted the General Assembly’s right (under Article 96[1] of the UN Charter) to request opinions and the Court’s concomitant authority (under Article 65[1] of the ICJ Statute) to give them.

But while *Eastern Carelia* was still deemed theoretically relevant for determining the *propriety* of giving an opinion, the Court has, in every instance, dismissed its pertinence. It has done so by:

- Emphasizing (often inconsistently) the “*advisory*” non-obligatory nature of the Court’s opinion;
- Insisting that no actual dispute was involved, only “*radically divergent views*”;

- Magnifying the interest of the requesting organ in the subject matter of the request, even when that interest was itself questionable, and the pertinent General Assembly practices at issue were eminently open to challenge; and
- Dismissing the difficulty of adequately ascertaining the facts in the absence of one of the main protagonists.

The Court also overlooked or overcame other objections, such as those based on the prominent “*political*” motives surrounding the request and the likely harmful political consequences of a judicial pronouncement. Whereas the U.S. Supreme Court often asserts a “political question” doctrine (and even when it does not, frequently exhibits a “political question mentality”), the ICJ has embraced a “legal question” doctrine (and certainly has a “legal question mentality”). It reiterates tautological formulae designed ostensibly to separate the “legal” “justiciable” from the “political”, “non-justiciable” cases. Yet, as ICJ Judge Hardy Dillard of the United States observed, in the context of the *Western Sahara* case, “*the notion that a legal question is simply one that invites an answer ‘based on law’ appears to be question-begging and it derives no added authority by virtue of being frequently repeated.*” (italics added)¹¹

In a world with no general peace settlement that required umpiring, with rampant and deep East-West and North-South cleavages, and with an Organization in which the Court’s advisory function could be used and abused despite a concerned party’s firm objections, the charge of politicization was hardly surprising. Nor was it surprising that all but one of the requests under Article 96(1) came from the General Assembly and not from the veto-bound Security Council.

During the Cold War, advisory opinions could be, and were at times, requested for scoring PR points against the Soviet Union. Every state became more vulnerable to being haled before the Court through the advisory back door than Russia had been in the *Eastern Carelia* dispute.

9. U.N. Charter Art.96 (1) states: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” And according to Art. 96(2), other UN organs and specialized agencies that receive General Assembly authorization “may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

10. Statute of ICJ Art. 65(1): “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

11. *Western Sahara*, Advisory Opinion, 1975 I.C.J. (Oct. 15), p. 117 (separate opinion of Judge Dillard).

In several instances, the dispute that came before the Court in its advisory capacity was not so much of an interstate, as of an Organization-versus-one-state nature.¹² And in some of the more recent of those cases, the Court was not really turned to for clarification, but rather for *adding the judicial imprimatur to the political organ's firm pre-set conclusions*. In such instances, the issue of "politicization" of the Court is especially acute – as it was in the "Wall" opinion, where the most objectionable features of previous abuse of the advisory function converged in a noxious brew.

Regarding this aberrant syndrome, the American Judge (and one-time President) of the ICJ, Stephen Schwebel, once wrote: "the appearance of telling the Court what the answer is to the question put to the Court is not consonant with the judicial character and independence of the Court."¹³

D.H.N. Johnson had made the same point much earlier. "It would make a mockery of the independence of the Court," he said, "if it could never 'reach conclusions at variance with the conclusions stated by the General Assembly'. ... It would also render the Court largely useless as an organ for giving legal advice to the Assembly."¹⁴

The ICJ's Dual Role Revisited

Several decades ago, Leo Gross noted the existence of tension generated by the ICJ's dual role. In its contentious capacity, the Court applied consensual international law, while in its advisory capacity, it acted as a UN organ and tended to apply expansive, non-consensual "UN Law". This tension – which had been absent in the PCIJ/League period – would lead, he predicted, to one of three outcomes.

- The existing "ambivalence" might continue.
- The two judicial functions might become more clearly separated.
- The Court might increasingly become a "United Nations Court."¹⁵

In fact, the third of these scenarios materialized. Over time, the Court has indeed become more and more a "United Nations Court," applying "UN Law" in both of its capacities, and abandoning judicial restraint in relation to matters of jurisdiction and substance.

This development was already in train by the mid-1960s because of the changed composition of the General Assembly and the enlarged Security Council. It was markedly accelerated by the shocked reaction in the UN to the Court's refusal in 1966 to rule on the merits in the *South West Africa Cases*,¹⁶ and by the resultant determination to ensure that the bench would henceforth more faithfully mirror the views of the UN majority.¹⁷ By

1986, the effect of this resolve became apparent to portions of the U.S. scholarly community. Thus, Michael Reisman observed:

The Court appears to have sensed [after the trauma of 1966] that its major constituency had become the transformed General Assembly, both for election of its members and for budget purposes, and thereafter moved much more sharply in the direction of the political preferences of the Assembly.¹⁸

How sharp was the turn became manifest in such contentious cases as *Nicaragua*¹⁹ and *Oil Platforms*,²⁰ and most pronouncedly, in the "Wall" advisory opinion. In its reasoning, the Court tended to attribute legal authority to General Assembly resolutions and declarations (and to cite them too selectively and dubiously); to confer

12. See, for example: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion 1971 I.C.J. (June 21); Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion 1988 ICJ (Apr. 26) and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004 I.C.J. (July 9). In these cases, the Secretary-General, in effect, acted as one of the protagonists in the proceedings.
13. Stephen M. Schwebel, *JUSTICE IN INTERNATIONAL LAW* p. 20 (1994).
14. D.H.N. Johnson, *The Case Concerning the Northern Cameroons*, 13 INT'L & COMP. L.Q. 1143 pp. 1176-1177 (1964).
15. Leo Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS, p. 320, 1967-I.
16. *South West Africa Cases* (Ethiopia v. South Africa and Liberia v. South Africa) 1966 I.C.J. 6 (July 18).
17. See discussion in Pomerance, *supra* note 8, at 399-400.
18. William Michael Reisman, *Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court of Justice*, in *THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* p. 89 (Anthony Clark Arend, ed. 1986).
19. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) 1986 I.C.J. (June 27).
20. *Oil Platforms* (Islamic Republic of Iran v. United States of America) 2003 I.C.J. (Nov. 6).

automatic validation to UN practices, however questionable (such as ignoring the limitations of Article 12 of the Charter and of the Assembly's 1950 Uniting for Peace resolution)²¹; and to restrict the right of individual and collective self-defense, especially when these were held to conflict with Assembly-sanctioned self-determination claims, introducing thereby what Judge Schwebel termed an impermissible "double standard in the law governing the use of force in international relations."²² Indeed, "self-determination", with all the problematics surrounding that notion, has become for the Court, as for the UN political organs, a supernorm, overriding even the linchpin of the Charter, the Article 2(4) prohibition of the use of force.²³

In attributing normative force to Assembly resolutions, the Court went far beyond what even the minority judges in the 1966 *South West Africa Cases* were prepared to accept. None of them had viewed such resolutions as generating law, without "the usual requirements for law-creation: practice, repetition, and *opinio juris*."²⁴ Consensus in the adoption of a resolution was for them no substitute for state consent as exhibited in its practice. Nor was the "organized international community" considered a construct with any legal meaning. Richard Falk's radical approach²⁵ had no buyers then.

Into the Future

To the extent that the Court acts as a "Court of UN Law," what does this augur for states, large and small, that do not share the UN majority's perspective, and whose need for self-defense is unrelenting? And what does it augur for the Court?

Within the American community of international law scholars, post-*Nicaragua* assessments tended to be highly critical of the Court and skeptical of its efficacy in situations of armed conflict. "In the present state of international relations," Richard Gardner observed, "it is simply not realistic ... to expect nations to accept decisions of an international tribunal on the legality of their behavior in armed conflicts in which they are or have been involved."²⁶ And a surprising source – Richard Falk – opined in 1986:

[T]he effort to cast a state in the role of de facto defendant, without acquiring its genuine consent to the proceedings, is hazardous for the Court from the point of view of its growth as an institution. The issue is most directly posed in the context of several advisory opinions. *The notion of judicial caution implicit in the Eastern Carelia proceedings before the Permanent Court of*

International Justice was an apt acknowledgment of these limits, perhaps too easily ignored by the International Court of Justice in the more difficult – that is, more politicized – environment of its operation. (italics added)²⁷

When Israel is the targeted state, Falk totally ignores his own sage assessment and advice. His recent recommendations to solicit ICJ advisory opinions on such matters as the legality of Israeli "apartheid" and "ethnic cleansing" reflect, first of all, his well-known decades-long and escalating animosity to Israel.²⁸ For him Israel has always been a *sui generis* case, and he has good grounds for expecting that it will be so for the Court as well. Moreover, his proposals are consistent with the radical views he has espoused regarding the role of the ICJ and the kind of international law it should embrace in general. In his opinion, the tribunal should eschew the tenets of positivism, with its emphasis on state consent; it should pay less obeisance to "formal Anglo-European jurisprudential techniques"; and its jurisprudence should be "pluralist", "non-Western", and "panhumanistic". The judges should not purport to be disinterested and "neutral", nor should they artificially attempt to dichotomize between law and politics or law and morality.

21. U.N. Charter Art. 12; G.A. Res. 377 (V) U.N. GAOR, 5th Sess., Supp. No. 20(A/1775).
22. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J., p. 273.
23. For a fuller discussion of this topic, see Michla Pomerance, SELF-DETERMINATION IN LAW AND PRACTICE (1982), Chap. 9.
24. Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM, p. 22 (W.E. Butler, ed., 1987).
25. On Falk's approach, see further, below.
26. U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcomm. on Human Rights and International Organization of the House Comm. on Foreign Affairs, 99th Cong., 1985, p. 115.
27. Richard Falk, REVIVING THE WORLD COURT p. 32 n. 10 (1986).
28. On Falk's spiraling, virulent anti-Israel pronouncements, see the websites of such UN monitors as UN Watch www.unwatch.org and Eye on the UN www.eyeontheunblog.com. Falk has apparently also endorsed conspiracy theories regarding the 9/11 attacks on the Twin Towers.

Rather, they should recognize “the law-forming quality of the will of the international community expressed through the activities” of UN organs.²⁹

Such views are naturally anathema not only to Israel but also to the United States, which reacted to the *Nicaragua* judgment by withdrawing its Optional Clause declaration, limiting further treaty-based compulsory jurisdiction to the ICJ, and opting, in some disputes, for a decision by chambers rather than by the Court plenum.

However, this form of “cameralization” or “arbitralization” of the Court is not an option in advisory proceedings. And despite much-lamented non-use of the advisory function in recent years, the more serious problem was and remains today, its potential for abuse.

In 1943, the Informal Inter-Allied Committee on the Future of the PCIJ warned that too organic a link between the Court and the new World Organization risks creating an unfortunate dependence of the Court’s prestige on “the varying fortunes” of its political patron.

But if the ICJ becomes ever more a “United Nations

Court” applying “UN Law”, as embodied in UN non-binding resolutions, and if it increasingly mirrors the political perspective of the Assembly with its “boundless and unprincipled majoritarianism,”³⁰ its usefulness and credentials as a non-politicized court might well be questioned. As Samuel Goldwyn once bluntly remarked concerning his assistants, “when two people agree all the time, then one of them is superfluous.” ■

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29. Falk’s thesis is presented in great detail in his book, *REVIVING THE WORLD COURT* (1986). *See, e.g.*, pp. xiv, 26, 111-112, 117-118, 135-156, 171-172. For a summary of his views, see Pomerance, *supra* note 8 at, 410-412.

30. The term is taken from Leo Gross, *Conclusions, THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* p. 754 (in Leo Gross ed., 2nd ed. 1976).

New Book

PALESTINIAN MANIPULATION OF THE INTERNATIONAL COMMUNITY

Edited by Ambassador (ret.) Alan Baker, former Legal Counsel of Israel's Foreign Ministry and Ambassador of Israel to Canada

Published by the Jerusalem Center for Public Affairs and available at

http://jcpa.org/overview_palestinian_manipulation/

This timely and vital book exposes the extent and the lengths to which international institutions and basic perceptions are being manipulated in all spheres of international community life – political, economic, social, legal, and religious, with the aim of influencing them and their actions by forcing a very selective, partisan, misleading, and patently false legal and political narrative.

The chapters of the book cover Palestinian manipulation in such fields as international law as part of anti-Israel “lawfare” (Prof. Robbie Sabel), universal jurisdiction (Dr. Rephael Ben-Ari), UN human rights bodies (Hillel Neuer Esq.), non-governmental organizations (Prof. Gerald Steinberg), the International Criminal Court (Prof. Eugene Kantorovich), the UN Human Rights Council (Dr. Dore Gold), abuse of Islam (Mme Sinem Tezyepar), abuse of Christian church organizations (Dr. Dexter Van-Zile), international media (Philippe Assouline Esq.) and manipulation of UNRWA (Dr. Rephael Ben Ari).

Adjudicating the Arab-Israel Disputes?

Robbie Sabel

The various disputes between Israel and the neighboring Arab states and the Israeli-Palestinian dispute are ideological, geographical and historical in nature. However, they also include weighty disagreements over issues of international law. Such legal disputes include the question of who is the legal sovereign in the West Bank (Judea and Samaria). Is it “occupied territory” according to international law? If the territory is occupied, is the population entitled to use force against the “occupier”? Are Jewish settlements illegal? Are Jews returning to their previous homes in Hebron, the Old City of Jerusalem, and Gush Etzion committing a violation of international law? Who is sovereign over East Jerusalem? Did the terms of the 1922 League of Nations Mandate for Palestine violate international law at the time? Do they have any continuing validity? How do you divide a shared aquifer? Does the rule of permanency of boundaries (*uti possidetis*¹) apply to the 1949 Armistice Demarcation Line with Jordan? Did Syria and Israel inherit the 1923 Mandatory boundary between them?² Does Syria have rights in Lake Tiberias? Is there a “right of return” for the 1948 refugees? If so, does it also apply to their descendants? The list goes on.

According to the UN Charter, “all Members shall settle their international disputes by peaceful means,”³ and they can do so by “negotiation, enquiry, mediation, reconciliation, arbitration, [or] judicial settlement.”⁴ Since negotiations and mediations have repeatedly failed to solve the issues, the question arises whether the parties should have recourse to binding legal adjudication, namely arbitration or an international court.⁵ Having recourse to such procedures can have the advantage of reaching a dispositive solution. Theoretically, such a decision is impartial and hence garners international acceptability. It is impersonal and does not require controversial decisions or concessions by political leaders of either party. It may reduce tension, and since it is usually a lengthy process, it enables the parties to gain time. However, there are dangers in international adjudication. It means that the parties give up control of the process and hand decision-making to a third party. The outcome may be unpredictable and entail the possibility of a complete defeat. It is difficult to find completely impartial judges

or even arbitrators on issues as emotionally divisive as the Arab-Israel conflict. Furthermore, judges or arbitrators may focus on narrow legal issues, while being unaware of or ignoring the wider context. Adjudication can in fact exacerbate a dispute by forcing the parties into adversative positions.

Despite the advantages of international adjudication, if I had to give advice to the Israeli Government about applying to an international court on a political issue, I would echo the English aphorism: “Advice to those about to get married: Don’t!” I am not referring to international commercial arbitration, where Israel has no particular problem, but rather to political disputes.

It is interesting that the 1907 *Convention for the Pacific Settlement of International Disputes*, drawn up at The Hague, restricted the proposed international commissions of inquiry to “disputes of an international



1. “The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.” Case concerning the Frontier Dispute (*Burkina Faso v. Republic of Mali*), 1986 I.C.J. 565 (Dec. 22).
2. GREAT BRITAIN AND FRANCE Exchange of Notes constituting an Agreement respecting the boundary line between Syria and Palestine from the Mediterranean to El Hammé. Paris, March 7, 1923, 364 L.N.T.S. 1924, www.hartzman.com/Israel/Mandate%20Era/British-French%20Boundary%20Agreement,%201923.pdf (accessed March 19, 2013). An earlier 1920 British-French agreement had placed part of the Golan Heights in Palestinian territory and part of Lake Tiberias in Syrian territory, but the 1920 Agreement was superseded by the 1923 Agreement.
3. U.N. Charter Art. 2(3).
4. U.N. Charter Art. 33(1).
5. On international adjudication, see generally, Richard B. Bilder, *Adjudication: International Arbitral Tribunals and Courts*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES (I. William Zartman ed., rev. ed., 2007; J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 4th ed. 2005).

nature involving neither honour nor vital interests.”⁶ Israel should avoid international adjudication on issues of vital interest.

Israeli society is a law-based society. It has a highly independent judicial system, and international law is enforced by Israeli courts. Why, then, the skepticism as to international political adjudication? The answer is that as long as the judges of international courts are nominated or appointed by governments, we must assume that international politics will be found somewhere. The fact that the ICJ is a UN body inevitably means that the political shadow of the UN General Assembly is somewhere in the background. This is true, although less so in international arbitration, where the parties choose their arbitrators. Although international arbitrators are selected as individuals, nevertheless their national backgrounds are often very relevant.

To illustrate the reasons for this conclusion, I shall cite three international judicial processes in which Israel was involved: the Bulgaria Aerial Incident case, the Taba arbitration, and the “Wall” advisory opinion.

The “Bulgaria” Case

Israel’s first searing experience came in the 1955 Aerial Incident *Israel v. Bulgaria* case. On July 27, 1955, an El Al plane on a scheduled commercial flight was shot down by Bulgarian air defense after it entered Bulgarian airspace by mistake. Fifty-eight passengers and crew were killed. The Bulgarian government admitted publicly that its air defense had acted in haste without taking necessary measures and promised to punish the perpetrators and pay compensation. When the Bulgarian government failed to pay compensation, Israel submitted a claim to the ICJ. (The US and the UK also submitted claims on behalf of their nationals but later withdrew their claims.)

Israel relied for jurisdiction on the fact that it had made a declaration under the Optional Clause, and Bulgaria had made a similar declaration to the PCIJ in 1921, and according to the Statute of the ICJ there was continuity in application of declarations made to the PCIJ.

The Court, however, came to the unique finding that since Bulgaria had become a member of the UN and of the Court only in 1955, it was not bound by its declaration, since continuity only applied to the original “San Francisco” members of the UN and not to states that joined the UN subsequently.

I pointedly stated that this decision was unique, since five years later, in the *Barcelona Traction* case, the Court completely reversed itself, ruling that the phrase “the parties to the Statute” must apply equally and indifferently to cover all those states which at a given time are participants, whatever the date of their several ratifications,

accessions or admissions.”⁷ It is extremely rare for the ICJ to explicitly reverse a previous ruling. In this case, the Court did so and admitted that it was reversing its ruling in *Israel v. Bulgaria*. The Court stated: “Nor can the Court be oblivious to other differences which cannot but affect the question of the need for the Court to make an independent approach to the present case.” The Court then went on to rely on what I think is the weakest basis for a legal ruling, namely that “the case of *Israel v. Bulgaria* was in a certain sense *sui generis*.”⁸ The Court failed to explain why *Israel v. Bulgaria* was *sui generis*. A leading textbook on the Court comments, in an English understatement, that the Court’s justification for applying a different rule was explained “somewhat unconvincingly.”⁹ Shabtai Rosenne, in his seminal treatise, also adds in his commentary on this case that the Court ruled that *Israel v. Bulgaria* was *sui generis* “without explaining in what respect.”¹⁰ I shall return to this issue of Israel and *sui generis*.

The “Taba” Dispute

The 1979 Israel-Egypt Peace Treaty defined the border between Israel and Egypt as being the border that existed between Egypt and Palestine under the British Mandate. During the demarcation of the border, a dispute arose as to the location of the Mandatory boundary at Taba near Eilat.

Israel agreed, rather reluctantly, to bring the issue to an international arbitration.¹¹ Israel’s reluctance was based on two considerations. The Treaty of Peace provided for dispute settlement by means of conciliation or arbitration. Israel’s strong preference was to try and settle the dispute

6. 1907 Convention for the Pacific Settlement of International Disputes, Permanent Court of Arbitration – Basic Documents, 22 Part III. International Commissions of Inquiry, Art. 9, www.pca-cpa.org/showpage.asp?pag_id=1187 (accessed March 19, 2014).
7. Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections (New Application) (Preliminary Objection), 1964 I.C.J 6, 34 (July 24).
8. *Id.* p. 29
9. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY (Andreas Zimmermann, et al. eds. 2nd ed., 2012), p.722.
10. THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, Vol. 2, JURISDICTION, Shabtai Rosenne, with the assistance of Yaël Ronen (2006) p.721.
11. Full disclosure: this author was the Agent for Israel.

through conciliation, a process that required agreement on some form of compromise. There was also a distrust of international machinery in political matters involving Israel and Arab states. The distrust proved to be well-founded. The three international arbitrators joined with the Egyptian arbitrator in an award that has been strongly criticized in law journal articles. The gist of the award was to recognize the stone boundary markers as delimiting the border, even though the markers may have been placed on the ground in violation of the binding 1906 boundary agreement.¹² The award decided that nevertheless the stones should be used to mark the boundary because they had been there for so many years. I believe this is incorrect law. Legally, the boundary could only have been changed by agreement between the parties and there had been no such agreement. Nevertheless, the arbitrators decided that the placing of the stones by persons unknown and the fact that the stones had remained on the ground took precedence over the legal boundary.

A possible explanation of the strange award of the arbitrators was their apprehension that an award against Egypt would not have been honored by Egypt or would have weakened the Egyptian government domestically and hurt the peace process. Because of the greater stability of Israel's political system, the arbitrators may have felt confident that Israel would comply with any award; and of course, they were correct. Israel fully complied with the award, although we were convinced that it was legally incorrect.

The "Wall" Advisory Opinion

The advisory opinion of the International Court of Justice (ICJ) is a glaring example of why Israel distrusts international courts on political issues.

The UN General Assembly requested an advisory opinion from the ICJ on the question: "What are the legal consequences arising from the construction of the wall being built by Israel, the Occupying Power, in the occupied Palestinian territory, including in and around East Jerusalem?"¹³ In a letter to the Court, Alan Baker, the then Legal Advisor to the Israel Foreign Ministry, wrote:

It is inconceivable to the Government of Israel that a court of law, seized of a request for an opinion on Israel's actions in constructing the fence, a non-violent measure designed to prevent precisely the kind of attack that we are at this very moment witnessing – could think it proper to enter into the question in isolation from consideration of the carnage that is being visited on Israeli civilians by its principal

interlocutor before the Court in these proceedings. Yet the resolution of the 10th Emergency Special Session of the General Assembly requesting the advisory opinion is absolutely silent on the matter.¹⁴

At the outset, the Court should have refrained from giving an advisory opinion. The question clearly revolved around the political dispute between Israel and the Palestinians. On the issue of state consent in advisory proceedings, the Court has stated as a basic principle:

In certain circumstances... the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent.¹⁵

Here I believe the Court ignored this principle as regards Israel.

Furthermore, the question already set the parameters of the Court's opinion. The territory concerned was termed "Palestinian territory" and Israel was stated to be the "occupying power" of that territory. The Court indeed proceeded on the basis of these two premises.

The designation of territory as belonging to an entity inherently implies that the entity concerned is a state or a subject of international law with its own territory and has the power "to exercise supreme authority over all persons and things within its territory."¹⁶ Whatever its

12. Administrative Separating Line Agreement, Egypt and Turkey of October 1, 1906, *British and Foreign State Papers 1905-1906*, vol. XCIX 99, 1905-1906, pp. 482-484 (1910).

13. U.N. GAOR Resolution A/RES/ES-10/14, adopted on December 12, 2003 at the 10th Emergency Special Sess..

14. Letter of January 29, 2004 from the Legal Advisor of the Israel Ministry of Foreign Affairs addressed to the Registrar of the ICJ, www.icj-cij.org/docket/files/131/1579.pdf (accessed March 19, 2014).

15. Western Sahara, Advisory Opinion, 1975 IC.J. (Oct.16), p. 12, at p. 25, para.33.

16. OPPENHEIM'S INTERNATIONAL LAW (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed., 1996) Vol. I, p. 382.

future status may be, the Palestinian Authority was clearly not a state in 2003 and had not even declared itself to be a state. The Court did not even attempt to resolve the dilemma of how the West Bank could be defined as occupied “Palestinian” territory when its status as occupied territory presumably derived from Israel’s seizure of the area from Jordan at a time when a Palestinian state had never existed there, or anywhere. The Court simply asserted:

The [Fourth Geneva] Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.¹⁷

The Opinion used the Green Line to determine the extent of the “Occupied Palestinian Territory.” The Court made no reference to the fact that the Armistice Agreement that created the Green Line had terminated and that no Arab state had ever recognized the Green Line as an international boundary. Nor had Israel accorded the line such recognition.

Perhaps the most flagrant attempt to manipulate international law against Israel was the Court majority’s opinion that Israel had no right of self-defense against terrorists operating from the territories under the control of the Palestinian Authority. The Court decided that it would not even examine whether Israel’s security barrier was a legitimate act of self-defense against acts of terrorism. The Court based its decision on its interpretation of Article 51 of the UN Charter, which recognizes the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” The Court interpreted Article 51 as referring only to an attack that emanates from a foreign state, although there is no mention in the UN Charter of any such condition.

The Court averred categorically that “Article 51 of the Charter has no relevance in this case.”¹⁸ Its conclusion was that Israel had no right of self-defense whatsoever against terrorist acts emanating from territories under the control of the Palestinian Authority. The British, Dutch, and U.S. judges on the court were the only ones who refused to concur with this startling ruling.¹⁹ The Court furthermore ignored a UN Security Council Resolution adopted unanimously under Chapter VII of the UN Charter which, in reaction to the 9/11 Twin Towers attack, explicitly authorized states to use force in self-defense against terrorism.²⁰

A striking feature of the *Wall opinion* was that one of the judges, Egyptian judge Nabil Elaraby (at present Secretary General of the Arab League) had played a leading role in the Emergency Special Session from which the request for an advisory opinion emerged.²¹ Moreover, two months before his election to the Court, Judge Nabil Elaraby gave an interview in his personal capacity in which he spoke of “grave violations of humanitarian law” by Israel, and “atrocities perpetrated on Palestinian civilian populations.” He further stated: “Israel is occupying Palestinian territory, and the occupation itself is against international law.” And “describing territories as ‘disputed’ and not ‘occupied’ are attempts to confuse the issues and complicate any serious attempt to get Israel out of the occupied territories.”²²

Notwithstanding all this, the Court refused to recuse Judge Elaraby. The Court based its reasoning on the fact that “the activities of Judge Elaraby were performed in his capacity as a diplomatic representative of his country.”²³ As to his interview with *Al Ahram*, the Court reasoned that there had been no explicit reference to the Wall. It was only the US Judge, Thomas Buergenthal, who voiced dissent on this issue. After praising Elaraby’s personal integrity (which Israel had not questioned), Buergenthal had the courage to declare that what Judge Elaraby had to say in that part of the interview “creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby’s participation in these proceedings.”²⁴

We are liable to find the phrase *sui generis* applied to other matters of international law in which Israel is

17. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), para. 101. This quote and all quotes from Written Statements, Oral Pleadings and the Advisory Opinion of the ICJ in the case are taken from the ICJ website: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

18. *Id.*, para. 78.

19. *Id.* Separate opinions of Judges Higgins, Buergenthal, and Owada.

20. U.N. SCOR Resolution S/RES/1368 (2001).

21. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for Advisory Opinion) Order of January 30, 2004.

22. See *Al-Ahram Weekly Online*, 16-22 August 2001, Issue No. 547.

23. See *supra* note 21.

24. *Id.* Dissenting Opinion of Judge Buergenthal, para. 13.

involved, and Israel must be aware that we are likely to encounter it in international legal proceedings. According to the UN Charter, UN General Assembly resolutions have the status of recommendations to states and are not binding.²⁵ They do not create international law and no state can be “guilty” of violating such a resolution. Such resolutions are political statements dictated by whatever group of states can muster a majority vote on a given issue at a given time. Palestinian lawyers and others maintain, however, that where UN General Assembly Resolutions are frequently readopted by the UN General Assembly, they “miraculously” turn into a binding rule of international law, where Israel is concerned. The legal reality is, however, that even where the General Assembly reiterates such a resolution, it nevertheless remains nonbinding. In the words of a leading French jurist, “Neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect.”²⁶ Nevertheless, the claim is frequently heard that Israel is “violating” General Assembly resolutions. Apparently there is an interpretation of the UN Charter that is applicable only to Israel.

In any dispute involving the laws of war, Israel is also likely to encounter the *sui generis* rule against use of disproportionate force against an enemy, a rule that seems to be applied only to Israel. According to this new rule, in actual combat Israel must not use weapons that are not proportionate to the weapons used by terrorist groups. Regarding other states, there is no such rule; on the

contrary, all armies try to concentrate superior forces and arms against enemy positions and forces. This universal military practice, however, does not prevent international organs from accusing Israel of using “disproportionate” force in actual combat situations.

Conclusion

On many of the issues enumerated in the opening paragraph of this article, Israel has an excellent legal case. Nevertheless, where Israel has disputes over vital issues, my advice would be: Negotiate and do not leave decisions to an international body. Hopefully, in the future, when the Israel-Arab hostilities will be a feature of the past, Israel will be able to embrace international adjudication on political issues. But we are not there yet. ■

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- 25. Except for certain internal matters, such as the budget, the Assembly cannot bind its members. It is not a legislature in that sense, and its resolutions are purely recommendatory. “The Assembly is essentially a debating chamber.” Malcolm Shaw, *INTERNATIONAL LAW* (6th ed. 2008), p. 1212.
 - 26. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413 (1983).

Boycotts, Divestment, Sanctions and the Law

Jonathan Turner and Anne Herzberg

It will hit the pocket of every Israeli if we don't deal with it. Every Israeli needs to make a decision. He needs to know that if there's not an arrangement his economic life will be harmed, and he needs to decide what he thinks about it," suggested MK Lapid, Israel's Finance Minister.¹

"I'm not saying that there will be an end to signs of boycotts, but this is not a cause for panic. Despite everything, Israel's engine is speeding ahead. The fourth quarter of this year was the most successful for Israeli high tech worldwide," responded MK Bennett, Israel's Minister of the Economy.²



Jonathan Turner

but also in "East" Jerusalem⁴ and the Golan. They then argue that it is justified to engage in BDS against any business which has any link of any kind, however marginal, with Israeli settlements. On this basis, BDS could affect a large proportion of the Israeli economy.

There are good arguments, supported by some highly respected exponents of international law, that "East" Jerusalem and the Golan are now within Israel's sovereign territory;⁵ and that Israeli settlements in Judea and Samaria are also legitimate, at any rate until the final status of these areas has been resolved.⁶ However, rightly or wrongly, these arguments

1. JERUSALEM POST, February 3, 2014, www.jpost.com/Diplomacy-and-Politics/Lapid-Foreign-boycotts-a-very-real-possibility-340185.
2. Jerusalemonline, February 6, 2014, www.jerusalemonline.com/news/politics-and-military/politics/israeli-minister-bennett-boycott-threats-dont-mess-with-israel-3546.
3. See, for example, "Recycling Veolia", CHRISTIAN MIDDLE EAST WATCH AND UK LAWYERS FOR ISRAEL, September 2012, www.dropbox.com/s/nupymvovoy1d71b0x/Recycling%20Veolia%20Report-final.pdf; "Deutsche denies divestment from Israel's Elbit," REUTERS, 30/5/2010, www.reuters.com/article/2010/05/30/us-deutsche-elbit-idUSTRE64T10W20100530; "TIAA-CREF BDS Hoax," DIVEST THIS BLOG, June 24, 2012, divestthis.com/2012/06/tiaa-cref-bds-hoax-social-investing.html.
4. That is, the areas of North, South and East Jerusalem beyond the "Green Line," possibly including no-man's-land.
5. For example, Stephen Schwebel, "What Weight to Conquest?" 64 AJIL (1970) 521; Elihu Lauterpacht, "Jerusalem and the Holy Places," Anglo-Israel Association (1968); Julius Stone, "Israel and Palestine", The Johns Hopkins University Press (1981).
6. For example, Eugene Rostow, *Notes and Comments*, 84 AJIL (1990) 717; Julius Stone, *op. cit.*; Report of the Commission to Examine the Status of Building in Judea and Samaria (Levy Commission, 2012) www.pmo.gov.il/Documents/doch090712.pdf.

They are both right.

Boycotts, divestment and sanctions (BDS) could have an increasingly significant impact if the threat is ignored. Israel's opponents are developing their tactics all the time and they may benefit from greater political and public support if Israel is blamed for a breakdown in negotiations with the Palestinians. They may also be bolstered if the International Criminal Court accepts the accession of "Palestine" as a "state". Equally, the impact of BDS to date has been limited and has been exaggerated by its proponents.³ More importantly, much can be done by Israeli businesses and other actors to limit the potential future impact of BDS by prudent legal and commercial strategies.

This article seeks to review some of the legal implications of BDS and identify some arguments and strategies that can be developed in response to it.

BDS takes many different forms, giving rise to diverse legal situations, including ones that we cannot yet predict, and only a few examples can be covered in the context of this article. However, there are some general themes that regularly recur.

Use of "Settlements" as a Justification for BDS

A key tactic of Israel's opponents is to use the alleged illegality of Israeli "settlements" in "occupied territory" as a justification for BDS. They maintain that this illegality is clearly established in international law and applies to any Israeli construction, not only in Judea and Samaria,

may not be accepted by European courts and other authorities, particularly given the contrary view expressed in the advisory opinion of the International Court of Justice.⁷

But there are other weak links in the arguments of Israel's opponents, as recent decisions of appellate courts in France and the UK have identified.

First, the key legal objection to settlements is based on Article 49(6) of the Fourth Geneva Convention, which prohibits a contracting state from transferring parts of its civilian population into occupied territory.⁸ By contrast, the operation of a factory or farm, or the construction of a railway or road, does not constitute a transfer of population. This distinction was rightly observed by the UK's Supreme Court in its recent decision in *Richardson v. DPP*.⁹

In this important case, two BDS activists had been convicted for disrupting the operation of a retail store of the Ahava group in London by immobilizing themselves on the floor. It was a requirement of the offense that the activity disrupted was "lawful." The activists argued that the operation of the shop aided and abetted breaches of Article 49(6) by Israel, since the products sold were made by the Ahava group in an Israeli settlement in the West Bank. They also submitted that the products sold were the proceeds of this "crime".

The Supreme Court rejected these and other arguments on the ground that any alleged offenses committed by the Ahava group were not integral to the activity of operating the shop. However, significantly, the Court also stated:

If therefore a person, including the shopkeeper company, had aided and abetted the transfer of Israeli civilians into the OPT, it might have committed an offence against these provisions. There was, however, no evidence beyond that a different company, namely the manufacturing company, had employed Israeli citizens at a factory in the West Bank and that the local community, which held a minority shareholding in that manufacturing company, had advertised its locality to prospective Israeli settlers. It is very doubtful that to employ such people could amount to counselling or procuring or aiding or abetting the Government of Israel in any unlawful transfer of population. Such an employer might be taking advantage of such a transfer, but that is not the same as encouraging or assisting it.¹⁰

Similarly, in *AFPS & PLO v. Alstom & Veolia*, the Court of Appeal of Versailles rejected arguments that the French defendants had acted unlawfully by participating in the construction and operation of the Jerusalem light rail system, which serves some Israeli and Arab suburbs of "East" Jerusalem as well as "West" Jerusalem and what was no-man's land between 1948 and 1967. The Court referred to Article 43 of the Hague Regulations and observed:

On the basis of this article, it was considered that the occupying power could and even should restore a normal public activity of the occupied country and accepted that administrative measures could concern all activities generally exercised by state authorities (social, economic and commercial life) ... ; that as such, it could construct a lighthouse [or] a hospital. It has even been recognized that the establishment of a means of public transport formed part of the acts of the administration of an occupying power (construction of a subway in occupied Italy) so that the construction of a tramway by the State of Israel was not prohibited.¹¹

The important point that commercial activity and investment in infrastructure do not constitute a transfer of population contrary to Article 49(6), and that an occupying power even has a responsibility to promote economic activity in occupied territory, also has the merit of consistency with political arguments that have broader international support. Thus former U.S. Senator George Mitchell, whose report¹² demanded the cessation of "settlement activity" by the Israeli government in the West Bank, recently praised the contribution made by Sodastream's factory at Mishor Adumim to laying the

7. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJR 136.
8. A similar provision is contained in Art. 8(2)(b)(viii) of the Rome Statute of the International Criminal Court, which may be applied if the accession of "Palestine" as a "state" to this Statute is accepted.
9. [2014] UKSC 8.
10. Section 17.
11. Judgment of March 22, 2013, translated from original French by Rejane Cohen Frey and Jonathan Turner.
12. Report of the Sharm El-Sheikh Fact-Finding Committee, April 30, 2001.

groundwork for peace, by demonstrating the economic benefits of working together.¹³

Another important point in these recent decisions is the courts' acceptance that even if one company in a group engaged in activities that promoted the transfer of Israeli population into occupied territory, this did not necessarily affect the legality of connected activities of another company in the group. In *Richardson v. DPP*, the UK Supreme Court firmly held that even if the Israeli manufacturing company could have been aiding and abetting an unlawful transfer of population, that could not amount to an offense by the separate UK retailing company, "whatever the corporate links between the two companies."

Likewise, in *AFPS & PLO v. Alstom & Veolia*, it was held that even if Israel's alleged objective of promoting the transfer of part of its population into "occupied East Jerusalem" made its contract with the CityPass company unlawful, the defendant companies were not themselves parties to that contract and could not be liable for any such illegality.

An obvious lesson of these decisions is to structure groups of companies so that companies doing business in Europe cannot be said to be responsible for any activities connected with "settlements" in "occupied territory".

A third point which can be discerned in these decisions is a general reluctance of courts to be used as vehicles to decide essentially political issues. But clearly their decisions have to be based on legal premises, such as adhering to the actual terms of applicable international conventions, and recognizing the separate legal personalities of different companies.

Where weak links in their arguments are identified, Israel's opponents do not stand still – they are busily devising means to by-pass these links, some of which will be discussed below. But it is now appropriate to examine some of the different situations that can arise.

Boycotts

As regards boycotts, it is important in Europe to distinguish between the public sector (government and utilities) and the private sector or individual consumers. Public sector procurement is subject to strict regulation under EU and EEA law,¹⁴ as well as domestic laws of some European countries.¹⁵ The EU and Israel are also parties to the World Trade Organization Agreement on Government Procurement. In general, significant public contracts must be awarded in the EEA on economic grounds, and political considerations must be disregarded. However, there are numerous exceptions and variations, resulting in a complex body of law.

Israel's opponents have sought, in particular, to invoke

provisions of the EU Directives¹⁶ and national implementing legislation under which an economic operator can be excluded if it "has been guilty of grave professional misconduct", which they say includes involvement with "illegal" Israeli settlements. The EU Court of Justice has held that "'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue"; and that "'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part." Furthermore, "in order to find whether 'grave misconduct' exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out."¹⁷

So far, public authorities in the UK have rejected arguments that operators should be excluded under this provision, on the ground that connected companies provide services to Israeli settlements. However, one cannot rule out the possibility that this argument may be accepted by some public authorities in Europe, particularly if they are ill-disposed towards Israel; or that further interpretations of this provision by the courts, or its amendment by future EU legislation, may cause problems for some Israeli companies.

The position regarding boycotts by the private sector or individual consumers is more mixed. Boycotts are illegal in some countries, such as France, where supporters of Israel or Israeli companies, most recently Sodastream,¹⁸ have won a succession of cases. In other countries, such as the UK, there is no general prohibition against boycotting businesses on political grounds. However, there may be particular circumstances on which a legal

13. TIMES OF ISRAEL, October 26, 2013, www.timesofisrael.com/senator-mitchell-peace-begins-with-tech-prosperity-2/.

14. EU Directives 2004/17 and 18. EU and EEA Member States are required to implement these Directives in their internal legislation and practices. While non-compliance does occur, the EU Commission makes significant efforts to ensure full implementation, including by legal actions in the Court of Justice of the EU.

15. For example, in the UK, Local Government Act 1988, Section 17, although this has recently been weakened by amendment by the Public Services (Social Value) Act, 2012.

16. EU Directive 2004/18, Art. 45(2)(c), EU Directive 2004/17, Art. 54(4).

17. *Forposta v. Poczta Polska*, Case 465/11 (2012).

18. *SAS OPM France v. AFPS*, Judgment of the Tribunal de Grande Instance de Paris, January 13, 2014.

19. The Co-operative Group Limited is registered under the

claim could be based. For example, it could be argued that the Co-operative Group, which operates a substantial retail chain in the UK, is guilty of unfair discrimination in breach of its constitutional rules,¹⁹ since it refuses to purchase any products from companies that have dealings with Israeli “settlements” in the West Bank and the Golan, but does not implement a similar policy in relation to other disputed territories²⁰ or other, often more serious, contraventions of international law.

Universities in the EU are covered by EU public procurement rules if more than 50 percent of their budget is contributed from public funds.²¹ In addition, academic boycotts by universities or unions are generally considered to be illegal under anti-discrimination laws of the UK²² and probably other European countries. On the other hand, a claim against a university teachers’ union for harassment of its Jewish members in passing anti-Israel motions was emphatically rejected by the London Employment Tribunal.²³

Disruption of commercial or artistic activities, obstruction of access, and harassment and intimidation of customers and staff are regularly used by Israel’s opponents to promote their boycott campaigns. Such conduct is often illegal, but the police and courts may be ineffective or even unwilling to enforce the law. For example, when a performance by the Israel Philharmonic Orchestra in London was seriously disrupted by shouting and chanting, the police refused to prosecute offenders on the ground that they had not been asked to intervene by the venue.²⁴

As mentioned above, two activists were eventually prosecuted and convicted for disrupting the Ahava shop in central London. However, the hostile atmosphere created by weekly demonstrations outside the shop led to complaints by neighbouring shops to the landlord, who refused to renew Ahava’s lease.²⁵ In another case, activists who vandalized the offices of a manufacturer of military equipment supplied to the IDF (amongst others) were acquitted on the basis of their defense that this was justified to protect the property of Palestinians in Gaza.²⁶ However, the judge was officially reprimanded²⁷ for his political summing-up to the jury.²⁸

Civil claims in these situations may or may not be effective and worthwhile. Some of the activists have, or claim to have, no funds and live on welfare. But others do have jobs and families, and might be discouraged by being forced to pay compensation to those affected by their unlawful activities.

These situations require careful handling to make the best use of local Israel supporters, available legal tools and experience gained in addressing them in the country concerned.

Divestment

Under English law, trustees have a fiduciary obligation to follow an investment strategy in the best interests of the beneficiaries, without regard for their political views. On this basis, it was held²⁹ that trustees of a pension fund for coal miners were not entitled to exclude oil companies and overseas investments from the portfolio. However, in a subsequent case,³⁰ the court ruled that the Commissioners of the Church of England were entitled to take ethical considerations into account in forming their investment policy, provided this did not risk financial detriment to the trust assets.

In the absence of clear criteria or a system of professional accreditation for ethical investment, anti-Israel activists

Industrial and Provident Societies Acts 1965-2003, and its rules are the equivalent of the Articles of Association of a company registered under the UK Companies Acts.

20. The Co-operative Group claims that the only territories for which there is an international consensus of illegality are the “settlements” in “Israeli Occupied Territories” and the Moroccan “settlements” in Western Sahara: *www.cooperative.coop/Corporate/CSR/downloads/human_rights_and_trade_policy_2012.pdf*. However, it does not impose a similar secondary boycott on suppliers dealing with Moroccan “settlements” in Western Sahara, ignores the consensus against the Turkish occupation of Northern Cyprus, and disregards other disputed territories such as Tibet, Abkhazia, South Ossetia and presumably, now, Crimea.
21. *The Queen v. HM Treasury, ex p The University of Cambridge*, CJEU Case C-380/98. The UK Government considers that this no longer, applies to most UK universities, following changes in funding arrangements in recent years.
22. Equality Act 2010. Advice of Michael Beloff QC and Pushpinder Saini QC to this effect was published by “Stop the Boycott” Campaign.
23. *Fraser v. University & College Union*, ET 2203290/2011 Judgment of March 22, 2013.
24. *www.thejc.com/news/uk-news/61841/call-prosecute-anti-israel-proms-protesters*.
25. *www.thejc.com/news/uk-news/55465/ahava-%EF%AC%81nally-closes-its-doors-london*.
26. *R v. Saibene and others*, June 30, 2010. *www.thejc.com/35771/judge-bathurst-norman-full-summing*.
27. *www.telegraph.co.uk/news/uknews/law-and-order/8048382/Judge-reprimanded-for-alleged-anti-Israel-comments.html*.
28. *www.thejc.com/35771/judge-bathurst-norman-full-summing*.
29. *Cowan v. Scargill* [1985] Ch 270.
30. *Harries v. Church Commissioners* [1992] 1 WLR 1241.

have been able to target ethics committees to promote divestment from companies doing business in Israel. In some countries, notably the Netherlands, such activists have secured places on corporate boards and corporate social responsibility (CSR) consultancies.³¹ A recent paper³² by a coalition of Dutch NGOs, aimed at institutional investors, provides a detailed toolkit for divestment based on “involvement” of targeted companies in the “occupation of the Palestinian territories”.

Corporations wishing to avoid negative publicity may accede to the demands of anti-Israel activists with little independent analysis or evaluation of the underlying issues. However, when confronted by supporters of Israel with information countering the claims, companies have sometimes re-examined their positions. For example, a concerted counter-effort by the pro-Israel community recently led the PGGM pension fund in Holland to re-evaluate its decision to divest from Bank HaPoalim.

It is therefore important to provide companies targeted by the BDS movement with timely information countering their materials and exposing their real goals. Supporters of Israel should also take a more active role in corporate governance and CSR initiatives.

Many BDS initiatives can in fact be traced to a small group of activists and NGOs, such as the Palestinian NGO, Al Haq; the Israeli NGO, Coalition of Women for Peace; the Rights Forum;³³ and the Dutch Church NGOs, ICCO, Ikv Pax Christi, and Cordaid. Most of these organizations receive substantial funding directly and indirectly from the EU and from national governments in Europe. A coherent strategy to counter BDS campaigns should take this into account and address the funders.³⁴

Sanctions

Sanctions may take the form of government measures or legal or quasi-legal claims initiated by private parties.

Bans on trade, even with “settlements”, on the part of European governments seem unlikely at present and may be impermissible under GATT.³⁵ On the other hand, the EU Court of Justice has held that products originating in “occupied territory” do not benefit from preferential tariff treatment under the EC-Israel Association Agreement.³⁶ There are detailed provisions in this Agreement defining origin³⁷ and some businesses may find it helpful to arrange their affairs so that they are entitled to claim Israeli origin for their products, despite some operations occurring beyond the “Green Line”.

European countries are increasingly likely to require products originating beyond the “Green Line” to be labelled to inform consumers that they are made in “occupied territory” and not “made in Israel”. In *Richardson v. DPP*, the UK Supreme Court upheld the helpful finding

of the trial court that labelling the products as “Made by Dead Sea Laboratories Ltd, Dead Sea, Israel” was not “likely to cause the average consumer to take a transactional decision he would not have taken otherwise”, so as to breach the UK regulations implementing the EU Unfair Commercial Practices Directive (2005/29). The Court affirmed that it was clearly open to the trial judge to find that “If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision were different because the goods came from illegally occupied [sic] territory.”

However, those opposed to Israel or its policies may well seek to change public opinion in this regard, and thereby achieve a different conclusion even without further legislation. More generally, it will be difficult to resist requirements to provide consumers with clear information, and it may be best to look for ways of describing origin which cannot be said to mislead, but equally do not detract from the perceived value of the merchandise to most consumers.

In July 2013, the EU published “Guidelines on the eligibility of Israeli entities and their activities in the

31. For example, several board members of Royal Haskoning and the PFZW Pension Fund had links to the NGOs lobbying them to sever ties with Israel: www.ngo-monitor.org/article/ngos_responsible_for_dutch_pension_fund_divestment_pggm_pfzw_dutch_funding_for_ngo_lobby_efforts; www.ngo-monitor.org/article/dutch_support_for_bds_campaigns_icco.

32. “Dutch Institutional Investors and Investments related to the Occupation of the Palestinian Territories,” www.business-humanrights.org/media/obdo_dutch_institutional_investors_7.pdf.

33. www.ngo-monitor.org/article/the_rights_forum.

34. See www.ngo-monitor.org for details on the activities of these organizations and funding sources.

35. Art. XXVI.5(a) provides that “Each government accepting this Agreement does so in respect of its metropolitan territory and the other territories for which it has international responsibility ...”. Although (c) provides for such a territory to become a party if it acquires full autonomy, sponsorship through a declaration by the responsible contracting party [Israel] is also required. The position was discussed in an Opinion of Prof. Thomas Cottier, available at www.mne.gov.ps/epp/EPPI/EPP_WYO_Work/1.pdf.

36. *Brita*, CJEU, Case C-386/08.

37. Protocol 4 to the EC-Israel Association Agreement.

territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards.”³⁸ Although the EU’s discrimination against Israel is itself objectionable, the extensive coverage in the media may have obscured the limited impact of this notice. For example, it only applies to activities of Israeli entities; other entities and Israeli individuals are not barred, even in relation to activities beyond the “Green Line” – so it would seem that these restrictions can be avoided altogether by operating through a non-Israeli entity with Israeli personnel.³⁹

Perhaps the most serious threat of sanctions against Israel will be from legal or quasi-legal claims initiated by individuals, NGOs or the PLO. So far, such cases have generally been rejected by courts.⁴⁰ In *AFPS & PLO v. Alstom & Veolia*, the claims were dismissed on the grounds that Israel’s obligations under international law did not bind private French companies and that the companies’ own ethical commitments did not create legally binding obligations. In *Bil’in v. Green Park*, the Superior Court of Quebec declined jurisdiction on the basis of *forum non conveniens* over claims against construction companies incorporated in Canada for tax reasons in respect of residential developments for Israelis in the West Bank.⁴¹ The Quebec Court of Appeal upheld this decision⁴² and the Canadian Supreme Court refused permission to appeal. However, we anticipate that Israel’s opponents will seek to circumvent these results by bringing legal actions on different grounds and/or in different jurisdictions.

Alternatively, Israel’s opponents may invoke the OECD Guidelines for Multinational Enterprises by submitting complaints to National Contact Points (NCPs) in contracting states. Such complaints are already pending against G4S in the UK (apparently for supplying

equipment used at checkpoints in the West Bank)⁴³ and against CRH in Ireland (for supplying cement used in the security barrier in the West Bank).⁴⁴ More cases of this nature may be anticipated. Even if unsuccessful, they may have a chilling effect on international companies’ willingness to do business with Israel.

In summary, the BDS threat to Israel should not be overrated, but neither should it be ignored. It should be carefully and skilfully addressed. ■

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38. OJ C 205/9 (2013).

39. This conclusion might be affected in relation to grants by Section 6(a) of the Guidelines and Art. 122(2) of the Financial Regulation 966/2012, but this provision does not apply to non-eligible or special purpose entities.

40. See e.g. Anne Herzberg, “NGO ‘Lawfare’: Exploitation of Courts in the Arab-Israeli Conflict,” www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf, and “Kiobel & Corporate Complicity – Running with the Pack,” *AMERICAN J. OF INT’L LAW AGORA*, January 2014, [www.asil.org/sites/default/files/AGORA/201401/Herzberg%20AJIL%20Unbound%20e-41%20\(2014\).pdf](http://www.asil.org/sites/default/files/AGORA/201401/Herzberg%20AJIL%20Unbound%20e-41%20(2014).pdf).

41. (2009) QCCS 4151.

42. www.jugements.qc.ca/php/decision.php?liste=75400801&doc=2AA0F2DA87EBA24C7315096A65498EA4D63BC4CBD39DEFEA4180DE43BC9CAA24&page=1.

43. lphr.org.uk/wp-content/uploads/LPHR-Public-Statement-November-2013.pdf.

44. oecdwatch.org/cases/Case_215.

Israel and the Alien Tort Statute: The Impact of the U.S. Supreme Court's Decision in *Kiobel v. Royal Dutch Petroleum Co.*

Michael M. Zmora

Over the past thirty years, aggrieved parties in American federal courts have made use of a unique and rarely invoked U.S. law, the Alien Tort Statute, to obtain relief for violations of the law of nations. These suits have largely dealt with human rights violations occurring overseas, perpetrated either by foreign defendants working on behalf of governments, or corporate entities that aided and abetted these violations by assisting or willfully ignoring them.

In 2013, the U.S. Supreme Court firmly stepped in (for only the second time) to decide a key concern of Alien Tort Statute jurisprudence. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court held that federal courts did not have jurisdiction to hear cases brought by foreign plaintiffs alleging torts that occurred on foreign soil against foreign defendants. The decision further introduced a presumption against extraterritoriality to all Alien Tort Statute cases, creating a high jurisdictional bar for many litigants.

In recent years, there have been a number of Alien Tort Statute cases involving the State of Israel. These suits fall into two broad categories. First, those brought by alleged victims of actions that violate the law of nations committed by the Israeli military and aided and abetted by corporate or other defendants.¹ Second, those brought by Israeli and other victims of Palestinian and Arab terror against terror organizations and/or corporate defendants, mostly banks, that have allegedly aided and abetted their acts by assisting in their financing.² Both types of cases face serious obstacles as a result of *Kiobel*.

Background to the Alien Tort Statute

The Alien Tort Statute (ATS) was enacted as part of the Judiciary Act of 1789, an omnibus legislation that also created the U.S. federal court system. Scholarship on the origins of the ATS has demonstrated that it was enacted in response to incidents for which the new U.S. government provided no remedies to foreign citizens residing in the United States for violations of the law of

nations.³ The concerns that prompted the legislation were breaches of customary international law concerning diplomats and merchants, torts that if left un-remedied threatened the peace of the nascent republic.

The Alien Tort Statute provides U.S. federal district courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴ This opaque language and what it means have formed much of the jurisprudence around the ATS.⁵

The statute lay dormant, with almost no case decisions to speak of, until the late 1970s when human rights groups and plaintiffs’ attorneys “rediscovered” the ATS, using it to bring cases against non-state actors for alleged human rights violations committed outside the United States.⁶



1. See, e.g., *Corrie et al. v. Caterpillar Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (Claims against defendant manufacturer for selling modified bulldozers to assist Israeli military in destruction of homes, discussed in greater detail *infra*).
2. See, e.g., *Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2nd Cir. 2013) (Claims against banks for permitting wire transfers between members of Hizbollah to finance terror).
3. The two famous episodes that occurred before passage of the ATS involved the rights of foreign ambassadors who were physically assaulted and whose domestic servants were improperly arrested. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1666 (2013) (discussing cases); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004) (same).
4. 28 U.S.C. § 1350.
5. As Justice Souter noted in his opinion analyzing the ATS, “despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended [in drafting the ATS] has proven elusive.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004).
6. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filartiga*, a suit filed by the Center for Constitutional Rights, is often credited as opening the doors to foreign plaintiffs’

This first generation of ATS cases was primarily brought against individuals living in the United States who had allegedly committed human rights violations against plaintiffs overseas. Since the mid-1990s, however, a second-generation of ATS claims has been brought by plaintiffs against multi-national corporate defendants alleging that these defendants aided and abetted local governments or other state actors in human rights violations.

The federal court jurisdiction afforded by the ATS has been significant in that suits brought by aliens against other aliens would otherwise be dismissed, as such suits could not claim the necessary diversity jurisdiction for access to federal courts. Therefore, the ATS, as interpreted by federal courts since *Filartiga*, has permitted alien-versus-alien suits based on the original jurisdiction of the statute.

The U.S. Supreme Court only addressed the ATS once prior to the *Kiobel* decision. In 2004, in *Sosa v. Alvarez-Machain*, the Court limited the expanding scope of torts recognized under the ATS by lower courts. Under *Sosa*, the Court held, only torts in violation of the law of nations and recognized by common law were actionable under the ATS. The court's opinion left the definition of what this meant vague, but cautioned that "any claims based on the present-day law of nations [should] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."⁷

Israel and the ATS

A number of ATS cases have been filed over the past fifteen years stemming from actions involving the State of Israel and its military actions in the West Bank and Gaza Strip, as well as with its Arab neighbors.

Perhaps the most famous of these cases was *Corrie et al. v. Caterpillar, Inc.*⁸ The plaintiffs in this matter were the parents of International Solidarity Movement activist Rachel Corrie, as well as Palestinian families who alleged their homes were destroyed and family members killed by bulldozers manufactured by the Illinois-based company, Caterpillar, Inc. The suit claimed that Caterpillar sold bulldozers to the Israeli Defense Forces when it knew or should have known that they would be used to unlawfully destroy civilian homes and inflict lethal harm on Palestinians and others, in violation of the Fourth Geneva Convention. The plaintiffs argued that these acts violated the law of nations under the ATS, as well as the separately enacted Torture Victim Protection Act, which provides a cause of action against individuals who subject others to extrajudicial killing. The district court dismissed the case (among other reasons) under the *Sosa* precedent, holding that the destruction of personal property under the Fourth Geneva Convention, except when militarily necessary,

did not "rest on a norm of international character" sufficient for the ATS, nor did the simple sale of bulldozers to Israel.⁹

Apart from ATS cases naming Israel and companies doing business with Israel as defendants, there have been a number of ATS cases brought by Israeli and other victims of terror against alleged state sponsors, non-state organizations and aiders and abettors of terror targeting Israelis. One of the earliest such cases, *Tel-Oren v. Libyan Arab Republic*, filed against Colonel Qaddafi's Libya, the Palestine Liberation Organization, and other Palestinian groups, alleged that the defendants aided and abetted a terrorist attack in 1978 in which a bus was hijacked by PLO terrorists killing 34 and seriously wounding 87 people. The lower court dismissed the case on several grounds, among them the lack of subject matter jurisdiction under the ATS. The D.C. Circuit affirmed, holding that the ATS itself did not provide its own cause of action.¹⁰

suits under the ATS for human rights violations. The Second Circuit granted plaintiffs, Paraguayan citizens, subject matter jurisdiction in the federal courts pursuant to the ATS in a suit against a former Paraguayan police officer living in New York City. The plaintiffs, family members of a man tortured to death by the defendant, alleged that the defendant's actions were a violation of the law of nations, and hence, U.S. federal courts had jurisdiction over the defendant's acts of torture that occurred in Paraguay under the ATS. *See also Forti v. Suarez-Mason*, 672 F. Supp. 1271 (N.D. Cal. 1987) (ATS claims brought by Argentinean victims against a General accused of human rights abuses during Argentina's "Dirty War"); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (ATS claims brought by Guatemalan victims of torture directed by defendant, director of the Guatemalan Army General Staff); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*see infra* for description).

7. *Id.* at 726.

8. *Supra* note 1.

9. The 9th Circuit Court of Appeals later affirmed the lower court's dismissal, but did so under the Political Question doctrine. That opinion did not discuss the ATS holding.

10. *See Tel-Oren v. Libyan Arab Republic*, *supra* note 6. The *Tel-Oren* decision stood in opposition to the Second Circuit's holding in *Filartiga* which found the ATS to provide its own cause of action. The dispute was ultimately resolved by the U.S. Supreme Court in *Sosa*, where it held that the ATS provided original jurisdiction for claims that violated the law of nations, as discussed above.

More recently, the wave of terror brought on by the Second Intifada (2000-2005) spurred litigation against banks that were alleged to have facilitated terror financing by providing wire transfer and other banking services to Hamas, Hizbollah, and the Palestinian Islamic Jihad. Some of these claims, but not all, were filed under the ATS. Notably, several suits brought against Arab Bank PLC, a Jordanian-based bank, sought relief under the ATS, alleging that by acting as paymaster for the families of suicide bombers and funneling money to Hamas leaders, the bank aided and abetted the campaign of terror that violated the conventions against genocide and crimes against humanity.¹¹ In 2007, the U.S. District Court for the Eastern District of New York, reviewing the ATS claims against Arab Bank PLC after *Sosa*, held that Plaintiffs had sufficiently pleaded claims for genocide and crimes against humanity, that such claims were cognizable violations of the law of nations, and accordingly denied the defendant's motion to dismiss.¹²

The *Kiobel* Decision

The fate of many of these ATS cases and potential cases like them lies in the U.S. Supreme Court's opinion in the *Kiobel* case.

The underlying case in *Kiobel* was brought by Nigerian citizens who alleged that Dutch, British and Nigerian oil-exploration companies aided and abetted the Nigerian government in brutally suppressing resistance to oil development in the Niger River delta in the 1990s by, inter alia, destroying property, extrajudicial killing, torture, and forced exile. The plaintiffs argued that these actions violated the law of nations as interpreted in *Sosa*. On the defendants' motion to dismiss, the district court granted the motion in part, dismissing claims stemming from property destruction, forced exile, and extrajudicial killing as not sufficiently defined under customary international law. The court, however, also denied the motion to dismiss in part, allowing claims to proceed related to aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture or cruel, inhuman and degrading treatment. The district court then certified the question for interlocutory appeal to the Second Circuit. In a 2-1 decision, the Second Circuit reversed the lower court and granted the motion to dismiss as to all claims holding that corporations could not be held liable for violations of customary international law. Citing *Sosa* and others, the court reasoned that "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world."¹³ Stinging from this loss, the plaintiffs then filed a petition for writ of certiorari with the U.S. Supreme Court.

The Supreme Court first heard arguments on *Kiobel* in February 2012 on the issue of corporate liability under the ATS. However, after oral argument, the Court unexpectedly asked for further briefing from the parties on the question of whether the ATS allows courts "to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." It is ultimately this territoriality question that the Court decided in *Kiobel*.

In a unanimous opinion written by Chief Justice Roberts, the Supreme Court held that the presumption against extraterritoriality, a canon of statutory interpretation expounded upon by the Court in a case from the previous term, applies to claims under the ATS, barring the instant dispute.

The Court addressed the extraterritoriality question through an analysis of the text of the ATS and its legislative history. It found no indication of extraterritorial reach in the text of the ATS or in the well-known events of the late 18th century that inspired its passage. The Court granted that the petitioner's example of international piracy could provide some evidence for extraterritorial reach, but concluded that piracy was the only such cause of action under the ATS, recognizing that "pirates may well be a category unto themselves."¹⁴ Finally, the Court reasoned that the United States, then a "fledgling Republic", would not have wanted to make its courts a "uniquely hospitable forum for the enforcement of international norms" through enactment of such extraterritorial power.

The Court's opinion, however, only provided a vague sketch of the extent to which ATS cases brought by foreigners must "touch and concern" the United States to overcome the presumption against the statute's extraterritorial reach. It concluded that "even where the

11. There are 11 similar suits against Arab Bank PLC that have since been consolidated for purposes of pre-trial proceedings. Collectively, the plaintiffs in these suits are 6,596 individuals. Petition for Writ of Certiorari filed by Defendant Arab Bank PLC, *Arab Bank PLC v. Linde et al.*, 12-1485 (Sup. Ct. 2013). Similar cases on different grounds have been brought by the Israel-based organization Shurat Ha-Din against Lebanese Canadian Bank, American Express Bank, and the Bank of China. See discussion below on *Licci v. Lebanese Canadian Bank* and *Elmaliach v. Bank of China Ltd.*

12. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

13. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir. 2010).

14. 1133 S.Ct. at 1667.

claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries and it would be too far reaching to say that mere corporate presence suffices.”¹⁵ In an opinion joined in by Justices Ginsburg, Sotomayor and Kagan, concurring in the court’s judgment but not its reasoning, Justice Breyer provided an alternative basis for jurisdiction under the ATS for foreign litigants. Breyer’s test would find ATS jurisdiction where “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor ... for a torturer or other common enemy of mankind.”¹⁶ This test, although having no binding authority over lower courts, could still provide the basic reasoning for lower courts’ development of a coherent analysis for ATS jurisdiction.

In the end, the Court held that in a case like *Kiobel*, where *foreign* nationals bring suit against *foreign* entities for torts that occurred on *foreign* soil – so-called “foreign cubed” suits – the ATS cannot provide grounds for original jurisdiction in federal courts.

***Kiobel*’s Impact on ATS Cases**

Kiobel’s impact on ATS cases pending in lower courts has been swift. A number of cases were immediately dismissed as a result. In *Balintulo v. Daimler AG*, for example, South African plaintiffs had sued Daimler AG, Ford Motors and IBM for aiding and abetting various human rights violations committed by its South African subsidiaries and sought damages under the ATS. On a pending appeal on the defendants’ motion to dismiss, the Court found that “all [plaintiffs’] underlying claims are plainly barred” by *Kiobel* because all the relevant tortious conduct occurred in the territory of another sovereign.¹⁷ Similarly, in *Chen Gang v. Zhao Zhizhen*, an ATS case brought by Chinese practitioners of the Falun Gong faith against a former chief of a Chinese state-owned television station, plaintiffs alleged that the defendant had led a campaign of anti-Falun Gong propaganda that resulted in their torture and detention, thus aiding and abetting, and commanding torture, arbitrary arrest and detention, and crimes against humanity in violation of the laws of nations. The district court dismissed, citing *Kiobel* for its holding that the ATS could not provide jurisdiction for torts that occurred entirely abroad.¹⁸

However, in at least one ATS case since, a court found *Kiobel*’s presumption against extraterritorial claims could be overcome. In *Sexual Minorities Uganda v. Lively*, the

plaintiffs brought suit under the ATS, alleging crimes against humanity stemming from systematic persecution against gay, lesbian, bi-sexual and transsexual Ugandan citizens by an American evangelical minister consulting with Ugandan counterparts.¹⁹ Analyzing *Kiobel*’s restrictions on extraterritorial claims, the U.S. District Court for the District of Massachusetts found the presumption overcome, as the defendant was a U.S. citizen and his “offensive conduct” – maintaining and supporting a network of like-minded individuals in Uganda – occurred mostly from his Springfield, Massachusetts home.²⁰

A third view, taken by the U.S. District Court of the Eastern District of Virginia, read *Kiobel*’s discussion of extraterritorial presumption to bar any judicial decision-making in cases where tortious conduct occurred outside the territory of the United States. In *Al Shimari v. CACI Int’l, Inc.*, the Court ruled that *Kiobel* “makes clear that the presumption against extraterritoriality is only rebuttable by legislative act, not judicial decision.”²¹

It is clear from these cases that *Kiobel* and its meaning for the Alien Tort Statute will be in flux in lower courts for some time to come.

Cases Involving Israel After *Kiobel*

So what does *Kiobel* mean for ATS cases involving Israel and Israeli interests? Taking the two types of Israel cases discussed above, it is clear that *Kiobel* will likely doom many such cases in the federal courts.

For cases alleging violation of the ATS by U.S. companies doing business in Israel, *Kiobel* likely signals their demise.²² On the one hand, the Court’s opinion specifically singled out “mere corporate presence” in the United States as

15. *Id.* at 1669.

16. *Id.* at 1671.

17. 727 F.3d 174, 188 (2d Cir. 2013).

18. *Chen Gang v. Zhao Zhizhen*, 2013 U.S. Dist. LEXIS 134510, at *6 (D. Conn. Sept. 20, 2013); see also *Chen v. Honghui Shi*, 2013 U.S. Dist. LEXIS 110409 (S.D.N.Y. Aug. 1, 2013) (Plaintiffs raised similar allegations against a defendant member of the Chinese Community party leadership in Guangdong Province and the court dismissed following the *Kiobel* precedent).

19. *Sexual Minorities Uganda v. Lively*, 2013 U.S. Dist. LEXIS 114754 (D. Mass. Aug. 14, 2013).

20. *Sexual Minorities Uganda v. Lively*, 2013 U.S. Dist. LEXIS 114754, at *4-5 (E.D. Va. Aug. 14, 2013).

21. *Al Shimari v. CACI Int’l, Inc.*, 2013 U.S. Dist. LEXIS 92937 at *27 (E.D. Va. June 25, 2013).

22. *E.g. Corrie v. Caterpillar* (described *supra* note 1).

insufficient U.S. interest to overcome the presumption against extraterritoriality embedded in the ATS. On the other hand, even if this presumption is overcome, suits brought in the federal courts in New York will have to grapple with the Second Circuit's own holding in *Kiobel* barring corporate liability under the ATS. A New York federal district court recently made clear that this decision is still good law in the Second Circuit, despite the Supreme Court's later holding, and relied upon it to bar an ATS claim.²³ Because New York corporate presence frequently provides the U.S. jurisdictional "hook" for such claims, the future for these cases is now uncertain.

However, there is a glimmer of hope for these ATS litigants in the Ninth Circuit Court of Appeals, the largest circuit in the United States that includes the State of California where many multi-national companies are headquartered. In *Doe v. Nestle USA, Inc.*, the Ninth Circuit held that "corporations can face liability for claims brought under the Alien Tort Statute," and cited dicta in the Supreme Court's opinion in *Kiobel* for support.²⁴ This same holding, however, noted that the presumption against extraterritorial application would still have to be overcome for such claims to proceed. Similarly, the D.C. Circuit and the Seventh Circuit also recognize corporate liability in ATS cases. Plaintiffs in these jurisdictions would thus have to wage an uphill battle in litigating ATS claims against corporations who "aid and abet" alleged human rights violations perpetrated by Israel but could perhaps do so if they demonstrated that the direction and collaboration with violators was orchestrated from the United States, as was alleged successfully in the *Lively* case. However, this may prove harder than it seems, as a recent court decision by a federal court in Alabama held that in making such a case, a party must marshal strong evidence that such decisions were made in the United States and not by local employees in a foreign country. Furthermore, that court found that the presumption against extraterritoriality could only be overcome if the tortious event on which the ATS focuses did not occur abroad.²⁵

For ATS cases brought by Israeli and other victims of Palestinian and Arab terror, the future in federal courts is equally uncertain. A series of such ATS cases have already been dismissed in light of *Kiobel*. In *Linde v. Arab Bank PLC*, the U.S. District Court for the Eastern District of New York granted the defendant's motion to dismiss the ATS claims, citing the Second Circuit's bar on ATS corporate liability in *Kiobel*. It did the same for other materially similar cases against Arab Bank PLC.²⁶ In another similar case in 2013, *Licci v. Lebanese Canadian Bank*, the Second Circuit instructed the lower court to decide subject matter jurisdiction in light of the Supreme Court's opinion in the *Kiobel* case.²⁷ As of March 2014,

that matter is still pending.

However, while federal courts have been unwelcoming to these terror finance suits, litigants have found greater success in state courts. These state court cases do not rely on causes of action under the ATS, but instead allege negligence and other state common law torts. An exemplar of this strategy is *Elmaliach v. Bank of China Ltd.*, where the plaintiffs, Israeli citizens injured in bombings and rocket attacks carried out by the Palestinian Islamic Jihad and Hamas between 2005 and 2007, filed suit against the Bank of China for facilitating the transfer of millions of dollars between these terror organizations' leadership abroad to operatives inside Israel. The suit alleged negligence, breach of statutory duty and vicarious liability under Israeli law. On appeal on a motion to dismiss, the New York Supreme Court, Appellate Division denied dismissal and determined that Israeli law – rather than American or Chinese law – should govern, an outcome favorable to the plaintiffs.²⁸ There are nevertheless other challenges to cases like *Elmaliach* in state court. Plaintiffs in these cases must overcome challenges to venue under the doctrine of *forum non conveniens*, personal jurisdiction issues over governmental and other entity defendants who are not purposefully availing themselves of American states for business purposes, as well as issues relating to some states' shortened statute of limitations periods.

Conclusion

For over thirty years, the Alien Tort Statute has provided plaintiffs with human rights grievances a path into the desirable venue of U.S. federal courts. In the wake of the Supreme Court's decision in the *Kiobel* case, these litigants will now have to clear a high hurdle to have their cases heard under the Alien Tort Statute. Barring new legislation to fill this void, it is likely that far fewer cases involving international human rights violations will now end up

23. *Tymoshenko v. Firtash*, 2013 U.S. Dist. LEXIS 123240 (S.D.N.Y. Aug. 28, 2013).

24. *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013).

25. *Giraldo v. Drummond Co. Inc.*, 2013 U.S. Dist. LEXIS 103981, at *30-32 (N.D. Ala. July 25, 2013).

26. See Order Granting Motion to Dismiss, *Linde et al. v. Arab Bank, PLC*, No. 04 Civ. 2799 (E.D.N.Y. Aug. 23, 2013) (dismissing *Almog v. Arab Bank*, *Jesner v. Arab Bank*, *Afriat-Kurtzer v. Arab Bank*, *Viktoria Agurenko v. Arab Bank*, and *Lev v. Arab Bank*).

27. *Licci v. Lebanese Canadian Bank*, *supra* note 2.

28. *Elmaliach v. Bank of China Ltd.*, 2013 NY Slip Op. 05858 (N.Y. Sup. Ct., App. Div., Sept. 17, 2013).

in U.S. courts. The decision comes at an interesting time for claims involving the State of Israel. Despite repeated attempts, civil cases brought against Israel and its government agents have not fared well in U.S. federal courts,²⁹ nor have similar claims brought against businesses contracting with Israel.³⁰ As the decisions in the terror finance cases demonstrate, however, such claims could be attempted in state courts where tort actions, artfully pleaded, might escape early dismissal. Yet, in light of increased so-called “lawfare” against Israeli interests in European and other courts recognizing principles of universal jurisdiction, the United States judiciary will likely play a secondary role, at best, in any new wave of cases. ■

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29. See *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (dismissing case alleging violations of ATS and TVPA against former head of Shabak, Israel’s General Security Services, related to program of targeted killings in Gaza and the West Bank, on state sovereign immunity grounds); *Belhas v. Ya’Alon*, 466 F. Supp. 2d 127 (D.D.C. 2006) (dismissing case alleging ATS and TVPA claims against former head of Israeli Army Intelligence related to bombing of Lebanese village during 2006 Lebanon War on same grounds).

30. See *Corrie*, *supra* note 1.



Meeting between Judge Marcos Arnoldo Grabivker, Vice President, IAJLJ, and a delegation of Jewish Argentinean leaders with Pope Francis, January 2014

A Grotian Moment: Corporations are Required to Respect Human Rights

Gavriel Mairone

The issue of corporate responsibility in connection with human rights abuses has had a tumultuous history at the United Nations and in courts around the world. The United Nations Human Rights Council tried and failed a number of times to draft “norms” in regard to human rights for business enterprises. That has now changed.

In 2005, the UN Secretary General appointed Professor John Ruggie as Special Rapporteur for Business and Human Rights. Ruggie was tasked to “*identify and clarify standards of corporate responsibility*”, including the role of governments, with respect to human rights. Six years later, after comments from thousands of stakeholders in 120 countries (business enterprises, civil society and governments), he produced the UN Guiding Principles on Business and Human Rights (UNGP). This *soft-law* instrument was endorsed unanimously by the UN Human Rights Council (HRC). Its core provisions on corporate responsibility to respect human rights were also incorporated into new human rights chapters in numerous international charters, including the OECD Guidelines for Multinational Enterprises, ISO26000, the European Union’s new Corporate Social Responsibility Strategy, and the new Sustainability Policy of the International Finance Corporation.¹

These developments are unprecedented. Human rights responsibilities of business enterprises have never before authoritatively been agreed to by a convergence of international and national institutions “with support from all relevant stakeholder groups, individual companies from a wide range of countries and the world’s major business associations, corporate law firms and the International Bar Association and American Bar Association, international trade unions and civil society organizations.”²

A Grotian Moment?

I am a child that has not only lived through World War II but also in the post-World War II period, where, in fact, there was the creation of a lot of institutions, which were supposed to deal with the turbulence... What troubles me at the moment is that there is a real question as to whether the

organisations work, whether they are properly suited for the 21st century. And the reason I say that, is that they are based on the concept of the nation state... **There is something new in the world today, which is non-state actors...** [which] are not just the terrorists. Non-state actors are also businesses and non-governmental organizations, and a variety of different stakeholders (emphasis added).³

On November 8, 1989, the world was still divided between East and West. NATO and Warsaw Pact troops faced each other across closed borders, and CD-ROMs for personal computers had not yet been invented. In less than 25 years, every aspect of modern society has changed beyond expectation. Technology, medicine, travel, communication, information, trade, economies and even climate have all changed beyond recognition. Law, which tends to resist rapid change, is compelled to relate to fundamental changes in the bedrock assumptions upon which it has been constructed over centuries of jurisprudence.

“*Grotian Moments* [is] a term that denotes radical developments in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance... Usually this happens during a period of great change in world history...”⁴

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1. For a detailed review of the background and history of the adoption of the Guiding Principles on Business and Human Rights, see: www.business-humanrights.org/UNGuidingPrinciplesPortal/BackgroundHistory - and links within this site.
 2. Andrea Shenberg, *New Global Standards for Business and Human Rights*, 13 BUSINESS LAW INTERNATIONAL 27 (2012). Shenberg served as Legal Advisor to John Ruggie from 2007 until the end of his mandate in 2011.
 3. Madeleine Albright, IBA Global Insight, Dec. 2013/Jan. 2014, p. 18.
 4. Michael P. Scharf, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS, pp. 1 and 5 (2013).

Business requires stability. Law strives for predictability. During rapid or radical change, business and law are challenged. Success depends upon the ability of lawyers and business management to recognize change and understand the trends and act to develop strategies to not only survive the change, but also discover opportunities and adapt.

Globalization and the end of the cold war have set the scene for a renewed debate on the meaning of law, rooted in and reminiscent of the debate that occurred at the end of that century's previous great conflict, World War II . . . The emerging legal order addresses not merely states and state interests and perhaps not even primarily so. Persons and peoples are now at the core, and a non-sovereignty-based normativity is manifesting itself...⁵

The United Nations Guiding Principles: Three Pillars

The UNGPs are built upon three pillars:

The first pillar: the state's **duty to protect** human rights.

The second pillar: corporate **responsibility to respect** human rights.

The third pillar: access to **remedies** for victims of business-related abuses.

States' Obligation to Protect Human Rights

States have the primary responsibility to prevent human rights abuses, provide business enterprises with guidance and regulations to assist businesses to respect human rights, and create the infrastructure for access to remedies, both judicial and non-judicial, for victims of human rights abuses. This is the duty of the state; it is not voluntary. States are required to *protect* human rights.

The primary tools for the state in protecting human rights are: enacting laws and promulgating regulations to guarantee and protect human rights; enforcing those laws; punishing abusers of human rights by imposing administrative, civil and criminal penalties and removing obstacles to justice for victims of human rights abuse.⁶

The duty of the state to prevent human rights abuse includes all human rights abuses occurring within the territory and/or jurisdiction of the state. States are not per se responsible for the human rights abuses of private actors, but states may be held liable where they or agencies controlled by the state commit human rights abuses or where a state fails to prevent, investigate, punish or redress private actors' abuse.⁷

States must enunciate clearly the expectation that all

business enterprises (irrespective of size) within their jurisdiction *respect* human rights.⁸ While states presently are not obligated, under international law, to regulate extraterritorial activities of businesses domiciled in their country, there is no prohibition of doing so.⁹

States must help ensure that business enterprises operating in conflict affected areas are not involved in human rights abuses.¹⁰ It is assumed that in conflict zones, the local states do not have strong rule of law institutions and are either corrupt or incapable of protecting human rights. Therefore, the "home" states of transnational corporations operating in such conflict areas have a role to play in assisting both the corporations and the relevant state actors to protect human rights and prosecute abuses.¹¹

In some cases, business leaders are calling for state action to support obligations on businesses to respect human rights throughout their international operations and supply chains.

Investors with a total of £195 billion in assets under management are calling for Transparency in Supply Chains (TISC) legislation to be embedded in the UK modern slavery bill... Human rights abuses not only present ethical concerns but also place financial returns at risk...Complex supply chains can leave business vulnerable to association with human rights abuses and... embedding transparency legislation will encourage companies to take action. Failure to manage human rights abuses can "impact dramatically on companies and their shareholders" due to reputations being damaged and supply chains being disrupted.¹²

5. Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667 (2008) available at ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4395&context=flr (last visited May 2, 2014).
6. U.N. Guiding Principles on Business and Human Rights, principle 1, available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited May 22, 2014).
7. U.N. Guiding Principles on Business and Human Rights, commentary to principle 1, available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited May 22, 2014).
8. *Supra* note 6, principle 2.
9. *Supra* note 7, commentary to principle 2.
10. *Supra* note 6, principle 7.
11. *Supra* note 7, commentary to principle 7.
12. Charlotte Malone, *Investors Call for Supply Chain Transparency*

Corporate Responsibility to Respect Human Rights

The second pillar of the UNGPs is corporations' responsibility to respect human rights. Unlike the state responsibility to protect human rights, which is obligatory upon states (and all entities controlled by states), corporate responsibility to respect human rights is not mandatory. Business enterprises "should" respect human rights. "This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."¹³

It should be noted that business enterprises should ensure that not only do they themselves refrain from causing human rights abuses, but also that they refrain from being complicit in such adverse impacts. Complicity has both legal and non-legal meanings. Legally, complicity usually entails knowing about or intentionally providing material support for the perpetrator of a crime. Corporations and management may be held criminally liable and punished, as well as civilly liable for damages. Non-legal complicity occurs where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices within its supply chain. In such a case, a company will not be held legally liable, but could suffer harm to its reputation and/or sales.¹⁴

The goal, stated in the commentary to the UNGPs, is to establish a global standard of expected conduct for all business enterprises, large and small.¹⁵ The underlying assumption is that it is in the interest of business enterprises to respect human rights. Failure to do so creates an economic risk to business. The risks are numerous.

First, there is the possibility of becoming entangled in legal disputes with various stakeholders. These can be governments, civil society organizations, labor unions, employees, consumers, investors, financiers or citizens adversely affected by business activities and/or environmental impacts. Corporate responsibility to respect human rights exists independently of any state's obligation to protect human rights and applies even in jurisdictions where states fail to protect human rights or violate human rights themselves.¹⁶

Second, business enterprises risk damage to their reputations which can adversely affect sales. For example, Apple produces 90 percent of its products in China. China Labor Watch published a report detailing 86 labor rights violations, including 36 legal violations and 50 ethical violations.¹⁷ "The New York Times wrote an in-depth series about working conditions at Apple's partner sites, and Change.org in 2013 delivered a petition signed by hundreds of thousands of consumers asking Apple to take a more forceful stance with suppliers in China."¹⁸ Over 30,000 people signed a similar petition demanding

that Dolce & Gabbana and other fashion designers stop sandblasting jeans after it was discovered that in Turkey the technique endangered the lives of workers.¹⁹

The UNGPs do not create new, substantive *human rights*. Human rights have already been listed in numerous international conventions; and, at a minimum, are those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights) and the principles enunciated in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.²⁰

The responsibility to respect human rights impacts business enterprises in two fundamental ways: First, corporations should avoid causing or contributing to adverse human rights impacts through their own activities, by taking adequate measures for their prevention,

Legislation in UK Modern Slavery Bill, March 27, 2014, available at blueandgreentomorrow.com/2014/03/27/investors-call-for-supply-chain-transparency-legislation-in-uk-modern-slavery-bill/ (last visited May 22, 2014).

13. *Supra* note 6, principle 11.

14. U.N. Corporate Responsibility to Respect Human Rights, available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (last visited May 9, 2014).

15. *Supra* note 6, principle 14.

16. *Supra* note 7, commentary to principle 11.

17. Apple's supplier Pegatron Group violates workers' rights, July 29, 2013, available at www.chinalaborwatch.org/news/new-459.html (last visited May 9, 2014). The violations fall into 15 categories: dispatch labor abuse, hiring discrimination, women's rights violations, underage labor, contract violations, insufficient worker training, excessive working hours, insufficient wages, poor working conditions, poor living conditions, difficulty in taking leave, labor health and safety concerns, ineffective grievance channels, abuse by management, and environmental pollution

18. *Apple's Supplier Labor Practices in China Scrutinized after Foxconn, Pegatron Reviews* FORBES, Dec. 12, 2013, available at www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in-china-scrutinized-after-foxconn-pegatron-reviewed/ (last visited May 9, 2014).

19. *Dolce & Gabbana in dock over 'killer jeans'*, THE GUARDIAN, Aug. 10, 2011, available at www.theguardian.com/world/2011/aug/10/italian-fashion-killer-jeans-sandblasting (last visited May 9, 2014).

mitigation and cure; and second, they should seek to prevent or mitigate adverse human rights impacts caused by others who are directly linked to their operations, products or services through their business relationships. In short, business enterprises are expected to use economic leverage within their supply and distribution chains in order to persuade other business enterprises to respect human rights.²¹ The key to corporations' fulfilling their responsibility to respect human rights rests upon three points: policy, due diligence and a process for cure.²²

Policy Commitment

The policy must be approved by the most senior levels of management and be communicated throughout the organization, enunciating the company's expectations of its personnel, business partners and others linked to its products or services to respect human rights. It must be publicly available and embedded in operational policies and practices throughout the enterprise.²³

Human Rights Due Diligence

The emerging global standard is that business enterprises must practice human rights, due diligence and assessments. Due diligence and assessments can be divided into three categories: 1- assessing actual operations; 2- assessing future investments and planned operations; and 3- tracking and monitoring complaints, mitigation and remedying processes.

Each of these assessments needs to be conducted within and throughout the business enterprise (including subsidiaries and affiliates), as well as throughout its supply and distribution chains. The initial step is to identify and access the nature of actual and potential adverse human rights impacts. Special attention should be given to operations conducted in jurisdictions where corruption is widespread, areas where weak institutions or traditions of rule of law prevail, conflict zones or where individuals from groups or populations may be at heightened risk of vulnerability or marginalization.²⁴ Business enterprises should consult with external experts to develop proper models for assessment in diverse jurisdictions and consult with local stakeholders. Human rights assessments should be ongoing and conducted at regular intervals as well as prior to engaging in a new activity or relationship, prior to major decisions such as market entry and prior to product launch or policy changes.²⁵

On assessing risks, corporations need to implement due diligence and publish their findings. The information should be in a form and frequency that is accessible to the intended audiences and stakeholders, provide sufficient information for evaluation of an enterprise's response to any particular human rights impact, and avoid

posing a risk to affected stakeholders, personnel or legitimate requirements of commercial confidentiality.²⁶

Due diligence and reporting is only the first step in respecting human rights. Adverse impacts must be effectively addressed.²⁷ Where the adverse impact is caused by the business enterprise, the enterprise is obliged to cure the adverse impact by itself or in cooperation with other parties. Where the adverse impacts have not been caused or contributed to by the business itself but are directly related to its operations, products or services, the enterprise is not required to provide the cure.²⁸

Businesses should track the effectiveness of their responses to actual and potential adverse human rights impacts and verify whether the impacts are properly mitigated or remedied. Depending upon the circumstances, verification should be by both internal and external human rights auditors.²⁹

Corporate Social Responsibility Reporting has already become a standard practice among the largest companies. According to KPMG's Global Survey on Corporate Responsibility Reporting (surveying the 100 largest companies (public and private) in each of 41 countries), 76 percent of the largest companies in the United States, 73 percent in Europe and 71 percent in Asia Pacific, publish annual CSR reports.³⁰ Seventy-eight percent of the companies utilize the Global Initiative Guidelines.³¹

20. *Supra* note 6, principle 12 and commentary to principle 12.

21. *Supra* note 6, principle 13.

22. *Supra* note 6, principle 15.

23. *Supra* note 6, principle 16.

24. *Supra* note 7, commentary to principle 18.

25. *Id.*

26. *Supra* note 6, principle 21.

27. *Supra* note 6, principle 22.

28. *Supra* note 7, commentary on principle 22.

29. *Supra* note 6, principle 20.

30. The KPMG Survey of Corporate Responsibility Reporting 2013, available at www.kpmg.com/global/en/issuesandinsights/articlespublications/corporate-responsibility/pages/default.aspx (last visited May 9, 2014).

31. G4 Sustainability Reporting Guidelines, available at www.globalreporting.org/reporting/g4/Pages/default.aspx (last visited May 9, 2014). The GRI Sustainability Reporting Guidelines (the Guidelines) offer Reporting Principles, Standard Disclosures and an Implementation Manual for the preparation of sustainability reports by organizations, regardless of their size, sector or location. The Guidelines also offer an international reference for all those interested in the disclosure of governance approach and of the environmental, social and economic performance and impacts of organizations.

Responsible Investment

Responsible investment is an approach to investment that explicitly acknowledges the relevance to the investor of environmental, social and governance factors, and of the long-term health and stability of the market as a whole. It recognizes that the generation of long-term sustainable returns is dependent on stable, well-functioning and well governed social, environmental and economic systems.³²

There is growing recognition in the financial community that effective research, analysis and evaluation of environmental, social and governance (ESG) issues are a fundamental part of assessing the value and performance of an investment over the medium and longer term, and that these steps should inform asset allocation, stock selection, portfolio construction, shareholder engagement and voting. Responsible investment requires investors and companies to take a wider view, acknowledging the full spectrum of risks and opportunities facing them, in order to allocate capital in a manner that is aligned with the short and long-term interests of their clients and beneficiaries.³³

Principles of responsible investment are becoming a global standard for the financial sectors, especially government and private investment funds, lenders, management of multinational enterprises and shareholders. Active responsible ownership requires investors to use their votes as well as access to engage management to encourage companies to improve their ESG performance and reporting. Negative screening involves excluding companies from the investment universe based upon their products, activities, policies or performance. For government pension funds, screening is obligatory, in accordance with the UNGPs. Standards of principles of reasonable investment are rapidly expanding into private sector funds.

The Danish Institute of Human Rights (DIHR) has developed and has made available to investors the Human Rights Compliance Assessment (HRCA), a comprehensive tool designed to detect human rights risks in company operations. It covers all internationally recognized human rights and their impact on all stakeholders, including employees, local communities, customers and host governments.³⁴ The tool incorporates a database of 195 questions and 947 indicators, each measuring the implementation of human rights in company policies and procedures. The database incorporates the Universal Declaration of Human Rights and more than 80 human

rights treaties and International Labor Organization conventions. DIHR publishes a country guide that provides country-specific guidance to help companies respect human rights and raise awareness of human rights issues.³⁵ Currently, ten states are listed in the Country Guide. Information about additional countries will be added as DIHR completes its research projects.

Under the UNGPs, governments are obliged to adhere to reasonable investor standards in managing and investing government funds, such as pension and sovereign wealth funds. The largest pension fund in the world is the Norwegian Government Pension Fund – Global with a current value of approximately \$830 billion (forecast to exceed \$1 trillion by 2019). This fund prohibits investments in companies engaged in business in nine categories which have been designated as sectors excluded for investment.³⁶ Currently, investment in 63 companies is prohibited. The excluded companies are from the United States, Europe, China, Japan and elsewhere. Three companies are excluded because of serious or systematic human rights violations – two Walmart enterprises (the largest retailer in the United States) and Zuari Argo Chemicals Ltd. Three companies—all Israeli—are excluded because of serious violations of the rights of individuals in situations of conflict or war: Africa-Israel Investments; Danya Cebus; and Shikun and Binui Ltd. Of the two

32. Principles for Responsible Investment, available at www.unpri.org/introducing-responsible-investment/ (last visited May 9, 2014).

33. *Id.*

34. Human Rights Compliance Assessment, available at hrca2.humanrightsbusiness.org/Default.aspx (last visited May 9, 2014). Developed over 6 years with the participation of 80 companies and human rights organizations and 14 European governments.

35. Human Rights and Business Country Guide, available at www.bghr.org/ (last visited May 9, 2014). Argentina, Brazil, Colombia, Denmark, Nicaragua, Peru, Serbia, Tanzania, Zambia and Zimbabwe.

36. www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122 (last visited May 9, 2014). Anti-personnel mines; cluster weapons; nuclear arms; sale of weapons to Burma; tobacco; serious or systematic human rights violations; severe environmental damages; serious violations of fundamentals of ethical norms; serious violations of the rights of individuals in situations of conflict or war.

companies excluded because of serious violations of fundamentals of ethical norms, one is Canadian and the other Israeli—Elbit Systems Ltd.

In the private sector, a leader in sustainable and responsible investing is Calvert Investments, with \$12.5 billion in assets under management and 400,000 investors.

Calvert is committed to transparency and corporate responsibility as core values... As a fiduciary, we take our responsibility seriously and have an established record of exercising proxy voting rights on the issues that matter to our shareholders. We were among only a handful of financial firms to first publish a formal Corporate Sustainability Report³⁷ that highlights our own practices.... Calvert is a founding participant of the United Nations Global Compact and is fully committed to its ten universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption. In April 2006, Calvert helped create the *Principles for Responsible Investment*, a joint program with the UN Global Compact.³⁸

Access to Remedies

The third pillar of the UNGPs is access to a remedy for the victims of adverse human rights impacts. States have the duty to provide access to an *effective* remedy for all those affected by business-related human rights abuses.³⁹ States must provide judicial, administrative, and legislative initiatives to ensure that effective remedies exist when business-related human rights abuses occur within their territory or under their jurisdiction (this can include abuses occurring outside of their territory by companies based or operating within their jurisdiction). Access to an effective remedy has both procedural and substantive aspects. Procedurally, states must ensure that there are no unreasonable obstacles to access to remedies. Remedies may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as injunctions or guarantees of non-repetition.⁴⁰

In order to provide effective remedies, states must remove obstacles to access to a remedy. Such obstacles include costs of bringing claims which go beyond an appropriate deterrent to unmeritorious cases, lack of incentives for lawyers to represent indigent claimants, inadequate options for aggregating claims (such as class actions) and inadequate resources for state prosecutors to meet the state's obligations to investigate business

involvement in human-rights related crimes.⁴¹

An important tool in access to remedies is the establishment of "*grievance mechanisms*." A "grievance" is a

perceived injustice invoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities... Grievance mechanism is ... any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy sought.⁴²

Examples of a state-based grievance mechanism include ombudsperson offices and "National Contacts Points" under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development. Non-state-based grievance mechanisms may be established by business enterprises themselves or in conjunction with stakeholders, or by industry associations, multi-stakeholder groups, or national or regional human rights associations.⁴³ These types of mediation-based grievance mechanisms may be the most effective and cost efficient means for both affected persons and business enterprises to provide remedies and quickly address actual and perceived abuses. In order to be effective, grievance mechanisms must be available to all stakeholders and the public must be made aware of the existence of such mechanisms.

The Boycotts, Divestment and Sanctions Movement

The UNGPs have no connection to the Boycotts, Divestment and Sanctions (BDS) movement, which is aimed at undermining the Israeli economy. "In 2005, Palestinian civil society issued a call for a campaign of boycotts, divestment and sanctions (BDS) against Israel

37. www.calvert.com/about-csr-reports.html (last visited May 9, 2014).

38. www.calvert.com/choose-key-shareholder.html (last visited May 27, 2014).

39. *Supra* note 6, principle 25.

40. *Supra* note 7, commentary on principle 25.

41. *Supra* note 7, commentary on principle 26.

42. *Supra* note 7, commentary on principle 25.

43. *Supra* note 7, commentaries on principles 27 and 28.

until it complies with international law and Palestinian rights.”⁴⁴

BDS, as stated on its webpage, is a *political* movement aimed at the State of Israel and not at businesses, either Israeli or Palestinian, believed to have an adverse human rights impact within Palestine or Israel. Scrutiny of the 170 Palestinian “civil societies” that founded BDS reveals that a large number of such groups reject any peace arrangement between Israelis and Palestinians based upon a two-state solution, in effect rejecting any notion of the continued existence of Israel as a state.

BDS will attempt to coopt the UNGPs and utilize these principles, wherever convenient. For example, BDS activists organized a letter sent by 29 Members of the EU Parliament to Baroness Catherine Ashton on March 14, 2014.

We are requesting that the EEAS takes action to discourage European businesses from engaging in activities that facilitate the on-going expansion of Israeli settlements, which are illegal under international law... The UN Guiding Principles on Business and Human Rights, which were endorsed by the EU, make it clear that governments have an obligation to ensure that businesses domiciled in their territory do not contribute to human rights abuses in their overseas operations, including by providing advice and guidance... We urge the EEAS to publish guidance discouraging European firms from maintaining economic relations with the settlements. Furthermore, the EU should use its presence in Israel and the occupied Palestinian territories to educate European businesses about the problems and risks associated with such relations and to encourage Member States to take similar action.⁴⁵

Israeli businesses need to differentiate between grievances made in accordance with the UNGPs and actions taken by BDS. The UNGPs specifically reject the notion of “divestment” except in extraordinary circumstances, when all else fails. Business enterprises, under the UNGPs, are directed to increase engagement

where human rights abuses occur, and utilize leverage to help mitigate and remedy any abuses. Sanctions are not part of the UNGPs.

Israeli companies are vulnerable to claims of adverse human rights abuses in cases where their operations may adversely impact Palestinians in the West Bank or Gaza regions. Whether or not settlement within these territories is actually a violation of international law has become rather irrelevant because the international consensus is that building and expansion of the settlements is “illegal.” Israeli companies conducting business in these territories or whose supply chains extend into these territories need to establish policies, due diligence, and grievance mechanisms that can demonstrate their overall compliance with the UNGPs and their respect for human rights. This is not an impossible task but it will require honest effort.

In order to be able to deal effectively with the rapid sea change happening within international law, all Israeli companies must understand and implement the UNGPs. Israeli attorneys need to learn these principles and advise their clients on effective ways to structure their business in compliance with the recommendations of the UNGPs and respond to requests from foreign businesses and government entities for information and due diligence demonstrating Israeli companies’ compliance with the emerging global standards of business and human rights.■

Gavriel Mairone is the founder of MM-Law LLC, a law firm dedicated to advancing international human rights law by representing victims of terrorism, torture, crimes against humanity and genocide in private lawsuits to force accountability upon the financiers, profiteers, aiders and abettors of the perpetrators of such crimes. Adv. Mairone is an expert in international terrorist financing and a pioneer in the development of legal remedies available to terror victims.

44. www.bdsmovement.net/ (last visited May 9, 2014). The BNC’s mandate and role is: To strengthen and spread the culture of boycott as a central form of civil resistance to Israeli occupation, colonialism and apartheid...To serve as the national reference point for anti-normalization campaigns within Palestine...www.bdsmovement.net/BNC (last visited May 9, 2014).

45. Letter to Catherine Ashton (March 25, 2014) available at www.eccpalestine.org/wp-content/uploads/2014/03/Letter-on-Corporate-Complicity-with-the-Settlements.pdf (last visited May 9, 2014).

Zivotofsky v. Kerry: A Historic Constitutional Battle

Nathan Lewin

In the first week of November 2014, I will be privileged to present oral argument in the United States Supreme Court in a case that will immediately affect about 50,000 American citizens, but may have much broader and lasting impact on powers of the President and the Congress under the United States Constitution. The case – now titled *Zivotofsky v. Kerry* – was begun in 2002, shortly after the plaintiff Menachem Binyamin Zivotofsky was born in Shaare Zedek Hospital in Western Jerusalem on October 17, 2002.

Less than three weeks before Menachem's birth, President George W. Bush signed a law that Congress had enacted, granting American citizens born in Jerusalem the right to list their "place of birth" on their U.S. passports as "Israel." The passport provision at issue in this case is part of a larger law entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," in which Congress repeated its desire to "immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." The first three subsections of the law relate to the Embassy location. Subsection (d), however, which is the only section at issue in the *Zivotofsky* case, states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

This provision was designed to change the policy that the State Department had been following regarding American citizens born in Jerusalem. Babies born anywhere in the world to parents who are both United States citizens have American citizenship from birth. And, of course, someone born in Jerusalem may obtain American citizenship later in life. American passports bear date-of-birth and place-of-birth designations. The State Department ordinarily identifies U.S. citizens born outside the United States in their passports by the *country* in which they were born. I, for example, was born in Lodz, Poland. My American passport lists "Poland" as my place of birth; it does not mention Lodz.

Asserting that the United States does not recognize any

part of Jerusalem as being within Israel, the State Department currently issues American passports to Jerusalem-born U.S. citizens listing the city, "Jerusalem," *instead* of the country. No country is named on American passports of American citizens born in Jerusalem. American citizens born in Tel Aviv or Haifa or in any other city within the pre-1967 borders of Israel carry passports that show "Israel" as their place of birth. (A specific exception is made by the State Department for American citizens who were born in Israel but object to showing "Israel" as their place of birth. They may remove "Israel" from their passport and designate their city of birth instead.) The 2002 law was designed to compel the State Department to show "Israel" as the

birthplace of any U.S. citizen born in Jerusalem who wants to specify "Israel" as his or her birthplace. Unlike the provision that directs that the United States Embassy be located in Jerusalem, the passport provision gives the President no authority to delay enforcement.

When President Bush signed the law in 2002, his office issued a "signing statement" that declared that the newly enacted statute "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." This "signing statement" applied not only to the provision that concerns the location of the embassy. It covered the statutory instruction regarding passports and birth certificates of citizens born in Jerusalem.

One Congressman who was very instrumental in having that law enacted called the office of Lewin & Lewin and said that he wanted us to bring a lawsuit on his behalf to compel the Secretary of State to comply with the law, notwithstanding President Bush's "signing statement." We notified the Congressman that under binding decisions of the Supreme Court, a Congressman did not have "standing" to bring such a lawsuit. Only an individual who was personally denied the right that the law created would be able to bring to an American federal court his or her legal claim to have his or her passport say "Israel" rather than "Jerusalem."

The Congressman urged us to find such a plaintiff. We



knew that the Zivotofskys, both of whom were born in the United States and retained U.S. citizenship after their *aliya*, were expecting the birth of a child who would be delivered at Shaare Zedek Hospital in Jerusalem. When they heard of the new law that gave their baby, whom they named Menachem Binyamin, the right to have a passport recognizing that he was born in Israel, Ari and Naomi Zivotofsky undertook to enforce it. After Menachem was born, his mother applied for a passport at the U.S. Embassy in Tel Aviv and asked that the passport show Israel as Menachem's country of birth. Applying the instruction in the State Department's *Foreign Affairs Manual* that forbids designating Jerusalem as being in Israel, the Embassy rejected her request. Menachem's passport and American birth certificate say that he was born in "Jerusalem" despite the law's directive that pursuant to his parents' request his place of birth be listed as "Israel." And so, at less than one year old, Menachem Binyamin Zivotofsky became our law firm's youngest client.

This *pro bono publico* lawsuit started by our firm in September 2003 has now passed its tenth anniversary. The Department of State first responded to our lawsuit by claiming that Menachem had no "standing" to object to the place-of-birth designation in his passport. After all, they said, he has a valid U.S. passport. What difference does it make how his birthplace is characterized in his passport?

The federal district judge accepted this argument and dismissed our case on the ground that Menachem lacked "standing." We appealed because the law explicitly gave Menachem (or his parents, who spoke for him) the right to have a particular birthplace designation in his passport, and this, we said, gave him "standing" to enforce that legal right in court. In February 2006, a unanimous panel of three judges of the United States Court of Appeals agreed with our position and referred the case back to the lower-court judge.

The district judge had also concluded that our lawsuit presented an issue that American courts cannot decide because it is a "political question." This is a self-imposed restriction on judicial authority that American courts have adopted. Unlike Israeli courts, which have no limitation that prevents them from resolving "political questions," courts in the United States deem "political questions" to be "nonjusticiable" because, they say, there are no "judicially discoverable and manageable standards" for resolving such issues.

In reversing the lower-court dismissal of our case, the Court of Appeals said that discovery should be conducted in the lower court so that the court would have information to decide whether our complaint seeking enforcement of

Congress' 2002 law presented a "political question." The State Department acknowledged in the discovery phase of the case that the birthplace designation in a passport is principally used to identify American citizens abroad. It has no international diplomatic significance.

The State Department reported that between June 1996 and June 2006, it had issued 99,177 U.S. passports identifying American citizens as born in "Israel" and 52,569 passports that listed the bearer's place of birth as "Jerusalem." We asked the State Department to "describe specifically any harm to the foreign policy of the United States that would result if American citizens born in Jerusalem carried U.S. passports that showed their 'place of birth' as 'Israel.'" The answer was a long-winded response covering ten paragraphs that asserted that "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel."

The State Department's response claimed that "any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap." We were told in this answer to our interrogatory that "the Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own." This could "cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict."

After a recitation of the few public condemnations of the 2002 law by "Palestinians from across the political spectrum" that the State Department could find, it predicted that a reversal of a "central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." Although the State Department could cite no study of the foreign-policy consequences of permitting Jerusalem-born citizens to carry passports identifying their place of birth as "Israel," the State Department stated that "such listing or designation would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty."

These dire predictions, however, ignore an important historical precedent. In November 1994, Congress had enacted a law concerning Taiwan that paralleled the law involved in the *Zivotofsky* case. U.S. foreign policy had, by 1994, recognized the island of Taiwan as part of the communist Republic of China. The Chinese government felt so strongly that Taiwan should not be recognized as independent in any official document that it refused to stamp Chinese visas on passports bearing “Taiwan” as a place of birth. Yet many American citizens born in Taiwan who opposed the Chinese government did not want to carry passports identifying themselves as born in the Republic of China. Congress passed a law directing the Secretary of State to comply with requests of those who wanted their passports to state that they were born in “Taiwan.” Notwithstanding China’s strong opposition, the State Department acquiesced in 1994 and issued an instruction to consular officers to substitute “Taiwan” for the Republic of China if requested by a citizen born in Taiwan. The instruction made clear that this was not a change in America’s official policy regarding Taiwan. The State Department declared: “Although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The U.S. recognizes the government of the People’s Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China.”

The State Department’s attempt to distinguish the Taiwan precedent when we cited it in our case was incomprehensible. Its brief in the Court of Appeals said: “The State Department began listing Taiwan only after determining that doing so would be consistent with the United States’ recognition that the People’s Republic of China is the ‘sole legal government of China’ and acknowledgment of the Chinese position that ‘Taiwan is a part of China.’” In fact, the 1994 statement said just the opposite – that American foreign policy did not accept Taiwan as a foreign state. The 1994 statement proves that the passport’s place-of-birth identification will not be perceived as a recognition by the United States of Israeli sovereignty over all of Jerusalem.

When the *Zivotofsky* case returned to the District Court, the judge – a graduate of Harvard Law School who had many years of judicial experience – dismissed our claim a second time. As she had done years earlier, she reached her decision without even hearing oral argument. On the basis of written submissions alone, she ruled that our complaint presented a “political question” that could not be decided by a federal court. She explained, in a remarkable mis-statement of the legal issue before her, that a decision on the merits of our claim “would

necessarily require the Court to decide the political status of Jerusalem.”

This led to a second appeal before three different appellate judges. The case was argued in October 2008 and a decision issued in July 2009. (Menachem was then almost seven years old.) This time, two judges agreed with the lower court and affirmed her dismissal of the case because it presented a “political question.” They did not share her perspective that the case required a decision on the “political status of Jerusalem,” but they said that resolving the legal issue “would necessarily draw [the court] into an area of decisionmaking the Constitution leaves to the Executive alone.” In other words, only the President has the authority under the Constitution to decide whether Jerusalem is part of Israel. Consequently, the courts have no business reviewing that Executive Branch decision.

A strong thirteen-page dissent on the “political question” issue came from Circuit Judge Harry Edwards, the most senior of the three judges on the appellate panel and a former Chief Judge of the Federal Court of Appeals in the District of Columbia. Judge Edwards disagreed on the justiciability of the case. He said that the constitutional question – whether the President could disobey this particular law on the ground that it infringed on his exclusive power to recognize foreign governments – could and should be decided by the court. He dismissed any argument to the contrary as “specious.”

The bottom line of Judge Edwards’ dissent was not, however, favorable to our claim that Congress’ law should be enforced. Although he believed that the case had to be decided because the issue was not a “political question,” he concluded that Congress’ law was unconstitutional because it infringed Presidential authority “in furtherance of the recognition power.” We petitioned for a rehearing before the full nine judges of the Court of Appeals, and three judges noted that they would grant a rehearing.

So we proceeded to the next level in America’s judicial hierarchy – the Supreme Court of the United States. It has total control of its own docket and agrees to hear about 75 cases in each Term of Court of approximately 1,500 paid petitions that are filed with it. (In addition, the Court receives an equal number of requests for review each year from prisoners and others who do not print their applications and are too poor to pay the filing fee.) The Court need not state any reason for accepting or denying review of a case. (The application to the Court requests that it issue a “writ of certiorari,” which is the traditional order directing that the case be brought before it.) The Justices ordinarily do not disclose how they voted at this stage of the process. All that is known is whether four of the Court’s nine members voted to hear a case. If

they did, the “Order List” that is published (ordinarily on Monday mornings) says, “Certiorari Granted.”

In our “Petition for a Writ of Certiorari” – our application to the Supreme Court – we presented for the Court’s review only the “political question” issue and did not ask the Supreme Court to decide the ultimate constitutional question of Congress’ power to disagree with any aspect of the State Department’s policy affecting Jerusalem. The Supreme Court treats the “Question Presented” in an application for review very seriously and refuses to consider legal issues that are not encompassed by the questions defined in the petition.

Although the State Department filed a vigorous opposition to our request for Supreme Court review, in May 2011, the Court announced that our petition was granted. Much to our surprise, however, the Supreme Court took a step that it rarely, but occasionally, does take. It added the following directive to the announcement granting the petition for certiorari: “In addition to the question presented by the petition, the parties are directed to brief and argue the following question: ‘Whether Section 214 of the [2002 law] impermissibly infringes the President’s power to recognize foreign sovereigns.’” As a result the “merits” of the case, which had never before been briefed in the case’s eight-year history, were briefed for the first time before the Supreme Court.

The Supreme Court’s Rules limit the number of words in briefs filed with the Court. We compressed the discussion of the “political question” issue into ten pages of our brief and spent more than double that number in arguing that Congress’ law was constitutional. The State Department had claimed that by directing that passports identify Jerusalem-born citizens as born in Israel, Congress was interfering with the President’s “exclusive” authority to grant recognition to foreign sovereigns. No language in the United States Constitution gives the President “recognition authority,” but the State Department argued that the authority given the President by Article II, Section 3 of the Constitution to “receive Ambassadors and other public Ministers” was intended to allow the President – and *only* the President – to grant official recognition to the government of a foreign territory. The late Professor Louis Henkin of Columbia University, a foremost expert on foreign affairs and the U.S. Constitution, noted in his treatise that the constitutional “receive ambassadors” language did not seem to be granting exclusive power to the President. It was, he said, “couched rather as a duty, an ‘assignment.’”

May Congress overrule a President’s “recognition” decision? Does the President have the sole authority to decide questions of foreign policy? Is an instruction that passports identify Israel as the birthplace of an American

citizen born in Jerusalem who chooses to be so identified an interference with a “recognition” decision? These were some of the very interesting and important questions that had to be addressed in resolving whether Congress’ 2002 law was constitutional.

The extent of the President’s authority in the area of recognition of foreign governments had not been a subject of extensive scholarly research before Professor Robert Reinstein of Temple University Law School recently reviewed the historical documentation in great detail. We relied heavily on his meticulous analysis that concluded that the drafters of the Constitution never vested “a plenary recognition power . . . in the President” and that they certainly never gave the President any exclusive authority in this area. (Professor Reinstein continued researching American history that followed adoption of the Constitution, and his conclusion in an article published in 2014 supported our position even more compellingly.)

The State Department’s brief in the Supreme Court presented in thirteen pages its view of the history of Congressional and Presidential involvement in “recognition authority.” The brief asserted that the President has “exclusive power to recognize foreign sovereigns.” Our Reply Brief cited “substantial proof to the contrary” beginning with a decision of Chief Justice John Marshall through the experiences of Presidents Monroe, Jackson, Taylor and Lincoln in recognizing newly established foreign governments. In each case, Congress participated actively in the recognition decision. We said that “Presidents who were confronted with controversial recognition issues acknowledged that action or approval by Congress was necessary before a foreign government would be formally recognized.”

Oral argument before the Supreme Court was held on November 7, 2011, after Menachem had celebrated his ninth birthday. Although he had never before left Israel’s borders and was reluctant to do so on this occasion, his parents persuaded him to visit Washington and listen in court as his case was presented. The photographers had a field day, and photos of Menachem and Ari striding hand-in-hand in front of the Supreme Court building (with Alyza Lewin in the background) made the front pages of newspapers in the United States and in Israel.

Lawyers who have had the heady experience of arguing before the Supreme Court (which I have done in 28 cases) say there is no comparable experience in legal practice. You have precisely 30 minutes to present your best case to the nine people who will be making the decision – an opportunity unequalled in any other presentation to an American government agency. The event is totally spontaneous and unrehearsed, and almost all your time is spent answering questions from the nine individuals

who are at the very peak of America's legal pyramid. I managed to utter 83 words before Justice Elena Kagan asked the first question: "Well, Mr. Lewin, what power is Congress exercising here?" My answer that it was exercising a power over passports was interrupted by Justice Samuel Alito, who called attention to the fact that the title and larger portion of the 2002 law concerned the obviously sensitive foreign-policy issue of moving the U.S. Embassy to Jerusalem.

Before I sat down I had fielded questions from all the Justices with the exception of Justice Clarence Thomas, who is known never to ask questions during oral argument. A light moment occurred when I argued that Congress' law did not dictate any foreign policy but merely permitted American citizens to choose how they wanted to identify their birthplace. Justice Kagan asked me whether I would not have a "better argument" along that line if a citizen could pick "Jerusalem," "Israel," or "Palestine." I replied that this was precisely what would be permitted under Congress' law because the State Department's regulation allows any person born before 1948 to choose "Palestine." Justice Kagan – then 51 years old (and the youngest justice on the Court) – responded, "Well, you have to be very old to say Palestine." Justice Ruth Ginsburg – who was then 78 (and the Court's oldest justice) – immediately interjected, "Not all that old." The audience roared with laughter.

After oral argument comes the long wait for a decision. Since the Supreme Court invariably follows the practice of deciding all argued cases before it adjourns at the end of June, we knew that a ruling would come in a few months. (Lower federal courts set no time limits for themselves, and I have been in cases in which courts have taken two years or more before issuing an opinion.) In the *Zivotofsky* case, however, the Court ruled promptly. It issued its 8-to-1 decision in an opinion by Chief Justice Roberts on March 26, 2012.

The Supreme Court held that the two judges of the Court of Appeals who had refused to rule on Menachem's claim because it was, in their view, a "political question" were wrong. Eight Justices of the Supreme Court ruled that the constitutionality of Congress' law was a standard constitutional issue and that "courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution." Chief Justice Roberts said, "Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under Section 214(d), to choose to have Israel recorded on his passport as his place of birth." He concluded, "The political question doctrine poses no bar to judicial review

of the case."

The surprise, however, came after the Court decided this preliminary matter. Although it had initiated and directed the briefing and argument of the ultimate constitutional question, the Chief Justice said that resolving it was not "simple." He summarized the historical arguments of both sides and said that the Supreme Court would benefit from having those arguments considered first by the Court of Appeals. The case was sent back to that court for a decision that might "guide" the Supreme Court's ultimate decision.

So we had another round of briefs and oral argument before three different appellate judges in the Court of Appeals. I presented oral argument on March 19, 2013, and the decision was rendered on July 23, 2013, when Menachem was approaching his eleventh birthday. All three judges agreed that, in light of statements made in Supreme Court opinions that were obiter dictum (extraneous to the decision that the Court rendered), the President had exclusive authority to control foreign policy. The appellate court's opinion acknowledged that the Supreme Court had never decided a case in which the President's foreign-policy decision conflicted with that of Congress, but it said that, as "an inferior court," it did not have the authority to disagree with Supreme Court dicta. On this ground, it found Congress' law unconstitutional, because "the President exclusively holds the power to determine whether to recognize a foreign sovereign."

We then filed another petition for certiorari, asking the Supreme Court to review and reverse this latest decision in the *Zivotofsky* case. By this time, Professor Reinstein had published an article summarizing his additional historical research. He concluded that "the text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power [to recognize foreign states and governments] is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress." We notified the Supreme Court of these scholarly findings.

The Court has agreed to hear this second round of Menachem's case, and our brief is due to be filed on July 15, 2014. We hope and pray that by his Bar Mitzva in October 2015, Menachem will be able to display an American passport describing his birthplace as "Israel." ■

Nathan Lewin is a Washington, D.C., lawyer, and partner in Lewin & Lewin LLP with his daughter Alyza, who is president of the American Association of Jewish Lawyers and Jurists. Mr. Lewin is a former president of the American Section of the IAJLJ and an adjunct lecturer on Supreme Court practice at Columbia Law School.

New Preachers of Hate: Where Does Freedom of Expression End?

Maurizio Ruben

The relationship between freedom of expression and hate speech was the controversial issue discussed during an event organized on March 3, 2014, by the IAJLJ, in association with Bené Berith of Milan and the Foundation of Corriere della Sera.

The event, entitled “The New Hate Propagators: Freedom of Expression and Hate Speech!” was inspired by the *Dieudonné* case. This case greatly alarmed the French public and had a huge media impact in other countries as well, including Italy. Articles were published for weeks in Italy on this issue and on the ever-present problem of the need to place limits on freedom of expression with regard to speech that incites racial hatred and anti-Semitism (as in the *Dieudonné* case).

The event, conducted by Giorgio Sacerdoti, a professor of international law at Bocconi University of Milan and a judge and arbitrator in various international committees, began with the *Dieudonné* case and an abstract of some of his most abhorrent statements and speeches edited by Philippe Karsenty, media analyst and French politician (Deputy Mayor of Neuilly s/S). Philippe Karsenty revealed and denounced the misrepresentation of a France 2 report on the *Al Doura* case.

The speeches of the French comedian Dieudonné included statements such as: “The Jewish lobby gives expulsion orders to Ministers and Presidents” and “Israel: a Nazi country, IsraHeil” and, as regards World War II, “I don’t know, I was not there, I’m neutral between Jews and Nazis. Who stole the most from the other I don’t know, but I have my own idea.”

According to Karsenty, the Dieudonné phenomenon was mainly due to French media (France 2, Radio FR, AFP...), which for years had demonized Israel and, subsequently, Jews who defended Israel. As a result, today, the French have had enough of Jews, Jewish issues, the Shoah, and the war between Israel and the Arabs.

After years of continuous demonization of Israel and Jews, French society was ready to welcome Dieudonné’s deeply anti-Semitic sketches. The comedian himself was not—at that time—considered a person to be avoided.

For more than ten years, French television stations,

particularly the public ones, continued to invite Dieudonné who, using freedom of expression and criticism, was able to express his most infamous ideas and stereotypes against Jews and Israel. We should remember that in 2009, he founded the Anti-Zionist Party and participated in the European elections under that symbol.

Moreover, over the years, Dieudonné forgot that it was always necessary to maintain a certain code of conduct. For this reason, his anti-Semitic friends abandoned him; Dieudonné became too heavy a burden in the fight against Jews.

But, Karsenty asked himself, was it a smart move to ban Dieudonné’s shows, or did the ban transform the French Minister of the Interior, Manuel Valls, into the best agent for

Dieudonné and the best worldwide advertising campaign?

This role of a sounding-board can be proved, according to Karsenty, by the fact that he was invited to speak on the *Dieudonné* case in Milan.

Instead of the French government intervening, it would have been preferable for the courts and the French tax authority to deal with the Dieudonné issue. The government intervention was of no help whatsoever; on the contrary, it was necessary not only to prevent preachers of anti-Semitic hate, like Dieudonné, Tariq Radaman, Alain Sorel and Stéphane Hessel, from expressing themselves in the French media, but also to actively fight lies and disinformation in the media regarding all persons and entities, including Israel.

“We have to find allies to oppose the fight which has as its first target the Jews and thereafter our open Western societies: after Saturday, then Sunday...” (meaning that after the Jews, it will be the Christians).

Viewed from this perspective, Dieudonné is the “useful idiot of French anti-Semitism”; the truly powerful anti-Semites are angry with him because he disgraced and revealed anti-Zionism, which they attempted to mask as not only acceptable but even as noble and progressive.

But now, Karsenty said, “it is becoming more and more difficult to be anti-Zionist without immediately making others understand that you are also anti-Semitic.” Karsenty bitterly concluded that “from this point of view, we must



at least thank Dieudonné.”

The second speaker, Claudia Shammah, criminal lawyer of the Bar of Milan and expert in the field of human rights, was asked about what would happen in Italy if a *Dieudonné* case arose. Shammah used as an example the case of a performance held in a theatre in Milan, Teatro Franco Parenti, which related to the face of Jesus Christ. The French play, which had aroused controversy in France, was presented in Italy under the direction of Romeo Castellucci. The play contained a depiction of the face of the Son of God, taken from a work of Antonello da Messina. The face of the Son of God appeared to cry during the depiction of sad events, and the reaction of the public was that the face of God had been vandalized.

Some fundamentalist Catholic groups filed a petition to the public prosecutor's office alleging blasphemy, which while certainly different from hate speech, gave rise to similar reactions and controversy. The petition sought to have the script confiscated. At the same time, a complaint was lodged to the Police Head Office and to the Mayor, and a warning was sent to the theater.

On the other hand, intellectuals mobilized to ensure that the performance continued. Vittorio Sgarbi, an Italian politician and intellectual, stated that the clamor served as a huge advertising campaign for the play, and that without it, only a few persons would have attended the performance. Some reactions even culminated in anti-Semitism, since the director of Teatro Franco Parenti is Jewish (“Yet again the synagogue of Satan offends Christ and the Catholics”).

In its fight against fascism and racial laws, Italy promoted comprehensive legislation against these types of crimes (for example, the Mancino Act of 1993).

The Italian Parliament is currently discussing a measure to impose tougher penalties in cases of incitement to terrorism, genocide, crimes against humanity and war crimes, as well as introducing the crime of negationism (which denies the existence of crimes of genocide or crimes against humanity).

Some believe that freedom of expression per se is capable of generating the necessary forces to prevent the proliferation of hate preachers; others think that penal law is the appropriate instrument. Shammah left this question unanswered.

Betti Guetta, a researcher at the CDEC Jewish Documentation Center and a sociologist, questioned whether a figure like Dieudonné could arise in Italy and asked what the reaction in Italy would be, in sociological terms. In her view, Dieudonné is a product of French culture and the French colonial past and could not appear in Italy.

Can the case of the Italian, Grillo, leader of the Five

Star Movement (5 stelle), be deemed comparable, since it often expresses anti-Semitic ideas?

According to Guetta, in Italy there are no phenomena comparable to the *Dieudonné* case. There is certainly some bad faith political and ideological confusion in Italy concerning the concepts - Jews, Zionists and Israel, but this has not led to anti-Semitic episodes comparable to the French ones.

According to a recent French study, in 2013 there were more than 420 anti-Semitic acts (of which more than 100 were violent); in Italy there were less than 50 (with only one or two violent acts each year).

Even a recent European study on Jewish perception of anti-Semitism in Europe revealed that more than 60% of European Jews think that there is anti-Semitism in Europe. More than 50% of French Jews but only 19% of Italian Jews feel this to be the case.

As an Italian Jew - Betti Guetta said: “I am still afraid of anti-Semitism, but at least from this point of view, I am extremely happy not to live in France.” Anti-Semitism in Italy arises from conspiracy and the Internet, not from angry groups. There is still strong prejudice, worse in some periods, like the present, than in others, and there is considerable stereotyping, for example the perception of mutual solidarity: “‘Jews always help each other’ or ‘in economic crises, we commit suicide and Jews help each other’”.

The final speaker, Lorenzo Cremonesi, the well-known correspondent for *Corriere della Sera*, and author of reports from some of the most dangerous locations in the world, specifically the Middle East, Afghanistan and Pakistan, maintained that Europe is still a magical place, where you are not killed for what you say or profess, even if someone engages in hate speech. It is important to preserve freedom of speech, even for hate preachers: any censorship gives them a voice and makes them stronger. “I am a determined supporter of freedom of opinion and of the press. Someone died for our freedom only a few years ago. I hate censorship, the arrest of journalists. I fight so that everybody can express his/her opinions, even if I do not share them.”

Cremonesi mentioned the case of Noam Chomsky, a very controversial figure, who was prevented from entering Israel and passing through that country to Palestinian territories. The situation triggered a scandal and criticism, promoting Chomsky's doctrine more than if he had been allowed to enter Israel.

Taking into account the fact that Israel is a free country where all topics are discussed and Palestinian suffering is presented more than in other countries, Cremonesi said that “I am even willing to not automatically persecute those who deny the Holocaust, preach racism, or express

anti-Semitism. I think that such a person must be contradicted, but not arrested. The more I condemn you, the more you become famous, the more I speak of you, the more you become a martyr.” The speaker, however, admitted that “new preachers of hate” are today a problem in terms of their numbers and quality.

The problem is aggravated by certain factors, for example the tiring of democracy, which goes hand in hand with the weakening of the American umbrella, the strengthening of China’s influence, particularly in Africa and the Middle East, and the failure of the Arab Spring, which prepared the ground for democracy in countries previously ruled by brutal dictatorial regimes.

What do young fighters want? To live like us, Europeans: to speak freely, travel.... Now, these countries are sinking into chaos, exposed to the risk of Al Qaeda. Where this risk is lower, as in Egypt, dictatorial regimes have returned, as Al Sisi’s regime in Egypt. Economic security is preferred to freedom of the press and opinion. New social media must be seen in this confusion of values and principles: you can write and read anything and everything. The NY Times site has the same value as racist, Nazi or negationist sites. In this context, he continued, the claim that the CIA and Mossad were behind the attack on the Twin Towers becomes credible.

The conspiracy theory triumphs again: there is no event, there are no historical situations; there are some dark forces that rule the world...

In 2006, Cremonesi was in Islamabad to talk with the rector of the Islamic University of Islamabad (one of the best-known intellectuals in Pakistan), who without any reservation declared (as if it is so very obvious) that the attacks on the Twin Towers were carried out by the Mossad; and that this was not an isolated case, since a French diplomat told him the same thing. And how did the rector, a man of culture, explain that statement? “Because everybody knows that at the moment of the

attacks no Jews were inside the Twin Towers...”.

There are very frequent similar examples in the Arab world. It is claimed that Morsi was brought down by the Americans and the Mossad; the revolution in Syria is the Mossad’s fault. And when the Mossad seemingly makes a mistake (as in the case of the attack on Khaled Meshaal in Amman), it does so on purpose; Jews are so clever and evil that what seems to be an error, is on the contrary intentional. The conviction that the world is governed by dark forces that act on the basis of a predetermined plan is very widespread: it can be fought only by serious journalism.

The moderator pointed out that Article 10 of the European Convention on Human Rights provides for freedom of expression, but this freedom must be exercised with some conditions and restrictions, for example to prevent discrimination and preserve human dignity.

After letting members of the audience speak, Professor Piergaetano Marchetti, President of the Foundation of Corriere della Sera, reminded the audience that there is an “inclined plane problem”, *i.e.* not letting someone speak could be counterproductive; letting someone speak too much can lead to prejudice, racism and anti-Semitism. The only possible reaction to the “inclined plane” is to educate people to be vigilant and critical; the problem involves more than anti-Semitism; these issues necessitate critical education and raise questions for serious deliberation. This is what each one of us can do. ■

Maurizio Ruben (Diploma in Advanced International Legal Studies, Mc. George School of law, University of the Pacific, Sacramento, CA) is a practicing lawyer before the Bar of Milan. He deals with issues of international law and contracts.

The event was organized in Milan jointly by the International Association of Jewish Lawyers and Jurists (of which the author is a member of the Executive Committee) and the Bené Berith Lodge of Milan (of which he is the President).

Experts Discuss Reforms for the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) at the UN

In an unprecedented event, the International Association of Jewish Lawyers and Jurists (IAJLJ) partnered with the American Association of Jewish Lawyers and Jurists (AAJLJ) and held a full-day Side Event on May 19, 2014, at United Nations headquarters in New York entitled “UNRWA – Providing Humanitarian Relief or Prolonging the Palestinian Refugee Problem.” While not prepared to disclose the exact number of Palestinian refugees registered with the organization, UNRWA claims to currently help approximately 5 million refugees – a number that has grown exponentially from the already exaggerated number of 650,000 Arabs who fled or were expelled during the 1948 Arab-Israeli War.

Adv. Irit Kohn, President of the IAJLJ, stressed (in a recorded address) the importance her organization places on reforming UNRWA, particularly with regard to transparency in the accounting of its humanitarian and political activities. Over the past year, the IAJLJ met with Ambassadors of donor States, asking that their contributions to UNRWA be conditioned on obtaining accurate information as to the number of Palestinians to whom the agency has granted refugee status and on what basis the status was given.

Israel’s Permanent Representative to the United Nations, **Ambassador Ron Prosor**, opened the program with candid remarks, claiming that “UNRWA fuels false promises and gives grievance to dangerous myths,” referring specifically to the “right of return” to which Arabs both personally and politically hold steadfast. Prosor emphasized that the “right of return” would “flood Israel with millions of refugees, and drown the Jewish State.” According to Prosor, the right of return is really a euphemism for the destruction of the State of Israel.

Professor Alexander H. Joffe, an archaeologist and Middle East historian at the Middle East Forum and **Professor Asaf Romirowsky**, Executive Director of Scholars for Peace in the Middle East, presented the first panel, which covered the creation of UNRWA’s mandate and provided historical background to the UNRWA of today.

Whilst the first panel dealt with a historical analysis of

UNRWA, the subsequent session focused on reforms within UNRWA. **James G. Lindsay**, who was the General Counsel of UNRWA from 2000 to 2007, provided an insider’s perspective. Lindsay, who flew from his current position in Rome to appear in his personal capacity, stated that UNRWA’s definition of refugees was its greatest flaw, and should be brought in line with the definition of the UN High Commission on Refugees. The UNRWA definition does not refer to statelessness, which is the central tenet of refugee status. It allows Palestinians to retain their refugee status despite obtaining citizenship or residency rights in the countries where they reside.

Steven J. Rosen, Director of the Washington Project of the Middle East Forum and former senior official of the American Israel Public Affairs Committee (AIPAC), concurred. According to Rosen, the overwhelming majority of Palestinian refugees would not be considered refugees under American law.

Dr. Einat Wilf, a Senior Fellow at the Jewish People Policy Planning Institute, made recommendations for ways that UNRWA could become less political and more humanitarian. She suggested the following reforms:

1. UNRWA should continue to provide humanitarian services, but they should be based on need and not on refugee status.
2. In Gaza, clearly part of the future State of Palestine, UNRWA should discontinue registering Palestinians living there as refugees, while continuing to provide services based on need. Similarly in areas under the control of the Palestinian Authority, the registration of Palestinians as refugees should be discontinued. The Palestinian Authority should become responsible for providing the humanitarian services till now supplied by UNRWA. This would strengthen the Palestinian Authority as the government of the Palestinians.
3. Outside of the West Bank and Gaza, UNRWA should merge with the UN High Commissioner for Refugees. Palestinian refugees should be treated as all other refugees, and efforts should be directed at securing equal rights for their descendants in the countries where they were born and have lived their entire lives.

Donor countries should still provide funds for humanitarian services to Palestinians, but this money would be channeled through the Palestinian Authority and the Jordanian government, in the two areas where most Palestinians live, instead of through UNRWA.

Alyza D. Lewin, President of the AAJLJ, moderated the event.

While the panelists had minor differences in opinion, all seemed to be in agreement that UNRWA in its present state was a catalyst for divisiveness that was obstructing the peace process, and that changes needed to be made. Hopefully this event will be the beginning of an on-going dialogue that will lead to much needed reform of the Agency and an important game changer in resolving the Israeli-Palestinian conflict and finally bringing peace to this troubled area of the world.

The event was attended by about 100 persons. It was broadcast by WEBCAM all over the world. It may be viewed in its entirety at webtv.un.org/watch/part-2-unrwa-providing-humanitarian-relief-or-prolonging-the-palestinian-refugee-problem/3576310872001/ - Part 2 (last visited June 29, 2014). The next issue of JUSTICE (No. 55) will be devoted to this UNRWA Side Event, and will include additional expert articles on this subject. For publications on this event, see www.intjewishlawyers.org/main/index.php?option=com_content&view=article&id=52&Itemid=64 (last visited June 29, 2014). ■

Adv. Regina Tapoohi serves as the IAJLJ Representative to the UN (New York).

The writer wishes to thank Alyssa Grzesch for her contribution to this review.



Errata: *Justice* 53, page 31: the correct name of the co-author of the article is Harry Borowski and not as mistakenly written.



הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

Due to the hectic reality we are currently experiencing in Israel nowadays, as a direct result of the heinous and superfluous murders of four teenagers, we wanted to share with you the recent statements written by the President of the Association - Irit Kohn.

May we all have peaceful and quiet days in the near future.

First statement, July 3, 2014

I want to share with you, the members of the International Association of Jewish Lawyers and Jurists, what is currently taking place in Israel.

As everyone certainly knows, two days ago we were informed that the bodies of the three teenagers, cruelly murdered by terrorists, were found, and yesterday they were buried.

In the past few days Qassam rockets fell in southern Israel. Children in southern kibbutzim and towns, who enjoyed several months of quiet, are again subject to fear as their summer break begins.

Israel is deliberating how to react. In a radio interview today I was asked, from my perspective as past director of the international department of Israel's State Attorney's office, whether in response to the murders is it legitimate to demolish homes of terrorists and to expel people from their homes? I answered that needless to say that all Israelis experience great pain because of the murder of three teenage boys, who only wanted to return home after school, and that we have to carefully consider our response and not stoop to the level of those who committed the murders.

The most important thing as I see it, is to apprehend the murderers who committed this terrible act, and I have no doubt that they will be caught, to prosecute them and learn more about what transpired. We must never lose sight of the fact that Israel functions under the rule of law and therefore must do so now. Among the impassioned voices we certainly hear the ideas consistent with those I am conveying as a lawyer who heads an international association of lawyers and jurists.

I wanted to bring this to your attention and to share my feelings with you.

Irit Kohn

Second statement, July 8, 2014

Dear friends,

Pursuant to the notice I distributed last week where I emphasized that Israel functions according to the rule of law, and the results of the police investigation concluding that the murderers of the Arab teenager Muhammad Abu Khdeir were Jewish, the International Association of Jewish Lawyers and Jurists strongly condemns this murder and calls on the Israeli legal system to prosecute those responsible for the murder to the fullest extent of the law.

I very much wished that this would not have been the result of the investigation, though this result teaches that our association must continue its work as an advocate against hate crimes and racism.

I promise that this is what our Association will do.

Irit Kohn
President

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הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

July 14, 2014

To: Ms. Navanethem Pillay, the High Commissioner of Human Rights

Subject: The High Commissioner's statement in light of the on-going hostilities in Israel and Gaza

Madame High Commissioner,

The International Association of Jewish Lawyers and Jurists (IAJLJ) wishes to express its concern in light of the High Commissioner's media statement of July 11, regarding the on-going hostilities in Israel and Gaza. After carefully reading the High Commissioner's statement, we find that it is one-sided and does not reflect the responsibility that should be shared by both parties to the conflict, including the Hamas de-facto authority.

As an organization that has always supported a peaceful and long lasting solution to the Israel-Palestinian conflict, we oppose the view reflected in the High Commissioner's statement which places the burden and responsibility for international law violations solely on Israel, disregarding Hamas' direct responsibility for international humanitarian law violations and war crimes. The hundreds of rockets aimed from Gaza at Israel's cities, towns and civilians are fired by Hamas personnel, with the support of both its military and political branches and leaders. The rockets are not fired indiscriminately, but rather intentionally toward heavily populated civilian areas. An example of this policy is Hamas' warning of July 12 that explicitly stated it would fire rockets toward Tel Aviv – the largest city in Israel. This policy, of intentionally targeting civilians and civilian areas of residence constitutes a war crime. The High Commissioner also ignored in her statement the reports from Gaza, calling for civilians to remain in their houses although they have been warned by the IDF of an imminent attack and to stand on rooftops of houses which constitute legitimate military targets, to render them protected. This policy, as well, is a violation of international humanitarian law and constitutes a war crime.

All these facts are absent from the High Commissioner's statement. The High Commissioner has also refrained from addressing the Palestinian Authority, and its representative at the Human Right Council, regarding its responsibility for recent events, as Hamas is now a partner of the Palestinian government as part of the government unity agreement between Hamas and the PA. In fact, the words "Hamas' responsibility" do not appear anywhere in the High Commissioner's statement, and thus factually ignore that there are two parties to this recent escalation.

Finally, the International Association of Jewish Lawyers and Jurists is deeply concerned by the recent escalation of violence in the area, and distressed by the number of casualties this on-going conflict has cost both sides. IAJLJ cannot remain silent in the face of the High Commissioner's one-sided statement, which in our view poses an obstacle to the prompt resolution of the current situation, deepens distrust and encourages extremists on both sides. We trust that the High Commissioner will clarify her view and issue a more balanced statement.

Yours sincerely,

Irit Kohn, Adv.
President



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

International Human Rights and Israel – Politicization or a Complex Reality? ***Eilat, November 19-22, 2014***

Wednesday, November 19

18:00 Opening Ceremony and Cocktail

With Keynote Speaker Dr. **Giandomenico Picco**, Former Under-Secretary General of the United Nations, U.S.A.

Thursday, November 20

09:00 Elections

09:45-11:45 Israel – An Apartheid State?

Prof. **Yaffa Zilbershats**, Deputy President, Bar-Ilan University;
Academic Advisor and Board Member, IAJLJ

Adv. **Michael Sfard**, Michael Sfard Law Office, Tel-Aviv

MK **Isaac Herzog**, Leader of the Opposition & Chairman of The Labor Party,
Israel

Coffee Break

12:15-14:00 BDS – Boycott, Divestment, Settlements

Dr. **Boaz Ganor**, Ronald Lauder Chair for Counter Terrorism, Founder &
Executive Director, The International Institute for Counter-Terrorism (ICT);
Deputy Dean, Lauder School of Government, Diplomacy & Strategy; The
Interdisciplinary Center (IDC), Herzliya

Adv. **Marc Lévy**, France/Israel

Hon. **Kenneth L. Marcus**, The Louis D. Brandeis Center for Human Rights
Under Law and former Staff Director, U.S. Commission on Civil Rights,
Washington, D.C.

Lunch

15:00-17:00 Human Rights in Asymmetric War: Lawfare?

Mr. **Avihai Mandelblit**, Cabinet Secretary, Israel

Prof. **Amichai Cohen**, Dean, Ono Academic College - Faculty of Law

Admiral (ret.) **Ami Ayalon** - Former commander of Israel's Navy and Head
of Israel Security Agency (the Shin Bet); A senior research fellow at the Israel
Democracy Institute

Gala Dinner in the Desert at The Camel Ranch

Friday, November 21

09:00-12:00 Human Rights Laws and their Politicization

Prof. **Geert-Jan Alexander Knoops**, Visiting professor International
Criminal Law, Shandong University, China; Knoops' advocaten, The
Netherlands

Prof. **Yuval Shany**, Hebrew University of Jerusalem

Prof. **Anne Bayefsky**, Director, Touro Institute of Human Rights and the
Holocaust, U.S.A

Prof. **Ruth Halperin-Kaddari**, CEDAW Member and Chair of the Rackman
Center for Women's Rights, Bar-Ilan University

Coffee Break

12:30-14:00 Perpetuation of the Palestinian Refugees Problem and UNRWA

Prof. **Irwin Cotler**, Member of Parliament, Former Minister of Justice and
Attorney General, Canada

Dr. **Einat Wilf**, Senior Fellow, The Jewish People Policy Planning Institute,
Israel

Prof. **Yossi Shain**, Romulo Betancourt Professor of Political Science and
Chair, Department of Political Science, Tel Aviv University; Professor of
Government and Diaspora Politics, Georgetown University

14:15

Board of Governors Meeting

Shabbat Dinner

Organizing Committee:

Adv. **Irit Kohn**, President, IAJLJ

Prof. **Yaffa Zilbershats**, Deputy President, Bar-Ilan University; Academic Advisor and
Board Member, IAJLJ

Adv. **Ronit Gidron-Zemach**, Executive Director, IAJLJ

Schedule is subject to additions/changes

The sessions will be held in English

Accommodations at: The Dan Eilat Red Sea Hotel or Dan Panorama Eilat Hotel
For registration forms or additional information, see: www.intjewishlawyers.org or
contact us: **+972 3 6910673** (9am-3pm, Israel time), iajlj@goldmail.net.il



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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** *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

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

We invite you to join a membership of lawyers, judges, judicial officers and academic jurists in more than fifty countries who are active locally and internationally in promoting our aims.

As a new or renewing member, you will receive a subscription to *Justice* and a free, one-month trial subscription to The Jerusalem Post. You will be invited to all international conferences of the Association and may vote and be elected to its governing bodies. You may also have your name and other information appear in our online directory linked to our main website.

Help make a difference by completing the membership form on the opposite page and mailing it to us together with the annual membership fee of US \$100.



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