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## PRESIDENT'S MESSAGE



This issue of *JUSTICE* is published on the eve of the 11th International Congress of our Association, which will celebrate in Jerusalem the fiftieth anniversary of the State of Israel. We extend a warm welcome to all the participants: members, accompanying persons, guests and speakers, and we look forward to meaningful deliberations on the important issues to be discussed at the Congress.

In this issue we highlight two matters: the Israeli - Palestinian accord recently signed at the Wye Plantation, which is in the process of being implemented as part and parcel of the Peace Process, and the frightening resurgence of blatant anti-Semitism in Russia, which is quickly becoming a central component of current politics in that country.

In accordance with the tradition we have established of providing the text of important documents, we have decided to include in this issue the full text of the Wye accord and the accompanying letters sent by various officials of the US Administration to Israel. We hope to deal with the controversy surrounding the legal implications of the accord in later issues.

The situation in Russia is cause for grave concern. At the beginning of this century representatives of the Russian Tsarist regime fabricated the *Protocols of the Elders of Zion*, a forgery allegedly proving the existence of a so-called Jewish international criminal plot to dominate the world. It is a matter of record that this vicious libel has been used throughout the century as a vehicle for anti-Jewish manifestations in various countries. It served the Russian *Okhrana* which initiated pogroms against Jews and it played a major role in Nazi propaganda throughout World War II. It is preposterous that close to the end of the century identical libels against Jews are still being voiced, not only by fringe groups, but also by a representative in the Russian State Duma. Unfortunately, the anti-Semitic statements of General Makashov ("All the Yids - to the grave" is one example) reflect a growing wave of similar public expressions accusing Jews of all the catastrophes which have lately befallen Russia. Although a number of protests have been heard from various circles, there has still been no official resolution of the Duma repudiating General Makashov's statements.

We shall follow events in Russia as they unfold and we shall publish relevant updates on this matter. We shall, of course, be pleased to publish any reactions by Russians, both in and out of government, who join in combating this vile phenomenon which is a blemish on the reputation of their country.

In the light of recent events, it is particularly apt that the Public Trial which will be held during the 11th Congress will focus on the boundaries of political speech. We hope that the contributions of the international panel of eminent pleaders and judges will help to establish usable guidelines in the fight against racism and incitement.

*Hadassa Ben-Zur*

# The World Financial Crisis and its Effect on Israel

Jeffrey D. Sachs

**A** remarkable series of events has occurred in the world markets in the last year and a half. Some of the world's fastest growing countries, particularly in Asia, but in other parts of the world as well, have virtually been pulled to a screaming stop, or even to outright economic collapse, in a way which was basically unforeseen in almost all cases. The magnitude of these events is so huge that it is sweeping over innocent bystander countries, including Israel. There is no doubt that the waves of economic crisis in Asia have removed some of the bloom from Israel's economic growth. Understanding these events is therefore particularly important, not just as an academic exercise and not just for Asia or the other countries that have been hardest hit, but also for countries such as the United States and Israel, which are definitely being affected by the shock waves.

How did such a deep crisis come about so suddenly, so spectacularly? How did it hit economies such as Korea, Indonesia or Malaysia, which, until 18 months ago, were the fastest growing countries in the world? These were not just the fastest growing economies for one or two or three years, but the fastest growing economies for a decade, in the case of South East Asia, or in the case of Korea, maybe the very fastest growing economy in the world over the past three decades. I think it is fair to say that nobody anticipated these events. It is also fair to say that the official reaction of the international community, and particularly the reaction led by Washington to these events, was probably detrimental in the first year of this crisis, roughly from the middle of 1997 through August of 1998. Since policy makers were so

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Professor Jeffrey D. Sachs, is the Director of the Harvard Institute for International Development. He specializes in transition to market economies in Eastern Europe and the international debt crisis. The text was adapted from remarks given by Prof. Sachs and the ensuing panel discussion, held during a Transatlantic Conference on the Global Economy which took place on 30.11.1998 in Jerusalem.

unequipped to deal with this crisis, the standard recipes of the International Monetary Fund and the US Treasury, not only failed to stop the crisis, but actually made the crisis considerably worse than it had to be.



Currently, basically beneficial changes are taking place both in the cycle of the crisis itself and in the way the policy makers are approaching it. Some of the countries hardest hit in Asia are beginning to climb out of the crisis, although many countries in the world, and particularly in Latin America this year, are still facing the full brunt of the economic crisis. Here, I shall try to introduce this subject, by considering the range of opinions and analyses that have been made to date, and particularly to contrast what may be called the "Washington view" of this crisis, with some other vantage points, including a vantage point to which I am rather more sympathetic.

Four questions arise: what happened; why did it happen; what was the appropriate policy response to what happened; and what is likely to come next.

It is necessary to go back a year and a half, to the middle of 1997, when this crisis started to unfold. It is conventional to date this crisis to July 2nd, 1997, when Thailand devalued its currency, the Thai Baht. That date was a watershed in the world

economy, because it triggered a sequence of events that led to outright economic collapse in Asia, and then to a spread of this virus to other emerging markets, most dramatically to Russia, in the middle of 1998, and to Latin America, particularly Brazil, at the end of 1998. Israel too has not been untouched by these events, particularly in recent weeks with the currency depreciation and with the significant slow down of exports. The first question is - what happened? Washington gave an interpretation soon after the start of the crisis. After the Thai Baht was devalued, the IMF entered the scene with a large bailout package for Thailand, of around 20 billion Dollars, in August 1997. The package was predicated on the idea that what we were observing was an Asian crisis, and, as was often said in Washington in the months that followed, "a crisis of Asian capitalism". The predominant interpretation was that Asia was suffering from a crisis of confidence of international investors, ensuing from failures of the Asian economic system, and specifically charges of massive corruption, lack of transparency, weak banking sectors, and generally a "way of doing business" that led to a shortfall of confidence in the Asian economies. The Washington view was, therefore, that these economies needed very deep surgery, and particularly that their financial markets needed urgent repair. In the Thai program, for example, much of the Thai financial sector was closed, as of August 1997, and most dramatically, a part of the financial sector called "the finance companies", was suspended. In particular, 58 of these financial companies were suspended in August and then later closed down, taken over by the State, with significant losses of investors, and, in some cases, of depositors.

The same interpretation followed in Indonesia, when the IMF and the US government engineered a large package of bailout support in November 1997. Again, the interpretation was that the combination of corruption, weak banking sectors and lack of transparency had led to a collapse of investor confidence, and therefore deep financial surgery was required. In the case of Indonesia, like Thailand, a significant part of the banking sector was closed. On 1st November 1997, 16 commercial banks were suddenly closed down. As the crisis spread north east to Korea, a similar kind of package, each bigger than the last, was announced in early December. Fifty-seven billion Dollars was lent to the Korean government in a period of staged releases. Again the interpretation was, as the IMF itself said, that this was to be an IMF program plus, and the plus was, deep financial surgery. Fourteen merchant banks were closed down in early

December in Korea. In all of these cases the IMF stated: first, that the financial sector needed deep surgery, and second, that macro-economic policy should be devoted to maintaining investor confidence by raising interest rates substantially, and cutting the budget sharply. This combination was designed to stabilize the currency, reassure international investors, and thereby, it was hoped, maintain economic growth. In each of these three IMF bailout programs a year ago, the growth targets were put at between 2 and 3 percent for 1998. The estimation was that these programs would continue to enable the Asian economies to grow, more slowly than at the past rate of 6-8% per year, but the intention was the growth would remain positive at 2-3% per year. One can fairly say, after almost a year and a half, that these programs failed to meet their macro-economic targets. Instead of these economies growing at 2-3% per year in 1998, each of these economies collapsed to a varying degree. Thailand will contract by about 8%, in 1998. Korea will shrink by about 7% in 1998. Indonesia, amazingly, is going to collapse between 15 and 20% in 1998.

The first proposition which can be put forward here, is that if a growth target is missed by 10 percentage points or more, in the space of a year, the wrong economic model is probably being used. This, I would suggest, is what happened. The wrong economic model was used. In my view, what we are seeing is not the kind of Asian crisis that Washington was so fond of talking about a year ago, but rather a crisis of international capital markets themselves. Asia had much wrong with it, but very few of the things wrong with Asia were news in 1997. Everybody knew there was corruption. Everybody knew that there were problems of transparency of the financial markets, and yet, despite those limitations, the Asian economies had grown rapidly for a decade or more, and in some cases for 3 decades. While Washington said that these shortcomings were the reason investors were pulling out, the Washington explanation was pretty poor in helping us to understand why investors have put so much money into Asia in the years preceding the crisis. In 1997, investors did indeed pull out about 20 billion Dollars net, from Asia. There was perhaps as much as a 40 billion Dollars net negative capital flow in the second half of the year, compared to perhaps a 50 or 60 billion Dollars positive flow, in the first part of the year. The Washington theory may therefore be right to say: "weak financial sector, investors pull out their money". But the theory is bad at explaining why, just a year earlier, the foreign investors had put in a net 95 billion

Dollars into just 5 countries in Asia: Indonesia, Korea, Malaysia, the Philippines and Thailand. Indeed, in the years 1994 to 1996, the international banks had put in enough so that cumulative outstanding balances owed to the banks stood at about 250 billion Dollars to those countries, by the middle of 1997. In other words, the international financial markets had poured money into this region for years. While money was indeed pulled out in 1997, a theory that claims that Asia was a terrible economy, may be good for the six months of 1997, but it is a terrible explanation of everything that went on in the years preceding this crisis. In my opinion we have to look somewhere other than at the intrinsic weaknesses of Asia, in order to understand this abrupt shift.

Paradoxically, a better starting point than the weaknesses of Asia is actually the strengths of Asia. The Asian economies were the most successful middle income developing countries over a period of at least a decade, and in some cases, two to three decades. During the 1970's and 80's that rapid growth, which was export led, was almost entirely financed by domestic saving. In the early 1990's, those countries liberalized their capital accounts. One country after another took the decision to open up its capital account to allow capital inflow. And usually this was done under the strong advice of the US government, and certainly the International Monetary Fund. Thus, for example, in 1992, Thailand created the so called "Bangkok International Banking Facility", which was essentially an administrative mechanism to allow Thai financial institutions to borrow Dollars from off shore and then lend them to the Thai economy. These countries have been so successful for so long, that as soon as the capital market liberalization took place, an enormous capital inflow ensued, and that capital inflow ran from the early 1990's right to the middle of 1997. Hundreds of billions of Dollars of net private capital flowed into the region, of which the most important form of financing was bank loans; that is, lending by international banks, mainly to domestic banks in those countries. I call this "a crisis of success", because that amount of lending would only occur in successful economies which were able to attract such large amounts of flows from outside.

The real story of this crisis is that economic success in the region coupled with capital market liberalization, led to a huge inflow of capital, that created financial vulnerability in the region; this was followed by an abrupt reversal of capital in 1997, which not only brought growth to a halt, but also essentially destroyed the banking sectors of those countries, as the capital fled from the region.

Why was there a shift from huge inflows year after year, to abrupt outflow? The story is roughly as follows: after the liberalization of capital in the early 1990's, these countries, as I have noted, faced a very large inflow of capital. They managed that inflow under a pegged exchange rate system in which they linked to the US Dollar. This turned out to be very important for what happened afterwards. At the beginning, that peg prevented the currencies from strengthening, later on that peg became the Achilles' heel of these economies. From 1992 to 1996, growth occurred very swiftly, and it was boosted by the capital inflows. That capital inflow supported a large expansion of domestic spending, most of which was directed towards investment. It was not wasted through consumption, and in some cases, like in Korea, it was devoted towards increasing export capacity. In Thailand, it would be fair to say, more of it went into business and residential construction. In almost all cases it built up investment rather than consumption. But it also caused the exchange rate to strengthen in real terms, which is what may be expected when a country absorbs several percent of GDP in net capital inflow. So each of these countries experienced a real appreciation of the currency, a combination of a nominal fixity to the US Dollar, domestic inflation and an excess of world inflation, and a strengthening of the US Dollar relative to the Yen, all of which added up to a real appreciation of perhaps 15 to 20 percentage points by 1996. In 1996, there was one important piece of news, namely, the real appreciation of the currency was becoming a major drag on exports, so that the Dollar value of exports from the region to world markets suddenly stopped growing. Together with this came a kind of peaking of the real estate markets in South East Asia, after years of heavy building, as well as some incipient excess capacity in the electronic sector, which was so much the target of investment by Korea and some of the other countries. Of course, the results of all the above was that demand started to decline.

This was the critical moment: there were over valued currencies and a decline of domestic demand. If the currencies had been flexible, this would have been a good time for currency depreciation, and normal market forces would have led the currencies to reverse their earlier appreciation. But instead, Thailand decided to defend the Baht, Korea decided to defend the Won, and so forth. The result was that these countries started to spend their foreign exchange reserves to defend their currencies as the currencies came under mild attack in early 1997. But the defense of the currency went on far too long. Thailand, which became a target of currency speculation in the first half of 1997, ended up spending between 10 and 20 billion Dollars of

foreign exchange reserves defending the Baht. Some of it, it did openly by intervening in the spot market, some of it, it did covertly by taking positions in the forward market, but not announcing those positions as a reduction of liquidity of the foreign exchange held by the central bank. As often happens when a country defends an over valued currency, by the middle of 1997 Thailand was really running low on liquid reserves. So, on July 2nd, it devalued the currency. Even so, it was not a country that was ripe for deep crisis at that point. It was vulnerable to crisis, however. And it was vulnerable because the devaluation definitely caused the investors to wake up and have a look around, and when they looked around, they saw, first, that there was 45 billion Dollars of short term debt outstanding, *i.e.*, debt falling due to international investors, within a 12 months period. Second, they noticed that the foreign exchange reserves had been reduced sharply, although nobody knew how much.

The investors were, of course, very deeply perturbed by the fact that Thailand admitted that it had basically falsified its reserve reporting by failing to report its foreign exchange position in the foreign markets. The critical point: the short term liabilities now exceeded the short term assets by a factor of 2 or even more. That made Thailand subject to a self-fulfilling panic, if one ignited. By this I mean that each of the short term investors understood that the short term liquidity available to pay off short term loans, was insufficient to repay all the short term claims coming due. So each of the investors understood the basic point, namely that if every one of the other investors were to pull out their money, any remaining short term investor would face a default on their claims, because there simply would not be enough short term funds around to make good on all the outstanding short term investments. This makes the country vulnerable to a self-fulfilling run that is very much like a classic bank run, when a solvent but a liquid bank suddenly faces a massive withdrawal of claims. That run defined the Asia crisis.

In my opinion, the International Monetary Fund helped trigger the run. Thailand was not in collapse in July 1997, and indeed, the decline of the currency was needed. This would have had the effect of embarrassing some borrowers because their balance sheets were now worsened by having Dollar loans and Baht assets, and so the depreciation of the currency was going to put a gap, and possibly cause some bankruptcies; on the other hand, the depreciation would surely have sped up some exports under normal conditions. I believe the IMF came in in a kind of hysterical manner, and suggested such drastic actions to the Thai authorities, that it helped to trigger the financial panic itself. By

closing down a large part of the financial sector, it caused the depositors to run from the remaining financial institutions. By engineering an intense squeeze of liquidity, it gave the investors the idea that borrowers were going to be a-liquid so it was necessary to pull money out as fast as possible. In my opinion, the IMF intervention had exactly the opposite effect to the one intended. It triggered panic rather than calmed the international investors. The rhetoric, the specific policy recommendations, the body language, the accusations that Asian capitalism was one big corrupt morass, all led to a drastic reappraisal by investors and then a self-fulfilling panic.

I watched this panic very closely in Jakarta in November 1997. By closing 16 banks in the beginning of the month, the IMF helped to trigger one of the world's worst banking crises in modern times. Because after those 16 banks were closed, every other Indonesian owned bank faced a creditor panic during the month of November. By the end of November, the Indonesian economy was in a complete free fall. In short, what happened after that was that all the economies with high levels of short term debt to foreign exchange reserves, found themselves under speculative attack. That attack went to Russia, it went to Brazil, it went to South Africa, it went to other Asian economies, but it basically went to countries with over valued currencies and very high levels of short term debt to foreign exchange reserves. Because those were the countries susceptible to a self-fulfilling financial panic. The IMF advice, in my view, was bad in most of these countries. Thus, for example, they told the Russians to defend their currency at all costs, even though the underlying fiscal policy in Russia was extraordinarily weak, the Russian Ruble was under attack from the bad winds coming from Asia, and oil prices had fallen so sharply that Russia had suffered a massive terms of trade collapse. Despite all this, the IMF thought that what investors wanted beyond anything was a stable nominal exchange rate, and they led Russia down a very misguided path, in which Russia wasted its foreign exchange reserves in the first half of 1998, defending its currency the same way that Thailand had wasted its foreign exchange reserves in the first half of 1997. In the end, they utterly collapsed, the same way as in Asia. Russia ran out of reserves, and then, unfortunately, it compounded its bad mistakes with the further dreadful mistake of defaulting on its debt payments. This created an incredibly fierce panic not only on the part of foreign investors, but also of domestic investors, and it thrust Russia almost immediately into hyper inflation.

The IMF, unfortunately, had advised Brazil similarly to keep

very high interest rates in order to defend the Brazilian Real, which is also overvalued, in my estimation, by between 20 and 40 percent. Brazil is a little like Israel was in the mid 1980's. It used an exchange based stabilization to end its high inflation, but the exchange rate itself then became over valued in real terms, just as happened in Israel, in Poland in 1990 and in other stabilization cases. Thus, Brazil too must devalue its exchange rate, but the IMF is advising it to defend the exchange rate by very high interest rates, and I fear that in Brazil too, this will lead to a sharp contraction in the economy in 1999, under the IMF program.

Briefly, it is important to note that these financial panics have a logic of their own. They run a certain course which is to a certain extent predictable, *i.e.*, the first phase of panic leads to an extreme overshooting of the real exchange rate, producing massive devaluation, massive depreciation; it leads to an extreme overshooting of economic activity, leading to massive contraction; it leads to an extreme overshooting in the financial markets, leading to a collapse of equity prices and a sharp upward spike of interest rates. But, all that overshooting unwinds after a period of about a year. And the reason that it unwinds is very simple - once the money has gone, it stops. The reason for the overshooting is the massive withdrawal of short term funds. But that massive net capital outflow ends. And it ends for three reasons: first, some of the short term debt gets repaid; second, some of the short term debt gets rescheduled; and third, some of the short term debt get defaulted upon, and the capital outflow stops for that reason.

In Asia we are seeing the end of the net capital outflow right now. Thailand and Korea repaid a huge amount of debt this year. The current account deficit which was negative 5% of GDT or more in 1997, has been a surplus of 10% or more of GDT in 1998, and that means that the short term debts have been paid down, and other short term debts have been put into default. The result is, that the overshooting stopped and is now unwinding. The Korean Won had gone from 931 to the Dollar, to 1,500 Won to the Dollar at the most depreciated point, and now it has bounced back to around 1,300 Won to the Dollar. The Thai Baht had gone from 25 Baht to the Dollar, to an incredible 57 Baht to the Dollar at its weakest point, and now has bounced back to around 37 Baht to the Dollar. Even the Indonesian Rupiah, in a country in complete political crisis, has bounced back, mainly because the Indonesian short term debt is in default, and so the net capital outflows have stopped. It seems to me, for this reason, that at least the politically stable countries in the Asian

crisis, and that mainly means Korea and Thailand, will actually begin to experience a rebound of economic growth in 1999, albeit a very slight one. Latin America, however, which is running six months to a year behind the crisis, will, I think, have a bad year because the crisis is still running its course.

As for the world economy, fortunately, the United States manages its own affairs much better than it manages other countries' affairs. In particular, when the US started to feel investors' panic, rather than compound it by tightening credit, as we advise the Asians to do, Mr. Greenspan cut interest rates significantly three times, and thereby really ended the mini financial panic which was starting in the United States. I think it fair to say that because of the actions of the US, the UK and some other central banks in lowering interest rates, the world as a whole will escape recession next year, even though the emerging markets crisis is bound to linger.

I would conclude by making a brief point about how one stops these crises. If one accepts the point of view espoused here, that these crises come from a situation of financial vulnerability, followed by a self-fulfilling panic, then the name of the game is to prevent the short term debt from rising so high relative to the short term liquidity of the central bank, as to put the country in jeopardy of such a panic, and also to manage the exchange rate flexibly so that over valuation does not occur. In my view, this adds up to 2 recipes:

- a) Countries should maintain flexible exchange rate regimes rather than pegged exchange rate regimes. They should not squander their foreign exchange reserves defending an over valued currency. They should not raise interest rates to a punishingly high rate to defend a nominal exchange rate; and
- b) Countries should use supervisory controls to prevent their banks from taking on such high level of short term debt from abroad, that they can cause the whole economy to go into crisis. I am not a fan of capital controls *per se*, but I am a great fan of supervisory limits on domestic banks which would prevent them from borrowing large amounts of short term debt. I think we would probably also want to explore such limits for large corporate borrowers, and, of course, governments should not borrow large amounts of short term debt from abroad, as that is a recipe for disaster.

So, in my view, keeping short term borrowing from abroad under control, and keeping exchange rates flexible, would do much better than all of the tinkering with global architecture could do.

# Panel: “There is a very great need to reform the financial sector”



## **Prof. Nissan Liviatan**

**(Professor of Economics,  
Hebrew University, Jerusalem):**

I think that most economists would agree that a structural solvency crisis has been confused with a liquidity crisis. However, the financial sector problems of these economies must not be underplayed. When we look at history, each time the capitalist system reveals a new weakness. As Professor Sachs stressed, for example, in the case of the debt crisis of the 80's, as long as exports were growing faster than the interest rate, things looked well, but when the rates changed, and exports started falling, the crisis erupted. As a result, the international community developed a certain criteria for what is wrong or what is right. I would say that the capitalist system is probably maturing through

crises and this crisis too is a basis for improving the system. It is not as some people say, that the capitalist system as a whole is collapsing and we may face something like the crisis of the 30's, rather it is a matter of an error correction mechanism. I believe one should distinguish between the vulnerability of a country and the predictability of the **timing** of the crisis. Professor Sachs himself did very important work on the multiple equilibrium features of economic systems, so we know that in many cases a country may be vulnerable, but we can not predict when the crisis will happen. While I agree that the way the IMF intervened was equivalent to crying “fire” in the theatre, there is nevertheless a very great need to reform the financial sector in these countries.

I would look at the issues from the point of view not of the IMF but of the individual, potentially vulnerable economy, especially one like Israel. It would seem that Professor Sachs is suggesting a number of recipes for a country like Israel to avoid the crisis. One is a flexible exchange rate regime, a direction in which we are moving; followed by tight banking supervision, and perhaps more attention to limiting foreign exposure or taking risky positions. Second, he suggested not to defend the peg of the exchange rate by high interest rates; however, contractionary policies are a form of defense against a crisis, because over expansion, especially

on the financial side, makes the country very vulnerable. On the whole, therefore, it seems that one should also refrain from counter cyclical policies against recession, which are the recipe of Keynesian economics. Currently, there is a very sharp debate over whether it is really justified to suffer the recession that we are going through right now, because of the international vulnerability of the economy. Is it not a better solution to compromise, rather than to be always over cautious in the face of the big threats? And, a final question: the United States and the European Community are like an anchor of stability and high demand upon which the whole world depends, but there is also talk of a possible financial bubble developing in the US, and this financial bubble is fed to some extent by the Asian crisis as funds go into the US. In this situation, the Greenspan policy of reducing interest rates seems strange. Does it not merely feeds the bubble, with the result that the ensuing collapse will be much more severe?

## **Prof. Assaf Razin**

**(Professor of Economics,  
Tel Aviv University):**

Professor Sachs very eloquently described for us the recent crisis that led to a severe international illiquidity. The illiquidity of the financial system is almost always rooted in previous bouts of financial liberalization. Not carefully





implemented financial liberalization gives rise to maturity mismatch between international assets and liabilities. In addition, capital flows from abroad caused by the opening of the capital account and falls in the world rate of interest, magnify the problem by requiring huge amounts of resources to be intermediated by domestic banks. If a country has a weak banking system, this is a real problem. China, for example, has not, at least so far, suffered in the same way as the other East Asian countries, because although it opened itself to long-term capital flows, specially FDI, it has resisted the temptation to open itself up to short term volatile capital.

I would like to connect Professor Sachs' points, with which I agree in general, to Israel. I would like to do so by telling the tale of three countries - Australia, Greece and Israel. Australia and Greece were close to the crisis zones, Israel was a little bit further out. Australia is close economically speaking to South East Asia, because most of its trade is with this region's economies, Greece is economically closer to Russia

than Israel. Israel, it was said, had a very stable economic structure. Israel has been compared in the past few months to the East Asian countries like Indonesia or Russia, but I think a more relevant comparison is to countries or economies which are at a relatively equal stage of development and have relatively similar economic and institutional structures. Let us consider the three cases:

**Australia**, has enjoyed strong economic performance over the past seven years. Growth over the last seven years averaged 3% and it also had stable inflation. The fiscal monetary mix has been balanced: not excessively tight and not overly expansionary. The current account balance was negative, but Australia has had four decades of current account imbalance, and it is still solvent. Its trade is dominated by exports to East Asia and imports from East Asia. What happened when the East Asian crisis erupted? Obviously, the Australian exchange rate, which was stable at about 1.336 Australian Dollars for 1 US Dollar, throughout 1993 and 1997, depreciated by about 15-20%. But there was no panic, there was no excessive tightening of monetary policy, and the exchange rate is now moving back to the pre-crisis level. The bottom line: no significant lasting effect of the Asian crisis can be detected, and no evidence of financial crisis, or a slide towards recession.

**Greece** set itself in the last decade to join the single currency union in Europe, and it plans to reach this goal by 2001 or 2002. What did Greece do? It liberalized capital flows like the rest of Europe, to integrate quickly into Europe. It used a hard Drachma policy, *i.e.* high interest rates to reduce inflation quickly *via* an appreciation of the Drachma. Its deficit

declined sharply from 7.5 percent of GDP in 1996, to 4 percent in 1998, in order to converge to the Maastricht criteria. When the Russian crisis came, it obviously put tremendous pressure on the Drachma, and it was devalued in March, in order to help Greece's move into the ERM. The stock market took a big beating, 25% down; and foreign exchange left the country in the last 2 weeks of August, to the tune of 3-4 billion Dollars. But, Greece was determined to reap the political gains of the disinflation policy.

In the last 3-4 years, **Israel** has engaged in a very sharp disinflation policy, with a very unbalanced mix of macro policy tools. It also liberalized its capital account. It was trying, and is still trying, to reach Europe's inflation targets very quickly, around the year 2000-2001. But what was the cost? A very over valued currency, the over-evaluation syndrome referred to previously by Professor Sachs, which Israel and Greece could not escape. Israel has seen rising unemployment, to the level of 9%, and sharply declining growth. The business output growth was 8.5% a year in the years '94-'95. It is now estimated to be 0 in 1999. The bottom line is that we have effectively an OECD country, Israel, even though it is not formally in the OECD. Australia is a good example because it was close to the action. Obviously the other OECD countries fared better around this crisis. Uniquely, Greece and Israel were determined to engage in a very quick process of disinflation - Greece for very obvious political reasons, Israel without such an obvious political reason. What was the result? Both Greece and Israel came into the crisis very weak, very vulnerable, with

over valued currencies, with tremendous amounts of “hot” money which was ready to move out. And both had sharp reversals. In Greece, it was in March, and even more during the Russian crisis, in 1998, and in Israel it was in October 1998, known as Israel’s “October Revolution”. Israel over shot; it is not going to make any political gains such as those made by Greece. It came to the world crisis unprepared, surprised, devastated, and at least for the short term, the financial crisis will prolong the recession that had started two and a half years earlier, well into 1999.

**Prof. Jeffrey Sachs**  
**(Professor of Economics,**  
**Harvard University):**

Let me just make a general remark about China. I do not believe we know or will know anything certain about China for the next half century. It is such a vast, sprawling, complex and fundamentally difficult transition in which they are engaged, socially, politically and economically, that I think any simple prediction that China will just sail ahead or sail through the crisis in the short term or the long term is nothing but guess work. As is well-known, China’s financial sector itself, while not a market based sector, is a completely crisis ridden sector, where the estimate is that about a third of the bank loans are non-performing. Those are bad debts owed by the state enterprises, but a third of a bad debt translates to a future fiscal bail-out by the Chinese State of Chinese depositors on the order of about 30% of gross domestic product. So China has a huge hidden fiscal crisis, lurking in the very bad shape of its banking sector which, in

turn, is a reflection of the massively bad shape of the State enterprise sector. And China has not figured out how to reform that State enterprise sector.

It is avoiding the worst of this crisis for the moment because it is not heavily borrowed on short term foreign debt, as Professor Razin noted, but that does not mean that its financial house is in order in any sense. It has also made a promise to keep its exchange rates stable *vis-à-vis* the Dollar, which was an opportunistic request of the US government in a sense, where the US said “keep things calm, we want you to peg to the Dollar for 1998” and now they are pushing China to reaffirm that peg for 1999. This is the sort of short sighted policy that I am not happy about: the Renmenbi is not strong as the US Dollar. No matter what the problems, the Renmenbi has to be on a course of gradual depreciation against the Dollar, and it should not get locked into a policy of fixation against the Dollar for all the reasons previously discussed.

Turning a little closer to home, the question arises how a country like Israel, which is thoroughly export dependent, with, in fact, a heavy export dependence on Asia itself, should, in general, comport its monetary and fiscal policy, and specifically how it should react to a crisis like this. I thought that Professor Razin’s illustration of Australia was very pertinent. I would add Canada, which is another commodity exporting country, to a significant extent - Asia dependent, and which, despite having open trade with the United States, has maintained a flexible exchange rate with the US for decades. The system works just as Professor Razin described with regard to Australia - the currency moves up and down as much as 15 or 20 percent,

without creating any sense of panic or crisis or need to take Draconian actions, and this is the kind of system that I am in favour of for most countries. If one is in a situation where one is not trying to defend the exchange rate, and otherwise have balanced macroeconomic policies, fluctuations of as much as 10-20 percent of the exchange rate do not cause crisis, but they do allow a country to absorb external shocks, and therefore I think it is prudent to pursue a policy course such as this.

Israel’s currency, the Shekel was becoming over valued in the past couple of years, however, the very tight monetary policies, with relatively expansionary fiscal policy, a bad mix, led to currency appreciation which was not really wise for an export led growth economy such as Israel’s, and was an over valuation that was surely going to lead to vulnerability, either slow growth or a dramatic depreciation of the Shekel as actually happened in October. Thus, leading up to the crisis the imbalance of macroeconomic policies was already evident, and the sharp decline of the Shekel in the last two months certainly is a reflection of the unbalanced macroeconomic policies that went before.

Given these facts and the very slow growth, what can one say about these hotly debated issues?

**First**, I believe that fiscal policy is so hard to manage in general, that good conservative fiscal policy, trying to keep budget deficits low is almost always the right policy, and that the idea of Keynesian style priming through fiscal policy in general is not manageable politically, because once deficits start, it is very hard to reverse them. So I tend to be, as a matter of course, a fiscal hawk:

keep the budget deficit low and under control. On the other hand, I am much less of a monetary hawk, in two sense: first, I certainly do not believe in high interest rates to defend exchange rates, because I think flexible exchange rates is a very good way to absorb external shocks, especially when fiscal policy is under control. **Secondly**, aggressively trying to eliminate inflation, ends with a painful rebound, either the currency ends up collapsing, or growth collapses, so reducing inflation from 600% to 6% is sometimes easier than reducing it from 6% to 4% or 3%. Generally, I do not believe in these aggressive targets, where one squeezes the real economy through over contractionary monetary policy for the sake of an extra percentage point or two of inflation. Very aggressively trying to reduce inflation targets can do a lot of damage to the real economy that is unnecessary; where the gains do not tend to be very much sustained. Two other areas where I would watch carefully are banking and foreign borrowing, and

those are closely related. Professor Leviathan is absolutely right, the financial sector weaknesses in Asia should not be underplayed, they are real. I meant to say that the collapse that has come is not commensurate with those weaknesses, but liberalization of the banking sector, followed by a big banking boom is part of the seeds of this kind of crisis. The problem is not just foreign borrowing, it is also the domestic credit expansion that comes from various kinds of policies such as licensing a lot of new financial institutions quickly, liberalizing the financial sector very rapidly, cutting reserve requirements sharply and so forth. All those liberalization policies have very frequently been followed by crises three or four years later. Capital account liberalization is the most dangerous of all of these forms of liberalization, because when one borrows in someone else's money, there is no lender of last resort. So opening a capital account has to be done with extremely stringent limits on the ability of leverage domestic institu-

tions to take on debt from abroad. This point cannot be over emphasized. If there was a sense in Israel of a lot of "hot" money moving in recent months as a result of a capital account liberalization, that is in general a worrisome feeling, because, on the one side economic theory does not really prove any huge benefits from liberalizing short term capital movements, and on the other hand we see a history full of dangers from doing this too quickly. There is a big distinction between long term capital and short term capital. What is really worrying is the bank loans, the sales of CD's to foreign investors on a short term basis and so forth. In this context, it seems to me that moderate monetary policy, is required, not crunching the economy through high interest rates, seeing the Shekel devaluation as a maybe unfortunate but really necessary response to the international events, as well as to the preceding of the real appreciation, followed by a lot of care in the banking sector and foreign borrowing. ■

## Books Just Received

*Israel Among the Nations:  
International and Comparative Law  
Perspectives on Israel's 50th Anniversary*

A. Kellermann, K. Siehr, T. Einhorn (eds.)  
T.M.C. Asser Institute, The Hague  
London, The Hague, Boston; Kluwer Law International 1998

On the occasion of Israel's 50th Anniversary, eminent American, European and Israeli jurists contributed essays of great relevance to the current debate on constitutionalism and its values, the international legal dimension of the Arab-Israeli conflict, the dilemma of democracies when dealing with terrorism, the establishment of the concept of UN peace-keeping forces, individual

responsibility and superior orders for war crimes, and the ombudsman as defender of democracy and human rights.

The authors analyze Israel's special features: the founding of the state, Israel's contribution to the development of international law, its complex relations with the United Nations and the special treatment accorded the Jew among nations, the values of a Jewish and democratic state, and the highly charged issue of religious freedom and religious coercion. But the authors also caution that, where appropriate, Israel should strive to harmonize its legal system with other developed systems rather than choose original solutions, as is the case with the civil code (in preparation), private international law, international trade law and matters of quality of legislation. The experience gained in the European Community and in other European states on their road to harmonization could provide helpful guidance.

# The Wye River Memorandum

## October 23, 1998

**Full text of accord and accompanying letters of the most recent Israeli-Palestinian agreement signed within the context of the Middle East Peace Process**

**T**he following are steps to facilitate implementation of the Interim Agreement on the West Bank and Gaza Strip of September 28, 1995 (the "Interim Agreement") and other related agreements including the Note for the Record of January 17, 1997 (hereinafter referred to as "the prior agreements") so that the Israeli and Palestinian sides can more effectively carry out their reciprocal responsibilities, including those relating to further redeployments and security respectively. These steps are to be carried out in a parallel phased approach in accordance with this Memorandum and the attached time line. They are subject to the relevant terms and conditions of the prior agreements and do not supersede their other requirements

### Further Redeployments

#### Phase One and Two Further Redeployments

1. Pursuant to the Interim Agreement and subsequent agreements, the Israeli side's implementation of the first and second F.R.D. will consist of the transfer to the Palestinian side of 13% from Area C as follows:

1% to Area (A)

12% to Area (B)

The Palestinian side has informed that it will allocate an area/areas amounting to 3% from the above Area (B) to be designated as Green Areas and/or Nature Reserves. The Palestinian side has further informed that they will act according to the established scientific standards, and that therefore there will be no changes in the status of these areas, without prejudice to the rights of the existing inhabitants in these areas including Bedouins; while these standards do not allow new construction in these areas, existing roads and buildings may be maintained.

The Israeli side will retain in these Green Areas/Nature Reserves the overriding security responsibility for the

purpose of protecting Israelis and confronting the threat of terrorism. Activities and movements of the Palestinian Police forces may be carried out after coordination and confirmation; the Israeli side will respond to such requests expeditiously.

2. As part of the foregoing implementation of the first and second F.R.D., 14.2% from Area (B) will become Area (A).

#### Third Phase of Further Redeployments

With regard to the terms of the Interim Agreement and of Secretary Christopher's letters to the two sides of January 17, 1997 relating to the further redeployment process, there will be a committee to address this question. The United States will be briefed regularly.

### Security

In the provisions on security arrangements of the Interim Agreement, the Palestinian side agreed to take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against the Israeli side, against individuals falling under the Israeli side's authority and against their property, just as the Israeli side agreed to take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against the Palestinian side, against individuals falling under the Palestinian side's authority and against their property. The two sides also agreed to take legal measures against offenders within their jurisdiction and to prevent incitement against each other by any organizations, groups or individuals within their jurisdiction.

Both sides recognize that it is in their vital interests to combat terrorism and fight violence in accordance with Annex I of the Interim Agreement and the Note for the Record. They also recognize that the struggle against terror and violence must be comprehensive in that it deals with terrorists, the terror support structure, and the environment conducive to the support of

terror. It must be continuous and constant over a long-term, in that there can be no pauses in the work against terrorists and their structure. It must be cooperative in that no effort can be fully effective without Israeli-Palestinian cooperation and the continuous exchange of information, concepts, and actions.

Pursuant to the prior agreements, the Palestinian side's implementation of its responsibilities for security, security cooperation, and other issues will be as detailed below during the time periods specified in the attached time line:

## **A. Security Actions**

### *1. Outlawing and Combating Terrorist Organizations*

The Palestinian side will make known its policy of zero tolerance for terror and violence against both sides.

A work plan developed by the Palestinian side will be shared with the U.S. and thereafter implementation will begin immediately to ensure the systematic and effective combat of terrorist organizations and their infrastructure.

In addition to the bilateral Israeli-Palestinian security cooperation, a U.S.-Palestinian committee will meet biweekly to review the steps being taken to eliminate terrorist cells and the support structure that plans, finances, supplies and abets terror. In these meetings, the Palestinian side will inform the U.S. fully of the actions it has taken to outlaw all organizations (or wings of organizations, as appropriate) of a military, terrorist or violent character and their support structure and to prevent them from operating in areas under its jurisdiction.

The Palestinian side will apprehend the specific individuals suspected of perpetrating acts of violence and terror for the purpose of further investigation, and prosecution and punishment of all persons involved in acts of violence and terror.

A U.S.-Palestinian committee will meet to review and evaluate information pertinent to the decisions on prosecution, punishment or other legal measures which affect the status of individuals suspected of abetting or perpetrating acts of violence and terror.

### *2. Prohibiting Illegal Weapons*

The Palestinian side will ensure an effective legal framework is in place to criminalize, in conformity with the prior agreements, any importation, manufacturing or unlicensed sale, acquisition or possession of firearms, ammunition or weapons in areas under Palestinian jurisdiction.

In addition, the Palestinian side will establish and vigorously

and continuously implement a systematic program for the collection and appropriate handling of all such illegal items in accordance with the prior agreements. The U.S. has agreed to assist in carrying out this program.

A U.S.-Palestinian-Israeli committee will be established to assist and enhance cooperation in preventing the smuggling or other unauthorized introduction of weapons or explosive materials into areas under Palestinian jurisdiction.

### *3. Preventing Incitement*

Drawing on relevant international practice and pursuant to Article XXII (1) of the Interim Agreement and the Note for the Record, the Palestinian side will issue a decree prohibiting all forms of incitement to violence or terror, and establishing mechanisms for acting systematically against all expressions or threats of violence or terror. This decree will be comparable to the existing Israeli legislation which deals with the same subject.

A U.S.-Palestinian-Israeli committee will meet on a regular basis to monitor cases of possible incitement to violence or terror and to make recommendations and reports on how to prevent such incitement. The Israeli, Palestinian and U.S. sides will each appoint a media specialist, a law enforcement representative, an educational specialist and a current or former elected official to the committee.

## **B. Security Cooperation**

The two sides agree that their security cooperation will be based on a spirit of partnership and will include, among other things, the following steps:

### *1. Bilateral Cooperation*

There will be full bilateral security cooperation between the two sides which will be continuous, intensive and comprehensive.

### *2. Forensic Cooperation*

There will be an exchange of forensic expertise, training, and other assistance.

### *3. Trilateral Committee*

In addition to the bilateral Israeli-Palestinian security cooperation, a high-ranking U.S.-Palestinian-Israeli committee will meet as required and not less than biweekly to assess current threats, deal with any impediments to effective security cooperation and coordination and address the steps being taken to combat terror and terrorist organizations. The committee will also serve as a forum to address the issue of

external support for terror. In these meetings, the Palestinian side will fully inform the members of the committee of the results of its investigations concerning terrorist suspects already in custody and the participants will exchange additional relevant information. The committee will report regularly to the leaders of the two sides on the status of cooperation, the results of the meetings and its recommendations.

### C. Other Issues

#### 1. *Palestinian Police Force*

The Palestinian side will provide a list of its policemen to the Israeli side in conformity with the prior agreements.

Should the Palestinian side request technical assistance, the U.S. has indicated its willingness to help meet these needs in cooperation with other donors.

The Monitoring and Steering Committee will, as part of its functions, monitor the implementation of this provision and brief the U.S.

#### 2. *PLO Charter*

The Executive Committee of the Palestine Liberation Organization and the Palestinian Central Council will reaffirm the letter of 22 January 1998 from PLO Chairman Yasir Arafat to President Clinton concerning the nullification of the Palestinian National Charter provisions that are inconsistent with the letters exchanged between the PLO and the Government of Israel on 9/10 September 1993. PLO Chairman Arafat, the Speaker of the Palestine National Council, and the Speaker of the Palestinian Council will invite the members of the PNC, as well as the members of the Central Council, the Council, and the Palestinian Heads of Ministries to a meeting to be addressed by President Clinton to reaffirm their support for the peace process and the aforementioned decisions of the Executive Committee and the Central Council.

#### 3. *Legal Assistance in Criminal Matters*

Among other forms of legal assistance in criminal matters, the requests for arrest and transfer of suspects and defendants pursuant to Article II (7) of Annex IV of the Interim Agreement will be submitted (or resubmitted) through the mechanism of the Joint Israeli-Palestinian Legal Committee and will be responded to in conformity with Article II (7) (f) of Annex IV of the Interim Agreement within the twelve week period. Requests submitted after the eighth week will be responded to in confor-

mity with Article II (7) (f) within four weeks of their submission. The U.S. has been requested by the sides to report on a regular basis on the steps being taken to respond to the above requests.

#### 4. *Human Rights and the Rule of Law*

Pursuant to Article XI (1) of Annex I of the Interim Agreement, and without derogating from the above, the Palestinian Police will exercise powers and responsibilities to implement this Memorandum with due regard to internationally accepted norms of human rights and the rule of law, and will be guided by the need to protect the public, respect human dignity, and avoid harassment.

### Interim Committees and Economic Issues

1. The Israeli and Palestinian sides reaffirm their commitment to enhancing their relationship and agree on the need actively to promote economic development in the West Bank and Gaza. In this regard, the parties agree to continue or to reactivate all standing committees established by the Interim Agreement, including the Monitoring and Steering Committee, the Joint Economic Committee (JEC), the Civil Affairs Committee (CAC), the Legal Committee, and the Standing Cooperation Committee.
2. The Israeli and Palestinian sides have agreed on arrangements which will permit the timely opening of the Gaza Industrial Estate. They also have concluded a "Protocol Regarding the Establishment and Operation of the International Airport in the Gaza Strip During the Interim Period."
3. Both sides will renew negotiations on Safe Passage immediately. As regards the southern route, the sides will make best efforts to conclude the agreement within a week of the entry into force of this Memorandum. Operation of the southern route will start as soon as possible thereafter. As regards the northern route, negotiations will continue with the goal of reaching agreement as soon as possible. Implementation will take place expeditiously thereafter.
4. The Israeli and Palestinian sides acknowledge the great importance of the Port of Gaza for the development of the Palestinian economy, and the expansion of Palestinian trade. They commit themselves to proceeding without delay to conclude an agreement to allow the construction and operation of the port in accordance with the prior agreements. The

Israeli-Palestinian Committee will reactivate its work immediately with a goal of concluding the protocol within sixty days, which will allow commencement of the construction of the port.

5. The two sides recognize that unresolved legal issues adversely affect the relationship between the two peoples. They therefore will accelerate efforts through the Legal Committee to address outstanding legal issues and to implement solutions to these issues in the shortest possible period. The Palestinian side will provide to the Israeli side copies of all of its laws in effect.
6. The Israeli and Palestinian sides also will launch a strategic economic dialogue to enhance their economic relationship. They will establish within the framework of the JEC an Ad Hoc Committee for this purpose. The committee will review the following four issues: (1) Israeli purchase taxes; (2) cooperation in combating vehicle theft; (3) dealing with unpaid Palestinian debts; and (4) the impact of Israeli standards as barriers to trade and the expansion of the A1 and A2 lists. The committee will submit an interim report within three weeks of the entry into force of this Memorandum, and within six weeks will submit its conclusions and recommendations to be implemented.
7. The two sides agree on the importance of continued international donor assistance to facilitate implementation by both sides of agreements reached. They also recognize the need for enhanced donor support for economic development in the West Bank and Gaza. They agree to jointly approach the donor community to organize a Ministerial Conference before the end of 1998 to seek pledges for enhanced levels of assistance.

### Permanent Status Negotiations

The two sides will immediately resume permanent status negotiations on an accelerated basis and will make a determined effort to achieve the mutual goal of reaching an agreement by May 4, 1999. The negotiations will be continuous and without interruption. The U.S. has expressed its willingness to facilitate these negotiations.

### Unilateral Actions

Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.

### Attachment: Time Line

This Memorandum will enter into force ten days from the date of signature.

Done at Washington, D.C. this 23d day of October 1998.

For the Government of the State of Israel: **Benjamin Netanyahu**

For the PLO: **Yassir Arafat**

Witnessed by: **William J. Clinton**, The United States of America

### Time Line

*Note:* Parenthetical references below are to paragraphs in "The Wye River Memorandum" to which this time line is an integral attachment. Topics not included in the time line follow the schedule provided for in the text of the Memorandum.

#### 1. Upon Entry into Force of the Memorandum:

- Third further redeployment committee starts
- Palestinian security work plan shared with the U.S. (II (A) (1) (b))
- Full bilateral security cooperation (II (B) (1) )
- Trilateral security cooperation committee starts (II (B) (3))
- Interim committees resume and continue; Ad Hoc Economic Committee starts (III)
- Accelerated permanent status negotiations start (IV)

#### 2. Entry into Force - Week 2:

- Security work plan implementation begins (II (A) (1) (b)); (II (A) (1) (c)) committee starts
- Illegal weapons framework in place (II (A) (2) (a)); Palestinian implementation report (II (A) (2) (b))
- Anti-incitement committee starts (II (A) (3) (b)); decree issued (II (A) (3) (a))
- PLO Executive Committee reaffirms Charter letter (II (C) (2))
- Stage 1 of F.R.D. implementation: 2% C to B, 7.1% B to A. Israeli officials acquaint their Palestinian counterparts as required with areas; F.R.D. carried out; report on F.R.D. implementation (I(A))

*continued on p. 16*

*continued from p. 15*

**3. Week 2-6:**

Palestinian Central Council reaffirms Charter letter (weeks two to four) (II (C) (2))

PNC and other PLO organizations reaffirm Charter letter (weeks four to six) (II (C) (2))

Establishment of weapons collection program (II (A) (2) (b)) and collection stage (II (A) (2) (c)); committee starts and reports on activities.

Anti-incitement committee report (II (A) (3) (b))

Ad Hoc Economic Committee: interim report at week three; final report at week six (III)

Policemen list (II (C) (1) (a)); Monitoring and Steering Committee review starts (II (C) (1) (c))

Stage 2 of F.R.D. implementation: 5% C to B. Israeli officials acquaint their Palestinian counterparts as required with areas; F.R.D. carried out; report on F.R.D. implementation (I (A))

**4. Week 6-12:**

Weapons collection stage II (A) (2) (b); II (A) (2) (c) committee report on its activities.

Anti-incitement committee report (II (A) (3) (b))

Monitoring and Steering Committee briefs U.S. on policemen list (II (C) (1) (c))

Stage 3 of F.R.D. implementation: 5% C to B, 1% C to A, 7.1% B to A. Israeli officials acquaint Palestinian counterparts as required with areas; F.R.D. carried out; report on F.R.D. implementation (I (A))

**5. After Week 12:**

Activities described in the Memorandum continue as appropriate and if necessary, including:

Trilateral security cooperation committee (II (B)(3)) (II (A) (1) (c)) committee

(II (A) (1) (e)) committee

Anti-incitement committee (II (A) (3) (b))

Third Phase F.R.D. Committee (I (B))

Interim Committees (III)

Accelerated permanent status negotiations (IV)

**Letter of Secretary of State Madeleine K. Albright to Prime Minister Binyamin Netanyahu. Following the Signing of the Wye River Memorandum, October 23, 1998**

Dear Mr. Prime Minister:

The United States is pleased to have worked with you in achieving a successful outcome in the negotiations on "The Wye River Memorandum." We believe its parallel phased approach will help provide greater confidence to both sides in the implementation process, since actions in each stage of the time line are to be completed by both sides before moving to the next stage. I can confirm that the United States is prepared to play the role identified for it in the Memorandum.

The United States recognizes the importance of the security provisions of "The Wye River Memorandum" to the State of Israel. In this context, and given the role specified for the United States in the Memorandum, we wish to reiterate our ironclad commitment to Israel's security and to peace, and to stress that Palestinian security undertakings are a critical foundation of the Memorandum.

In this context, we wanted to confirm our understanding of assurances we have received from the Palestinians on several issues that you have indicated are of special concern to Israel. Regarding the Palestinian apprehension of terrorism suspects (II (A) (1) (d)), we have been assured that all the cases which have been identified will be acted upon. With respect to Palestinian decisions regarding the prosecution, punishment or other legal measures that affect the status of individuals suspected of abetting or perpetrating acts of violence or terror, there are procedures in place to prevent unwarranted releases. Furthermore, we will express our opposition to any unwarranted releases of such suspects, and in the event of such a release, we will be prepared to express our position publicly.

Regarding the Palestinian side's program for confiscation and disposition of illegal weapons under paragraph II (A) (2) (b), our assistance to the Palestinian side will help ensure that any retention of weapons is consistent with the relevant Interim Agreement provisions, including Article IV (5) of Annex I. The U.S. plans to inform Israel periodically of the progress of our assistance program. Finally, with respect to the Palestinian side's provision of its list of policemen to Israel (II (C) (1) (a)), the U.S. has been assured that it will receive all appropriate information concerning current and former policemen as part of our assistance program.

Sincerely,

**Madeleine K. Albright**



*Embassy of the United States of America  
Tel Aviv, October 31, 1998*

Mr. Dani Naveh, Cabinet Secretary  
Office of the Prime Minister, Jerusalem

Dear Dani:

I wanted to confirm our policy on the issues of Permanent Status Negotiations and Prisoner Releases. In this regard, the statements issued publicly by the State Department are accurate and represent our policies.

With regard to Permanent Status Negotiations, the statement said: "the U.S. is highly sensitive to the vital importance of the permanent status issues to Israel's future. We recognize that the security of the State of Israel and the Israeli public is at stake, and the U.S. commitment to Israel's security remains ironclad."

"We appreciate that if the U.S. is invited by both parties to participate in the permanent status talks, which are to be conducted between Israel and the Palestinians on a bilateral basis, we will do so for the purpose of facilitating the negotiations".

"Only Israel can determine its own security needs and decide what solutions will be satisfactory".

"We also understand that any decision to convene or seek to convene a summit to resolve permanent status issues will need the agreement of both parties".

As for the issue of prisoner releases and the question of a "revolving door", the statement said: "we have had discussions with the Palestinians and they have given us a firm commitment that there will be no 'revolving door'".

These public statements by the State Department represent our policies. We will not change them and they will remain our policies in the future.

Sincerely,  
**Edward S. Walker, Jr., Ambassador**

*Embassy of the United States of America  
Tel Aviv*

*October 29, 1998*

Mr. Dani Naveh, Cabinet Secretary  
Office of the Prime Minister, Jerusalem

Dear Dani:

I wanted to confirm our policy on the issue of the 3rd phase of further redeployment. In this regard, the statement issued publicly by the State Department on October 27, 1998, is accurate and represents our policy.

Regarding the third further redeployment, the statement said: "during the discussions leading to this agreement, the U.S. made clear to both parties that it will not adopt any position or express any view about the size or the content of the third phase of Israel's further redeployment, which is an Israeli responsibility to implement rather than negotiate."

"Under the terms of the memorandum, an Israeli-Palestinian committee is being established. Nonetheless we urge the parties not to be distracted from the urgent task of negotiating permanent status arrangements, which are at the heart of the matter and which will determine the future of the area."

"Our own efforts have been and will continue to be dedicated to that vital task."

This public statement by the State Department represents our policy. We will not change it and it will remain our policy in the future.

Sincerely,  
**Edward S. Walker, Jr.**  
**Ambassador**



View of Wye Plantation, Maryland U.S.A., location of the latest round of Middle East Peace talks.

*Embassy of the United States of America  
Tel Aviv, October 29, 1998*

Mr. Dani Naveh, Cabinet Secretary  
Office of the Prime Minister, Jerusalem

Dear Dani:

I wanted to confirm our policy on the issues of unilateral actions and the Charter of the PLO. In this regard, the statements issued publicly by the State Department on October 27, 1998, are accurate and represent our policies.

With regard to unilateral declarations or other unilateral actions, the statement said: "as regards to the possibility of a unilateral declaration of statehood or other unilateral actions by either party outside the negotiating process that prejudice or predetermine the outcome of those negotiations, the U.S. opposes and will oppose any such unilateral actions."

"Indeed, the U.S. has maintained for many years that an acceptable solution to the Israeli-Palestinian conflict can only be found through negotiations, not through unilateral actions. And as we look to the future, that will remain our policy."

"For the present, we are doing all we can to promote permanent status negotiations on an accelerated basis. And we are stressing that those who believe that they can declare unilateral positions or take unilateral acts, when the interim period ends, are courting disaster."

With regard to the PNC, the statement said: "the Wye River Agreement specifies that the members of the PNC (as well as the members of the PLO Central Council, the Palestinian Council and the Heads of Palestinian Ministries) will be invited to a meeting which President Clinton will attend."

"The purpose of this meeting of the PNC and other PLO organizations is to reaffirm Chairman Arafat's January 22 letter to President Clinton nullifying each of the Charter's provisions that are inconsistent with the PLO's commitments to renounce terror, and to recognize and live in peace with Israel."

"This process of reaffirmation will make clear, once and for all, that the provisions of the PLO Charter that call for the destruction of Israel are null and void."

These public statements by the State Department represent our policies. We will not change them and they will remain our policies in the future.

Sincerely,  
**Edward S. Walker, Jr., Ambassador**

*U.S. State Department  
Washington, D.C., October 30, 1998*

Mr. Dani Naveh, Cabinet Secretary  
Government of Israel

Dear Mr. Naveh:

I wanted to provide further clarification of the understanding of the United States regarding one of the issues addressed in the "Wye River Memorandum."

With respect to the Palestinian side's provision of its list of policemen to Israel (II(C)(1)(a)), the U.S. has been assured that it will receive all appropriate information concerning current and former policemen as part of our assistance program. It is also our understanding that it was agreed by the two sides that the total number of Palestinian policemen would not exceed 30,000.

Sincerely,

**Dennis B. Ross**  
**Special Middle East Coordinator**

*United States Department of State  
Washington, D.C. 20520, October 23, 1998*

Mr. Dani Naveh  
Israeli-Palestinian Monitoring  
and Steering Committee

Dear Dani:

With regard to the current or former U.S. elected official to be appointed to the trilateral incitement committee referred to in "The Wye River Memorandum", we intend to consult with the Israeli Government to confirm that the appointment would be mutually satisfactory.

Sincerely,

**Dennis B. Ross**  
**Special Middle East Coordinator**

# Anti-Semitism in Russia

## Special Report

**A**nti-Semitism is becoming one of the primary ideological tools in the political struggle for power in Russia.

This process is particularly prominent in the stance taken by the principal Russian political forces, the public and social elites and supreme governmental institutions concerning the statements made by General Albert Makashov, a Communist Member of Parliament (KPRF).

It will be recalled that on 4th October 1998, during a demonstration held by opponents of the present regime in Moscow, and on 7th October 1998, during a separate demonstration held in the city of Samara, General Makashov called for the murder of Jews ("All the Yids - to the grave" and similar statements). Participants in the demonstrations greeted the General's remarks enthusiastically.

On 6th November 1998, in an interview given to the Italian newspaper *La Stampa*, Makshov called for the introduction of quotas (0.5%) in the appointment of Jews within the civil service.

These statements were in clear violation of Section 282(2)(a) of the Russian Criminal Code: "Activities designed to excite national, inter-racial or religious enmity, where the said activities are performed in public and with the threat of violence"; such activities carry a penalty of between 3-5 years imprisonment.

It should be emphasized that as

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**Following is a presentation of recent events and their implications, as background and analysis of anti-Semitism in the Russian Federation today. The phenomenon of anti-Semitism is in the process of evolution, and it is presently unclear in which direction it will develop. There seems to be a wide and significant reaction, yet the subject may fade and smolder, or alternatively, it may rekindle into a major conflagration in the coming period - as it is an election year. On the legal level, few effective steps have been taken in the past years to combat anti-Semitism, though lately certain concrete actions have been initiated.**

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General Makashov is a member of the lower legislative chamber (the State Duma), the initiation of legal proceedings against him requires the Chief Prosecutor of Russia personally to apply to the Speaker of the Duma for the removal of his immunity.

### **Reactions of the Authorities and other Political Forces**

In the light of these circumstances, the Russian authorities took the following measures:

On 12th November 1998, following a delay of over a month after the occurrence of the above incidents, the President of Russia, Boris Yeltsin, ordered the Prime Minister, the head of the FSB, Vladimir Putin, the Minister of

the Interior, Sergei Stepashin, and the Secretary of the Russian Security Council, Nicolai Bordioza "to crack down on nationalist and political extremism, which has recently been on the increase"; he did this without specifically mentioning General Makashov and without expressly condemning anti-Semitism.

On 13th November 1998, the Russian Prime Minister Yevgeny Primakov, reiterated the statements of the President, promising that these phenomena would indeed be dealt with. Previously, the Prime Minister had made no reference whatsoever to this subject and the only government reaction expressing general condemnation of nationalist extremism had issued from First Deputy Prime Minister Yuri Maslikov's spokesman Anton Surikov, who also acts as a commentator and journalist for the extremist opposition newspaper *Zavtra*.

The Chief Prosecutor of Russia Yuri Skuratov, publicly promised that this matter was indeed being handled by the Prosecution Service. At the same time, it became clear that in fact:

- The Moscow Prosecution Service (and not the Chief Prosecution Service) had on 13th October 1998, opened a criminal file against a group of people, including General Albert Makashov; the leader of the National Bolshevik Party, Eduard Limonov; the leader of the Cossacks, Michael Folin and the nationalist poet, Ivan Gunko;
- The said criminal file was opened in

respect of an offence under Section 280 of the Russian Criminal Code which refers to “public calls for violent change to the constitutional regime in the Russian Federation”, an offence which is almost impossible to prove, and not in respect of Section 282 as described above.

On 4th November 1998, by a majority of 121 Members of Parliament to 107, the State Duma refused to confirm a very mildly worded proposed decision condemning the statements of General Makashov; all the members of the Communist caucus (except for the Speaker of the Parliament, Gennadi Seleznirov) voted against the proposed decision. Only on 13th November, on a vote on a different version which made no mention whatsoever of Makashov’s comments and the issue of anti-Semitism in Russia but rather referred to “activities and statements which complicate the inter-ethnic relations in Russia”, did the Duma vote in favour, with a majority of 303 against 34. During the same sitting, the Duma refused to place on the agenda a proposal by a group of Democratic Members of Parliament to the effect that the Duma would ask the Chief Prosecution Service to institute criminal proceedings against General Makashov (this proposal fell by a majority of 118 to 106).

Concurrently with the above, the central political forces of Russia, and in particular the Communist Party, initiated a public campaign with the purpose of exploiting the Makashov issue to achieve wider political objectives, in which the anti-Semitic element of the affair was to remain in the background. Within this framework:

- Liberal political figures, remnants of the regime governing Russia until

September 1998, as well as various organs of the mass media, most of which belong to the same figures, commenced attacks against the Communist Party, including proposals for its statutory prohibition (Boris Berezovsky, Egor Gaidar, Anatoly Chubais, Boris Nemtsov, as well as the Chief Rabbi of Russia, Adolf Shayevich, and more).

- The Communist Party, which is building its image as a moderate left-wing party, similar to the social-democratic parties in the West, and which is seeking government in Russia, but at the same time is well-aware of the popularity of anti-Semitism in Russia among its own potential electorate, has exploited this measure of the Liberals and has shifted the emphasis of the public debate from issues of anti-Semitism to the issue of the political struggle for government. For this purpose it adopted a three pronged strategy:
  - It has declared its willingness to consider anti-Semitism in Russia (while mildly condemning the statements made by Makashov as being too extremist), but coupling this agreement with the need to simultaneously deal with Russophobia (hatred of Russians), which in the language of the extremist right and left wing parties means - damage maliciously caused by the Jews, and in particular wealthy Jews, to Russia in the age of reform;
  - Explanatory activities are being conducted out of the public eye (during a meeting between party leader Gennadi Zyuganov with Israel’s Ambassador to Russia Zvi Magen, on 12th November; with the Chairman of the Organization of Jewish Communities in Germany, Ignatz Bobis on 24th November;

background talks with Jewish journalists and more, in order to lessen the public outcry against the positions taken by the Communist Party on this issue and while promising that anti-Semitism is not the official ideological line of the Party;

- Concurrently a propaganda campaign of a diametrically different nature is being conducted with the aid of mass media affiliated with the extremist left and right wings (an interview given by Gennadi Zyuganov to the newspaper *Zavtra*, Issue no. 44, November 1998). As part of this campaign, Jews and the State of Israel are jointly blamed for the current condition of Russia. It will be remembered in this context that these accusations are not an outcome of the Makashov affair, but have been made by Gennadi Zyuganov over a long period, including in his pragmatic book “*Beyond the Horizon*”, in 1995.

## Conclusion

Anti-Semitism has become one of the primary ideological tools in the political struggle currently being conducted in Russia in relation to the future shape of the regime in that country.

The lack of willingness of the Communist Party - one of the main contenders for government, the Russian parliament and the supreme government institutions of the present regime, to condemn this phenomenon in absolute terms and to take effective legal measures to cope with it, clearly points to the fact that Russia is returning to an age of State anti-Semitism, which may be expected to increase after the elections due to take place in Russia in 1999 and 2000.

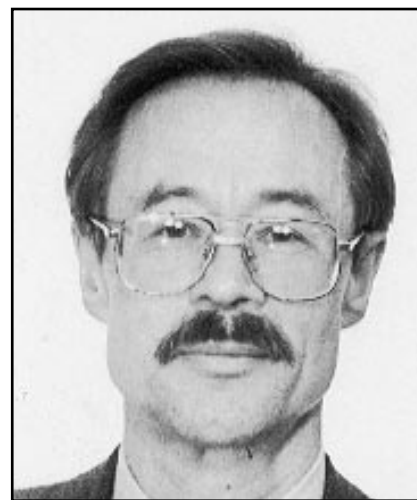
# Human Rights in Russia

## Vladimir Kartashkin and William Smirnov

On November 23-24, 1998, an international conference was held in Moscow on "Fifty Years of the International Declaration on Human Rights and Russia". The Conference was chaired by Professor Vladimir Kartashkin, a renowned expert on international law who teaches at the Institute of State and Law of the Russian Academy of Sciences. Professor Kartashkin serves as Chairman of the Presidential Commission on Human Rights of the Russian Federation, is a member of the UN Human Rights Committee in Geneva and of the Sub-Commission on Human Rights. The Conference was held in the midst of crisis in the Russian Federation, in the wake of a blatant anti-Semitic statement by a member of the State Duma and in the aftermath of Galina Starovoitova's murder. As such, the Conference arena served as a microcosm for airing the views of representatives of Government ministries, political parties, NGOs and human rights leaders from Moscow as well as the outlying provinces of the Russian Federation. Freedom of speech is alive in Moscow.

**T**he essence of the protest movement in the former Soviet Union and the main goal of transformation in post-communist Russia was human rights and freedom. More than 250 participants from Russia, representatives of such international bodies as the UN, European Council, Council of Europe, UNDP, OSCE and other distinguished foreign guests, including from Israel, over a two day period discussed the implementation of the UN Universal Declaration of Human Rights in contemporary Russia. This conference in the year declared by the Russian President as the Human Rights Year was not so much a celebration of the 50th Anniversary of the Universal Declaration as an open and critical discussion of difficulties and obstacles to promotion and implementation of human rights in Russia.

From a formal legal and institutional point of view, during the last 7 years Russia has made a real breakthrough in the field of human rights and freedoms: the acting 1993 Federal Constitution has some of the most comprehensive articles on human rights in the world; there are two main public national institutions: the Presidential Commission on Human Rights of the Russian Federation and the Parliamentary Commissioner on Human Rights; autonomous Commissions on Human Rights function in 60 (out of 89) federal entities, the Commissions are attached to the heads of the executive branches; regional ombudsmen operate in another 3 federal entities; several hundred civic national and regional human rights organizations and movements are active, starting with such famous organizations as Amnesty International, Helsinki Groups, Memorial



Vladimir Kartashkin (top) is Chairman of the Presidential Commission on Human Rights of the Russian Federation, William Smirnov (bottom) is a Member of the Presidential Commission on Human Rights of the Russian Federation. He is also a Doctor of Law, Head of the Department for Political Science Studies, Institute of State and Law, Russian Academy of Sciences; and Vice-President, Russian Political Science Association. He graduated from Faculty of Law, Moscow State University, is the author of two books and more than a hundred chapters and articles in the field of sociology of law, law and politics, political participation and human rights.

and ending with Soldiers' Mothers and the Committee for Civil Rights.

The reality is that we are observing the spectacular improvement of political rights, a more modest amelioration of civil rights, and the regression of social-economic rights. An abundance of statistical and other data, facts and evidence of gross violations of human rights have been listed in reports by the First Deputy Russian Federation Procurator General Yurii Chaika, Federal Vice-Ministers of Justice and the Interior Sergii Ivanov and Sergii Kozevnikov, and in speeches of human rights activists.

There are many causes of these violations. The most important of them are economic and financial crises, weakness of the judicial system, low standards of legal culture of the majority of the population, and disintegration of the legal system itself. In present day Russia, there exist some 89 legal systems: the Constitutions of most of the 21 Republics directly contradict the Federal Constitution, according to the Federal Ministry of Justice report; in the last three years practically all 88 (Chechnya, in reality, is beyond Russian legal jurisdiction) federal entities have passed more than 1600 illegal laws and other legal enactments. Often these illegal enactments violate human rights.

This is the reason why it is not surprising that, according to a 1998 public opinion poll based on an all Russia sample, 75% of all adult citizens believe that human rights in Russia are not observed, and only 14% think that during the last several years observance of human rights has improved. According to Russian citizens, the

following human rights are most often violated: equality before the law, the right to life and security, and the right to work. It is alarming that 24% of citizens (every fourth citizen) believes that in today's Russia, there is no institution which protects their rights.

The Chairman of the Presidential Commission of Human Rights of the Russian Federation Professor Vladimir Kartashkin in his keynote address states:

“Systemic crisis in Russia makes an extremely negative impact on the life of millions of Russians. The majority of the employed, as well as pensioners, children, disabled persons and other most vulnerable groups of the population, are denied a decent life due to nonpayment of salaries and pensions and other violations of their socio-economic rights. One of the main reasons for these violations is the lack of a strong and efficient system of procedures and mechanisms for protecting human rights and freedoms. Commissions and Commissioners (Ombudsmen) on Human Rights have no authority to pass the decisions binding on governmental institutions and public officials. To make human rights activity more efficient, it is necessary to create authoritative institutions. In many countries these institutions are the minister or ministerial department on human rights; one of the deputies of the head of presidential administration or one of the president's advisers; in Parliament it is a committee on human rights. It is time to found in Russia not only institutions of these kind but also the civic inspections on human rights that could consist of members of the Commissions on human rights, representatives of nongovernmental human rights organizations, and mass media persons. These civic inspections would concentrate their efforts in prisons, and in

military and other institutions where the violations of human rights are systematic and substantial.

Protection and guarantees of human rights have to become the national idea that will unite Russian society. On the basis of this idea it is possible to work out a compromise between right, center, and left.”

Discussions in this Conference and recent events in Russia prove that the achievement of this goal is an extremely difficult task. The Conference starts with commemoration of Deputy (MP) of the State Duma - the law passing Chamber of Russia's Parliament, one of the most famous liberal reformists, a consistent defender of human rights and fighter against anti-Semitism, Galina Starovoitova who was assassinated in St. Petersburg two days before the Conference. The condemnation by Sergei Kovalev, one of the leaders of the human rights movement, of this killing and the flagrant anti-Semitic statement of General Makashov - the Communist Party MP, were met by critical remarks from two proponents of the nationalistic left. In their view, the official mass media pays tribute almost solely to the assassinations of liberals, who are responsible for crises in the country and for the sufferings of the majority of Russians, and defends rights mostly of “representatives of one ethnic group that actually are in commanding positions in Russia. These and other facts provoked Makashov remark”.

These statements were resolutely rejected by other Conference participants. Moreover, the Conference Resolution passed almost unanimously

*continued on p. 41*

# Presenting Israel's Case Before International Human Rights Bodies

Alan Baker and Ady Schonmann

**I**n the formative years following its establishment as a State, Israel found itself faced with a basic quandary touching on the very tenets of its existence as a member of the international community. This quandary arose, first and foremost, out of the unique composition of its population, and the concomitant problems which arose in the integration, absorption and day to day dealing with the religious, cultural, social and political aspects inherent in the development of a new society based on communities of differing religions and cultures. Added to this, were the security and external political problems emanating from a situation of belligerency imposed by its neighbours, including periods of open hostility as well as ongoing acts of terror systematically directed against its civilian population.

With this internal situation as a factor in its early development and in the development of its internal political, legal, economic, cultural and social infrastructure, Israel had to weigh this unique quandary *vis-à-vis* the desire, in the external context, to realize, in every way, its rights and duties as a *bona fide* member of the international community.<sup>1</sup>

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Alan Baker (top) is the Legal Adviser of Israel's Foreign Ministry. Ms. Ady Schonmann (bottom) is a human rights lawyer, member of the Legal Office of the Israeli Foreign Ministry. The views expressed are the authors' and do not necessarily represent the views of the Government of Israel.



faced with such a unique internal, political and social mosaic, and dealing, in its own way, with the legislation and application of human rights norms in a uniquely developing society, could undertake the additional burden inherent in the reporting requirements of various human rights Conventions which were then being drafted and adopted. Additionally, and in light of Israel's political standing in United Nations bodies, the question also arose whether the human rights monitoring bodies functioning according to the norms and criteria set out in the human rights instruments which serve as a basis for reviewing implementation, were duly equipped and able to objectively and impartially consider Israel's position in the context of its unique problems and social and political structure.

This dilemma remained until the second half of the 1980's when governmental authorities came to the conclusion that Israel's legislative and legal infrastructure as well as governmental practices in the social, economic, cultural and political spheres had developed to the extent that Israel was able to open itself to the international scrutiny accompanying accession to the human rights instruments. In retrospect, this trend in policy may perhaps be attributed to the drafting of a series of "Basic Laws" forming the basis of a constitutional framework, and to the growing judicial activism of Israel's Supreme Court since the 1980's. That is to say, Israel's accession to the human rights treaties was a manifest affirmation of its existing law, as

Thus, throughout the early years, the oft-repeated question was asked whether Israel,

developed in a body of jurisprudence protecting human rights and liberties.

Accordingly, on 3 October 1991, Israel notified the Secretary General of the United Nations of its ratification of five of the principle human rights instruments cited below<sup>2</sup>, and in so doing reaffirmed worldwide its already existing commitment to the on-going process of protecting and promoting human rights within its territory. Accordingly, like every other State Party, Israel undertook to submit to the respective treaty bodies, periodic reports on the measures adopted by it to give effect to the rights and duties set out in the Conventions, and to openly and constructively discuss its policies and practice with those treaty bodies.

In the endeavor to comply with the treaty requirements for reporting, the Ministries of Justice and Foreign Affairs embarked on extensive research in order to produce the required Reports. Government ministries as well as other relevant government institutions were asked to supply information and data concerning their areas of operation. To this end, local non-governmental organisations (NGOs) as well as other independent and academic research authorities were involved in the preparation process of the reports. NGOs also were given opportunities to consider and comment upon the State reports, and to submit complementary "shadow" reports.

This article is intended to provide a brief description of Israel's recent presentations under the human rights instruments to the monitoring committees pursuant to the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>3</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>4</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);<sup>5</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>6</sup> and the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW).<sup>7</sup> Israel's initial report pursuant to the Convention on the Rights of the Child<sup>8</sup> is currently in preparation and is thus not covered by the present article.<sup>9</sup>

## Special Considerations

In proceeding to research and produce the reports required by the human rights instruments, it became evident that several very unique questions, applicable only to Israel in the light of its special *sui generis* character, population composition, and political environment, had to be addressed and explained. These involved such matters as Israel's character as a Jewish and Democratic State (an issue repeatedly raised by *rapporteurs* of the treaty bodies and discussed in some of the Reports as well as in the oral presentations by the Israeli delegations). The continued, formal existence of a state of emergency in Israel since the creation of the State also gave rise to wide-ranging comment and the need for general explanation. In addition, the question of the applicability of the human rights instruments to areas beyond Israel's "national territory", and specifically to the areas of the West Bank and the Gaza Strip, arose in all the various contexts in which Israel was required to report on implementation of the instruments. This issue was, and continues to be especially relevant in light of the political developments taking place in the area at any given moment during the course of the reporting process.

### A. Jewish and Democratic State

Israel's constitutional system is based on two fundamental tenets: that the State is democratic and that it is also Jewish. These principles are rooted in the 1948 Declaration of Independence, which defined the State of Israel as a Jewish State<sup>10</sup>, founded as the only homeland of the Jewish people - the need for which became apparent after the unfolding of the

horrors of the Holocaust. Yet, on an equal footing, this Declaration also guaranteed to all of its citizens, irrespective of religion, race or ethnic background, the right to enjoy equal social and political rights within the State. Although there has been some question whether the Declaration of Independence constitutes a binding constitutional document, the 1992 Basic Law: Human Dignity and Liberty<sup>11</sup> explicitly provides both that the human rights set out in it shall be interpreted in the spirit of the principles of the Declaration of Independence, and that the purpose of the Basic Law is to establish the values of the State of Israel as a Jewish and democratic State<sup>12</sup>.

The Jewish nature of Israel is reflected, *inter alia*, in the demographic composition of the State, in the automatic citizenship bestowed upon any Jew who wishes to immigrate to Israel, in the design of the country's flag, and in the celebration of Jewish festivals as national holidays. Furthermore, the religion-oriented character of the State is reflected also in personal status issues, which generally fall within the jurisdiction of the religious courts of each respective religious sect. The fact that within the Jewish community itself, fundamental differences exist as to what it means to be a Jewish State, render the inter-relationship between religion and state a particularly complicated one. While these two tenets may find themselves, on occasion, at odds with each other, there is no inherent impediment to reconciling them, and the constitutional challenge facing Israel is to create a synthesis between them.

### B. State of Emergency

A State of Emergency has existed in Israel since 5 May 1948, due initially to the basic threat and realisation of hostilities directed by neighbouring states, aimed both at Israel's existence as well as against the life and property of its population. The on-



going struggle against acts of violence and terror committed by extremist groups and individuals in centres of civilian life, including public markets and means of transport, compounded the problem and obliged the Government to take measures to meet the exigencies of the situation, both for the defense of the State as well as for the protection of life and property. Such a need was addressed by the declaration and maintenance of the state of emergency, which included the exercise of powers of arrest and detention<sup>13</sup>.

Faced with the conflicting imperatives of preserving the democratic character of the State on the one hand, while maintaining public security and defending the lives of individuals under its jurisdiction on the other, Israel has consistently sought to maintain its democratic character, preserving and implementing human rights despite the need to act both against terror and external hostility. In 1992 the *Knesset* approved the "Basic Law: Government",<sup>14</sup> which provided that a state of emergency could only apply for one year and could only be renewed by vote in the *Knesset*. This altered the pre-existing situation in which a continuing state of emergency had existed ever since the establishment of the State. Consequently, a state of emergency is no longer necessarily a permanent situation, but is subject to annual parliamentary debate and scrutiny. In this context, the Ministry of Justice is also currently reviewing all emergency regulations in order to minimise the number of emergency provisions to those which are absolutely vital.

### C. Scope of Application

Israel's position with regard to the applicability of the human rights instruments to the West Bank and the Gaza Strip has become the subject of extensive debate in the human rights treaty monitoring bodies. Israel has consistently maintained, pursuant to Article 29 of the 1969 Vienna

Convention on the Law of Treaties, that a State's jurisdiction is not binding beyond its national territory unless otherwise determined in the treaty. In the context of Israel, the West Bank and the Gaza Strip the question arises which legal regime applies in the West Bank and the Gaza Strip (hereinafter: the Territories) - human rights law or humanitarian law<sup>15</sup>.

Even assuming that a State Party is indeed accountable for implementation of human rights conventions in areas over which it exercises actual and effective civil or military control, this assertion is, to a very large extent, not applicable in Israel's *sui generis* context. In light of the on-going negotiating process with the PLO on implementation of the 1995 Interim Agreement on the West Bank and the Gaza Strip, and of the more recent 1998 Wye River Memorandum, the legal regime in the Territories is in a state of constant change, with powers and responsibilities being transferred to the Palestinian autonomous administration in varying spheres of civil life. In fact, virtually all spheres of government covering civil aspects of life in the West Bank and the Gaza Strip, as well as a variety of security issues, are now under complete Palestinian responsibility. Accordingly, both legally as well as practically, Israel is not in a position to enforce compliance with human rights norms in the Territories in many of the spheres covered by the Covenants.

Israel remains responsible for powers and responsibilities which have not been transferred to the Palestinians, including external security and to a certain extent, in specific areas, internal security and public order, as well as a number of civilian responsibilities relating to land in areas where there is little civilian population. Consequently, to the extent that it still has relevant data, Israel has expressed its willingness to share information and to respond to queries raised in the various human rights monitoring bodies<sup>16</sup>.

### D. Overlapping

Notwithstanding the difference in origin and content of the various human rights instruments, they nevertheless share common elements of convergence and overlapping, both as regards concept as well in their application. With a view to addressing this problem and reducing duplication in the different supervisory bodies, a special Report of the Secretary-General was prepared<sup>17</sup> in 1989 indicating the extent and nature of the overlapping issues dealt with in the six principal human rights treaties.

As most of the reports presented by Israel, as cited above, are initial reports, there exists, of necessity, a greater level of overlapping in some spheres, mainly in the background presentation required by each Covenant, but also in substantive matters covered by the Covenants. Hence, in this present review of Israel's presentations before the international human rights bodies, despite the fact that various issues figure repeatedly and extensively, both in Israel's reports as well as in the discussions of Israel's implementation of the various Covenants, reference is made only once to each such issue.

## Appraisal of Israel's Most Recent Presentations under Human rights instruments

### 1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The development and protection of civil rights and personal freedoms for all citizens and residents of Israel has been, and still remains dynamic and ongoing. Given the lack of a written constitution, Israel's constitutional framework is set out in a series of Basic Laws and Supreme Court decisions. The Supreme Court views human dignity in its widest scope, indicating that it would interpret the 1992 "Basic Law: Human Dignity and Liberty" as guar-

anteeing rights and freedoms which are not explicitly mentioned in it, such as the freedom of religion and conscience<sup>18</sup> and the freedom of expression<sup>19</sup>. It has also affirmed that discrimination which offends human dignity, such as discrimination on the basis of race, religion, sex or national origin, is prohibited under the Basic Law<sup>20</sup>. In addition, the Supreme Court has applied the Basic Laws to the private sphere<sup>21</sup>.

Since the creation of the State, Israeli governments have consistently exercised responsibilities for the provision of social services in those spheres covered by the Covenant. There is an effective social safety net; illiteracy and school drop-out rates have declined, and infant mortality has significantly dropped while immunization percentages of children has reached around 95 per cent between 1982 and 1995. This trend of gradual development complies with the norm of progressive realization of rights set out in the Covenant<sup>22</sup>.

An illustration of the trend of legalizing welfare in Israel is manifest in the area of social security. Since the enactment in 1995 of the National Health Insurance Law the sphere of health insurance has been revolutionised, improving in particular the situation of Arab and Bedouin populations in Israel by obligating health provision institutions to accept all applicants as members and to provide residents with a "basic package of services" as determined by the government. Equal access to health care is also ensured in the 1996 Patients Law, which prohibits discrimination in health care, and instructs that medical care be provided under professional standards while protecting the patient's human dignity and privacy.

With regard to equality, the first part of the 1998 "Equal Rights for People with Disabilities Law" was recently enacted<sup>23</sup>, establishing the fundamental principles of equality, non-discrimination and affirmative action in employment for people

with disabilities. It also requires accessibility by the disabled to all means of public transportation.

While Hebrew and Arabic are official languages in Israel, the Arab minority, whose proportion within the population has risen over the years, has indeed suffered the ramifications of the Arab-Israeli conflict, and that impeded its legitimate quest for equal rights. However, the rate of improvement in the rights of the Arab population had been more pronounced, although gaps between the Arab and non-Arab sectors of the population still exist. Substantive steps have been taken to gradually remedy this situation. Hence, even during a period of budget cuts, budgets were divided 64:45 per cent between Jews and Arabs, while Jews constitute almost 80 per cent of Israel's population. Progress has also been made in construction of classrooms, nurseries and day-care centers in the Arab sector.

Questions arose in the ICESCR Committee with regard to the legal status of the World Zionist Organization (WZO), and the Jewish Agency for Israel (JAFI), which are private non profit organizations funded by donations from Jews throughout the world. These institutions receive a special status under Israeli law, and their activities are dedicated to helping Jews, in particular those at risk, to bringing them to Israel and supplying them with basic housing and needs. However, it was stressed that these activities are not discriminatory *vis-à-vis* non-Jews. Israel still remains responsible for meeting the economic, social and cultural needs of all its citizens under the Covenant. Moreover, there are organizations in Israel that assist only Arabs, yet it is not claimed that such activity is discriminatory. Similarly, the 1950 Law of Return which provides every Jew with the right to immigrate to Israel, does not prevent others from immigrating<sup>24</sup>.

With regard to questions raised

concerning citizenship status of Arab residents of East Jerusalem, most have not opted for citizenship and have rather preferred to remain permanent residents.

## 2. The International Covenant on Civil and Political Rights (ICCPR)

One of the central questions raised in the context of this Covenant (as well as in other contexts) was that of administrative detention<sup>25</sup> - a measure used by Israel as part of the above-mentioned balance between human rights and security considerations. This measure has been part of Israeli law since the end of the British Mandate in 1948, with the enactment of the emergency laws. It has been in use in the territories since 1967 (pursuant to British mandatory legislation still valid there), being considered necessary in situations where the military commander felt it was needed in order to maintain security in the area. Faced with continuing terrorism and threats to security, Israel thus finds itself obliged to resort, in specific situations, to the preventive measure of administrative detention. Strict limitations have been imposed on the scope of the emergency provisions under which administrative detention orders are issued, in order to minimise the potential harm to human rights.

From the point of view of internal Israeli law, the emergency regulations are not considered incompatible with the provisions of the "Basic Law: Human Dignity and Liberty", dealing with encroachment on human rights, since they are used "for a proper purpose and for a period and to an extent that is no greater than required"<sup>26</sup>. While it was alleged in the Human Rights Committee that administrative detention is used to justify incarceration of persons where there is insufficient evidence to convict them, Israeli representatives, in rejecting this allegation, stressed that it is only used in circumstances where the usual judicial procedures are inadequate because

of a danger to sources of information or a need to safeguard classified information which cannot be revealed in open court. It is resorted to as a consequence of extreme circumstances, acknowledged and provided for in the 1949 Fourth Geneva Convention.<sup>27</sup> Moreover, the administrative detention procedure in the Territories adheres to and in several respects surpasses the protections to the rights of detainees provided therein.<sup>28</sup>

Among other issues raised within the ambit of Israel's presentation before the United Nations Human Rights Committee were questions regarding equality and non-discrimination, the state of emergency, the right to life and interrogation techniques used by the General Security Services (GSS). These subjects were raised in other Committees and are discussed in the relevant sections of this article.

With regard to the right to self-determination, and without entering here into a detailed discussion of the components of self-determination (external and internal), Israel's position, as presented to the United Nations Human Rights Committee, held that a process of external self-determination is presently taking place through the ongoing Middle East peace process, as established in the series of agreements between Israel and the PLO, in which the Palestinians are in the process of freely negotiating their status.

In this context, and in response to claims in the Committee (as well as in other Committees, including the CERD - see below) that Israel's policy of settlements is inconsistent with the right of self-determination, Israel clarified that the establishment of any settlement is predicated upon an extensive analysis of the title to land concerned, as well as an intricate appeals procedure (both to an Appeals Board, as well as to the Supreme Court sitting as the High Court of Justice) in order to ensure that private rights are not prejudiced. Moreover, it was mutually agreed

by Israel and the PLO that the issue of settlements will be negotiated between them during the final stage of their negotiations on the permanent status of the territory. As such, this issue is indeed part and parcel of the external self-determination process.

As regards the right to life, the 1945 Defense (Emergency) Regulations in force in the Territories, allow for the imposition of the death penalty for offenses involving illegal use of firearms against persons, or use of explosives or inflammable objects with intent to kill or to create grievous bodily harm (Regulation 58). However, in practice, the death penalty is neither requested nor has it been imposed, even for the most severe offenses. In any event, pursuant to the 1982 Criminal Procedure Law (Consolidated Version), imposition of the death penalty requires an automatic appeal to the Supreme Court even if the defendant has not appealed the sentence or conviction.

### **3. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

In presenting its report to the CERD Committee, Israel elaborated on its policy of closing the gaps in treatment between Jewish and non-Jewish sectors, stressing the policy of affirmative action and other efforts by the government to reduce and eventually eradicate the social, economic and educational gaps between the Jewish majority and the Arab minority.

During the 1990s there has been a significant move toward equality in the allocation of resources to Arab localities, by several government ministries. The standard of living of most elements of the Arab population in Israel has risen considerably, including a rise of more than ten years in life expectancy<sup>29</sup>, which is now the highest in the Middle East. Arab citizens have become part of the political system in

Israel; in addition, as Israeli laws prohibit all forms of discrimination by private or public employers, the 1995 amendment of the Equal Opportunity in Employment Law prohibits discrimination in the labor sphere on the grounds of national, ethnic origin, country of origin, beliefs, political views, political party, affiliation or age.

In its presentations before this Committee, and despite all efforts aimed at maintaining the professional and substantive nature of the subject, Israel has been obliged to reject repeated attempts by *Rapporteurs* and Committee members to represent various aspects of the Arab-Israeli conflict in terms of racial discrimination, or in a selective or generalised manner, as a means of justifying the Committee's dealing with political aspects of matters related to the conflict. The need to maintain a strict differentiation between the substantive subjects covered by the Convention and the political issues dealt with in the various political fora of the United Nations did not, however, prevent the Committee from adopting clearly politically orientated conclusions and recommendations bearing little relation to the subject matter of the Committee's mandate.

### **4. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

In presenting its position to the United Nations Committee on Torture, Israel elaborated on the dilemma confronted on a daily basis, stemming from its obligation, on the one hand, to comply with international human rights norms as reflected in the provisions of the Convention, and the necessity, on the other hand, to conduct an ongoing struggle against acts of terrorism, which carry alarming threats to public safety. This struggle against terrorism narrows down in many cases to a need to interrogate suspects who have knowledge

of imminent acts of terror. As torture is categorically prohibited under Israeli Law<sup>30</sup>, the 1987 Landau Guidelines<sup>31</sup> sanctioned the use of “moderate physical pressure” *vis-à-vis* detainees in exceptional cases in order to gain vital information on impending terrorist actions, including suicide bombings.

The Committee discussed, together with Israel’s representatives, allegations that measures such as sleep deprivation, loud music, hand-cuffs and shaking of detainees, constitute “torture” or “cruel, inhuman or degrading punishment” according to the Convention. In this context Israel reiterated its position calling for some analysis by the Committee of the definitions built into the Convention with a view to establishing acceptable criteria by which to determine if any particular act may or may not be considered to constitute “torture” or “cruel, inhuman or degrading punishment”.

Israel detailed in its presentation a number of reforms, such as the creation of the Office of Public Defender, the creation of a committee to recommend oversight of police violence, amendments to the Criminal Code, ministerial review of several security service interrogation practices and the creation of a committee to review the rules of evidence. Moreover, a number of legislative reforms have taken place in the area of arrest and detention, such as the recent 1996 Criminal Procedure (Powers and Enforcement - Arrest) Law, which aims at ensuring maximal protection of a person’s liberty and rights in all phases of the detention process.

In response to calls by the Committee for the publication of the classified sections of the Landau guidelines, Israel asserted that the secrecy of the interrogation procedures used by the General Security Service (GSS) is crucial, and making that information public could undermine efforts to prevent terrorist actions. However, clear guidelines and detailed instructions have been estab-

lished which guide the GSS in all aspects of the interrogations process. Additionally, a unique real-time mechanism of judicial review of interrogation procedures enables detainees under interrogation to petition the Israeli Supreme Court at any given moment, and the Court is empowered to prohibit any practice which it considers to be contrary to the law, constituting torture or cruel, inhuman or degrading treatment.

### **5. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**

Having acknowledged the importance of taking a proactive stance both in the public and the private sphere, there have been various governmental initiatives to promote the advancement of women. The principle of equality is perceived as substantial and not formal, and is manifest in legislation such as the Equal Pay (Male and Female Employees) Law of 1996, the Prevention of Domestic Violence Law of 1991, and the Single Parent Family Law of 1992 entitling single-parent families to higher income support. In addition, the 1997 Prevention of Sexual Harassment Law<sup>32</sup> which expands the prohibition on sexual harassment, broadly defined, from being solely a criminal offense to grounds for civil action as well, and the 1998 Law setting up the Authority for the Advancement of the Status of Women,<sup>33</sup> created a unique authority in that its governing bodies include both representatives of government ministries and NGOs. The progressive legislation as well as comprehensive programs for dealing with violence against women and equal employment opportunities were commended by the Committee<sup>34</sup> in its consideration of Israel’s Report.

The Supreme Court also contributes to the ongoing process of instilling norms and values of gender equality by ruling that the exclusion of women from participating in

an Air Force Fighter pilots basic training course is illegal discrimination<sup>35</sup>. It has also ruled<sup>36</sup> that women who were obliged to retire from work at the age of 60, were discriminated against, *vis-à-vis* men, and consequently women may now choose to retire at the age of 65.

The problem of illiteracy in Israel is virtually non-existent among Jewish women and has significantly diminished among Arab women. More and more women are receiving advanced education and there is steady growth in women’s participation in the workforce. Women’s health has been steadily improving among all population groups in Israel, and infant mortality has fallen steadily. Pregnant women, as well as those who have just given birth, are provided with legislated rights and protections, and both men and women are allowed to take leaves of absence while undergoing fertility treatment. The latter has been covered under the basic package of health services. In addition, much progress has been made with regard to gender-based violence in Israel.

Following a 1995 enactment,<sup>37</sup> the use of affirmative action has been introduced into the boards of directors of government companies and into the civil service, thereby contributing significantly to the advancement of women. While there has been little progress in the advancement of women at the national political level, women’s participation in local politics is more encouraging. In addition, women’s participation at the senior levels of government and the civil service has shown gradual improvement as well.

Admittedly, there still exist gaps in living conditions between Jewish and Arab women, which is partly due to reluctance of traditional Arab communities to allow women to work outside their homes. Similar problems are also common to Jewish immigrants from Ethiopia and eastern Europe. Hence, the government is allocating more resources in order to inte-

grate them in Israeli society, and to improve their health, education and employment conditions.

Matters of personal status are governed by religious law in Israel, although the civil system does, in some spheres circumvent some of the difficulties facing women by religious laws. Since the role of religious tribunals in governing personal status has been considered basic and essential to Israel's social fabric, Israel, upon ratifying the Convention, submitted reservations on this matter. Consequently, religious courts have exclusive jurisdiction in matters of marriage and divorce and concurrent jurisdiction in other matters of family law. However, there has been a gradual removal of issues from the jurisdiction of religious tribunals, and their rulings under certain circumstances are subject to Supreme Court review.

## Conclusion

Notwithstanding significant substantive progress which has been achieved in the various fields of human rights covered in the different instruments, difficulties and dilemmas affecting their implementation still lie ahead.

As issues relating to human rights are drawing growing public interest, both within and outside Israel, Israel has welcomed the opportunity to conduct an open and constructive dialogue in the international sphere and to address the many queries - whether based on a genuine lack of information or on biased and manipulative propaganda issued for politically motivated reasons.

Upon becoming party to the various human rights instruments, Israel approached the task of reporting to the monitoring committees with openness and with a sincere effort to comply with the international standards and guidelines. Israel regarded, and continues to regard the fulfilment of its reporting duties both as a vital component of its foreign relations, in

implementing its international obligations pursuant to international conventions, as well as an essential internal exercise aimed at discovering human rights problems within the system, addressing them and remedying them. Its representatives sent to introduce the respective reports were chosen on the basis of their professional expertise in the subject matter of the convention being dealt with, and given a mandate to respond in as frank, constructive and open a manner possible, whatever the subject.

At the outset of this article, we referred to the dilemma inherent in any reporting activity by Israel to an international body, and specifically to the extent to which such body would be able to rise above political considerations and deal, genuinely, with the substance of its mandate. Regrettably, in virtually all of the fora to which Israel has reported, the political double-standard was nevertheless evident, and cast its shadow, in one way or another, over any attempt to maintain a standard of professionalism, expertise and constructive engagement<sup>38</sup>.

This regrettable trend was particularly evident during the course of the presentations to the CERD, CAT and ICCPR Committees, and the most recent ICESCR Committee, which published its Concluding Observations relating to Israel's report on 4 December 1998. These Concluding Observations appear to have virtually disregarded both Israel's written report and the extensive oral presentations, explanations and responses to issues raised, as well as its accomplishments in a wide range of subjects covered by the ICESCR. The Observations appear to judge Israel in terms and by criteria far more critical than those used even with respect to reports of other countries.

Faced with what appears to be an irrepressible tendency by United Nations treaty organs, whatever their mandate, to adopt some element of double standard *vis-à-vis* Israel, and in some cases to taint their

substantive discussions with United Nations politics, Israel will have to consider very carefully whether, and to what extent, its openness, sincerity and candid desire to conduct a professional and substantive dialogue with such bodies will be possible, and will serve its basic interests. In any event, considerable thought is needed in order to find ways to ensure that the work of these committees indeed fulfils the intentions of the drafters of the human rights conventions, and serves the genuine interests of human rights, and human rights alone.

- 1 Israel was accepted as a Member State of the United Nations on 11 May 1949. See General Assembly Resolution 273 III.
- 2 Israel had previously ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD) twenty years earlier, on 3 January 1971.
- 3 Adopted on 16 December 1966. Entered into force on 3 January 1976. Israel's Combined Initial and Second Report was submitted to the United Nations on 28 November 1997 and circulated as United Nations Document CESR/E/1990/5/Add.39 dated 20 January 1998.
- 4 Adopted on 16 December 1966. Entered into force on 23 March 1976. Israel's Combined Initial and First Periodic Report was submitted to the United Nations on 1 June 1998 and circulated as United Nations Document CCPR/C/81/Add.13 dated 2 June 1998.
- 5 Adopted on 21 December 1965. Entered into force on 4 January 1969. Israel's Combined Seventh, Eighth and Ninth Periodic Report was submitted to the United Nations on 17 October 1997 and circulated as United Nations Document CERD/C/294/Add.1 dated 5 August 1997.
- 6 Adopted on 10 December 1984. Entered into force on 26 June 1987. Israel's Second Periodic Report was submitted to the United Nations on 6 March 1998 and circulated as United Nations Document CAT/C/33/Add.3.
- 7 Adopted on 18 December 1979. Entered into force on 3 September 1981. Israel's Combined Initial and Second Periodic Report was submitted to the United Nations on 8 April 1997 and circulated as United Nations Document CEDAW/C/ISR/1-2.

- 8 Adopted on 20 November 1989. Entered into force on 2 September 1990.
- 9 These Reports are distributed to officials in all government ministries and authorities, to members of the judiciary, to NGOs, scholars, policy institutes, public libraries, foreign diplomatic missions and Israeli embassies throughout the world. Translations in English, French, Russian, Spanish and Chinese have been distributed by the United Nations. Israel's Reports under the CEDAW and CAT have also been circulated in Arabic.
- 10 United Nations Resolution 181(II) dated 29 November 1947, also provided for the establishment of a Jewish State and an Arab State in Palestine.
- 11 Passed by the *Knesset* on the 12th *Adar Bet*, 5752 (17th March, 1992) and published in *Sefer HaChukkim* No. 1391 of the 20th *Adar Bet*, 5752 (25th March, 1992); the Bill and the Explanatory Note were published in *Haza'ot Chok*, No. 2086 of 5752, p.60.
- 12 For a discussion of Israel's Declaration of Independence as an international document, see Alan Baker "The Development of the Peace Process between Israel and its Neighbours" (Hebrew) in 14 *Bar Ilan Law Studies* (1998), No.2, p. 494
- 13 Thus, in conformity with the derogation clause of Article 4 (1) of the ICCPR, which explicitly refers to times of public emergency, Israel, upon ratifying the Covenant, submitted a declaration with regard to the said Article, indicating that the situation in Israel constitutes a public emergency within the meaning of Article 4(1) of the Covenant.
- 14 *Sefer HaChukkim* No. 1396 of the 14th April 1992, p. 214.
- 15 The distinction between the two regimes and their respective applicability is the subject of an interesting initiative in the United Nations by the Hashemite Kingdom of Jordan, in which a very clear distinction is drawn between the human rights instruments which apply to normal state situations, as opposed to the norms of humanitarian law which apply in situations of belligerent occupation. See Letter dated 28 October 1981 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General concerning a request for the inclusion of an additional item on a "new international humanitarian order", in the agenda of the 36th Session, and the Annex and Appendix distributed as document A/36/245 dated 30 October 1981. The Jordanian initiative has recently been renewed in the 53rd session of the General Assembly. See Document A/C.3/53/L.54, dated 17 November 1998.
- 16 With regard to the "Security Zone" in Southern Lebanon, Israel lacks effective control or jurisdiction over that area, except for self-defense operations against terrorists. Accordingly, its obligations under these Covenants do not extend to this area.
- 17 E/C.12/1989/3 (16 November 1988).
- 18 See, e.g., H.C.J. 5016/96 *Horev v. Minister of Transportation*, 97 Takdin 421 (1997); H.C.J. 5394/92 *Huppert v. "Yad Vashem"*, 48 (3) P.D. 353.
- 19 See, e.g., I.C.A. 2687/92 *Geva v. Walt Disney Co.*, 48 (10) P.D. 251; H.C.J. 2481/93 *Dayan v. Wilk et al.*, 94 (1) Takdin 1170; C.A. 105/92 *Re'em Engineers and Contractors Ltd. v. Upper Nazareth Municipality*, 47 (5) P.D. 189, 201.
- 20 H.C.J. 4541/94 *Miller v. Minister of Defense*, 49 (4) P.D. 94, at pp. 132, 135 (Dorner, J.); H.C.J. 721/94 "*El-Al*" *Israel Airlines Ltd. v. Danilovitz*, 48 (5) P.D. 749.
- 21 This view has been advanced in *obiter dicta* and by legal scholars. See, e.g., C.A. 239/92 "*Eged*" *Cooperative Ltd. v. Mashiach*, 48 (2) P.D. 66.
- 22 See Opening Statement of M. Atlan, Head of Department in the Legal Office of the Ministry of Labour and Social Affairs, to the ICESCR Committee (17 November 1998).
- 23 *Sefer HaChukkim* No. 1658 of the 3 March 1998, p. 152. This Law will enter into force in 1 January 1999.
- 24 Some criticism by the ICESCR Committee related to an apparent inequality between the rights of Jews pursuant to the Law of Return and the rights of Arabs to immigrate. As this matter involves issues presently being negotiated between Israel and the Palestinians we will not discuss it here.
- 25 Israel's position on this matter is discussed in a paper on "The legal framework for the use of administrative detentions as a means of combating terrorism" by the Foreign Relations and International Organizations Department of the Ministry of Justice, dated 15 March 1998.
- 26 Section 8 of the 1992 Basic Law: Human Dignity and Liberty.
- 27 Article 78.
- 28 The procedural aspects of administrative detention are designed to ensure respect for due process. The courts are aware of the effect of administrative detention on the principle of due process and consequently examine the possibility that normal criminal proceedings should be applied instead. Only after such a test has been applied, will the courts determine whether the circumstances justify the issuance of administrative detention. All recipients of detention orders are granted the right to legal representation of their choice as well as the opportunity to appeal their detention order at two juridical levels including to Israel's Supreme Court sitting as the High Court of Justice. In this respect, Israel was the first and remains the only country in the world to have opened its highest court to non-citizens petitioning against administrative orders. Administrative detention orders are issued for a period or up to six months, and may be extended only after judicial review.
- 29 A. Hareven, "Retrospect and Prospects, Full and Equal Citizenship? The Arab citizens of Israel on the 50th Anniversary", *Sikkuy*, The Association for the advancement of equal opportunity (1998), p.6.
- 30 Section 2 of Basic Law: Human Dignity and Liberty prohibits any "violation of the life, body or dignity of any person as such", and Section 4 grants all persons the right to protection against such violations. These provisions are considered as constituting a general prohibition of cruel, inhuman or degrading treatment or punishment, including torture. See also Penal Law (1977), Section 227.
- 31 Report of a Commission of Inquiry into the Methods of Interrogation of the General Security Service Regarding Hostile Terrorist Activity, October 1987.
- 32 *Sefer HaChukkim* No. 1661 of 19 March 1998, p. 166.
- 33 *Sefer HaChukkim* No. 1661, of 19 March 1998, p. 171.
- 34 Report of the Committee on the Elimination of Discrimination against Women (Sixteenth and seventeenth sessions), General Assembly Official Records (52nd Session) Supplement No. 38 (A/52/38/Rev.1) under paragraph 151.
- 35 See, *ibid.*, H.C.J. 4541/94 *Miller v. Minister of Defence*.
- 36 H.C.J. 104/87 *Nevo v. National Labour Court et al.*, 44 (4) P.D. 749.
- 37 The 1995 State Service (Appointments) Law (Appropriate Representation).
- 38 For an interesting critique of the United Nations human rights treaty implementation system see Prof. Anne F. Bayefsky, Report on the UN Human Rights Treaties: Facing the Implementation Crisis, International Law Association, Report of the 67th Conference, Helsinki (1996), p.337.

# Non - Participation in Islamic Seminar

*The following letter was sent by the Association's Geneva Observer, Mr. Daniel Lack, to the UN High Commissioner for Human Rights. As of the date of going to print, no response has been received by the Association.*

4 November 1998

Mrs. Mary Robinson  
High Commissioner for Human Rights  
United Nations

Dear Mrs. Robinson,

I am in receipt of your letter of 29 October 1998 in which you inform the IAJLJ of the seminar on Islamic perspectives on the Universal Declaration to be held on 9/10 November next.

Firstly I believe the IAJLJ would wish to welcome the holding of this seminar, since undoubtedly Islamic perspectives on the universality of human rights as expressed in the Universal Declaration, is of the highest interest to the international community.

The fact that 20 eminent Islamic legal experts will be discussing together such basic principles as non-discrimination, civil and political rights well as economic social and cultural rights contained in the Universal Declaration should indeed be a most informative and significant event.

Allow me to observe however, that such a unique opportunity for enrichment, exchange, clarification and better understanding of the Islamic position by human rights scholars of different perspectives will be most regrettably lost, since while the audience is intended to represent all sectors of the international human rights community, only the invited Islamic experts will be permitted to take part in the discussion.

It is indeed a sad reflection that this decision is at variance with the basic values of the Universal Declaration which calls call for free expression of differing viewpoints in full respect for the beliefs, rights and dignity of others, in an effort to arrive at better mutual understanding, clarification of previous misconceptions and the reduction of intolerance.

Such a process of interchange of ideas through scholarly and informed debate by recognized experts imbued with respect for the Islamic contribution to human rights values but coming from different philosophical, legal and theological traditions and horizons, would have certainly made this seminar a memorable occasion.

In the format agreed by your office and the OIC, this productive interchange and enriching dialogue will most regrettably not prove to be possible and the governmental, intergovernmental and non-governmental representatives will be reduced to the role of passive listeners.

I venture to say that this will be the only occasion in which participation in some structured and organized form of the expression of views and presentation of questions by representatives of the international human rights community attending a seminar of this kind, will have been excluded by its ground rules.

This does not seem to be a particularly auspicious way for celebrating the fiftieth anniversary year of the Universal Declaration or expressing respect or confidence for the scholarship of Islamic experts who could most certainly make a most effective presentation in an open exchange of views governed by the customary parliamentary procedures on civilised discourse.

Would your rules of procedure for example, permit answers to written questions on one of the seminar's themes?

I believe that lawyers and jurists from my own association as well, as experts from other religions would welcome the holding an international human rights seminar from their perspectives on the same or similar themes in an atmosphere of free and untrammled participation in a scholarly and constructive debate. Indeed should such sanitising ground rules be offered by the organizers as proposed by your office or the forthcoming Islamic seminar, they would be disavowed as counterproductive and unwelcome.

I would be grateful for your reply to the query I have raised.

Yours sincerely,

**Daniel Lack**  
*IAJLJ Geneva Observer at the UN*

# The Legal Fight Against Anti-Semitism in the Netherlands

Ronny Naftaniel

**O**n 8 December this year the Civil Court of Amsterdam banned all publications that cast doubt on the authenticity of the Anne Frank's diary, declaring that such questions insulted and offended Jews. The case was ruled after the unsolicited distribution to Dutch libraries in 1991 of a book by the Belgium revisionist Siegfried Verbeke with a foreword of the French revisionist Robert Faurisson, that alleged that Anne's father Otto, was the true author of the journal that chronicled her family's years of hiding from the Nazi's. The case was brought up by the Anne Frank Foundation in the Netherlands and the Anne Frank Fund of Basel, Switzerland. The court barred the publishers and authors of the book *Anne Frank: A Critical Approach* from distributing it, on pain of a \$ 12,500 fine. A month earlier the Penal Court in Amsterdam had ruled that the selling of a single historic copy of Adolf Hitler's *Mein Kampf* at the fleemarket in Amsterdam was illegal. The book, worth about \$ 200, was seized. Both cases show that The Netherlands possesses strict and well applied anti-discrimination laws.

These laws were introduced six years after the General Assembly of the United Nations had adopted the International Convention on the Elimination of All Forms of Racial Discrimination. The states participating in the convention agreed to take several measures to prevent racial discrimination. Article 1.1 of the Convention contains a definition of racial discrimination. In 1971 Dutch criminal law was amended to reflect the Convention's principles. These steps included Article 90 *quater* in the Penal Code, which describes discrimination as follows: "Every type of distinction, exclusion, restriction or preference with the intention or result of undoing or compromising the use or exercise of human rights based on equality and the fundamental freedoms on political, economic, social or

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cultural grounds or other aspects of public life."

This definition is slightly broader than Article 1.1 of the International Convention, which lacks the words "result of". The changes also included elaborating articles 137 *c-e* in the Penal Code, which all concern



some manner of public and deliberate insult of a group of people on grounds of their race, religion or ethnic background, or the encouragement of such action. Over time, new modifications or amendments arose. In 1981, Article 429 *quater* in the Penal Code, which prohibits discrimination in economic transactions, was extended to prevent Dutch companies from issuing so-called Gentile certificates in accordance with the Arab boycott against Israel. At present, discrimination on the basis of gender or sexual preference is prohibited as well.

Although the term anti-Semitism appears neither in the International Convention on the Elimination of All Forms of Racial Discrimination nor in the Dutch penal clauses, these anti-discrimination articles have considerably enhanced legal protection of Jews in the Netherlands. Contrary to the expectations that would normally arise from these generic prohibitions, most Dutch courts have kept close tabs on the special characteristics of anti-Semitism with respect to racism and in general. In this article I try to provide an historical background about the way courts have treated the special characteristics of anti-Semitism under the Dutch anti-



discrimination law and the development of the the relevant case law over the past 27 years. In this more than quarter century since the new anti-discrimination was enacted, the situation has largely changed for the better. Jews in the Netherlands have found the court to be one of the most forceful means of combatting open utterances of anti-Semitism, which occur some dozens of times a year.

## Xenophobia - versus anti-Semitism

For centuries the Jews were in Europe the only visible and numerable minority. By the outside world they were despised for being foreigners who clung to their traditions and refused to assimilate. This field of tension between the steadfast identity of the Jewish people and the ongoing attempts (violent and non-violent alike) by the people in whose midst the Jews lived to strip them of their identity is an important element of anti-Semitism. Jews were the first and in some countries for a long time the only allochtones (inhabitants with a cultural heritage different from the surrounding culture). However, the desposal of a people that does not wish to assimilate by no means defines the manifestations of anti-Semitism over the centuries. Rather, the religious component (*i.e.* the Christian religion) is the common thread. Christianity evolved from a separate Jewish sect to a fiercely competing religion. Parts of the Gospel were deliberately misinterpreted by priests and Church Fathers with a view toward depicting Judaism as heresy. In the New Testament, Matthew 27:25 is infamous: "Then answered all the people, and said, his blood be on us, and on our children." This passage was interpreted as the Jewish people's self-imprecation for the crucifixion of Jesus Christ until the end of time. Those priests and Church Fathers wanted the Jews to suffer for refusing to acknowledge Jesus as the Messiah or to embrace the "true faith": Christianity. This idea coincided with restrictive measures imposed by the Church, which usually gave rise to discrimination, persecutions and pogroms over the centuries. Many negative ideas about Jews were also adopted by the Reformation.

Only after World War II did the Protestant and Catholic churches change in this respect. On 31 December 1993 the Vatican and the government of Israel signed "The fundamental agreement between the Holy See and the State of Israel", which normalized relations between Jews and Catholics after 1,900 years. The Vatican recognized the State of Israel and in Article 2.2 condemned "hatred, persecution and all other expressions of anti-Semitism directed against the Jewish people and individual Jews at any place or time in the world or by anybody." The agreement rectified one of the injustices in the history of the Roman Catholic Church. In this past, Christianity was an essential pillar of anti-Semitism. In some

cultures (*i.e.* the Eastern Churches and among some Western fundamentalist factions) it still is.

The religious background precludes a blanket identification with general xenophobia. Admittedly, anti-Semitism and xenophobia should both be eliminated and are equally unpleasant for their victims. Both patterns are embedded in the culture in which we live. Answering the social and legal question as to whether an action or statement is offensive, however, should consider the historical experiences of the specific group of the population targeted by the statement or action. Discrimination against Jews, who are fully integrated in most European societies at present, has long ceased to entail being slighted in economic transactions or insults based on physical appearance (as remains the case for allochtones all too often). Today, most discrimination against Jews concerns expressions of prejudices with deep social, cultural and religious roots or negative references to past outbursts of anti-Semitism.

## Special considerations

In his contribution to the collection *What is Anti-Semitism?* (Kok, Kampen, 1991), Professor J.C.M. Leyten, formerly an advocate general at the Supreme Court of the Netherlands, covers the role of the past in determining whether certain statements directed at Jews are offensive under civil or criminal law in the Netherlands. He uses two cases to illustrate his argument. In the first, the defendants were a few members of the Palestina Komitee. In 1980 they had distributed cards with a cartoon comparing Israel to the Nazis. In Israel's name in the cartoon, the "s" had been replaced by a swastika. The Lower Court had ruled that the cartoon was offensive. Leyten, who tried the case in the Supreme Court, agreed. He submitted, however, that if the cartoon had referred to a group other than the Jews, the court might have ruled otherwise.

Consider history. This past determines the vulgarity, as well as the monstrous danger that lurks. [...] Anybody who reproaches the state where some of the people live who were annihilated by the racism of an underworld regime - the state established precisely to avoid any recurrence of this Holocaust - of being comparable to this hell, should realize that such an imputation will achieve a horrible impact on the majority of the survivors, even the ones who may severely criticize the current policy of the Israeli government. This device, this comparison is both vulgar toward Israel and vulgar toward Jews in general.

Law and case law function in society. Society is an entity that derives its present bearing and existence from the past.

The second case noted by Leyten is the Supreme Court ruling in the civil suit against two Dutch evangelists, Mr and Mrs Goeree.

Unasked, the couple went door to door dropping their gospel publication *Evan* in mailboxes, preferably those of Jews. In their pamphlet, they maintained that the Jews brought the Holocaust on themselves by refusing to accept Jesus as their redeemer. Regarding the suits against the Goerees, the Advocate -General of the Supreme Court of the Netherlands commented:

“I repeat: law and case law reflect the past. [...] The law’s widely acclaimed abstract quality - Themis’s blindfold, judging without considering an individual’s appearance - has only a relative value and truth. Visible aspects are observed by the law and play a role in defining the law and case law. Without World War II and the annihilation of six million Jews for being Jewish, case law regarding discrimination against Jews would be quite different than it is, even without any changes in the relevant legal stipulations.”

Looking back twenty-seven years at the fight against racism in the Netherlands, the main accomplishment with respect to anti-Semitism is the growing awareness among courts that hatred of Jews is no isolated phenomenon but is part of our common history and should be repressed as soon as it rears its ugly head. This awareness is attributable to tighter anti-racist legislation following the ratification of the International Convention on the Elimination of Racial Discrimination, which has afforded case law greater leeway. Another factor is the increased interest that arose in the 1970s - following years of relative silence on the subject - in the atrocities during World War II. Since their implementation in 1971, case law regarding articles 137 c-e and Article 429 *quater* in the Penal Code (which was improved on 22 May 1981) and the modifications and amendments to these articles dated 14 November 1991 have set a firm guideline for the elements of racism and anti-Semitism that will not be tolerated by society. A rift has occurred between the small minority, which attributes every social setback or economic recession to people with a different skin colour or cultural heritage, and the overwhelming majority of Dutch society, which eschews racism.

The Centre for Information and Documentation on Israel (CIDI) has - often in collaboration with the Anne Frank Foundation, the National Bureau Against Racial Discrimination and the Dutch Council of Christians and Jews (OJEC) - initiated several lawsuits highlighting the subtleties that constitute racism. In the process, the Centre for Information and Documentation on Israel deliberately targeted statements that were modern versions of old, persistent stereotypes. They caused the greatest upheaval within the Jewish community. Moreover, the public prosecutors and judges were

likely to discern and acknowledge racism and to issue final rulings that might affect other groups suffering discrimination as well.

The new anti-racism legislation has offered potential victims of discrimination an opportunity to discard the view that the battle against racism needs to be fought by the majority. The French philosopher Jean Paul Sartre was an exemplary supporter of this perception. In his book *Reflections sur la Question Juive* (1946) he argued that anti-Semitism was not a Jewish problem.

In the same way we must say that anti-Semitism is not a Jewish problem; it is our problem. Since we are not guilty and yet run the risk of being its victims - yes, we too - we must be very blind indeed not to see that it is our concern in the highest degree. It is not up to the Jews first of all to form a militant league against anti-Semitism ; it is up to us.

Though appealing, this view defies application. The barriers in the criminal justice system concern the need of public prosecutors and judges in a criminal suit involving racism to know whether the group in question has indeed been offended, even though the plaintiff need not pertain to that group. Socially, such a perspective deprives the discrimination victims of their say, whereas successful legal action can raise the self-esteem and the standing of the group that has suffered discrimination. The 1971 legislation has therefore been of considerable emancipatory value.

### Path breaking cases

Let me describe further three notable cases to illustrate the development of the anti-discrimination legislation in the Netherlands. How have they improved the legal protection for the Jewish community and possible other groups of potential discrimination victims in Dutch society?

I already mentioned the Goeree couple, who exemplified current religious anti-Semitism , by distributing leaflets door to door. According to the Goerees, the Jews brought the Holocaust on themselves by refusing to accept Jesus Christ as their redeemer. Seven organizations and four individuals initiated summary proceedings against the Goerees. On 13 September 1985 the civil court in Zwolle prohibited the Goerees from making any more offensive statements about Jews at the risk of a penalty of NLG 1,000 for each violation. The Supreme Court upheld this verdict. Initially, the criminal suit against the same offence was less successful. The court in Arnhem acquitted both evangelists because their motives were considered “beyond reproach”. The Supreme Court reversed this ruling, finding that the allegations by the Goerees were offensive “regardless of the reasons of the individual making this public statement for believing that the Jews were to blame for everything.”

These judgments were path-breaking. They created a pecking

order between two civil liberties in the Constitution. The Supreme Court ruled that the right to freedom from discrimination took precedence over freedom of religion. Another achievement was the finding by our highest court that the intent of the perpetrator is irrelevant. Only the fact that the offence has been committed matters. A disadvantage of the Goeree case was the meagre return of the costly civil proceedings. Collecting the penalty proved impossible. Moreover, Jenny Goeree continued distributing her leaflets. The criminal courts had no qualms about imposing unconditional sentences on the couple.

The second issue concerned the Gentile certificates issued by Dutch companies to employees posted in Arab states. In 1981, following a parliamentary inquiry, the government modified Article 429 *quater* in the Penal Code to prohibit such differentiation. A few resulting criminal cases floundered (primarily on technicalities). The outcome was different in the case against the Flakt company in Amersfoort. This firm had issued two statements indicating that the employees to be posted in Saudi Arabia were Christian or Muslim and had no ties with Israel. On 14 March 1985, following an extended legal process, the court of appeal in Amsterdam sentenced Flakt B.V. to pay two fines of NLG 750 each. On 26 June 1984 the Supreme Court had decreed that "differentiating on the grounds of religion and political belief, if actually intended as or resulting in a discriminatory distinction, is within the scope of Article 429 *quater*".

The ruling demonstrated that the current legislation also covers indirect discrimination, meant to exclude Jews. This judgment, as well as the Binderen ruling (against a housing association that rented on purpose too few dwellings to allochtones) and several judgments against discotheque owners for excluding people because of their appearance, increased legal protection in economic transactions. As a result of the Flakt ruling, issuing Gentile certificates by Dutch companies virtually ceased.

The final issue is the Siegfried Verbeke case. This Belgian had sent schools, the press and individuals in the Netherlands various pamphlets denying that the Nazis had murdered millions of Jews in the gas chambers. The Centre for Information and Documentation on Israel and the Anne Frank Foundation initiated summary proceedings and filed a criminal complaint. On 16 June 1994 the court in The Hague ruled in the civil case that the pamphlets were indeed unlawful (Article 1401 in the Civil Code) and imposed a penalty of NLG 10,000 for each violation. Remarkably, the civil court ruled that Verbeke's theories were injurious only toward the victims of Nazi persecution and their descendants but not toward the entire Jewish community or society overall. The civil court further stepped into the shoes of the criminal court by asserting that

denial of the Holocaust was unlawful but not punishable. The criminal court in The Hague later found that Verbeke had indeed committed an indictable offence. On 2 May 1996 he was fined NLG 5,000 and received 6 months probation. Verbeke lodged an appeal in cassation, which he recently lost on the same grounds.

The advantage of the outcome in these cases and the one on the Diary of Anne Frank, mentioned in the beginning of this article, is that the court rightly found that proving the Holocaust took place is unnecessary. Moreover, a Dutch court has proven able to prosecute a foreigner committing an unlawful or punishable act on Dutch territory. The ability to take legal action against the denial of the Holocaust without the need for a separate article in our penal code is an international milestone. Jewish organizations in Europe have been lobbying for an article directed against the denial of historical mass murders. Some countries have already enacted prohibitions. At present, such a measure appears unnecessary in the Netherlands.

## Internet

Since the introduction of the International Convention on the Elimination of All Forms of Racial Discrimination in Dutch law the fight against racism has achieved considerable progress, although much work remains. More effective measures are necessary against racism in sports. Sometimes sporting events seem like sanctuaries where offences are permitted that would be forbidden outside the stadium. Interest groups and the Public Prosecutions Department need to keep a close watch on all forms of anti-Semitism that do not yet play a role. Professor D. van Arkel, a former professor of social history at Leiden University, has stated that "Antisemitism is like Proteus, the slippery god of water who constantly changes shape."

Antisemitism keeps reappearing in different manifestations. Today Internet users can surf to sites that provide information prohibited under Dutch criminal law. Those sites, denying that the Holocaust ever took place, are especially popular. Because of the absolute freedom of speech under the First Amendment in the USA, revisionist ideas are exported by the Internet from the USA to European countries, where the utterances of those ideas is forbidden. In practise the States are exporting their First Amendment to Europe. Soon this may lead to a serious weakening of the effectivity of the present anti-discrimination laws, including the ones in the Netherlands. That is why international co-ordination between governments is imminent. That is also, why internet providers all over the world need to observe a special code of conduct. The political process to achieve this is highly complex. The history of anti-Semitism, however, has demonstrated that we must meet this challenge. ■

# Legal Difficulties Encountered in Dealing with the Past

## The Work of the Independent Commission of Experts: Switzerland During the Second World War

Laurence Boillat

**O**n 13 December 1996, the Swiss Parliament adopted a Federal Decree concerning the historical and legal investigation into the fate of assets which reached Switzerland as a result of the National-Socialist Regime (hereinafter: the Federal Decree). This Federal Decree constitutes the legal framework of the task, which has been entrusted to experts within the deadline of 31 December 2001, to conduct an investigation into the role of Switzerland and, more particularly, into that of the Swiss financial center, before, during, and after the Second World War, as well as to examine the effectiveness of the measures undertaken to date by the Swiss authorities in connection with events during that period in history.

In accordance with the first Article of the Federal Decree, the investigation covers the extent and fate of all kinds of assets which were deposited for safekeeping, or for investment, or for transfer to third parties with banks, insurance companies, attorneys, notaries, fidu-

ciaries, asset managers, or other physical or legal persons or groups of persons residing or headquartered in Switzerland, or were acquired by these physical or legal persons or groups of persons, or were received by the Swiss National Bank, and which:

- a) belonged to victims of the National-Socialist Regime who have disappeared or are believed missing, and whose assets have not been reclaimed by their legitimate claimants;
- b) were confiscated from their rightful owners as a consequence of the racial laws or other discriminatory measures enacted under the influence of the National-Socialist Regime;
- c) originated from members of the National-Socialist Party, from the Nazi Reich or from its institutions, its representatives, or from physical or legal persons closely connected to it, including all the financial transactions involving them which were subsequently carried out.

The investigation is also to cover the measures taken by the Swiss authorities since 1945 with respect to the above-mentioned assets.

Article 2 of the Federal Decree provides for the appointment of an inde-

pendent commission of experts by the Swiss government (Federal Council) in order to carry out historical and legal research into the extent and the fate of the assets referred to in the first Article. The persons entrusted with conducting the investigation as well as their staff members are bound by official secrecy (Article 3). From the Articles mentioned above, it is understood that the objective of the Decree is to deal neither with individual cases in the search for heirless assets, nor with settling the fate of unclaimed assets since such problems specifically fall within the scope of the Volcker Commission. The Commission of Experts, however, is obliged to inform the Federal Council if, during the course of its investigations, concrete indications relating to asset claims should emerge.

The Federal Council, which has the sole right of disposal over all of the documents and materials connected to the work of the Commission of Experts (Article 6), is to publish the results of the investigation in full. Prior to publication, it shall remove personal data if the preponderant right to protection of the interests of living persons may so require (Article 7).

In addition, the Federal Decree estab-

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lishes two obligations: the obligation to preserve records (Article 4) and that of granting access to records (Article 5) The first obligation prohibits any individual from destroying documents which could be useful to the investigation marked out in the first Article, from transferring them abroad, or from making them in any way less accessible. The second obligation, which takes precedence over any legal or contractual secrecy obligation, prescribes that the physical persons or institutions mentioned in the first Article, their legal successors, as well as authorities and government offices, must allow the members of the Commission of Experts and its staff to consult all records which may be useful to their research. According to Article 8, should litigation arise with respect to one or the other of these obligations, the Federal Department of Home Affairs shall render a decision, which can ultimately be the object of an appeal to the Supreme Court (Federal Tribunal). Those persons who deliberately contravene Article 4 or any decision based on Article 5 shall be liable to punitive sanctions (Article 9).

### **The Federal Decree of 19 December 1996**

In order to implement the Federal Decree, the Federal Council issued a decree on 19 December 1996. In so doing, it set up the Commission of Experts, at the same time defining the former's mandate and organization. This Commission, which was to be named the Independent Commission of Experts: Switzerland - Second World War (hereinafter: the Commission), is placed under the chairmanship of Professor Jean-Francois Bergier, and is composed of eight members, both Swiss and foreign

nationals, all of whom are historians with the exception of one lawyer. Upon starting up its operation, the Commission hired a staff of about thirty members whose task it is to examine and study documents which have been conserved in both public and private archives not only in Switzerland, but in the USA, Great Britain, Russia, Germany, Italy, Poland, and Israel as well. In function with its requirements, the Commission has also mandated specialists in certain specific research domains.

**“The Federal Council has specified that the notion of legal investigation as used in the Federal Decree is to be understood in a juridico-historical sense and should not be interpreted as referring to any kind of legal inquiries, criminal or other, aimed at individuals who would end up being requested to account for their behavior.”**

In initiating its work, the Commission examined the issue of gold purchases, that of refugee policy, as well as the fate of looted assets which arrived in Switzerland. Upon the occasion of the 2-4 December 1997 London Conference on Nazi Gold, the Commission submitted a substantial contribution entitled: “Gold Transactions during the Second World War: A Statistical Survey with Commentary”.

The establishment of such a team of experts and researchers, charged by the

public authorities with a clearly defined historical and legal mandate, is a *grande premiere* within the Swiss Confederation. This being the case, it has given rise to various problems which have never before been confronted, problems not only relating to the historical domain, but also those of a legal nature. As a matter of fact, Swiss and international law are strongly solicited within the framework of the research efforts, both from the aspect of the historical past, as well as from that of the actual present.

### **The Legal Issues Related to the Study of the Past**

#### **The Legal Research Conducted by the Commission**

In its very title, the Federal Decree refers to an investigation into unclaimed assets which is at one and the same time historical and legal in scope. In so doing, the Swiss legislators' desire was that the Commission, within the context of its historical research, examine on the one hand the pertinent legislative framework for the investigation being conducted and, on the other, elucidate the application of the legal instruments in connection with the issue being dealt with. This desire is the result of a concern to remind the experts that the objects of their research should not only be considered as individual issues, but that they should also be placed into their overall context. Indeed, there is no denying the fact that, for example, the trade in gold carried out by the Swiss National Bank, or the refugee policy as it was practiced, cannot be evaluated without considering the legal foundation of the institutions which were involved and the legal bases which guided them.

And so it is that in the initial phase, the Commission must behave like a historian of law by recapitulating the totality of regulations issued by the Swiss authorities relative to the topics with which it is dealing, whether these regulations be in published form (laws, ordinances, Federal decrees, and in some instances decrees of the Federal Council), or not (regulations, directives, or circulars which have to be fished out of the Federal Archives). Later on, it must examine the other sources of law, namely, legal doctrine and jurisprudence, in order to obtain the interpretation given to these regulations in applicational force. Let us take, for example, the problem posed by the principle of precedence or international law over internal Swiss law. This principle, which is essential for an understanding of Switzerland's position with respect to international treaties and agreements during the Second World War, has not always been recognized during the course of the 20th century, and its content has been subject to numerous modifications. This being the case, it is not always a simple task to place it within the context of the investigation.

Furthermore, the Federal Council has specified that the notion of legal investigation as used in the Federal Decree is to be understood in a juridico-historical sense and should not be interpreted as referring to any kind of legal inquiries, criminal or other, aimed at individuals who would end up being requested to account for their behavior. The modalities of the assessment which the Commission shall undertake will undoubtedly crystallize on their own as the investigation proceeds. In any event, they will be obliged to respect the general system of law which consists in

an *in concreto* evaluation of a situation, taking into account all of the circumstances of the period under consideration.

### **The Constitution of the Commission**

Setting up a Commission entrusted with the mandate of probing Switzerland's past posed, in and of itself, various problems of a legal nature.

### **The legal basis of the investigation**

When the Federal authorities made the decision that it behooved Switzerland to shed light on the extent and the fate of unclaimed assets, as had been called for in a parliamentary initiative tabled on 24 March 1995, it proved necessary to determine the legal basis upon which the investigation was to be executed

It appeared that for several reasons it was appropriate to act by means of legislation. The legislature was of the opinion that it was essential to oblige the government offices, the archives, and private persons to provide any and all information useful to the experts appointed by the Federal Council. This in turn presupposed the lifting of official and professional secrecy to which these persons or institutions were bound. But in order for this to take place, it was necessary that the obligation to provide information to the Commission (*cf.* Article 5 of the Federal Decree) be decreed at least on the same legislative level as the obligation to maintain secrecy as stipulated in various Federal laws. Moreover, a formal, legal base, *i.e.* a legislative act subject to the optional referendum, was indispensable in as much as the Commission's investigations bore upon elements of personal data which were vested with special protection.

Since it was planned that the duration

of the Commission's work be limited to a five year period, it followed from the Swiss system of legislation that the sole, formal legal base, limited in duration, which could be chosen, was a generally binding federal decree. This Federal Decree, as all others of the same type, was subject to the optional referendum. The latter, however, was not demanded by the Swiss people.

### **The field of investigation**

Articles 4 and 5 of the Federal Decree, which were mentioned above, impose the obligation to safeguard documents, as well as the obligation to permit the consultation of documents. These two obligations, however, are limited to the field of investigation of the Commission as defined in the first Article of the Federal Decree. Moreover, the violation of these provisions as we have already pointed out, is subject to criminal sanctions by Article 9 of the Federal Decree which, by its very nature, cannot be interpreted on an extensive scale. As a result, the legislature was forced to fix the framework of the investigation in a precise manner within the formal legal base itself. Nonetheless, it foresaw the possibility of the Federal Council's modifying, either of its own initiative or on recommendation of the experts, the field of investigation to keep in line with newly revealed facts or with the work being conducted by other investigative commissions.

The scope of investigation has been interpreted in a broad manner in view of the desire of the legislature to have the investigation conducted as exhaustively as possible. The Federal Council so specified it in its Decree of 19 December 1996 by defining four general thematic aspects for research:

- 1) The relevance of gold transactions and of currency dealings; the role of the banks and of asset managers, as well as their degree of knowledge concerning the origin of the assets; the transit of fugitive capital through Switzerland; the dealings in works of art, jewelry, and other confiscated or looted assets, as well as the degree of awareness as to their origin; the role of the Swiss armaments industry; the take-over of German plants by Swiss enterprises, particularly within the context of aryanization measures; the financing of export import business dealings;
- 2) Government measures and legal bases for the economy and for the finance center; the treaties entered into by Switzerland with the Axis Powers as well as those with the Allies; the measures undertaken by the authorities to control currency trading, trade in war materials, export and import activities, as well as those to supervise the banks (including the Swiss National Bank); the relevance of refugee policy in connection with the economic and financial relations of Switzerland with the Axis Powers and with the Allies;
- 3) Measures undertaken for the identification control, and restitution of looted goods and fugitive capital; the treatment of assets which were unclaimed, as well as that of assets coming from the Axis Powers; measures undertaken to return looted assets to their owners or to their legitimate claimants; the definition of conditions for a justified claim;
- 4) Reports by the authorities on their activities; official historical probes; reactions to publications by foreign sources.

Based on this Interpretation of the field of investigation, it was the Commission's desire to encompass in its research the maximum possible number of persons concerned. Certain private enterprises, however, called into question their being subject to the Federal Decree For this reason, the Commission established a standard agreement with them.

### Oral History

The Decree of the Federal Council provides that the Commission include in its research the audition of eyewitnesses to history capable of providing information to the Commission. In this scenario, the Commission wondered whether these persons should be heard as witnesses at a formal hearing, and whether they were thereby subject to the obligation to testify as well as to the prohibition of giving false testimony.

Due to the fact that it implies certain duties which are subject if necessary, to penal sanctions, the formal hearing of witnesses requires a legal basis stemming from the parliament and subject to the referendum (Federal law or generally binding Federal decree). Yet the Federal Decree of 13 December 1996 does not regulate the hearing of witnesses. Hence, the persons who are heard by the Commission cannot be subject to the obligation to testify, nor to punitive sanctions in the event of false testimony, nor still to the rights recognized to those providing testimony such as have been put down in procedural law. And so, within the framework of oral history, only these individuals furnish information who accept to do so, and their more or less precise declarations are object of evaluation by the Commission in keeping

with the elements already in its possession.

## The Current Legal Problems Linked to the Work of the Commission

### The Interpretation of the Federal Decree

From the start of the work undertaken by the Commission, questions have appeared regarding the interpretation of the Federal Decree.

### Subject matter of research

The Commission's field of investigation (first Article) covers the extent and the fate of all kinds of assets which were deposited for safekeeping, or for investment, or for transfer to third parties with physical or legal persons residing in Switzerland, acquired by these persons, or received by the Swiss National Bank, and which concern the victims of Nazism, confiscated property or assets belonging to the Third Reich. As regards, for example, the problem of forced labour, can this belong to the field of investigation of the Commission?

It is the legislature's desire that the term of assets be open to a wide interpretation, thus comprising not only money, gold, and titles, but also all objects which possess monetary value such as antiques, works of art, jewelry, or even notes of credit. Historical research already conducted in Switzerland and elsewhere has shown that during the War, enterprises drew a profit from work which was performed for them by forced labour. For example, they did not always pay out the stipulated wages, unjustly withheld social security contributions, or refused to honor the vacation time and days off which were specified. The

Commission considers that such behavior led to an increase in assets with the result that the issue of forced labour shall be examined within the framework of its work.

### **The legal persons targeted in the investigation**

According to the first Article of the Federal Decree, only those legal persons or groups of persons residing or headquartered in Switzerland are included in the Commission's field of investigation. Diverse questions can arise with respect to these legal persons: are the foreign branch offices of companies headquartered in Switzerland going to be subject to the obligations foreseen in the Federal Decree?; is it possible for the Commission to conduct research in the corporate archives located on foreign territory, or to force a company to transfer the archives to Switzerland for consultation?; should the investigative framework encompass documents which are located in Switzerland at corporate headquarters, but concern the activities of legally independent subsidiaries located abroad?

In order to remove any incertitude concerning the application of the Federal Decree with respect to these branch offices or subsidiaries, the Commission has undertaken to enter into a standard agreement with the enterprises interested. Insofar as this agreement has served its purpose and no concrete questions have arisen to date, the legal problems raised concerning legal persons in terms of the Federal Decree's territorial application have not had to be resolved for the time being.

### **The obligation to grant access to documents**

As we have already seen, Article 5 of

the Federal Decree stipulates that the physical or legal persons referred to in the first Article, their legal successors, as well as government authorities and public institutions are obliged to allow the members of the Commission of Experts and its staff to consult all of the documents which might be of assistance to their investigation. This obligation is at the origin of various problems.

As opposed to Article 4 whereby the obligation to safeguard documents applies to everybody, Article 5 concerns solely those physical or legal persons targeted in the first Article, their legal successors, as well as government authorities and public institutions. Therefore, the Federal archives, cantonal archives, and the archives of corporations and institutions are obliged to permit the experts and their staff to consult all records which could be useful to their research. Provision has been made that this obligation take precedence over any legal or contractual secrecy obligation, such as official secrecy, professional secrecy, bank secrecy, and even legal waiting periods which limit the public's access to archives. Based upon the foregoing, the Commission informed certain cantonal archives which were concerned about the problem of protecting sensitive personal data, that the obligation set down in the Federal Decree took precedence over the Federal law as well as cantonal laws on data protection. Moreover, no problem of confidentiality emerges with the experts having access to personal data since the latter are bound by official secrecy under the terms of Article 3 of the Federal Decree.

This same Article 5 is the only one to have been the object of a modification project. Further to the Meili affair - the

case named after the employee who was fired after having saved documents which could possibly have been of interest to the Commission's research from being destroyed - the Federal authorities planned a complement to the Federal Decree which would expressly stipulate that an employee providing information to the Commission is, in so doing, not in violation of his obligation of loyalty towards his employer. One of the chambers of the Swiss parliament (here, the Council of States) nonetheless considered this disposition to be unnecessary given that the employee's rights are sufficiently protected by contractual law.

### **The Instruments Designed to Facilitate the Work of the Commission**

The legal bases which guide the work of the experts do have their limits, in particular with respect to the persons targeted by the investigational field of its research. So as to properly carry out its activities, facilitate its task, and allow the latter to encompass all that it should, the Commission has made arrangements with various organizations and entities. In these negotiations, the main point was to ensure the proper implementation of the research activities while at the same time safeguarding the independence of the Commission and the confidentiality of its work.

### **The arrangement with the Federal Archives**

In the process of applying the Federal Decree, the Commission concluded an agreement with the Federal Archives on 19 June 1997. This agreement aims at granting facilitated access to the Federal Archives for the Commission's research



personnel. It also places at their disposal the infrastructure necessary for their work. In exchange for this, the Commission commits itself to restoring the documents when its investigation has ended, and to undertaking a mutual exchange of information. This agreement with a Federal organ has to the present point in time occasioned no difficulty at all.

### **The accord with the Volcker Committee**

On 2 May 1996, the Swiss Bankers Association, on one side, and the World Jewish Restitution Organization on the other, signed a Memorandum of Understanding which created a Committee of Eminent Persons under the chairmanship of Paul Volcker. In December 1997, the Commission undertook steps to conclude an agreement of coordination and cooperation with the Volcker Committee. The spirit of this agreement is to set up a type of cooperation in full respect of the rules of confidentiality, to plan meetings between the partners, and to foster mutual assistance, for instance, in matters of terminology. This is in keeping with the desire of the legislature for as an effective as possible concert of efforts between the Commission and the Volcker Committee. This agreement is on the verge of being finalized and eventually implemented.

### **The standard agreement with private enterprises**

This agreement was established in November 1997 with certain private enterprises which argued that they were not subject to the first Article of the Federal Decree, while the Commission,

at the same time, was hoping to include them into its field of investigation. As of January 1998, this agreement has been signed by several of the enterprises concerned.

The companies which are party to the agreement take on an engagement towards the Commission that they will ensure free access to their archives. The enterprise also makes a working infrastructure available for the researchers. For its part, the Commission provides them with the same guarantees as does the Federal Decree in terms of the confidentiality of informational data which is not of public domain. Furthermore, it recognizes their right to take a stand on any passages in the Commission's reports which may concern them.

This agreement shall allow for the application of Article 8 of the Federal Decree to be avoided between the parties. In fact, Article 8 sets up a channel of appeal in case of litigation with respect to the obligation to grant access to documents and the obligation to safeguard them. Up to now, however, Article 8 has not been called into action for the fact that the Commission has not yet encountered any litigation.

### **Conclusion**

This report reveals a certain number of problems which have appeared both before the Commission was established as well as after its work had begun. It is important to underscore the fact that these problems, for which legal solutions have in general been found, have up to now not hindered the Commission's work of research.

It is quite evident that all of the difficulties which may be able to arise within the context of an activity like that of the

Commission, have not been presented in this *expose* which cites only the most significant. We would be safe in wagering that the future work of the Commission and the next topics it will be dealing with will give birth to new legal questions which will not fail to keep the lawyers busy.

### **Human Rights in Russia**

*continued from p. 22*

declares "Extremism, fascism, and anti-Semitism are being openly advocated in the country, neo-Nazi organizations are acting unimpededly". The Resolution appeals to the State Duma to pass the Federal Law "On prohibition of activities of extremist organizations". The participants of the Conference have also supported the Federal Ministry of Justice that is drafting the Federal Laws "On prohibition of Nazi symbols and publications" and "On counteraction to political extremism in the Russian Federation".

The Resolution also appeals to the Federal Parliament and legislatures of federal units to renovate the legislation in accordance with the Federal Constitution and Russia's international obligations in this field. First and foremost Russia's Parliament should ratify human rights laws and protocols passed by Council of Europe and by the International Labour Organization, Protocol 16 to the European Convention on Protection of Human Rights and Basic Freedoms.

# Anomalies in the Admiralty Jurisdiction of the State of Israel

Rahel Rimon

**T**he Israeli Maritime Court operates an antiquated Admiralty legislation inherited from the period of the British Mandate. The resulting anomalies have caused the Israeli judiciary a variety of problems in attempting to deal fairly and rationally with complex modern disputes, which were not foreseen at the time of the enactment of the original legislation in 19th Century England, or dealt with at the time of the adoption of that legislation in Israel in 1948 or upon the establishment of the Israeli Maritime Court in 1952. These problems remain unresolved despite a variety of foreign jurisdictional statutes and international conventions which could provide a model for modern Israeli legislation.

## Background

In terms of the procedural and substantive maritime jurisdiction of modern Israel, the most critical factor was the overwhelming impact of the British Mandate (1920-1948). This period not only saw the introduction of colonial Admiralty legislation which is still in force today, but also, more fundamentally, overlaid the prevailing Ottoman law and military proclamations with concepts and traditions running through the English common law.

By virtue of Article 9 of the Mandate for Palestine, “[t]he Mandatory [was] responsible for seeing that the judicial system in Palestine [would] assure to foreigners, as well as to natives, a complete guarantee of their rights”. This provision was fulfilled, *inter alia*, by the issue of Orders in Council by His Majesty in Great Britain.

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The principal Order in Council, published after the commencement of the Mandate and providing for the administrative and legislative institutions of Palestine, was the Palestine Order in Council, 1922, amended the following year by



the Palestine Amendment Order in Council 1923.

Clause 43 of the 1922 Order established the Supreme Court of Palestine. Clause 46, in turn, provided for the jurisdiction of that and all the other Courts. The jurisdiction conferred was that existing in 1914 together with later Orders in Council, Ordinances, *etc.*, and subject thereto the Courts were directed to act in accordance with the substance of the common law and the doctrines of equity in force in England. Neither the 1922 nor the 1923 Orders in Council specifically established a Maritime Court, nor was any express Admiralty jurisdiction granted exceeding the limited jurisdiction conferred by Clause 35(ii) of the 1922 Order. This omission was eventually rectified by the promulgation of the Palestine Admiralty Jurisdiction Order - 1937, which invested the Supreme Court of Palestine with the powers of an Admiralty Court.

Clause 2(1) of the 1937 Order was the main constituting provision, stating that: “The Supreme Court of Palestine shall be a Court of Admiralty and shall exercise Admiralty jurisdiction in

all matters arising upon the high seas or elsewhere upon any lake, river, or other navigable inland waters or otherwise relating to ships or shipping". In addition, Clause 2(2) of the 1937 Order extended to Palestine certain provisions of the Colonial Courts of Admiralty Act 1890.

Each of these provisions of the Colonial Courts of Admiralty Act 1890 gives rise to its own individual difficulties, although the most important, in terms of defining the ultimate jurisdiction of the Admiralty Court, was Section 2(2) of the 1890 Act, which provided that:

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise, and the Colonial Courts of Admiralty may exercise such jurisdiction in the like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations".

This wording raised a critical question which continues to have an impact on the scope of the Court's jurisdiction to this date. What was the extent of the Admiralty jurisdiction of the Supreme Court? Was it the unrestricted jurisdiction set out in Clause 2(1) of the Order of 1937, with or without some original powers granted by Ottoman legislation? or, was it equivalent to the jurisdiction enjoyed by the High Court in England in 1937 when the Admiralty Jurisdiction Order was promulgated? or, was it perhaps equivalent to the more limited jurisdiction of the High Court in England in 1890 when the Colonial Courts of Admiralty Act came into force?

The question of the extent of the Admiralty jurisdiction of the Supreme Court of Palestine has proved crucial to a determination of the extent of jurisdiction of the modern Israeli Maritime Court. Paradoxically, while deserving credit for inaugurating the Admiralty system applied in Israel, the Ordinances and legislation introduced by Britain also formed the main obstacles to the development of that Admiralty law, much as they restrained the development of Admiralty law throughout the British colonies in earlier times (a matter since rectified by Section 150(2) of the Supreme Court Act 1981 which provides that the jurisdiction of the High Court in England may be extended to any colony; numerous orders have been made under these provision, thus conferring the modern jurisdiction on a considerable number of present and past members of the British Empire).

The first cases decided by the Supreme Court of Palestine sitting as an Admiralty Court were characterized by confusion, apparently aggravated by the fact that the small number of Admiralty cases brought before the Court precluded comprehensive discussion of the full range of Admiralty jurisdiction. Nevertheless, by the termination of the British Mandate in 1948, the view taken by the Supreme Court was that its Admiralty jurisdiction was limited to that enjoyed by the High Court in England in 1890.

The rationale for this view as explained in the cases is not wholly convincing and on the face of it did not follow any lengthy or exhaustive argument in Court although it is in line with the leading Privy Council judgment in *The "Yuri Maru"* [1927] A.C. 906 .

Unlike the position in the British colonies, where the Colonial Courts of Admiralty were bound by the wording of the Admiralty Courts Act 1890, the Supreme Court of Palestine had the opportunity to exploit the wide phrasing of the Admiralty Jurisdiction Order 1937 (namely, jurisdiction in relation to "all matters arising upon the high seas...or otherwise relating to ships or shipping") to support a construction whereby the Supreme Court could be deemed to enjoy jurisdiction at least equivalent to that enjoyed by the High Court at the time the case was heard. While this approach found initial judicial favour, as noted, more conservative thinking later held that in fact jurisdiction was frozen as at 1890 thereby sewing the seeds of many of the current problems of the Israeli Maritime Court.

## Current Maritime Jurisdiction

As can be seen from the above, today on the eve of the 21st century, Israel's Admiralty law is governed by the British Colonial Courts of Admiralty Act 1890; the Admiralty Courts Acts 1840, 1854 and 1861; and the Merchant Shipping Act 1854 introduced under the Palestine Admiralty Jurisdiction Order in Council 1937. Together with Ordinances issued by the High Commissioner of Palestine during the period of the British Mandate, these Acts have laid the foundation of the present structure and jurisdiction of Israel's Maritime Court. Legislation enacted by Israel's parliament has done little to modernize the jurisdiction or bring the Maritime Court's procedure into line with procedure in the civil courts of Israel. The primary cause of the failure to engage in reform would appear to be the lack of awareness of the subject and its importance for the commercial life of the country.

In addition, the procedure followed in the Maritime Court also relies on antiquated provisions set out in the Vice-Admiralty Rules 1883. Procedure in the Vice-Admiralty Courts was governed by rules set out in the Vice Admiralty Order in Council of 1883, enacted under the Vice Admiralty Courts Act, 1863, which empowered the Queen to enact rules by Order in Council. These rules, known as the Vice-Admiralty Rules 1883, were made applicable to Palestine by virtue of Section 16(3) of the Colonial Courts of Admiralty Act 1890. But while the Vice-Admiralty Courts Act 1863 was repealed by the Colonial Courts of Admiralty Act 1890, and therefore lost its application in terms of Palestine, the Vice-Admiralty Rules 1883 were not repealed and therefore remained applicable. These rules continue to govern procedure in the Israeli Maritime Court, long after their removal from the English Court practice.

An effort has been made to overcome the restrictive effect of this construction by arguing that while clearly providing for the applicability of the Vice-Admiralty Rules 1883, the final clause of Section 16(3) also enables the Admiralty Court to exercise its ordinary procedural powers in those cases where the Vice-Admiralty Rules are inapplicable to the issue at hand. Where accepted, this interpretation has enabled certain Israeli Rules of Civil Procedure, promulgated under the various Courts Laws, to be applied in the Israeli Maritime Court. Disputes have arisen, however, as to which of the Rules of Civil Procedure may be applied, since only those Rules may be applied which relate to a matter not dealt with by the Vice-Admiralty Rules 1883. Thus a contest has developed between the 1883 rules and the Israeli Rules of Civil Procedure, applied in the other civil courts, which provide for wider and more effective relief (such as declaratory relief) but whose application in the Maritime Court is based on doubtful statutory grounds.

## Anomalies

### The Maritime Court - 1952

Since 1948 a number of Court Laws have been enacted in Israel. In 1952, attention was turned to the Admiralty structure and, ultimately, the Maritime Court Law was enacted making specific provision for a Court enjoying Admiralty powers and transferring original maritime jurisdiction from the Supreme Court of Israel (which had inherited the jurisdiction of the Supreme Court of Palestine) to the District Court of Haifa. The 1952 Law remains in force today although other laws dealing with the Civil Courts have been concentrated in the Courts Law

[Consolidated Version] - 1984. Many of the problems currently faced by the Maritime Court set up under the 1952 Act are derived from decisions taken during the early Mandate period and the wording of the governing Acts.

The primary difficulty posed by the application of even the select group of provisions referred to above, to the legal position in Palestine lay in their unmodified incorporation. While Orders in Council were directed at Palestine, inconsistencies were preserved and the Orders failed to supplement gaps in jurisdiction retained by the Admiralty Courts Acts.

Thus, for example, Section 2(4) of the 1890 Act provided that where a Court in a British possession exercises jurisdiction in respect of a matter which has arisen outside the body of the country, that jurisdiction shall be deemed to be exercised under the terms of the Act alone. As noted, while treated as a possession and while the term "Palestine" must be read *in lieu* of "British possession" for the purposes of the 1890 Act, at no time in its history has Palestine actually ever been a British possession. Accordingly, there has generally been no occasion for any of the complex issues relating to the meaning of the term "possession" to be considered by the Supreme Court. Nevertheless, in view of the fact that no judgment has ever been delivered to the effect that the Admiralty Court may enjoy a jurisdiction which is extraneous to that conferred by the 1890 Act in respect of matters arising **outside** the body of the country, it must be concluded that the Court has impliedly accepted that it stands in an analogous position to that of a Court of Admiralty in a British possession in terms of all matters **wheresoever** arising (see Ad/F 1059/87 *Zim Israel Shipping Co. Ltd. v. David Kritz and Others (The "Segal")*), unreported, which considered the Maritime Court's jurisdiction in respect of salvage on the high seas and held that it depended on Section 6 of the Colonial Courts of Admiralty Act, 1840. There, the applicant had claimed that the Wrecks and Salvage Ordinance 1926 **excluded** jurisdiction for salvage on the high seas.)

The examples of the restrictions on the Maritime Court's jurisdiction are many. Thus, for example, the **Admiralty Court Act 1840**, confers on the High Court of England (*i.e.*, now replaced by the Maritime Court) jurisdiction in respect of all claims concerning mortgages but subject to the condition that the vessel (or the proceeds thereof) to which the mortgage relates is already under arrest by process issuing from the High Court; Section 4 confers jurisdiction to decide all questions as to the title to or ownership of any vessel (or its proceeds) arising in any cause of

possession, salvage, damage, wages or bottomry but other causes are excluded; and Section 6 confers jurisdiction to decide all claims in the nature of salvage for services rendered to or damage received by any ship, or in the nature of towage, or necessities supplied to any foreign ship, irrespective of the place where the vessel was at the time the services were rendered or damage received, but does not refer for example to necessities supplied to a locally registered ship.

While the **Admiralty Court Act 1861** did extend the jurisdiction of the High Court of Admiralty and consequently the Maritime Court, this Act too is limited in application. The Court acquired jurisdiction over bills of lading, damage to cargo, and claims for necessities but only where the shipowner was domiciled outside the country. No such limitation was placed on claims for damage done by a ship which therefore allowed a variety of collision claims including those occurring within the body of a county. Other limitations included, for example, the provision that a claim for repairs could only be brought where at the time of the institution of the cause the ship or the proceeds thereof were already under arrest, or, a claim for necessities had to satisfy the dual conditions that the ship was foreign and that the necessities had been supplied outside the home port.

In damage to goods cases under Section 6 (probably the most widely used of the jurisdictional sections) jurisdiction is conferred over any claim by the owner, consignee or assignee of any bill of lading of any goods carried into any port in [Israel] in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless (at the time of the institution of the cause) the owner or part owner of the ship is domiciled in [Israel]. It is clear from this wording that a wide variety of claims are not covered - for example in respect of cargo carried out of Israel, or in respect of goods carried otherwise than under a bill of lading, such as under a charterparty, Nor did the Act confer jurisdiction over general average and freight. But the Act did confirm that jurisdiction could be exercised by proceedings *in rem* or *in personam* and ultimately it had its intended effect - supplementing the 1840 Act and forming the primary source of maritime jurisdiction for both the Supreme Court of Palestine and later the Israeli Maritime Court.

### Israeli Legislation

As noted, the Maritime Court Law 1952, which was the first

statute to consider maritime affairs, provided for the structure of the Court which was to exercise Admiralty jurisdiction and embraced pre-existing jurisdiction. It did not purport and made no effort to expand that jurisdiction or bring it into line with modern needs. Indeed, the one attempt by the Israeli legislature to enact relevant legislation in this field has confused the situation even further.

Thus, the law most directly relevant to the Maritime Court is the **Shipping (Vessels) Law - 1960**. This Law deals with the registration of vessels, their transfer and devolution, liens, mortgages, loss of qualification, striking off the Register, the effect of the registration of rights, nationality and flag, the name of the vessel and other miscellaneous provisions. Arguably, this is the only piece of Israeli legislation which affects the jurisdiction of the Maritime Court in terms of the actual provisions of the Admiralty Courts Acts. The provisions which potentially achieve this result are Section 40 which provides for debts to be secured by a first lien and Section 41 which lists the type of debts which are capable of being secured and the order of priority of the liens. The Law does not expressly refer to the position under the Admiralty Acts, although it does retain existing legislation concerning the creation or transfer of a mortgage or charge upon a vessel. The questions which, of course, arise in this connection, are whether the creation of statutory liens also confers complementary jurisdiction *in rem* on the Maritime Court, and how the Court will rank priorities in the event of any conflict between the provisions of Section 41 of the Shipping (Vessels) Law and accepted principles of general Admiralty law.

Another law which has impacted on the jurisdiction of the Maritime Court is the **Wrecks and Salvage Ordinance - 1926**. This Ordinance dates back to the early days of the Mandate, although it has been amended from time to time since then. *Inter alia*, the Ordinance deals with vessels in distress; claims in respect of wrecks and unclaimed wrecks; offences in respect of wreck; salvage in respect of services rendered in Israel and determination of salvage disputes; valuation of property and salvage by the Government of Israel.

The Ordinance provides for determination of salvage disputes by arbitration. Neither the Wrecks and Salvage Ordinance nor the regulations promulgated under it make reference to the jurisdiction of the Maritime Court, but, rather, give an aggrieved party the right to apply for leave to appeal to the President of the **District Court** of the district in which the salvage was effected.

This provision is incompatible with Section 6 of the Admiralty Court Act of 1840 and Section 9 of the Admiralty Court Act of 1861 which give the Maritime Court jurisdiction to decide **all** claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship and in respect of life salvage claims. In other words, while the Admiralty Courts Acts confer jurisdiction to hear all salvage claims on the Maritime Court, and that jurisdiction applies to claims wherever arising, the Ordinance is limited to services rendered in Israel and *prima facie* negates the jurisdiction of the Maritime Court in respect of such services by referring disputes relating thereto to arbitration, and on appeal to the District Court.

### Need for Reform

It is evident that a variety of problems have been created by the application of principles dating almost 150 years. These include the difficulty in identifying the maritime and statutory liens recognized by the Israeli Court; limited heads of Admiralty jurisdiction; lack of jurisdiction in relation to sister ships and ships in the same beneficial ownership, surrogate ships or surrogate freight and cargo; arrest as a means of providing security for local or foreign proceedings or arbitrations; problems in relation to foreign vessels, foreign liens and the application of foreign law; as well as factors which influence the Court's decision to stay an action on grounds of jurisdiction clauses, *forum non conveniens* and *lis alibi pendens*.

There is clearly a driving need and extensive room for reform of Israel's Maritime Court structure and jurisdiction.

An attempt to do so was made in 1993, when the Attorney-General of Israel set up a committee to issue formal proposals for legislative reform. The Report and committee work comprise the basis of proposals currently being drafted in the Ministry of Transport. The most recent draft prepared in November 1995 takes the form of a draft bill with an accompanying explanatory memorandum. A number of objections may be made of this draft which is limited in its aspirations. The recommendations give rise to three criticisms in particular. The decision to engage in reform by amending the existing Maritime Court Law - 1952 as opposed to legislating a complete, new Admiralty code, misses an opportunity to clarify the entire Admiralty jurisdiction of Israel (apparently it was thought that amending the existing law would prevent questions being asked as to the need to have a separate Maritime Court in the first place). Second, the parallel

jurisdiction proposed (over claims *in personam*) with the District Courts generally, and the transfer of exclusive jurisdiction to the Magistrates Courts over maritime claims in *personam* below a certain specified figure may result in many cases being directed away from the Maritime Court, including cases which may be of low monetary value but which involve complex issues of law or concern common questions of practice. Such issues may well be the ones which should most properly be allocated to a specialized Court, thereby providing it with an opportunity to generate a much needed unified body of law and procedure. Finally, the Report is limited in terms of the types of claims it considers, procedures for enforcing those claims and the interaction between those claims and other laws currently in force. Thus, while the Report recommends repealing all English legislation, it makes no reference to the amendment of Israeli legislation other than the Maritime Court Law - 1952, itself.

Clearly, a much more wide ranging reform is necessary. One possibility is the enactment of a new Admiralty Code accompanied by repeal of incompatible legislation. Additional reforms are needed of the Maritime Court's procedural powers. Israeli procedure recognizes the right to attach a defendant's goods in an action *in personam*. This form of relief is widely sought in Israeli practice and certain aspects of it may be applied by way of analogy in developing jurisdiction *in rem*. The Maritime Court's powers may be broadened to include power to grant injunctions similar to *Mareva* injunctions in England, provision of security in respect of court or arbitration proceedings both in Israel and abroad, as well as declaratory relief and a wider competence to hear non-maritime claims which are ancillary to maritime claims within the Court's original jurisdiction. A review must be conducted of international treaties dealing in arrest of vessels, salvage, mortgages, liens and a variety of other issues, and where possible Israel should come into line with the rest of the maritime community. While there are a number of principles which may be adopted from other systems, including for example Australia and South Africa which had comparable legislative histories and recently reformed their Admiralty legislation, English jurisprudence has rightly held pride of place in shaping judicial thinking long after the establishment of Israel as an independent state and, in terms of the natural development of Israel's Admiralty law, will inevitably be the dominant partner in any collaboration with principles taken from other legal systems in any process aimed at reforming the current jurisdiction. ■

# Conversion in the Age of Immigration

Menachem Finkelstein



In a letter to the Neeman Commission on Conversion, I wrote as follows:

The issue of conversion retains its place on the public and legal agenda of the State of Israel. In my opinion, the principal problem in Israel today pertaining to matters of conversion ensues from the existence of thousands, and perhaps hundreds of thousands, of immigrants from the former Soviet Union, who, from the point of view of the *Halacha*, are not Jewish or whose Jewishness is doubtful, and who in any event have not converted. These people live as Jews among us - in schools, in the Army and in every other area of life; however, as a matter of Jewish law they are not recognized as Jews.

It seems to me that we are facing a **new situation** which requires a fresh look and courageous new handling, to the extent even of: "It is time for thee, Lord, to work: for they have made void thy law." (Psalms, 119:126, this verse forms the *Halachic* basis for lifting prohibitions when it is necessary to do so). In my opinion this will be the test of the religious public, its arbiters of *Halacha* (*Poskim*) and leadership in Israel.

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Brigadier-General Dr. Menachem Finkelstein is the Deputy President of Israel's Military Court of Appeals. He is the author of *Proselytism - Halakhah and Practice* (Bar-Ilan University, 1994). Dr. Finkelstein was invited to provide expert testimony to the Neeman Committee (chaired by Minister of Finance Yaakov Neeman) which examined the issue of conversions performed in Israel. This article is based on a letter written in September 1997 to the Committee, at the Committee's request.

The reexamination and proposals offered must, of course, fall within the framework of the *Halacha*, and be made by the greatest *Poskim* of the day. The greater the public which accepts these proposals - the better. The goal must be to admit larger numbers of converts than have been admitted to date.

The following are the principal grounds which, cumulatively, give rise to the "new situation":

- A. The huge numbers of immigrants under consideration.
- B. The fact that, in practice, the immigrants have joined Jewish society in the State of Israel.
- C. The current social reality in the State of Israel, including the tension and distrust in the relations between the "religious" public and the "secular" public.
- D. The legal state of affairs in the State of Israel, in the period following the enactment of the Basic Law: Human Dignity and Liberty, and the constitutional revolution.
- E. The current spiritual reality in the State of Israel.

A detailed discussion of these issues is outside the scope of this letter.

In the past, arbiters of the *Halacha* faced a "new situation" in the area of conversions - this was in the middle of the 19th century, during the emancipation in Europe, when a number of central, interconnected, processes brought issues of conversion for the purpose of marriage to the forefront. These processes were a) annulment of the prohibition on conversion in many countries, and the sharp increase in the rate of conversion; b) the social links between Jews and gentiles, and in particular, the

high rate of civil marriages; c) the phenomenon of secularization; and d) the spread of the reform movement.

One of the most common questions considered by the *Poskim*, concerned the position of a Jew married to a gentile in a civil marriage, who wished to marry her in accordance with Jewish law following her conversion. Similarly, they considered the position of a Jewess who wished to marry a gentile after he converted. In this connection, a distinction has to be drawn between two prohibitions: first, the prohibition on converting when the conversion is for the purpose of marriage; and second, the prohibition imposed on a Jew to marry a gentile woman who has converted, when there is a suspicion that the two cohabited prior to the conversion of the woman. Numerous *responsa* addressed these questions, and it may be said that in practice, the majority of *Poskim* in recent generations have tended to leniency in their rulings on this issue, while detailing and developing various considerations of *Halachic* policy - the essence of which is to preclude problems which might arise if the conversion does not take place (for example, saving the Jewish spouse and his offspring, so that he will not be assimilated). There is no doubt that these *responsa* offer a courageous and creative way of coping with the problems which the new times are creating. Professor S. Shilo, who examined this area, emphasized that this effort on the part of the *Poskim* to deal with the new problems which have arisen, is of great significance, and not only in connection with conversions -

“... but [it] demonstrates the dynamism and creativity inherent in the *Halachic* system” (S. Shilo, *Halachic* Leniency in Modern *Responsa* Regarding Conversion, 22 *ILR* (1987) p. 353).

The return to Eretz Israel and the establishment of the State of Israel also posed new problems and questions in relation to conversion, including in regard to the weight which should be given to the fact that the conversion is not carried out abroad, but in Israel, from the point of view of:

“More precious is Eretz Israel which validates the converts” (*Masechet Gerim*, Heiger ed., Chapter 4, Rule E). Indeed, the possibility that the Jews from the other side of the iron curtain would immigrate in their masses to Israel at first seemed to be an unlikely possibility.

In this connection, the comments of the Deputy President of the Supreme Court Justice Moshe Zilberg a generation ago in the Shalit case are instructive. In that case (H.C.J. 58/68 *Shalit* v.

*Minister of Interior and others*, 23(2) P.D. 477 at p. 500) Justice Zilberg referred to the petitioner’s contention that if the *Halachic* rule relating to the definition of a Jew was accepted, Russian Jewry would be estranged from us if we ever succeeded in lifting the iron curtain: “because these Jews who have been cut off from their people for over 50 years, have among them assimilated men and women who are not of the seed of Israel and a large proportion of whom are not Jewish under the rules of the *Halacha*”. The Judge was unwilling to give too great a weight to this contention, for two reasons. The first was that the immigration from the countries beyond the iron curtain:

“is still a closed vision, hope, dream, ‘*Halacha* for the age of the Messiah’, which we cannot, and are not entitled to use as the basis for determining our actions in this country. If indeed the miracle will happen, and the Jews of the Soviet Union will be permitted and will want to immigrate in their masses to the State of Israel, this matter itself will prove how deep the connection is linking them with the traditions of Israel, and therefore I do not believe that their immigration will actually conflict with the use of the *Halachic* test.”

The second reason is:

“I fully believe that if indeed there will be widespread immigration from the Communist states - immigration which is liable to determine the fate of the people of Israel for good or bad - wise men will be found who will use their full authority, and will ease the absorption of the remote Russian peoples, among our people and in the country. The values of the *Halacha* have always unified the people, but they did not suffocate them”.

Nevertheless, with the large wave of immigration from the Soviet Union in the beginning of the 1970s, a need did arise to find answers to the religious identity problem. A good example of the way this subject may be handled may be seen in the comments of the Chief Rabbi of Israel, Rabbi Issar Yehuda Unterman, in 1971 (Rules of Conversion and Methods of Performing them, Oral Law, 13 (1971) p. 13). The essence of these statements concerned the need to draw closer those immigrants who were not Jews, and convert them in accordance with the laws of the *Torah*:

“In such an hour of need, where it is impossible to prevent foreign immigrants from intermingling among the people of Israel” (page 16).



Throughout his statements, Rabbi Unterman suggested that it would be wrong to exercise “excessive caution”, that the “proponent of moderation will not loose” (page 17), and that “It would be very unfortunate if we should loose the opportunity” (page 19). An additional aspect is that the treatment of “those who require lawful conversion shall be performed with sensitivity and understanding, bearing in mind the spiritual distress which these brothers of ours have undergone” (*ibid.*, and *cf.* the comments of the Rambam in one of his *responsa* (Blau ed., Vol. 2, Para. 121: “And we assist him to marry her with tenderness and softness”).

As an example of the statements made in the last year, which point to the need for urgent solutions in the new and grave situation which has emerged, one may refer to the article written by Rabbi Shlomo Rosenfeld, “‘Time to Act’ to Convert Mixed Families” (*Tchumin*, 14 (1994) page 223). At the beginning of the article, the author considers the new situation which has arisen with the mass immigration from the iron curtain countries (and from Ethiopia), a situation which requires an urgent solution. The essence of his proposal is:

“to encourage those who really come out of a desire to be Jewish in Israel in accordance with their understanding, so that the process of their conversion will be conducted in accordance with the *Halacha*. This should be done in a State-recognized manner by establishing numerous conversion centres and bringing the converts together with foster families which keep the Commandments, and in particular in neighbourhoods and towns where the surroundings will support their integration into Jewish life” (page 224).

In my remarks to the Committee I mentioned Dr. Haim Ozer Grodzansky, “the *Achiezer*” and Rabbi Moshe Feinstein, as the *Torah* sages whose decisions could provide the way to unlock the doors to converts in current times; the “*Achiezer*”, in a famous response written in the beginning of the century (*Responsa, Achiezer, Part C, Para. 26*), and Rabbi Moshe Feinstein in numerous responses written by him. The two Rabbis were of the opinion that conversion was first and foremost “an entry to religion” and not joining a nation or “collective”; from their rulings it is clear that accepting the Commandments is the essence and substance of conversion, and they are referring to a commitment and not solely a declaration. At the same time, these Rabbis did not close their eyes to the reality which had to be dealt with in their times.

The central *Halachic* problem in the modern age in terms of the validity of conversions (which was also considered in the responses of the two Rabbis) touches upon the issue of accepting the Commandments. Fears as to the validity of conversions followed from the assessment, based on a high level of probability, that the candidate for conversion had made no real commitment to accepting the Commandments. For this reason, Rabbi Moshe Feinstein had doubts as to the validity of conversions carried out in the United States; nevertheless he recognized the possibility of leniency on the part of Rabbis who were willing to accept converts, and he took this approach in view of the fact that there were cases - albeit infrequent cases - where the intention to accept the Commandments was real:

“... I feel a sense of disquiet with regard to the essence of conversion and I myself refrain from becoming involved with it [*i.e.* accepting converts], not only because of the legal principle - that one may not accept in advance conversions effected solely for the purpose of marriage, but also on the grounds that it is almost completely obvious that the Commandments have not truly been accepted and that the acceptance is verbal only... [and] when the [prospective convert] does not accept [the Commandments] he is not accepted - this is the essence of conversion, and with regard to most of the conversions performed in this country for the purpose of marriage, the Commandments are not accepted even though orally they [the converts] claim to accept the Commandments - and it is well-known that they are being deceitful - after all she [the converted woman] will not be better than her husband who transgresses all the laws of the Torah. On the other hand, perhaps the converted wife will accept the Commandments, and therefore I will say nothing to Your Honour, because there are many Rabbis in New York who accept such converts and therefore I will not say that it is prohibited, however, I am not comfortable with this and neither was my very learned late father comfortable with this, although I do not say it is prohibited. Your Honour will do as he understands and thinks right and as is exigent.” (*Responsa, Igrot Moshe, Yoreh Deah, Part A, Para. 159; cf.*, similar remarks at para. 160).

In other words, the “possibility” that a certain convert would accept the Commandments prevented the Posek from negating the decision of the Rabbis admitting the converts to Judaism.

In my opinion, the latter point may provide an opening for considering a certain “leap forward” in relation to the conversion in Israel of immigrants from the former Soviet Union. The sages referred to above considered the situation which existed in the previous generation in Europe and the United States, and it may

*continued on p. 55*

# Injury to Religious Feeling in a Democratic Regime

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**Criminal Appeal 697/98**

**Tatiana Sozkin v. State of Israel**

**Before Justices Theodor Or, Tova Strasberg-Cohen,  
Eliezer Goldberg**

**Judgment delivered on 8.7.1998**

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## **Precis**

The Appellant, Tatiana Sozkin, was convicted by the District Court in Jerusalem of a number of offences involving injury to Moslem religious feeling and Palestinian property, committed during June 1997, following her attempt to distribute a leaflet depicting a pig, captioned Mohammed, stepping on the *Quran*, within the Palestinian controlled section of the city of Hebron. The Court imposed a sentence of 3 years imprisonment, one year suspended. The Supreme Court unanimously dismissed the Appellant's appeal against both her conviction and the severity of the sentence and analyzed the relationship between the offence of injury to religious feeling and freedom of expression. Justice Theodor Or delivered the leading judgment of the Supreme Court.

## **Justice Theodor Or**

### **Charges**

The Appellant was charged with preparing some 30 leaflets, depicting a pig wearing a *Kafieh* and treading on an open book. The pig appeared to hold a pen in one of its trotters and write in the book. The name "Mohammed" appeared in English and Arabic on the image of the pig, and the word "*Quran*" appeared on the book. According to the charges the Appellant drove to the Palestinian controlled area of Hebron, and stuck a number of leaflets on the doors of various shops. At the time she was wearing a yellow t-shirt depicting a clenched fist, allegedly the symbol of the illegal terrorist group - *Kahane* or *Kach*. In respect of this incident the Appellant was charged with committing a racist act, contrary to Section 144D1(A) of the Penal Law - 1977

("the Law"), defacing of property contrary to Section 196 of the Law; injury to religious feeling contrary to Section 173 of the Law and supporting a terrorist organization, an offence under Section 4(g) of the Prevention of Terrorism Ordinance - 1948 ("the Ordinance"). An additional charge related to an incident which occurred the following day in which the Appellant allegedly threw a stone at a Palestinian vehicle, an offence of endangering human life on the roads, contrary to Section 332(1) of the Law.

After hearing evidence, the District Court convicted the Appellant of these charges; however, it limited the conviction to attempted as opposed to actual commission of the offences referred to in the first two charges - injury to religious feeling and destruction of property.

The District Court held that the offence under Section 173(1) is not a 'consequence' offence but a behavioural offence. Accordingly, it does not require actual injury. It was not necessary for any Moslem to have actually seen or been present during the distribution of the harmful publication, it was enough that the publication was capable, on the basis of the objective test of the 'reasonable observer', of causing the prohibited injury. Applying judicial notice, the District Court held that this was a severe and serious injury exceeding what was reasonable, and that by her own admission the Appellant knew 'with a high degree of certainty' that she would cause inter-religious strife - and even intended this result.

The District Court further held that the mental element required for this offence was criminal intent.

Additionally, the District Court further held that wearing the t-shirt with the symbol of '*Kach*' in the area of H1, the part of Hebron under Palestinian control, comprised an open act of identification with a terrorist organization, committed in a public place, and the offence of attempting to destroy property had been committed with a racist intent, namely, to cause the "persecution, humiliation, ridicule, display of hatred, hostility or violence, or creation of disaffection towards a public or section of the public".

The brunt of the appeal was directed against the conviction for attempting to injure religious feeling.

### Section 173(a)(1) - Injury to Religious Belief

This Section provides that a person who publishes material which is calculated to outrage the religious beliefs or feelings of other persons is liable to imprisonment of up to one year. Justice Or noted that use of this section is very rare and this was the first time that the Supreme Court had been required to consider a criminal charge based on this provision. Justice Or held that such a wide prohibition on publications which might outrage the feelings of others, including their religious feelings, lies on a direct collision course with the fundamental principles of a democratic State.

The judge noted that a democratic State recognizes the basic right of a man to behave and express himself in accordance with his own views, beliefs and rationale, without the State imposing restrictions. Often, completely legitimate acts, located within the hard core of this freedom, are capable of impairing the feelings of others, and Justice Or quoted his own remarks in H.C.J. 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religious Affairs* 47 (5) P.D. 485:

“The protection given to the feelings of one section of the public may easily be excessive and injure the feelings of another section of the public. The tension between freedom of religion and freedom of conscience, one of the aspects of which is also freedom of religion - two principles mentioned in the Declaration of Independence as concepts on which the State of Israel is based - is an inherent tension which cannot be prevented. It appears to me that in the delicate balance between freedom of religion and freedom from religion, it should be remembered that the very fact that one sector of the public holds opinions and beliefs which are different and behaves differently, even if this injures the feelings of others, does not justify preventing the first section from continuing to think, believe and behave in accordance with those different views, beliefs and customs.”

This statement was also applicable in the instant case. The factual element of the criminal offence was ‘publication of material’, and publication is an expression. This, therefore, was an offence which imposed restrictions on expressions capable of impairing religious feelings. Holding that every expression which has the potential to outrage religious feeling, falls within the ambit of this offence, would undermine the basic right to freedom of expression.

Justice Barak stated in H.C.J. 953/89 *Eindor v. Mayor of Jerusalem* 45(4) P.D. 683:

“By its nature, an expression impairs feelings, and if every impairment of feeling would enable impairment of freedom of expression, ultimately we would not recognize freedom of expression at all. Accordingly, a democratic society, which wishes to protect both freedom of expression and the feelings of the public, must establish a ‘level of tolerance’, where only an injury to the feelings of the public exceeding such a level, would justify impairment of freedom of expression.”

Justice Or noted that these statements do not mean that there is no need for the offence provided by Section 173 of the Penal Law. In certain circumstances there may be justification for imposing limitations on freedom of expression, in the context of outraging religious feelings. However, these statements make it clear that great caution is needed in defining the scope of the criminal prohibition provided for by Section 173. Care must be taken that this criminal prohibition will not impair basic freedoms of our legal system beyond what is necessary in order to achieve its purpose - the prevention of serious and unjustified injury to religious feeling.

In the instant case, counsel for the Appellant had argued that as the offence imposed a limitation on freedom of expression, it was necessary to interpret the requirement that there be a ‘publication which causes a serious injury to religious beliefs or feelings’ before the offence was committed, as one which required an actual ‘consequence’ of injury to religious feelings. Justice Or held, however, that even if this contention was upheld, it would not affect the Appellant’s conviction, as she was not convicted of the completed offence of injury to religious feeling but of an attempt to commit such an act. Even when the factual element of the completed offence included a ‘consequence’ component, criminal liability for an attempt to commit the offence did not depend on achieving the prohibited result. On the contrary, where reference was to a ‘consequence’ offence, one could talk of an attempt only where the consequence on which the offence depends had **not** taken place. Where the consequence had taken place, the offence was complete. For this reason, even if an actual consequence had been required for the purposes of liability under Section 173(1), this would not have impacted on the conviction of the Appellant for attempting to commit the offence.

In fact, however, Section 173(1) does not require actual

injury. It requires behaviour which has objective potential for such an injury. The wording of the Section does not relate to a consequence component but to a circumstance which delineates the nature of the prohibited behaviour.

In this spirit it was held in H.C.J. 351/72 *Canaan v. Council for Film and Play Censorship* 26(2) P.D. 811, in relation to Section 149 of the Criminal Law Ordinance (the precursor of Section 173), that this was a provision which established objective standards concerning the potential influence of the publication on someone who held a particular religious belief. As Justice Landau said in that case: "The test is objective... It is not the subjective motive of the person making the publication which is determinative for the purpose of this Section but the impression created by the matters which were published in the heart of the person holding the religious belief."

Accordingly, for this reason too, one must reject the contention that the offence is one of consequence. The injury referred to by the Section is, therefore, potential injury to feelings.

Another question which must be asked is what must the prosecution prove in relation to the element of the offence "which is calculated to cause outrage". Justice Or noted that first we must define 'outrage to religious feeling', which it is required must potentially exist. It is difficult to refer to injury to feeling in the same way as injury to the body of a person.

Feelings are not material objects which may be injured. Thus, Justice Or queried, how could this consequential element of injury to feelings be expressed?

In his article "Injury to Religious Feelings" (*Multi-Cultures in a Jewish and Democratic State* (Moutner, Saguy, Shamir, eds.), Tel Aviv, 1998), D. Stettman offers the following solution at p. 136:

"... Injury to the feelings of a person means to cause him unwanted feelings, such as feelings of sorrow, frustration, outrage, aggravation and anger... accordingly, injury to religious feelings is the creation of hurt feelings originating in the religious beliefs of the injured party. A person injures the religious feelings of another when by his behaviour he causes him anger, frustration, outrage and the like, and when these feelings would not have arisen in the heart of the injured party were it not for his holding a religious belief."

According to Justice Or this is a common sense solution. It convincingly translates the abstract concept 'outrage to feelings' to a term having practical meaning. The question which there-

fore arises is what is the strength and scope of the injury, within the said meaning, whose potential existence is required, and how great a probability of such an injury is required.

With regard to the strength of the injury, the provisions of the Section require that the behaviour has the potential to cause a "serious" injury to feelings. This is drawn from the need to establish a threshold which is not too low and will therefore not bring about the criminalization of a wide range of expressions. Justice Or noted that we live in a democratic society which is based on openness and pluralism. The special democratic society in which we live includes a wide and complex mosaic of beliefs, perceptions and religions which are not always compatible with each other. In such a state of affairs, there is always the potential for injury to feelings as a result of any particular act. Thus, an approach is needed which sets the boundaries of the offence of injury to religious feelings so as only to embrace cases where there is a potential for serious and significant injury.

Moreover, questions concerning the relationship between religion and State often give rise to dispute and contention. These too may lead to assertions which cause injury. Referring to criticism, arising within the context of the public debate, and which may cause injury to religious feeling, it has been said that 'not by means of criminal trials may another decision be reached' (Justice Sussman, H.C.J. 4/64 *Vagnar v. Attorney General* 18 P.D. 29.). This too shows that certain injuries to religious feelings must be recognized as injuries which must be accepted. It necessitates the approach that not every injury to religious feeling comprises a criminal offence, but only those injuries of appropriate severity.

With regard to the extent of the potential injury, Justice Or accepted that the interest protected by the offence prohibiting injury to religious feeling, is the interest of members of the same religion as a whole, in contrast to outrage to the religious feelings of a particular individual.

Accordingly, it has been held that in examining the injury to religious feelings, one must consider "... the opinion and feelings of the majority or an appreciable section of that public and not the extreme opinions of people belonging to a minority which has extremist views" (Justice Etzioni in H.C.J. 124/70 *Cochavei Shemesh v. Registrar of Companies* 25(1) P.D. 505). Impairment of freedom of expression, occasioned by the punishment of expressions which cause injury to a small and special sector of the relevant public, which may perhaps have special sensitivities, exceeds what is necessary within the framework of the 'give and take' demanded in a democratic regime.

Another question touches the needed level of probability of the potential injury to religious feeling.

Justice Or was of the opinion that a mitigating test has to be adopted, which is satisfied by the adverse tendency of the publication to outrage feeling. The punishment of statements entailing a low potential for injury to the religious feeling of the majority of members of a religious group, or where the potential for injury is high, however, the anticipated injury is not serious, would, in his opinion, extend criminal liability in an undesirable manner. Justice Or emphasized that it has to be remembered that prior to making any statement, there is often doubt regarding possible liability in relation to it. The potential publisher who does not wish to be exposed to liability, naturally adopts a safety margin. Because of this phenomenon, setting too low a threshold is likely to preclude numerous expressions when so doing is of no usefulness at all. This result is undesirable and must be prevented.

In the instant case, the question arose whether to adopt the test of reasonable or real possibility [of severe injury], as applied in the case of Cr.App. 6696/96 *Kahane v. State of Israel* (unpublished) or the more severe test requiring near certainty of serious injury. Considering the test of near certainty, Justice Or noted that the interest being protected in the instant case, although an important one, was not equivalent to the interest weighed in the *Kahane case*. In that case, President Barak expressly stated that he was adopting a balancing formula of reasonable possibility, in view of his finding that the social interest protected by the offence of sedition was an interest touching the structure of the regime. President Barak held that that was an interest “which stood at such a high level in the structure of values of the State of Israel, and the danger of injury to it was so great” that one “had to position the requirement of causal connection on the test of reasonable (or real) possibility”. Justice Or noted that against this background it could be argued that in the instant case the Court should adopt a more severe test, which provided greater protection to freedom of expression. Such a position would be compatible with the difficulties entailed by restricting expressions which injure feelings.

Against this, it has been held that religious feelings are part of the public order within the broad meaning of this term.

Serious injury to religious feeling undermines the principle of tolerance, which is one of the values which unites and consolidates Israeli society. The duty not to injure the religious feelings of another, currently provided by Section 173 of the Law,

“directly ensues from the duty of mutual tolerance between free citizens possessing different beliefs, without which no democratic society such as ours would be possible” (Justice Landau in the *Canaan case, supra*, at p. 814). Similarly, President Shamgar noted in H.C.J. 806/88 *Universal City Studios v. Council for Film and Play Censorship* 43(2) P.D. 22:

“... Serious injury to religious feeling is the antithesis of tolerance... the latter is intended to nurture and positively promote human self-expression and not injure and oppress feelings. Mutual tolerance between people possessing different views, opinions and beliefs is a fundamental condition for the existence of a free democratic society, and serious injury to feelings is not compatible with it”.

Justice Or noted that an additional consideration concerns the nature of the limitation on freedom of expression. The test of near certainty was established in relation to decisions concerning prevention of expressions in advance of their utterance. Prevention in advance has been characterized as the most severe form of limitation on freedom of expression (President Barak in the *Universal Studio case, supra*, at p. 35.). While prevention in advance is of an “absolute” character which precludes any room for expression, criminal sanctions have a “weaker” character: applying a less severe test of reasonable possibility (or real potential) of injury to feelings.

Justice Or stated that for the purpose of the issue at hand, he was inclined to adopt the test of near certainty. He based this on his viewpoint that the interest under consideration was not at the highest level of values protected by Israel’s legal system.

With regard to the issue of proof of injury to religious feelings, Justice Or held that this was not a question for expert witnesses unless the matter was unclear. The Court would consider the entirety of the circumstances which could influence the potential impact of the specific publication at the time it was made. The Court would first and foremost consider the contents of the publication, in terms of both its meaning and its style, and then the circumstances surrounding the event - the medium utilized, the targeted public, where the publication was made, and when it was made. A matter of possibly considerable importance was whether the audience was a “captive audience”. All this would enable a determination whether the publication contained a real potential for serious injury to religious feeling.

In the instant case there was no difficulty in confirming the categorical conclusion of the District Court that the publication

contained a real potential for serious injury to the feelings of members of the Moslem faith. From the point of view of a member of the Moslem faith, this was a crude and serious insult to the most holy prophet of that faith (Mohammed), and the most holy book of that faith (the *Quran*). Added to this was the place where the Appellant wished to publish the leaflet - a city having a large Moslem population, and subject to a high level of tension between Jews and Arabs in recent years.

Accordingly, Justice Or concluded that in all the circumstances, the publication of the leaflet involved an injury to religious feelings which crossed the boundaries of what was permissible, and exceeded the threshold of tolerance. The circumstantial element relating to the nature of the specific publication under consideration, required for the offence to be committed, therefore existed.

#### **Section 144D1 of the Penal Law - Racist Motivation**

Justice Or held that Section 144D1 is a basket provision. The Section provides that if any of the long list of offences referred to therein are committed for racist motives, the offender will be subject to double the penalties provided in respect of the particular offence, or 10 years imprisonment, whichever is less. Among the list of offences, Subsection (b) includes:

“Offences against the person, freedom or property, offences of threats or extortion; offences of hooliganism and public mischief and nuisances included in Articles 9 and 11 of this Chapter, and offences committed in or against the public service contained in Chapter 9 Article 4, save for an offence which carried a penalty of 10 years imprisonment and more.”

Accordingly, the legislature did not intend to create a separate offence under Section 144D1. Its purpose was to establish a more severe mental element - “a racist motivation” - the existence of which appreciably increases the level of punishment. Thus, one cannot speak of a conviction for a racist act or an attempt to commit a racist act, but only of the commission of one of the offences listed in Section 144D1(b) (or an attempt to commit it) which is performed with racist motives.

What applies to the completed offence also applies to an attempt to commit the offence; accordingly, in the instant case the Appellant was properly convicted of attempted defacement of property (contrary to Section 196 of the Penal Law) motivated by racism (contrary to Section 144D1 of the Penal Law).

#### **Support for a Terrorist Organization**

The District Court had convicted the Appellant of an offence under Section 4(g) of the Prevention of Terrorism Ordinance, expressed by her wearing a t-shirt bearing the symbol of an outlawed organization.

Section 4(g) provides as follows:

“A person who -

does any act manifesting identification or sympathy with a terrorist organization in a public place or in such a manner that persons in a public place can see or hear such manifestations of identification or sympathy, either by flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any other similar overt act clearly manifesting such identification or sympathy as aforesaid

shall be guilty of an offence...”

Justice Or held that the question which arose was whether in all the circumstances of the case, the message understood by a reasonable observer of the act was a message of identification or support for a terrorist organization.

Justice Or held that wearing a blouse bearing a symbol of a terrorist organization would certainly satisfy this requirement. The act of wearing the blouse could clearly give rise to the conclusion that the wearer was affiliating himself, at least conceptually, to the outlawed movement. The message arising from the act was one of a link between the terrorist organization and the wearer of the blouse. This potential [for the expression of support] was greatly strengthened where the symbolic act was performed in a city having a large Arab population and in the midst of a difficult and continuing conflict between Jews and Arabs.

Section 4(g) does not require that the message be understood by a person belonging to a specific group, for example, persons who may be hurt by the identification with the terrorist organization. Thus, an expression of identification with a terrorist organization, within the meaning of Section 4(g) is possible - and perhaps even more likely - when the potential audience is an audience of supporters.

With regard to the mental element of the offence, in the absence of express statutory provision, a conviction requires actual knowledge of the behavioural component and the circumstantial components of the offence. The accused has to be aware of the nature of his conduct, *i.e.*, aware that his conduct

expresses support for or identification with a terrorist organization.

Both the factual and mental elements of the offence existed in the instant case and accordingly the Court would uphold the conviction under Section 4(g) of the Ordinance.

## Sentence

Finally, Justice Or held that there was no room to intervene in the sentence imposed by the District Court in view of the gravity of the circumstances of the offences and their potentially destructive effect. The acts of the Appellant, fully completed, had a real potential to cause a serious conflagration. It was true that some of the offences concerned expressions of opinion. Israel's system of law recognizes that the protection of expressions is an essential and fundamental pillar of the democratic structure. However, this does not alter the fact that in certain circumstances words, symbols and expressions may be just as dangerous as acts.

Justice Or held that excessive weight should not be given to the fact that the Appellant's plan was frustrated. The legislature

had imposed the maximum penalty on an attempt to commit an offence, a penalty which was identical to that applicable to the completed offence. This was because there was no distinction in relation to moral guilt and issues of deterrence between a person attempting to commit the offence and a person actually completing the offence.

Justice Or emphasized that offences involving the sewing of disaffection and encouragement of confrontation necessitates punishment which is compatible with the gravity of the offence. The sanctions imposed in respect of these offences has the important function of preventing deterioration.

In view of these considerations and after examining the particular circumstances of the Appellant, Justice Or upheld the sentence imposed by the District Court.

Justices **Strasberg-Cohen** and **Goldberg** agreed with the judgment delivered by Justice Or.

*Abstract prepared by Dr. Rahel Rimon, Adv.*

## Conversion in the Age of Immigration

*continued from p. 49*

perhaps be said that the evaluation regarding non-compliance with the Commandments by converts is **weaker** today than it was in the past. There are increasing numbers of people keeping the Commandments among the population absorbing converts in the State of Israel. The cases in which it becomes clear that acceptance of the Commandments is real are not few but are rather on the increase. This "statistical" fact may therefore - upon examination - be a factor which may be relied upon. The fact that reference is to the acceptance of converts in Israel and not abroad is also of great importance, and it is necessary to try and adapt to the new situation which has recently been created - as described above - which justifies rulings "required by the exigencies of the time". Of course, it would be best if the process would be carried out through State channels.

The ruling of the former Sephardi Chief Rabbi, Rabbi Uziel, in this connection is well-known. *Prima facie*, he did not see any

obstacle or difficulty to admitting converts, even when it was known that they would not abide by the Commandments (*The Decisions of Uziel in the Questions of the Time*, Para. 65). This decision has not been applied, and in my opinion there is a real, conceptual difficulty in accepting the approach to the effect that conversion is not a commitment to abide by the Commandments on the part of the convert, but his agreement to subject himself to the system of reward and punishment which applies to Jews. At the same time, the following recent remarks may be appropriate: "Those same approaches and opinions in accordance with which decisions have **not** been made, are now also likely to be used, in this hour of need, as supporting grounds, and turn a retrospective rule into a solution from the beginning" (Rabbi Yigal Ariel, "The Conversion of Soviet Immigrants" (*Tchumin* 12 (1991) 81, 82).

# IAJLJ Explores Prospects for Cooperation with Council of Europe

**Daniel Lack**

It will be recalled that representatives of national associations of IAJLJ met some two years ago in Paris with a view to creating a European Council as a subgroup of IAJLJ, to explore ways and means of cooperating with various European intergovernmental institutions dealing with legal issues of international concern with which IAJLJ identifies, notably the Council of Europe.

After some delay and consultations with colleagues in various European countries and with the IAJLJ President, Joseph Roubache of Paris and Daniel Lack of Geneva went to the seat of the Council of Europe in Strasbourg on 30 October 1998 to meet with senior officials of the secretariat to explore prospects for collaboration on specific human rights related problems of mutual interest.

The Council of Europe was created in 1949 by ten western European countries, to strive for European reconstruction and unity following the Second World War. Gradually it attracted all the western European countries to its program of promoting and strengthening democracy, the rule of law and human rights. The legal instruments it created, in particular the European Convention on Human Rights and the other legal instruments, institutions and programs which have been generated over the last fifty years, attracted most of the central and eastern

European countries as from 1989 so that today, it comprises 40 Member States throughout the whole of the European continent. Israel, as the only true democracy in the Middle East, long enjoyed special ties with the Council and at its invitation, sent a delegation from the Knesset with special observer status, to participate in the proceedings of its Parliamentary Assembly.

During the Strasbourg meeting, the IAJLJ representatives were cordially received by Deputy Secretary General, Hans Christian Kruger, and conducted wide ranging discussions with key officials of the secretariat's planning and research unit, the directorate of legal affairs including its special unit on minorities, the committee on legal affairs and human rights of the Parliamentary Assembly and the head of external relations of the directorate of political affairs. Specific areas of possible areas of collaboration that were examined include, contributing to the work of the European Commission against Racism and Intolerance, providing information relative to the implementation of the Framework Convention for the Protection of National Minorities, taking part in the work of a working group of the steering committee for human rights dealing with the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe and finally exploring how a contribution could be made to the work of a group of specialists on democratic strategies for dealing with extremist movements in Europe constituting a

threat to human rights and democratic society.

IAJLJ could subsequently explore further with the Council of Europe, the possibility of collaborating on an *ad hoc* basis or seeking a more formal consultative status relationship accorded to non-governmental organizations with recognized expertise.

The IAJLJ delegation was clearly given to understand that whatever method would be chosen, its association with the work of the Council of Europe would be warmly welcomed.



## South African Chapter Discusses Divorces in Jewish Law

On 19th October 1998, the South African Chapter of the Association held a discussion on the *Get* and the Divorce Amendment Act, new South African legislation dealing with religious divorces. The legislation arose mainly out of representations made by the Jewish community and is similar to that in force in Canada. In this connection, the principal amendment to the Divorce Act 70 of 1979 was set out in the new Section 5A, inserted by Section 1 of Act 95 of 1996:

"If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses of either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such



prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.”



### Judge Margo Honoured

On a separate occasion in their cultural calendar, the South African Chapter of the Association held a reception on 1st December 1998, in honour of Judge Cecil Margo, President of the South African Chapter. The reception was attended by many distinguished judges, lawyers and officials of Jewish institutions, including the South African Zionist Federation and South African Jewish Board of Deputies. The main address was delivered by Judge Basil Wunsh, who noted that Judge Margo's distinguished war record; his advice to Ben Gurion on the establishment and organization of the Israel Airforce when the State was established in 1948; his legal career and part in many notable trials. Judge Margo has recently published his autobiography, entitled *Final Postponement*.



### Association Congratulates Lord Millet on his appointment as Lord of Appeal in Ordinary

The Rt. Hon. the Lord Millet M.A. (Canatab.) has been appointed a Lord of Appeal in Ordinary. He has been an active member of the U.K. Section of the Association and has kindly consented to become its Vice-President.

Lord Millet has a distinguished career in the law. In 1955 he was called to the Bar, in 1973 appointed a Q.C., in 1980 elected a Bencher of Lincoln's Inn, in 1986 appointed a Judge of the High Court Chancery Division, in 1994 appointed a Lord Justice of Appeal, and in 1998 appointed a Lord of Appeal in the House of Lords.

He has held several appointments including Counsel to the Department of Trade and Industry, membership of the Bar Council and membership of the Insolvency Review Committee.

He is a contributor to *Halsbury's Laws of England* and has served the Jewish community as a past President of the West London Synagogue.

### ERRATA (JUSTICE 18)

◆ Judge Alan Sacks, Administrative Law Judge, PA, U.S.A., has kindly brought to our attention that an error occurred in the facts stated by Professor Shevach Weiss in the interview conducted with him for the last issue of *JUSTICE* (page 5). In fact, President Wilson appointed Justice Brandeis in 1916 and President Johnson appointed Justice Goldberg in 1962. President Roosevelt did appoint seven members of the Supreme Court beginning in 1937 with Hugo Black and instituted his famous but unsuccessful “court packing” plan in 1937.

◆ Page 37: Editor's note should read: President of the Association, Judge Hadassa Ben-Itto has been appointed to serve on the Claims Restitution Tribunal in Switzerland which deals with the individual claims against Swiss banks on the dormant accounts.

◆ Page 44: From the Supreme Court, Abstract of case prepared by Dr. Rahel Rimon, Adv.

### Captain F. Ashe Lincoln, Q.C. 1907 - 1998

The Association deeply regrets to announce the passing of Captain Fredman Ashe Lincoln, a founding member of the International Association of Jewish Lawyers and Jurists and Honorary Deputy President. F. Ashe Lincoln will be particularly remembered for his rich and varied career, spanning law, navy, politics and Jewish communal life, throughout which he remained committed to Jewish values and the State of Israel. In an earlier issue of *JUSTICE* (Issue 9) we had pleasure in paying tribute to his outstanding contribution to the work of the Association, on the occasion of the publication of his autobiography *Odyssey of a Jewish Sailor* (Minerva Press, 1995).



Ashe Lincoln was a prominent and highly respected barrister and active member of the Anglo-Jewish community. During and after the Second World War he assisted thousands of Holocaust survivors reach Palestine; in 1947 he made proposals to Shertok and Ben Gurion, which were ultimately accepted, for the formation of a Navy for Palestine and thereafter worked to establish the Navy itself. Despite his busy legal career he was actively involved in numerous Jewish organizations, including the Zionist Federation, the Jewish National Fund, the World Jewish Congress and the United Jewish Israel Appeal. He was particularly devoted to our Association and attended almost all our International Congresses.