

# JUSTICE

The Legal Magazine of the International Association of Jewish Lawyers and Jurists

Summer 2019

No. 63



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INTERNATIONAL JEWISH LAWYERS

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

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**Cover:** Signing the Israel-Jordan Peace Treaty at the Arava Border Terminal.

Seated (L-R) PM Rabin, U.S. Pres. Clinton, Jordanian P.M. Majali

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# President's Message

Meir Linzen

I preface this message to you by noting the passing of the former President of the Supreme Court of Israel, Justice Meir Shamgar. Meir Shamgar, of blessed memory, took an active part in the establishment of our Association and was a member of its initial Board. In his various roles, as IDF Advocate General, Attorney General, Justice of the Supreme Court and President of the Supreme Court, Meir Shamgar left an indelible mark on the primary areas of concern of our Association. He was the most active Justice in the area of public international law in the history of the Supreme Court.

It is now 50 years since the establishment of our Association, and we will mark the occasion with a conference on the topic of the War against Antisemitism. At the opening event, we will honor the memory of the three outstanding jurists whose ideas brought about the establishment of the IAJLJ, and who stood at its head: Deputy President of the Supreme Court, the late Justice Haim Cohen; United State Supreme Court Justice and United States Ambassador to the United Nations, the late Arthur Goldberg; and Nobel Peace Prize laureate, the late Professor René Cassin.

The purposes for which the Association was established remain valid 50 years later. Antisemitism in Europe, in the United States, and elsewhere, is raising its head. Antisemitic outbursts are becoming more common and extreme, and are breeding acts of violence against Jews and Jewish institutions. Antisemitism has found expression in its extreme form in recent times, in particular with shootings, injury and murder of Jews and mere passers-by at synagogues in Germany, the United States, and elsewhere. Most recently, we saw the murderous attack on a synagogue in Halle, Germany. The writing was on

the wall: the murderer was known for his racist and antisemitic outbursts, yet nothing was done to stop him.



Photo: Ami Erlich

A year ago, I established within the framework of our Association, a Center for Legal Struggle against Antisemitism, headed by Adv. Avraham (Avrumi) Yishai. The Center initiates and coordinates legal proceedings against incidents of antisemitism, as well as defends by legal means people who are acting to uproot antisemitism and are attacked for doing so.

Our most important task is to wage a legal war against incitement on the Internet. Freedom of expression should never be allowed to justify antisemitism. From a legal point of view, in order to stop violence and murder, we must work to prevent and punish seemingly "minor" acts such as antisemitic statements that involve no physical violence. Only through preventing antisemitic outbursts can we prevent acts of violence. In parallel, we are active in defending the rights of Jews, for example on questions of outlawing kosher slaughter.

Antisemitism manifests itself not only through incitement and through violence against Jews, but also in statements and actions denying the legitimacy of the State of Israel, the State of the Jewish people. Actions or statements that call into question the legitimacy of the State of Israel (as opposed to legitimate and proportionate criticism of Israeli government policy) is no less harmful than any other antisemitic statement or action, since the object of such behavior is to deny the national home of the Jewish people. Our Association will continue to act within international organizations, but also in courts of law, against any attempts to call into question the legitimacy of the State of Israel.

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# Determining the International Boundary Between Israel and Jordan and the Case of the Two Special Regimes\*

Elyakim Rubinstein

The issue of the boundary between states and nations is founded in the history of mankind. In the past, nations have attributed enormous significance to their borders and they continue to do so today, to the point of sanctifying them. The Lavan-Ya'akov agreement in *Genesis* 31, 44-53 is a type of model in this regard: the two parties entered into a treaty that set a statue as a boundary mark, and committed to avoid transgressing the boundary for evil purposes (although the biblical commentator Rashi says "but you can cross for trade"). This is true the world over, including the Middle East region. Peaceful, secure and recognized borders are the ideal in international law. Security Council Resolution 242 of November 22, 1967, concerning attempts to establish peace between Israel and its neighbors, refers in paragraph 1 (ii) to the right of all states in the region to "live in peace within secure and recognized boundaries free from threats or acts of force."

I was privileged to participate in the negotiations on the peace treaties with Egypt (1977-1979) as a member of the Israeli delegation, and in the negotiations with Jordan (1991-1994) as head of the delegation. In my view, the most significant achievement in the peace negotiations with Jordan was the determination of the border between the two countries.<sup>1</sup> I think that the Jordanians too had attached great importance to this, since when it was decided in June 1994 to transfer the negotiations from Washington to our region, the Jordanians insisted on conducting them, at least initially, in the border area of the Arava. The objective was to make it clear that the border was to be determined, because there were those in Jordan who feared that Israel was not giving Jordan its full political weight. Indeed, negotiations on this issue accelerated in July 1994 in talks conducted in a tent in the Arava.

Let us go back to the beginning. After the Madrid Conference in 1991, the momentum moved toward the determination of the Israeli-Jordanian border. The talks

began with the negotiations on the "Agreed Common Agenda" between Israel and Jordan, that was formulated in Washington in 1992 and concluded in November of that year, but was signed only on September 14, 1993. This agreement provided that the agenda for negotiations (Article 5) would include:

settlement of territorial matters and agreed definitive delimitation and demarcation of the international boundary between Israel and Jordan with reference to the boundary definition under the Mandate, without prejudice to the status of any territories that came under Israeli Military Government control in 1967. Both parties will respect and comply with the above international boundary.

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\* Partially based on the article: Elyakim Rubinstein, On the Boundary and the Israel-Jordan Border, *PARASHAT HASHAVUA* (Hebrew) 170 (A. Hacoheh and M. Vigoda eds. 2004). It was dedicated – inter alia – to the blessed memory of David Ben-Rafael (Goldman), a diplomat of peace and law who served as Israel's Minister in Argentina, and was assassinated in the terrorist attack on the Embassy of Israel in 1992.

1. There has been extensive writing on the Israel-Jordan boundary by Prof. Moshe Brawer, Dr. Haim Srebro, and Prof. Gideon Biger; see, inter alia: Moshe Brawer, The Israeli-Jordanian Peace Boundary, in *BORDERLANDS UNDER STRESS* (Martin Pratt and Janet Allison-Brown eds., 2000); Haim Srebro, *THE BOUNDARIES OF ISRAEL TODAY* (Hebrew, 2012); Elyakim Rubinstein, On the Boundary and the Israel-Jordan Border, *PARASHAT HASHAVUA*, 170 (Hebrew); The Peace Between Israel and Jordan: Anatomy of a Negotiation, *ibid.* (1996); Moshe Yegar, Yosef Govrin and Arye Oded, *MINISTRY OF FOREIGN AFFAIRS – THE FIRST 50 YEARS*, pp. 194-204 (2002).

The wording is careful and meticulous: “with reference to the boundary definition under the Mandate.” This is also reflected in Article 3 of the 1994 Israel-Jordan Peace Treaty, which deals with the international boundary.

The practical delimitation of the border was perhaps the most complex issue because there was no known marked border between the two countries. The Armistice Line of 1949 did not have the status of a political border. On the contrary, that line was denied by the Arab negotiators. The Armistice Agreements were effectively canceled because of the actions of the Arab States in the 1967 Six-Day War, and Israel officially declared the agreements null. In September 1970, following the period of Fatah activity within and from Jordan after the Six-Day War, Jordan expelled the Palestinian Liberation Organization from its territory, indirectly assisted by Israeli deterrence, thus preventing the Syrians from interfering. The de facto security line was then moved eastwards, and the Arava villages were permitted by the Israeli government to cultivate lands east of the Armistice Line. Those lands had been barren and had never been cultivated. During the course of the peace negotiations, the representatives of the Arava villages tried to preserve the lands cultivated by them east of the Armistice Line, which comprised about half of the cultivated land and water of these communities. The State of Israel had a moral-agricultural interest that the Arava villages in this important region would not be harmed.

Unlike Egypt, where the border between the Ottoman Empire and British-controlled Egypt had been delimited in 1906 and was even fully marked (although due to some disputes on specific points they were settled later in the Taba Arbitration), there was no delimited and demarcated border between Israel and Jordan. The border was defined verbally in 1922 by the British, as described below, but not marked on the ground, except for the marking of four kilometers north of Aqaba in 1946. The Mandate definition of the border in September 1922, with the separation of Transjordan from the application of the King’s Order-in-Council of 1922 – i.e. from the obligation towards the Jewish National Home in Palestine promised in the Balfour Declaration of November 2, 1917 and the League of Nations Mandate for Palestine of July 24, 1922 (Preamble, and see also Article 25 of the Mandate) – was established in the Transjordan Memorandum as approved by the League of Nations on September 16, 1922. The Mandate definition of the border was described as the:

line drawn from a point two miles west of the town of Akaba on the Gulf of that name

up the centre of the Wadi Araba, Dead Sea and River Jordan to its junction with the River Yarmuk; thence up the centre of that river to the Syrian Frontier.

The question was how to translate this line into legal and practical language. Moreover, at a later stage during the Mandate period, reference was made to the “low points line,” although this too was impossible to identify precisely.

In 1994, the year when the Peace Treaty was concluded, it was difficult to determine where the border was. Although the terms “centre of the Wadi Araba, Dead Sea and River Jordan” were accepted in international parlance, it was still not clear what “Wadi Araba” was and what was “the centre of Wadi Araba,” as there is no single water carrier, either dependable or transitory, between the Red Sea and the Dead Sea that could be identified. The boundary posed another problem regarding the relations with the Palestinian Authority, and it was dealt with in the Treaty (Article 3(2)), which states that “The boundary, as set out in Annex 1a, is the permanent, secure and recognized international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.”

The problem with the term “the centre of Wadi Araba” stemmed from the fact that there does not exist one Wadi (dry river) that could be identified as running from Eilat-Aqaba to the Dead Sea. We developed, with our experts, the thesis that “the centre” meant “the Arava Valley,” namely, the two sides of the hilly chains known as the Syrian-African Rift. This is how we described the situation during the negotiations, whereas Jordan relied on the Armistice Line. Our thesis implied that the boundary would be situated significantly eastward. Obviously, the Jordanians did not like this and insisted on the Armistice Line as the boundary.

In the course of the discussions between Israel and Jordan, the idea of an exchange of territories arose, with each side having clear interests: Jordan would be able to tell the Jordanian public that it had not relinquished any of the territories of 1949; Israeli farmers would continue to cultivate lands throughout the Arava villages under Israeli sovereignty.

The idea of an exchange of territory indeed followed a precedent in our region, when Jordan received from Saudi Arabia an area east of the Gulf of Aqaba in exchange for a larger desert area. Therefore, an exchange of territory was agreed upon: the areas cultivated by the Arava

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communities would remain under Israeli sovereignty, and in return, Jordan would receive wasteland in Israeli territory in the western part of the Arava. In this way, about 40 square kilometers were exchanged – one for one – and essentially the remaining territory was made consistent with the Armistice Line. Thus, Jordan was able to state that it had received 300 of the 380 square kilometers that it had demanded, and the Arava communities received the cultivated areas under Israeli sovereignty. As one of their leaders pointed out to me: “The border was set in the place reached by the Hebrew plow.”

Special regimes were established in Naharayim/Baqura in the north and, later, in Zofar/Al-Ghamar in the Arava. Regarding Naharayim, Jordanian sovereignty was recognized, but special circumstances justified the establishment of a special regime for 25 years, during which Israel would retain the right to engage in cultivation and tourism under special legal arrangements, with the possibility of an extension, to be later discussed. With regard to Zofar, as its cultivated land was east of the line established, a similar special regime under Jordanian sovereignty was agreed upon in order to enable further agricultural cultivation, again, with a possibility of extension. I shall come back to this below.

The matter of the exchange of territory is not mentioned in the Peace Treaty, but the latter contains a reference to the aerial photographs that were attached to it. The result was that in the Arab world some criticism was raised and directed at the two special regimes – media referred to these as “leases” — but not at the border itself.

### **The Border Clause in the Peace Treaty**

Article 3 of the Peace Treaty with Jordan deals with the international boundary, and paragraph (1) states that the boundary “is delimited with reference to the boundary definition under the Mandate as is shown in Annex 1 (a) ...,” and in paragraph (5) it is agreed that “in the event of natural changes in the course of the flow of the river as described in Annex 1 (a), the boundary shall follow the new course of the flow. In the event of any other changes, the boundary shall not be affected unless otherwise agreed.”

Annex 1 (a) discusses in detail the Jordan and the Yarmouk:

(1) The boundary line shall follow the middle of the main course of the flow of the Jordan and Yarmouk Rivers. (2) The boundary line shall follow natural changes (accretion or erosion) in the course of the rivers unless otherwise agreed.... No artificial

changes [in or of the course of the rivers] may be made except by agreement between both Parties. (3) In the event of a future sudden natural change in or of the course of the rivers (avulsion or cutting of new bed), the Joint Boundary Commission [...] shall meet as soon as possible, to decide on necessary measures, which may include physical restoration of the prior location of the river course. [...] (5) Adjustments to the boundary line in any of the rivers due to natural changes (accretion or erosion) shall be carried out whenever it is deemed necessary by the Joint Boundary Commission or once every five years.

### **On Changes in the Jordan River**

Without entering into a meticulous interpretation of these articles, it is clear that with regard to changes in the course of the Jordan River, the basic approach in international law is that natural changes modify the boundary and the boundary is delimited by the new course. This approach is compatible with the view of the Jewish sages, as cited in *Talmud Yerushalmi* (the Talmud version written in *Eretz Israel*, or the Land of Israel, in the third and fourth centuries)<sup>2</sup>: “The Jordan, which took from one and gave to the other, whatever it took it took and what it gave it gave” (Tractate *Hallah* 4:8). In other words,

The Jordan River, if it changed its course and expanded the boundaries of Eretz Israel and detracted from [the land of] the other side or the converse, whatever it took it took and whatever it gave it gave, the border of the Land of Israel is always the Jordan River and changes with the course of the Jordan River.<sup>3</sup>

As Gideon Biger noted, “the principle commonly accepted today in most international agreements relating to river borders” was implemented in the Israel-Jordan Peace Treaty.<sup>4</sup>

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2. TALMUD YERUSHALMI, The Academy of the Hebrew Language edition, Jerusalem, 1961.
  3. TALMUDIC ENCYCLOPEDIA, *Eretz Israel*, Vol. 2, p. 207 (Hebrew).
  4. Gideon Biger, *Boundaries in Rivers and Lakes – General and Particular in the Boundaries of Israel STATE, GOVERNMENT AND INTERNATIONAL RELATIONS*, vol. 41-42, pp. 207-216 (Hebrew).

### On the Two Special Regimes

As mentioned earlier, Naharayim/Baqura in the north of the Jordan valley, and Zofar/Al-Ghamr in the south, posed special questions regarding the boundary issues. This bore two additions to the Treaty – annexes that perhaps because of their detailed character raised some criticism in the Arab world. As stated above, they are lands under Jordanian sovereignty used by Israelis for 25 years, with the possibility of automatic renewal, subject to a one-year notice of termination.

**Naharayim/Baqura** first: The electricity station in Naharayim, established in 1932 by Pinhas Rutenberg, the founder of the Palestine (now Israel) Electric Corporation in 1923, was based east of the Jordanian river. A part of its area, adjacent to the lands of Ashdot Yaakov (Ihud and Meuhad) and Gesher Kibbutz villages, remained after 1949 in the possession of the State of Israel. This was based on the Armistice Line at the time. These lands were by and large registered in the Jordanian Land Registration (Irbid) in the name of the Palestine Electric Company (PEC) as being a part of the Rutenberg Lands. While dealing with the drafting of the Treaty, and within the good atmosphere that prevailed in the negotiations, we argued that since many problems – including important water issues – were being resolved, why should we not give expression to the fact that the Israeli villages have been working the lands – registered in the name of the PEC – for 46 years?

Indeed, an agreement was reached between King Hussein and Prime Minister Rabin. While the area is under Jordanian sovereignty, based on the 1922 definition, Article 2 of Annex 1(b) of the Treaty stipulates that:

(2)(1) Recognising that in the area which is under Jordan's sovereignty with Israeli private land ownership rights and property interests ("land owners") [...], Jordan undertakes: [inter alia], (1) to grant without charge unimpeded freedom of entry to, exit from land usage and movement... to the land-owners and to their invitees or employees....

Israel undertakes, inter alia, (3)(1) "not to carry out or allow to be carried out in the area activities prejudicial to the peace or security of Jordan." Subject to the Annex, Jordanian law applies in the area, but Israeli law applies to Israelis and their activities. The same language appears in the Zofar Annex 1(c), to which I will later refer.

Indeed, whoever now visits Naharayim can see Jordanian sovereignty represented by the presence of Jordanian soldiers and Jordanian flags, while the agricultural work and enterprises on the land are carried out by Israelis. Naharayim was planned to be, per Agreed Minute C to the Treaty, a joint tourism area. This Agreed Minute (Article 2(3)) states that:

In the spirit of peace, the two Parties attach high priority to the planned recreation joint venture project in the Naharayim/Baqura area, they favourably consider the partnership in peace to be created there, and will endeavor together to promote its implementation as soon as possible.

Some moves toward this end and initial plans had indeed been in the works, but they were sadly affected in 1997 when a group of Israeli school girls who were touring the area were cruelly murdered by a Jordanian soldier.

As for **Zofar/Al-Ghamr**, the problem was that the lands cultivated by the village were five kilometers east of the Armistice Line. This differed from the other Arava villages. Fitting the boundary within this "belly" towards the east was deemed difficult. In the last leg of the negotiations, King Hussein and Prime Minister Rabin applied the Naharayim solution to Zofar. The language in Annex 1(c) relates to "Jordan's sovereignty with Israeli private land use rights."

The two special regimes in Naharayim and Zofar required the enactment of a special law by the Knesset, "The Implementation of the Peace Treaty Between the State of Israel and the Hashemite Kingdom of Jordan Law, 5755-1995." This law contained detailed provisions and regulations, and stated (in Section 2) that "The Peace Treaty is regarded as valid for all intents and purposes." In this way, a legal solution was found for the issue of territorial exchange.

With regard to the duration of the special regime areas, both annexes stipulate in Article 6 that:

Without prejudice to private rights of ownership [Naharayim] – of use [Zofar] – of land within the area, this Annex will remain in force for 25 years, and shall be renewed automatically for the same periods, unless one year prior notice for termination is given by either Party, in which case, at the request of either Party, consultations shall be entered into.

The language is clear: the intention of both parties was that the renewal would be automatic, as explicitly stipulated. Indeed, a formal right to termination was duly incorporated but personally, I would expect that based on the overall consideration of the peaceful relations between the two countries, including on the matters of security and water, the automatic renewal will prevail, without in any way derogating from Jordanian sovereignty. It is my understanding that consultations between the two states are being conducted. I am hopeful that appropriate understandings, in the spirit of peace, will be achieved. One should remember, without going into detail, that on the basis of mutual good will, various rights and interests between the two states have to be taken into consideration.

### Conclusion

The Israel-Jordan boundary has reached its 25th year, and except for the sad and abhorrent murder of the seven innocent girls in Naharayim in 1997, it is indeed a boundary of peace. It should be noted that the late King Hussein, acknowledging the crime, himself came to console the families of the victims, and the families were later compensated by the Jordanian government. A border of peace also means that the IDF and the Jordanian army maintain control on security matters without the mediation

of a third party, whether it be the United Nations or any other international body. This in itself is an important achievement. We must pray for God's help in the future, as well as pray that "He makes your border one of peace" (Psalms 147:14).

The Israel-Jordan peace is vital for both countries. As the head of Israel's delegation to the peace negotiations a quarter of a century ago, I believe we all should be proud of the way the boundary has been shaped. I would like to conclude by expressing my appreciation, respect, and gratitude to all my colleagues on both sides who took part in this mission.

*Elyakim Rubinstein served as Government Secretary for four different Israeli governments, 1986-1994, and as Attorney General of Israel, 1997-2003. He was appointed Justice of the Supreme Court of Israel in 2004, and later Deputy President of the Supreme Court of Israel, 2015-2017. He now serves as an Associate Professor of Public Policy and Political Science at the Hebrew University of Jerusalem.*



Elyakim Rubinstein, head of the Israeli delegation to the Jordan-Israel peace talks (then Government Secretary), and Fayez Tarawneh, head of the Jordanian delegation, sign the Israel-Jordan Common Agenda at the State Department in Washington D.C., September 14, 1993 (photo credit: AP/Charles Tasnadi).

(right to left): Eitan Bentsur, Elyakim Rubinstein, Fayez Tarawneh, Dr. Marwan Muashar, Warren Christopher, Victor Posevaliuk.

# The Mouse that Roared?

## Palestine v. United States at the ICJ

Robbie Sabel

The “State of Palestine” is suing the United States in the International Court of Justice at The Hague (ICJ), claiming that moving the U.S. Embassy to Jerusalem is a violation of the international law relating to diplomatic relations.<sup>1</sup> The gist of the Palestinian claim is that embassies can only be located in the sovereign territory of a state, and Jerusalem is not in the sovereign territory of Israel. Palestine contends that the ICJ indeed has jurisdiction since both the U.S. and Palestine are parties to a multilateral treaty granting the ICJ jurisdiction in cases involving diplomatic missions. A number of issues emanating from these contentions require decisions by the ICJ. These are discussed below.

### Does Palestine Have Standing Before the Court – Is it a State?

According to the ICJ Statute, “Only States may be parties in cases before the Court.”<sup>2</sup> Even before considering the question of jurisdiction, the Court will therefore have to decide whether Palestine is, in fact, a state and thus entitled to appear before the Court.<sup>3</sup> Presumably the Palestinian claim that Palestine is a state will be based on the claim that over 130 states have recognized Palestine; that it is a party to many international treaties; and that it has been recognized as an “Observer State” by the UN General Assembly (UNGA).<sup>4</sup> They will no doubt quote the Prosecutor of the International Criminal Court (ICC), “The Office [of the ICC Prosecutor] considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a “State” for the purposes of accession to the Rome Statute.”<sup>5</sup>

However, the U.S. is already on record as stating that it does not see Palestine as a state.<sup>6</sup> Shabtai Rosenne, a professor of international law and an Israeli diplomat, comments: “The Court may be called upon to decide the question [whether the applicant is a State] even without a challenge by another State.”<sup>7</sup> The Court will also have to take into consideration the accepted formula for defining a state as having a permanent population, defined territory, effective government and the ability to enter into relations with other states.<sup>8</sup> The Court will have to examine whether

Palestine fulfils these criteria and whether the fact is relevant that in the Oslo agreements the Palestine Liberation Organization (PLO) undertook not to declare statehood.<sup>9</sup> As to the question of the recognition of the State of Palestine by the UNGA, it is relevant that nine states voted against the Resolution and 41 states abstained. It is also relevant that the UNGA has no authority to

1. Application Instituting Proceedings in the International Court of Justice, *State of Palestine v. United States of America* (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.
2. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 33 U.N.T.S. 993.
3. *Legality of Use of Force, Serbia and Montenegro v. Belgium*, Judgment, Preliminary Objections, 2004 ICJ Rep. 279, paras. 34, 36 (Dec. 15, 2004).
4. UN General Assembly Res. A/RES/67/19, *Status of Palestine in the United Nations* (Dec. 4, 2012).
5. The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, THE INTERNATIONAL CRIMINAL COURT, Jan. 16, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.
6. John Bolton on Palestine: “Of Course It’s Not a State,” C-SPAN, Oct. 4, 2018, available at <https://www.c-span.org/video/?c4753603/john-bolton-palestine-of-state>.
7. Malcolm Shaw, *ROSENNE’S LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005*, ch. 2, 296 (5<sup>th</sup> ed., 2016).
8. *Montevideo Convention on the Rights and Duties of States*, Dec. 26, 1933, 165 LNTS .
9. *Declaration of Principles on Interim Self-Government Arrangements, Israel and Palestine Liberation Organization*, 32 I.L.M. 1525, Sept. 13, 1993; *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, Sept. 28, 1995, available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

recognize states as such; furthermore, it explicitly only granted to Palestine “the status of a non-member State”<sup>10</sup> and did not recognize it as an observer state. The language used was in this context different from that used when dealing with the Vatican.<sup>11</sup> Furthermore, after the vote, a number of states that voted in favor of the Resolution explained that the Resolution did not mean recognizing Palestine as a state. The French delegate, for example declared “The international recognition that the Assembly has today given the proposed Palestinian State can become fact only through an agreement based on negotiations between the two parties.”<sup>12</sup> The Swiss delegate specified “This decision does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations.”<sup>13</sup>

### Jurisdiction

On the issue of the Court's jurisdiction, the Palestinian argument is that the “State of Palestine” acceded to the 1961 Vienna Convention on Diplomatic Relations<sup>14</sup> (Vienna Convention) and to the Optional Protocol Concerning Compulsory Settlement of Disputes, 1961<sup>15</sup> (Optional Protocol). Parties to that Optional Protocol agreed that disputes “arising out of the interpretation or application of the [Vienna] Convention lie within the compulsory jurisdiction of the ICJ.” The U.S. is party to both the Vienna Convention and to the Optional Protocol.<sup>16</sup>

Although only state members of the UN are parties to the ICJ Statute, nevertheless the jurisdiction of the Court is open to any state that “shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court.”<sup>17</sup> Palestine deposited such a declaration regarding the Optional Protocol.<sup>18</sup>

An anomaly of the UN system is that a state that is not a member of the UN and wishes to become a party to the Statute of the Court needs to obtain authorization by the UN General Assembly and the UN Security Council.<sup>19</sup> However, if the state wishes to just accept the jurisdiction of the Court in general, or for a particular case, it can do so by a unilateral declaration without any external authorization.<sup>20</sup> The Palestinian National Authority chose the latter procedure, namely a unilateral declaration.<sup>21</sup>

Presumably the U.S. could argue that since it does not recognize Palestine as a state, and it does not recognize Palestine as a party to the Optional Protocol, then there are no treaty relations between the U.S. and Palestine that could, in turn, bestow jurisdiction on the ICJ.

The Court furthermore will have to consider two weighty constraints on its having jurisdiction. First, the Court will have to decide whether the issue raised is really

the “interpretation or application of the [Vienna] Convention,”<sup>22</sup> or whether the issue is, in fact, the question of sovereignty over Jerusalem. The issue of the status of Jerusalem is clearly not covered by the Optional Protocol, and in no way has the U.S. agreed to adjudicate it at the Court. The only dispute between the U.S. and Palestine is the status of Jerusalem, and the Court has no jurisdiction to decide this issue.

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10. UN General Assembly Res. A/RES/67/19, *supra* note 4, “Decides to accord to Palestine non-member observer State status” (emphasis added).
  11. See UN General Assembly Res. A/58/314, Participation of the Holy See in the work of the United Nations (July 16, 2004): “...Capacity as an Observer State.”
  12. UN General Assembly 67th sess., A/67/PV.44 (Nov. 29, 2012), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0>.
  13. *Ibid.*
  14. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (April 18, 1961).
  15. Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes, 500 U.N.T.S. 241 (April 18, 1961).
  16. Subsequent to the submission of the Palestinian claim, the U.S. withdrew from the Optional Protocol.
  17. UN Security Council Res. S/RES/9, para 1, The International Court of Justice (Oct. 15, 1946), available at <https://www.icj-cij.org/en/other-texts/resolution-9>; Art. 35(2), Statute of the International Court of Justice, *supra* note 2.
  18. Annex 5 Application Instituting Proceedings in the International Court of Justice State of Palestine v. United States of America (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.
  19. UN Charter, United Nations, available at <https://www.un.org/en/sections/un-charter/un-charter-full-text/>.
  20. The International Court of Justice Rules of Court, art. 41, April 14, 1978, available at <https://www.icj-cij.org/en/rules>; UN Security Council Resolution S/RES/9, The International Court of Justice (Oct. 15, 1949); Statute of the International Court of Justice, art. 35(2), *supra* note 2.
  21. Dapo Akande, ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine. Is He Right? EJIL: TALK, April 5, 2012, available at <https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>.
  22. Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes, art. I, *supra* note 15.

The second constraint on jurisdiction refers to what is known as “Interests of a Third Party.” Rosenne writes that the Court will not have jurisdiction if it is required “to pass on the legal position of a third state which is not a party to the proceedings.”<sup>23</sup> In the *Monetary Gold Case*, the Court ruled that where “the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision binding upon any State.”<sup>24</sup> The Court made a similar ruling in the *East Timor* case. There, the Court decided that it could not exercise jurisdiction because “it would have to rule, as prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent.”<sup>25</sup> The criterion is whether the legal interests of the third party form the “very subject-matter”<sup>26</sup> of the decision. There can be little doubt that the status of Jerusalem is the very subject matter of the issue.

In the *Wall* case,<sup>27</sup> and in the recent *Chagos* case,<sup>28</sup> the Court rejected a similar claim but made the point that the lack of consent to the Court’s contentious jurisdiction by interested states has no bearing on the Court’s jurisdiction to give an advisory opinion. However, the present proceedings are contentious, so it would appear that the *Monetary Gold* and the *East Timor* cases should serve as precedents for denying jurisdiction.

One commentator is of the opinion that the “*Monetary Gold*” precedent does not apply, since “Indeed, Palestine framed its claims in such a way as the Court could answer them without determining the extent of Israel’s territory.”<sup>29</sup> Israel has not and clearly will not agree that the ICJ adjudicate the status of Jerusalem.

### The Substance of the Claim

The substance of the Palestinian claim is based on the argument that embassies should be located in the territory of the “receiving State”<sup>30</sup> and Jerusalem is, according to this argument, not within the territory of Israel, the “receiving State.”

On the first issue, the Court will have to take into consideration the fact that the article of the Vienna Convention to which the Palestinian claim refers does not stipulate that an embassy must be in the territory of the receiving state. The Vienna Convention, in fact, explicitly allows a state to have an embassy in one state accredited to a number of other states.<sup>31</sup>

The Palestinian position, that Jerusalem is not within the territory of Israel, is based on the 1947 UNGA Resolution 181<sup>32</sup> (the “Partition Plan”), that called for the whole of Jerusalem to be a *corpus separatum* not part of either the proposed Jewish or Arab states. The Palestinian

claim adds that the reference to Jerusalem in UNGA Resolution 181 was reiterated by the UNGA in 1949.<sup>33</sup>

This argument would not seem to be tenable. The Partition Plan was a non-binding recommendation by the UNGA made over 70 years ago and rejected at the time by all the Arab member states of the UN and by the representatives of the Palestinians.<sup>34</sup> Although the Jewish population of Palestine expressed its willingness to accept the plan at the time, if the Arabs were to accept it, the Israel offer was rejected and the plan was never implemented.<sup>35</sup> In other words, the 1947 Partition plan

23. Shaw, *supra* note 7, at 560.

24. *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom and United States), Judgment, ICJ. Rep. pp. 19, 32, 33 (June 15, 1954).

25. *East Timor* (Portugal v. Australia), Judgment, ICJ. Rep. p. 90, paras. 32-35 (June 30, 1995).

26. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ, para. 88 (Nov. 26, 1984).

27. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136, para. 47 (July 9, 2004).

28. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep., para. 86 (July 9, 2004), available at <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

29. Alina Miron, *Palestine’s Application to the ICJ, neither Groundless nor Hopeless. A Reply to Marko Milanovic*, EJIL: TALK, 2018, available at <https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/>.

30. 1961 Vienna Convention on Diplomatic Relations, art. 21 (2), *supra* note 14.

31. 1961 Vienna Convention on Diplomatic Relations, art. 5 (1), *supra* note 14.

32. UN General Assembly Res. A/RES/181 (II) *Future Government of Palestine* (Nov. 29, 1947).

33. UN General Assembly Res. A/RES/303 (IV), *Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places* (Dec. 9, 1949).

34. UN GAOR, 2nd Sess., 1947, at 12-19 (Ad Hoc Committee on the Palestine Question).

35. Victor Kattan writes: “It could be argued that Israel consented to the jurisdiction of the ICJ when it accepted the 1947 UN Partition plan.” See Victor Kattan, *It’s time to take Palestine v. USA Seriously*, OPINIO JURIS, Oct. 16, 2018, available at <http://opiniojuris.org/2018/10/16/its-time-to-take-palestine-v-united-states-of-america-seriously/>.

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remained a recommendation and was never implemented. Non-binding resolutions do not become binding by being repeated. This view is reflected in Prosper Weil's statement that "Neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect."<sup>36</sup>

Nowadays the official Palestinian position is that East Jerusalem should be the capital of Palestine,<sup>37</sup> hence even today they do not accept the Partition Plan with its proposed *corpus separatum* status for Jerusalem. The Arab League 2002 Peace Initiative,<sup>38</sup> which reflects the unanimous position of all Arab League states, including the "State of Palestine," refers to a number of UN resolutions but makes no reference to the Partition Plan.

### Is the Dispute Political Rather than Legal?

The function of the ICJ is to decide legal disputes between states and not political disputes. The Court has recognized and has ruled, however, that "Legal disputes between sovereign States by their very nature are likely to occur in political contexts."<sup>39</sup> The Court always has, however, discretion to refrain from deciding a case even if it finds that it has jurisdiction. Rosenne writes that "circumstances can require it to refrain from deciding a case."<sup>40</sup>

### The Location of the U.S. Embassy – East and West Jerusalem

A little observed feature of the U.S. decision to move the embassy to Jerusalem was that the embassy is today located in West Jerusalem and not in East Jerusalem. Furthermore, President Trump's statement carefully noted that:

We are not taking a position on any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, or the resolution of contested borders. Those questions are up to the parties involved.

The United States would support a two-state solution if agreed to by both sides. In the meantime, I call on all parties to maintain the status quo at Jerusalem's holy sites, including the Temple Mount, also known as Haram al-Sharif.<sup>41</sup>

Although Israeli law makes no distinction between East

and West Jerusalem and regards the city as undivided, the international community (including Arab states) disputes Israel's status in East Jerusalem but not in West Jerusalem. International law regards West Jerusalem as undisputed Israeli territory. It is undisputed because it satisfies the test of the ultimate criteria to establish to whom a disputed territory belongs. The test is namely whether there exists "the continuous and peaceful display of territorial sovereignty"<sup>42</sup> and acquiescence by other potential claimants. With regard to West Jerusalem, except for some fringe elements of the Palestinian community,<sup>43</sup> the entire world community, including Arab states and the Palestinians, accept or acquiesce to Israeli sovereignty over West Jerusalem. This is demonstrated by the fact that all heads of state, including the presidents of the U.S., Russia, and China have made state visits to (West) Jerusalem. All ambassadors, including the ambassadors of Egypt and Jordan, present their credentials to the President of Israel at his official residence in (West) Jerusalem. Treaties to which Israel is party are signed in (West) Jerusalem. Since all these actions imply recognition of Israeli sovereignty in (West) Jerusalem, presumably they would all have to be considered as violating international law, if the Palestinian arguments were to be accepted by the Court. The 2002 Arab League Peace Initiative, which represents the consensus of all the Arab

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36. Prosper Weil, *Towards Relative Normativity in International Law*, 77(3), *AM. J. INT'L L.*, pp. 413, 417 (1983).

37. Beirut Declaration on Saudi Peace Initiative, ISRAEL MINISTRY OF FOREIGN AFFAIRS, March 28, 2002, available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/beirut%20declaration%20on%20saudi%20peace%20initiative%20-%202028-.aspx>.

38. *Ibid.*

39. *Case Concerning United States Diplomat and Consular Staff in Tehran (United States of America v. Iran) Judgment*, ICJ Reports, para.37 (May 24, 1980).

40. Shaw, *supra* note 7, at 560.

41. White House Press Release, Statement by President Trump on Jerusalem, Dec. 6, 2017, available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem>.

42. *Island of Palmas Case, United States v. Netherlands, PCA*, 2 RIAA 826 p. 845 (April 4, 1928).

43. Hanan Ashrawi's statement in a recent CNN interview that "the legal status of West Jerusalem remains *corpus separatum*" (reference omitted) would seem to be an aberration.

states and the PLO, demands from Israel “the acceptance of the establishment of a Sovereign Independent Palestinian State on the Palestinian territories occupied since June 4, 1967 in the West Bank and Gaza strip, with East Jerusalem as its capital,”<sup>44</sup> thus clearly not making any claim to West Jerusalem. The 1994 Israel-Jordan Peace Treaty includes the following phrase, inserted at Jordanian request:

Article 3 (2) The boundary.... is the permanent secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israel military government control in 1967.<sup>45</sup>

The advisory opinion of the International Court of Justice in the *Wall* case expressed that “all these territories (including East Jerusalem) remain occupied territories,”<sup>46</sup> thus implying recognition of Israel sovereignty over West Jerusalem.

The Palestinian claim brought to the ICJ refers to a number of UN General Assembly and Security Council Resolutions dealing with Israel’s status in Jerusalem and denying the validity of Israeli unilateral steps.<sup>47</sup> A commentator who supports the Palestinian position, writes that “As such, it creates an objective territorial situation, opposable *erga omnes*.”<sup>48</sup> However all the Resolutions quoted are post 1967 and refer to Israeli actions taken as regards East Jerusalem. Since 1949, there has not been a single UN Security Council or General Assembly Resolution denying Israel sovereignty in West Jerusalem. Consequently, it would be difficult to sustain a position that moving an embassy to West Jerusalem is a violation of international law.

#### Conclusion – What if the Palestinians Lose the Case?

The former legal advisor to the U.S. Department of State writes that “the United States will have very strong arguments to defend in the case filed by Palestine and is very likely to win.”<sup>49</sup> Another legal commentator writes:

So, this case – whatever its merits – will just not go anywhere. The only question is how quickly the Court shoots it down, and what exactly it says in doing so....The case is, in other words, an exercise in constructing and furthering a particular narrative. And seen in that light the case will probably achieve its purpose (for whatever that’s exactly worth) even if it gets thrown out by the Court (which it will be).<sup>50</sup>

One commentator adds, however, that even if the Court does not accept the substance of the Palestinian claim, “an authoritative opinion from the ICJ on Palestine’s statehood” could be helpful to the Palestinian cause on other issues. “As the principal judicial organ of the United Nations, the ICJ is a good place to challenge the policy of a global hegemon.”<sup>51</sup>

If, however, the Court senses that the real motive behind submitting the claim to the Court was simply to obtain recognition of Palestine as a state, the Court may well see this as an abuse of the legal process. The Court might rule that requesting an advisory opinion would be the correct way to get an opinion on this legal issue and not artificially enclosing it in what may well be considered a spurious contentious claim.

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44. Beirut Declaration on Saudi Peace Initiative, *supra* note 37 (emphasis added).
  45. Israel-Jordan Peace Treaty, art. 3 (2), Oct. 26, 1994, available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20peace%20treaty.aspx> (emphasis added).
  46. International Court of Justice, Advisory Opinion, [2004] ICJ Rep. 136, *supra* note 27, para. 85 (emphasis added).
  47. UN General Assembly Resolutions A/RES/2253 (ES-V), Measures Taken by Israel to Change the Status of the City of Jerusalem (July 4, 1967); A/RES/2628 (XXV), The Situation in the Middle East (Nov. 4, 1970); A/RES/2799 (XXVI) The Situation in the Middle East (Dec. 13, 1971); A/RES/2949 (XXVII), The Situation in the Middle East (Dec. 8, 1972); and UN Security Council Resolutions S/RES/267 (July 3, 1969); S/RES/298 (Sept. 25, 1971); S/RES/476 (June 30, 1980); S/RES/2334 (Dec. 23, 2016).
  48. Alina Miron, *supra* note 29.
  49. John Bellinger, Thoughts on the ICJ’s Decision in Iran v United States and the Trump Administration’s Treaty Withdrawals, LAWFARE, Oct. 5, 2018, available at <https://www.lawfareblog.com/thoughts-icjs-decision-iran-v-united-states-and-trump-administrations-treaty-withdrawals>.
  50. Palestine sues the United States in the ICJ re Jerusalem Embassy, EJIL TALK, Sept. 30, 2018, available at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy>.
  51. Victor Kattan, Opinion // Palestine Declares (Legal) War on the United States of America, HAARETZ, Oct. 8, 2018, available at <https://www.haaretz.com/middle-east-news/.premium-palestine-declares-legal-war-on-the-united-states-of-america-1.6527711>.

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# The Spanish Act on Granting Nationality to Sephardi Jews

Mercedes Clavell

In June 2015, Spain passed an act regarding the granting of Spanish nationality to Sephardi Jews.<sup>1</sup> On October 1, 2015, the law came into force for the duration of three years, but it was extended for an additional year until September 30, 2019.<sup>2</sup> Some interpretive instructions to facilitate the procedure were issued by the Notaries' General Directorate.<sup>3</sup> There are two avenues for Sephardi Jews to acquire Spanish naturalization: one is non-residence based, the other is residence based.

## Non-Residence Based Avenue to Acquire Spanish Naturalization

The procedure prescribes the submission of certain documents to a notary public in Spain for analysis and ascertainment of accuracy and pertinence. Subject to the outcome of this examination, the applicant may be summoned to the notary, who will grant a deed to be submitted to the Notary's Directorate, which will subsequently issue a decision either granting or denying Spanish nationality. The law does not require the applicant to renounce an existing nationality, or to live in Spain following naturalization.

The applicant must satisfy the following conditions:

1. Prove his or her Spanish Sephardi origin.
2. Prove a special link with Spain, including successfully completing two tests: one in Spanish language, the other in Spanish culture.
3. Pass a criminal record check.

These requirements can be satisfied in several alternative and non-cumulative ways, to be evaluated by the notary public. The requirement regarding Spanish Sephardi heritage is of primary importance. The following discussion will elaborate further on the requirements.

## Proving Spanish Sephardi Origin

Established Jewish authorities may confirm Sephardi origin. These authorities include:

- a) The President of the Permanent Commission of the Jewish Communities in Spain (Federación de Comunidades Judías en España, FCJE).
- b) The President of the Jewish Community outside

of Spain where the applicant resides or was born.

- c) The Rabbinic authority of the aforementioned communities.

Due to a change in the interpretation of this rule, a certificate issued by any of the above authorities is no longer considered mandatory to prove Sephardi status for the purpose of the notarial decision; rather it is considered as just additional proof among others. An applicant might qualify for Spanish nationality even in the absence of such a certificate, provided the remaining evidence, according to the notary's evaluation, is satisfactory.

The President of the FCJE may issue a second certificate regarding the legality (for Spanish jurisdictional purposes) of the foreign authority (b and c above) which issues the certificate regarding the Spanish Sephardi origin. This second certificate saves the applicant the trouble of proving the legal status of the authorities mentioned in points b and c above, including a notarized, apostilled and sworn translation, minutes of incorporation, articles of association, good standing certificate, etc. However, in order to qualify for this second certificate, it is necessary that such foreign authorities be registered with the FCJE.

Spanish Sephardi origin may also be proven by means of submitting any of the following documents (these are alternative, not cumulative).

- a) Certificates issued by competent entities (such as Centro Salti de Estudio del Ladino, Bar Ilan University (Israel), or Centro Sefardí – Sefarad Kültürü, in Istanbul) attesting to the fact that the applicant has been speaking "Ladino" or the

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1. Law granting Spanish nationality to hereditary Sephardi Jews, Ley 12/2015 of June 24, 2015, Official Gazette (BOE) no. 151, Ref. BOE-A-2015-7045 (2015).
  2. Resolution of the Spanish Government (Consejo de Ministros) of March 9, 2018, BOE, Orden PPA/325/2018, RCL 2018/499 (2018).
  3. Instrucciones de la Dirección General de los Registros y del Notariado, Sept. 29, 2015 and Nov. 5, 2015.

- “Haketía” language within the family, or any other sign or indication to prove that the applicant belongs to the Spanish Sephardi community.
- b) A birth certificate, ketubah, or marriage certificate stating that the applicant’s marriage is recognized according to Castilian traditions.
  - c) A report issued by a competent entity demonstrating that the applicant’s family name is Spanish Sephardi.
  - d) Any other evidence that proves the status of Spanish Sephardi origin (such as historic, hereditary information, or genealogical reports).

The law does not require applicants to be Jewish, but only to have a Spanish Sephardi background.

### Proving a Special Link with Spain

A special link with Spain can be proven by the applicant through any of the following (alternative, not cumulative) means.

- a) Certificates of studies on Spanish history and culture, issued by public or private entities officially recognized by Spain.
- b) Proof of knowledge of Ladino or the Haketía language.
- c) Inclusion of the applicant’s direct ancestry in the list of protected Sephardi families from Egypt or Greece.<sup>4</sup>
- d) Inclusion of the applicant’s direct ancestry among those persons who obtained Spanish nationality according to the Decree dated December 20, 1924.<sup>5</sup>
- e) Involvement in non-profit, cultural or economic activities that promote Spanish people or institutions or promote entities that support groups and organizations dedicated to the study, conservation and diffusion of Spanish Sephardi culture.

Additional requirements to be satisfied in order to “prove a special link” with Spain include successfully completing two exams, one on the Spanish language and one on Spanish culture. Both of these tests are administered by the “Instituto Cervantes,” which has branches in many foreign countries. Applicants under 18 and above 70 years old are exempt from both exams, while individuals from countries where Spanish is the official language are exempt from the language exam.

### Obtaining and Passing a Criminal Background Check

In order to pass a criminal background check, applicants

must provide certified and notarized copies (officially translated into Spanish, if applicable) of the following documents (and include payment of a € 100 fee):

- a) A certificate of criminal record issued by the authorities of the country in which they were born and the country where they have resided in the five years prior to their application;
- b) Their birth certificate;
- c) A copy of their passport (or EU ID card).

In the case of families, each member must submit an individual application with all the relevant documents, taking into account that applicants under 18 (apart from being exempt from taking the previously mentioned exams), are not required to appear before the Spanish notary as their parents would represent them on their behalf. Documents proving the Spanish Sephardi origin of any of the parents are also valid for the children.

Applicants are to submit all of the required documents to a Spanish notary for analysis and verification. Where approved by the notary, the applicant will subsequently appear before the notary to receive the official grant of notarial deed (*Acta de Notoriedad*).

Next, the deed will be forwarded to the Notaries’ Directorate that within a period of no more than twelve months upon receipt of the deed, will determine the validity of the application. Applicants who are denied naturalization by the Notaries Directorate can appeal to the courts of justice. The validity of an appealed decision remains suspended until such time that the applicant provides a new criminal records certificate, swears loyalty to the King of Spain and obedience to the Constitution and all Spanish law. The applicant has a twelve-month period to comply and demonstrate before a local Spanish Consulate General that they satisfy the post decision procedure requirements.

### Residence Based Path to Acquire Spanish Naturalization

The Spanish Civil Code<sup>6</sup> provides the possibility for Sephardi Jews to acquire Spanish nationality with only two years of legal residency in Spain (the standard term is ten years, except for citizens from Latin American

4. Decreto-Ley of Dec. 29, 1948, BOE no. 9 (Spain).

5. Real Decreto of Dec. 20, 1924, BOE, Gaceta de Madrid no. 356 (Spain).

6. Article 22, approved by Royal Decree, July 24, 1889, Spanish Civil Code, Ref. BOE-A-1889-4763 (Spain).

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countries, Philippines, Guinea, Portugal and Andorra, for whom it is two years as well). While this provision is without an expiry date, there has been no special regulation enabling Sephardi Jews to obtain a residence permit.

The fast tracks for non-EU foreigners to acquire a residence permit in Spain are through either the business-friendly immigration program or the so-called non-lucrative residence permit.

### **Business-Friendly Immigration Program**

The business-friendly immigration program, also called “Golden visa,” requires a minimum investment of €500,000 in real estate or €1 million in shares, investment funds or bank deposits.<sup>7</sup> This type of residence permit also covers the investor’s family (spouse, children under 18 and also 18 or older if they are students) and parents (if they depend on the applicant for health reasons), and a work permit is granted as well to the applicant investor and spouse.

In addition to the investment, investors must also prove that they have the financial means to live in Spain (at least €26,000 per year, and an additional €7,000 for each family member) and provide requisite documents such as health insurance and absence of criminal records.<sup>8</sup> Applicants who fulfill these requirements are granted a residence permit for an initial period of two years, renewable for an additional five years.

The same Law also includes the possibility for entrepreneurs who wish to develop an innovative project in Spain to obtain a residence permit, but the business project must be evaluated and approved by the authorities.<sup>9</sup>

### **Non-Lucrative Residence Permit**

Another fast way to acquire a Spanish residence permit is through the so called “non-lucrative residence permit.”<sup>10</sup> This permit prohibits work, and is granted provided the applicants show that they have the financial means to live in Spain for at least one year (at a minimum cost of €26,000 per year plus €7,000 for each additional family member). To receive this type of residence permit, the usual requirements of providing a certificate of health insurance and lack of criminal records also apply.

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7. Article 73, Ley 14/2013, Sept. 27, 2013, de Apoyo a los Emprendedores y su Internacionalización, Ref. BOE-A-2013-10074 (Spain).
  8. This amount is updated annually. In fact, it is calculated as a multiple of “IPREM” (Indicador Público de Renta de Efectos Múltiples). For 2018, it was €537.84.
  9. Articles 69 and 70, Ley 14/2013, *supra* note 7.
  10. Royal Decree 557/2011 of April 20, Ref: BOE-A-2011-7703. This law provides for the regulations in Organic Law 4/2000, amended by Organic Law 2/2009, on the rights and freedoms of foreigners in Spain and their social integration.

# Polish Lawsuits Against Defenders of Holocaust Memory: The Impact of the Amendments to the National Remembrance Act\*

Wojciech Kozłowski

One cannot prohibit the filing of a lawsuit, even if it is completely meritless (unless an anti-suit injunction is issued, however that is not applicable to the cases at hand). That said, I believe that lawsuits based on the National Remembrance Act<sup>1</sup> against those who defend the memory of the Holocaust survivors stand very limited chances in Polish court.

Ever since the Amendment to the Polish Institute of National Remembrance Act (INRA) came into effect in January 2018, public debate has focused on the criminalization of statements that attribute responsibility for crimes committed by the German Third Reich to the Polish Nation or the Polish State. This debate has overshadowed the civil remedies that the INRA made available to those who wish to protect the good name of Poland and the Polish Nation. Criminal sanctions (applicable to those who attribute responsibility for crimes committed by the German Third Reich to the Polish Nation or the Polish State) were repealed on June 27, 2018.<sup>2</sup> The abandonment of the criminal sanctions was justified by reference to civil remedies, that according to the Polish government are considered more appropriate. This begs the question of when can one be held liable under civil law for impugning the good name of Poland and the Polish Nation.

Further questions arise: who can be held liable on the basis of civil law? What are the instances where no such liability is incurred? What torts are subjected to such liability? Indeed, not everyone realizes that the INRA's civil liability regime does not mirror that law's criminal liability arrangements. The INRA is silent on the specific civil sanction for the attribution of responsibility (a tort or any other breach of civil law) to the Polish State or the Polish Nation with respect to crimes committed by the German Third Reich. The INRA merely refers to the Civil Code provisions on personal rights infringements as the

applicable law to protect the good name of the Polish State and the Polish Nation.

To understand the legal situation after the INRA amendment, it is helpful to look at the joint declaration of the Prime Ministers of the State of Israel and the Republic of Poland, Benjamin Netanyahu and Mateusz Morawiecki, respectively. In their declaration, they:

support free and open historical expression and research on all aspects of the Holocaust so that it can be conducted without any fear of legal obstacles, including but not limited to students, teachers, researchers, journalists and – with all certainty the survivors and their families – who will not

\* This article is based on a text published in Polish by Adv. Kozłowski in *GAZETA WYBORCZA*, July 12, 2018.

1. Act of 26 January 2018 amending the act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, laws on graves and war cemeteries, laws on museums and the act on the liability of collective entities for acts prohibited under penalty, *JOURNAL OF LAWS*, ITEM 369 (2018), available at <http://dziennikustaw.gov.pl/du/2018/369/1>.
2. Act of 27 June 2018 amending the act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the Liability of Collective Entities for Acts Prohibited under Penalty, *JOURNAL OF LAWS*, ITEM 1277 (2018), available at <http://dziennikustaw.gov.pl/du/2018/1277/1>.
3. Joint declaration of prime ministers of the State of Israel and the Republic of Poland, *PREMIER* (June 27, 2018), available at <https://www.premier.gov.pl/mobile/en/news/news/joint-declaration-of-prime-ministers-of-the-state-of-israel-and-the-republic-of-poland.html>.

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be subject to any legal charges for using the right to free speech and academic freedom with reference to the Holocaust. No law can and will change that.<sup>3</sup>

The so-called authentic construal is when law is interpreted by the actual body that legislated it. Such a construal by a representative of the statute's authors (the government) should therefore have a major impact on how courts will interpret the law. Accordingly, and rightly so, there will be no legal liability involved when exercising one's rights to freedom of expression and scientific research concerning the Holocaust. This begs the obvious question: what statements did the lawmakers have in mind that would give rise to the liability of impugning the good name of Poland and the Polish Nation and which statements would be protected under the right to free speech and scientific research concerning the Holocaust? In practice, civil liability would only apply to expressions such as "Polish concentration camps" or "Polish death camps" that crop up in the media.<sup>4</sup>

In this regard, both Prime Ministers are right to say in their declaration that these terms are "blatantly erroneous and diminish the responsibility of Germans for establishing those camps."<sup>5</sup> Yet, even with such iniquitous language, for the law that seeks to protect the good name of Poland and the Polish Nation to be applied properly, any specific term used will need to be analyzed in its context. In other words, it will need to be established whether the word "Polish" in its respective context constitutes the defective attribution of responsibility to the Polish Nation or the Polish State for the Third Reich's crime of having built such camps, or whether it is a mere reference to their geographical location. Otherwise, we would have to prosecute the publishers of Zofia Nałkowska's *Medallions (Medaliony)*,<sup>6</sup> or historians working on Jan Karski's biography, to give just two examples.<sup>7</sup>

It was in quite a different historical and cultural context 70 years ago that Zofia Nałkowska used the expression "Polish camps" in her *Medallions*, to quote:

Not tens of thousands, not hundreds of thousands, but millions of human beings underwent manufacture into raw materials and goods in the Polish death camps. In addition to well-known spots – like Majdanek, Auschwitz, Birkenau, and Treblinka – we uncover new ones, less famous, one after another.<sup>8</sup>

Jan Karski, in turn, writing for *Collier's Weekly* in 1944, titled his article "Polish Death Camps."<sup>9</sup> Needless to say, one could hardly claim that those two individuals, who rendered such great service to Poland and bore witness to the Holocaust, intended to attribute Nazi crimes to Poland or the Polish Nation.

In his interview in *Haaretz*, published in July 2018 (one day after the INRA had been amended), Prof. Yehuda Bauer quoted the part of the Polish and Israeli Prime Ministers' joint declaration in which they said that "some people – regardless of their origin, religion or worldview – revealed their darkest side," and described this sentence as a "complete lie."<sup>10</sup> What does "some people - regardless of their origin" mean? Bauer asks and supplies his answer that "some people" refer to "Poles" and specifies "and not one or two." Continuing his thought, Professor Bauer expressed a concern that Polish historians who try to find historical truth "will be sued in civil courts and impoverished,"<sup>11</sup> with the Prime Ministers' joint

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4. See for example, Julia Jacobs, From Obama to Fox News: The Term "Polish Death Camps" Persists, and Poland Objects, N.Y. TIMES (Aug. 23, 2018), available at: <https://www.nytimes.com/2018/08/23/world/europe/fox-news-polish-death-camps.html>.
  5. Joint declaration of prime ministers of the State of Israel and the Republic of Poland, *supra* note 3.
  6. Zofia Nałkowska, *MEDALIONY* (1946).
  7. Zofia Nałkowska was a Polish prose writer, dramatist, and prolific essayist. Nałkowska was a member of a special committee for the investigation of Nazi crimes that took place in Poland, where she had learned facts directly from victims and witnesses. Jan Karski was a Polish World War II resistance-movement soldier. Between 1942–43, Karski reported to the Polish Government-in-Exile and to Poland's Western Allies about the situation in German-occupied Poland, especially about Germany's destruction of the Warsaw Ghetto and other atrocities committed by Germans against the Jews and Poles.
  8. Nałkowska, *supra* note 6 (2017 ed.), p. 35.
  9. Jan Karski, Polish Death Camps, *COLLIER'S WEEKLY* (Oct. 14, 1944), pp. 18-19.
  10. Yehuda Bauer, Opinion // Israel's Stupid, Ignorant and Amoral Betrayal of the Truth on Polish Involvement in the Holocaust, *HAARETZ* (July 4, 2018), available at <https://www.haaretz.com/opinion/.premium-okay-so-the-poles-didn-t-murder-jews-1.6242474>.
  11. *Id.*

declaration legitimizing and making this kind of abuse more likely.

Other individuals too – whether from Poland, Israel or the wider international community, including the Simon Wiesenthal Center, the Chief Rabbi of Poland, Michael Schudrich,<sup>12</sup> and representatives of political organizations in Israel,<sup>13</sup> expressed their uncertainty about the consequences of the civil liability regime. Scholars, as well, can justifiably be concerned. This is because representatives of some Polish right-wing organizations who were said to have co-authored the INRA's criminal liability provisions, and on whom should be placed political responsibility for the waves of antisemitism in Poland and anti-Polish sentiment abroad that followed the ill-conceived amendments, have already filed relevant, though unsuccessful, civil suits.<sup>14</sup>

Thus, the risk that cases will be brought against Holocaust scholars or families of Holocaust victims is real. Still, given the general rules of civil liability and how the INRA is worded, such lawsuits against Holocaust scholars, witnesses and their families, or indeed anyone commenting on the matter, are doomed to fail. There are several reasons for this, each of which would suffice to dismiss the case as unfounded.

1. The provisions of the INRA establishing protection of the good name of the Republic of Poland and the Polish Nation should be interpreted and applied exclusively to personal rights infringements involving attribution of responsibility to the entire Polish Nation or the Polish State.

Even if they are historically true in their reference to tens of thousands of Poles who denounced Jews to German Nazis or themselves killed their Jewish neighbors, statements concerning the involvement and co-responsibility of individual Poles for the Holocaust do not refer to the Polish Nation as a whole or the Polish State and as such do not impugn the good name of the Republic of Poland and the Polish Nation.

Therefore, in the case of statements alleging that particular Poles carried responsibility for the Holocaust, there will be, I believe, no infringement of the good name of the Republic of Poland or of the Polish Nation; therefore, there will be no civil liability for such statements.

2. Even if a statement were to refer to the Polish Nation as a whole or to the Polish State, civil law provides certain mechanisms that prevent

the infringer's conduct from being held unlawful. One example of such a lawful right is the right to cultivate the memory of the dead (or in other words, commemorate a deceased person), in this case concerning deceased Holocaust victims. This particular right is also a personal right. Therefore, those who make statements in defense of the Holocaust memory can be said to exercise their own right to commemorate the dead. This commemoration right is usually vested in family members. However, given the legal and historical specificity of the Holocaust as genocide committed against the entire Jewish nation and a crime against humanity, I believe that if it comes to litigation, the right to commemorate the dead can be invoked by any person, whether Jewish, Polish or any other person who feels an attachment to the Jewish nation and wants to cultivate the memory of the Holocaust victims in this way.

3. Such statements (other than unacceptable statements referring to "Polish death camps" which triggered the amendments to the law) can potentially be claimed to be made in defense of a legitimate social interest. In particular, the defense of acting in furtherance of a legitimate social interest, which defeats the claim of unlawfulness, is precisely the reason why there

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12. Wiesenthal Center Urges Polish Government To Reconsider Controversial Legislation Regarding Holocaust History Recently Passed by Polish Parliament, SIMON WIESENTHAL CENTER (Jan. 28, 2019), available at <http://www.wiesenthal.com/about/news/wiesenthal-center-urges-53.html>; Opinion expressed by Chief Rabbi Schudrich, see Atika Shubert and Antonia Mortensen, Polish Holocaust law sows "distortions," Poland's chief rabbi says, CNN (Feb. 9, 2018), available at <https://edition.cnn.com/2018/02/09/europe/poland-holocaust-bill-chief-rabbi-intl/index.html>.
  13. See for example, Yad Vashem response to the Law Passed by the Polish Senate, YAD VASHEM (Feb. 1, 2018), available at <https://www.yadvashem.org/press-release/01-february-2018-10-04.html>.
  14. See for example, Polish group sues newspaper in Argentina under controversial new Holocaust Law, JEWISH TELEGRAPHIC AGENCY (March 4, 2018), available at <https://www.jta.org/2018/03/04/global/polish-group-sues-newspaper-argentina-controversial-new-holocaust-law>.

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appears to be relatively little chance of successful litigation if personal rights infringement suits are filed against statements about Poland's or the Polish Nation's responsibility for the Holocaust or against historians or journalists writing about Polish involvement therein. Legitimate social interest is some interest of the community or an individual (private) interest that has supra-individual import or pertains to issues that a broad range of people consider relevant. To serve as a defense that justifies the infringement of a personal right, social interest will be specifically defined against the background of the specific case. In the case of press publications, legitimate social interest is reflected mainly in the principle of transparency in public life and in society's right to information. Most importantly, according to the courts, one socially desirable outcome that meets the test of acting in defense of social interest is when statements are published that are designed to uncover the "historical truth" as part of a public debate about the past and about the roles of historical figures in it. It is pointed out that such statements are generally made in exercise of the freedom of expression and of transmission of ideas and views, and as such are admissible

and protectable, even where they are controversial or go against the prevailing version of historical events.

In summary, for these reasons, if historians, journalists, commentators, Holocaust witnesses or families of Holocaust victims revealing the "historical truth" about Polish involvement in the Holocaust or people alleging Holocaust responsibility of particular Poles are sued under the legislation protecting the good name of the Republic of Poland and of the Polish Nation, I believe that the courts should hold that the defendants acted in furtherance of the legitimate social interest that is reflected in society's right to information. At the same time, it is important that the Polish government issues binding guidelines, in accordance with the joint declaration of the Prime Ministers, which will ensure that no legal action can be brought with respect to historical expression and research on all aspects of the Holocaust, in order to prevent a chilling effect, even if eventually such claims would be rejected by the courts. In this manner, society will be ensured of the right to the historical truth about its own past.

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# Poland Holocaust Law

Comments by Professor Dan Michman

I was pleased to accept the invitation of the editors of *Justice* to review the article by Wojciech Kozłowski. Let me point out at the outset that my expertise lies in history and not in legal affairs, and thus I am not particularly familiar with the subtleties of the Polish legal system. This notwithstanding, I found the article most interesting due to the legal claims and considerations brought forward by the author. His claim – that there is relatively little chance of successful litigation if personal rights infringement suits are filed against those who make statements about Poland's or the Polish Nation's responsibility for the Holocaust or against historians or journalists who simply write about Polish involvement therein – was of singular interest.

From my perspective as a historian who closely observes what is happening in Poland, there is reason to emphasize the following:

1. Even if Kozłowski's assertion will be proven correct, there are still right-wing organizations (some openly antisemitic) who, I believe, will actually be able to successfully sue individuals once they have found the moment in time that works for them. The defendant, who is likely to be an individual lacking the financial means of a powerful organization, will then be forced to raise funds to obtain legal representation – a time-consuming and costly process. Consequently, the possibility of harassment resulting from the law is a real one. In light of the broad array of current activities emerging from different groups in Poland against anyone who demonstrates by scholarly means that (a considerable number of) ethnic Polish individuals were involved in either murdering Jews or denouncing those who hid the Jews, this possibility is not a figment of the imagination.<sup>1</sup>
2. The main effect of the law is deterrence. The law highlights and brings to public awareness the core elements of the current Polish government's policy that it has initiated toward various levels of historical research. This includes the provision of funds to researchers investigating involvement of Polish individuals in saving Jews during the Holocaust. It also exerts pressure on scholars and educators who

critically explore the following two issues: Polish individuals involved in murdering Jews, and Polish individuals who denounced those who courageously hid the Jews. Furthermore, the law can lead to the removal of dissenting museum curators from their positions, as happened in the World War II museum in Gdansk in April 2017,<sup>2</sup> and more recently with the intentionally delayed approval of the nomination of the re-elected director of POLIN, the Museum of Polish Jewish History.<sup>3</sup> It can also lead to the altering of the narrative of museums (as was the case with that same museum in Gdansk, where the original broader context of World War II narrative was replaced with a more Poland-centered narrative). The establishment of the museum of Polish Righteous among the Nations in Markova, and the forthcoming Warsaw Ghetto museum will thus likely focus on

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1. Probably the most extreme example was the violent behavior of a group of Polish nationalists during an academic conference on *La Nouvelle école polonaise d'histoire de la Shoah*, convened at the *École des hautes études en sciences sociales (EHESS)* in Paris on Feb. 21-22, 2019. A report about this appeared in *LE MONDE*, available at [https://www.lemonde.fr/societe/article/2019/03/01/un-colloque-sur-l-histoire-de-la-shoah-perturbe-par-des-nationalistes-polonais\\_5429753\\_3224.html](https://www.lemonde.fr/societe/article/2019/03/01/un-colloque-sur-l-histoire-de-la-shoah-perturbe-par-des-nationalistes-polonais_5429753_3224.html). See also Jonathan Brent, *The War Between Polish Nationalism and Holocaust History*, *TABLET MAGAZINE* April 12, 2019, available at <https://www.tabletmag.com/jewish-news-and-politics/283216/polish-nationalism-and-holocaust-history>; and Robert Rozett, *Distorting the Holocaust and Whitewashing History: Toward a Typology*, *ISRAEL JOURNAL OF FOREIGN AFFAIRS*, 2019. See also <https://www.tandfonline.com/doi/full/10.1080/23739770.2019.1638076?fbclid=IwAR0UMt4V6odiWdmLDihBTgRxaWnvJIUwL5PRsumo-LUPdrQOX8WqP0bLw7w8>. Both provide many more examples.
  2. <https://www.theartnewspaper.com/news/director-of-polands-second-world-war-museum-dismissed>.
  3. <https://polandin.com/43523934/museum-of-polish-jews-polin-without-head-for-2nd-month>.

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Poland's heroic past and will compete with the relatively recently inaugurated POLIN museum, which is situated almost next door to the Jewish Historical Institute, with the latter two looking at the history of Poland through a more differentiated lens. Furthermore, there is the joint statement of Prime Minister Morawiecki of Poland and Prime Minister Netanyahu of Israel on June 27, 2018, which presented a distorted picture of the Holocaust in Poland.<sup>4</sup> Educators, history teachers, tour guides and research students in Poland already comment on a changing atmosphere, in which dealing with sensitive aspects of wartime Polish-Jewish relations is monitored, and the issue of Poles-rescuing-Jews is disproportionately promoted.

Consequently, even if the law here discussed in Kozłowski's article will likely not be detrimental from the legal point of view (as the author claims), it has already had noticeable repercussions on the broader public. Therefore, it is important to keep in mind that the impact

of laws is not limited to their direct legal effect, but that they also have broader public implications and significance.

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4. See the declaration, available at <https://www.premier.gov.pl/mobile/en/news/news/prime-minister-mateusz-morawiecki-signed-a-joint-declaration-of-the-polish-and-israeli.html>; and the response of Yad Vashem's historians, among them this author, to that joint declaration: <https://www.yadvashem.org/research/historians-reaction.html>.

# Back to the Future with an Updated Ben-Gurion – Blaustein Agreement: Revising the Covenant Between North American Jewish Communities and Israel

Erez Padan and Deborah Housen-Couriel

**E**ditorial note: In recent months, unprecedented antisemitic attacks on two synagogues in the United States have cost the lives of twelve Jews: eleven in the attack on October 27, 2018 in Pittsburgh, Pennsylvania; and one in the attack on April 27, 2019 in Poway, California. The Anti-Defamation League, a leading anti-hate organization, has recently published a report on a sharp surge in hate crimes and antisemitic activities in the United States and Canada. This trend is of deep concern to the IAJLJ, and a group of Israeli Jews and North American Jews who have worked on the Covenant described in this article. The drafters of this Covenant have on dozens of occasions reviewed and revisited this document with Jewish individuals and organizations in both Israel and North America, including the Jewish Agency, the Office of the President of the State of Israel, and the Wexner Foundation that has sponsored the Covenant renewal project from its inception. The invitation to participate in the ongoing dialogue around the renewed Covenant is open to all IAJLJ members and all other interested parties. The text is reproduced below, together with the original Ben-Gurion - Blaustein agreement, and is available for reading and commenting at <http://najcisraelcovenant.org/>.

## Background

The relationship between the two most populous Jewish communities of contemporary times, Israel and North America, is currently in difficult straits. Issues of Jewish identity, religious pluralism, left-right politics, and strong conflicts over various religious and political issues, all continue to be deeply divisive both within each of these communities and in the interactions between them. Worrisome indications suggest that the rift is only growing over time and that the next generation of Israeli Jews and North American Jews (perhaps with the exception of their

respective Orthodox communities) will have little in common; fewer interpersonal interactions; and only rarely engage with each other in any meaningful way to build a relationship. Several community leaders have expressed their deep concern that the relationship is at a crisis point, and that the rift is growing wider each year. In a New York Times article, journalist Jonathan Weisman wrote that “There are roughly 6.5 million Jews in Israel. There are roughly 5.7 million Jews in America. Increasingly, they see the world in starkly different ways. The Great Schism is upon us.”<sup>1</sup>

Underlying the widespread observation and concern that the relationship between Israel and the North American Jewish community (“NAJC”) is deteriorating to a point of no return, is a fundamental question, often overlooked, about what is the historic paradigm for this relationship: how might it evolve in the face of current critical challenges, including growing global antisemitism, political change in both Israel and the U.S. and Canada, and geopolitical developments in general? While there is at present no mutual agreement on the nature of the relationship between the two most important centers of Jewish life today, nor an effective forum or mechanism for figuring this out, current threats to the integrity of Jewish peoplehood, in our view, call for the definition of new, possibly more formalized, parameters for NAJC-Israel relations.

## The Origins of the Drafted “Covenant”

Beginning in the spring of 2016, a group of U.S. and Israeli Jews – all alumni of the Wexner Foundation’s leadership programs in these two countries – took on the

1. Jonathan Weisman, American Jews and Israeli Jews Are Headed for a Messy Breakup, N. Y. TIMES, Jan. 4, 2019.

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challenge of re-framing this strategic relationship and drafted a “covenant,” with respect to the relationship between Israel and the NAJC. The document is entitled “Covenant between the North American Jewish Community and the State of Israel” (Annex 2 below). Referring to issues relating to the relationship between Israel and the NAJC, it is hosted on a web platform inviting public comments and insights (<http://najcisraelcovenant.org>), and is intended to serve as a basis for discussions, rather than as a legally binding contract.

This initiative offers a renewed normative framework for the relationship between Israel and the NAJC, with a long-term goal of establishing a new platform for dialogue and decision-making that can support a vibrant long-term partnership based on shared values and mutual obligations between the two communities. In its draft form, it offers a framework for redefining the relationship through a statement of these shared values and mutual obligations, as detailed below, and then, as mentioned, goes on to propose the creation of a new platform for dialogue and decision-making in order to support an explicit and flourishing long-term peoplehood partnership. While this is the first stage between these two communities, the hope is that the Covenant will eventually extend to all of world Jewry.

### **The Original Ben-Gurion - Blaustein Agreement of 1950**

This current project harkens back to the Ben-Gurion - Blaustein agreement of 1950,<sup>2</sup> an interesting moment in the relationship between the two communities that has since served as a point of reference in discussions of Jewish peoplehood. On August 23, 1950, the President of the American Jewish Committee and U.S. industrialist Jacob Blaustein visited Israel. In an historic meeting at the King David Hotel in Jerusalem, Israeli Prime Minister David Ben-Gurion and Jacob Blaustein issued a joint public statement expressing their mutual understanding of the relationship between U.S. Jews and Israel, in what became known as the Ben-Gurion - Blaustein agreement. Three issues were at the focus of that agreement: representation of the U.S. Jewish community and Israel, dual loyalty, and *aliya*. In summary:

- Ben-Gurion declared on behalf of Israel that the State of Israel represents and speaks only on behalf of its own citizens and does not speak in the name of American Jews.
- The State of Israel also recognizes, he said, that Jews living in the U.S. hold political loyalty to the U.S., not to Israel.

- Blaustein’s declaration, on behalf of U.S. Jews, stated that while Israel does not represent the NAJC, it does have a responsibility to neither speak nor act in ways that harm this community.

Although the “exchange of views” did not establish mutual and binding legal obligations in a formal sense (it touched almost exclusively on actions Israel should or should not take), these statements represented a mutual intent and a mutual definition of the relationship between Israel and the largest Jewish community outside of Israel.

### **Drafting an Updated Covenant**

In drafting the updated Covenant which is the subject of this article, an intentionally broad perspective was adopted in order to allow individuals with great diversity of opinions to identify with it and to feel welcome under its aegis. Included in the group of drafters were traditional, Orthodox, and non-denominational Jews as well as other secularists, Israelis and North Americans. All of the participants feel a great sense of connection with Israel, the NAJC, or both.

The Covenant begins with a statement of seven fundamental values – each of which is deeply rooted in Jewish tradition – values that the drafters believe are shared by the two communities. In spite of the fact that these values (for example, those of peace, justice, and mutual responsibility) can be interpreted in a variety of ways, according to the drafters of the Covenant, they are, nevertheless, foundational principles on which a Jewish peoplehood should be based, no matter the geographic location or political/social positions of its communities.

The Covenant then goes on to articulate with greater specificity a set of concrete obligations that Israel should adopt vis-a-vis the NAJC — e.g., respect for diverse expressions of Judaism, development of deeper understanding of the NAJC, and the investment of resources to help assure the continuity of that community. Recognizing the mandate of mutuality, the Covenant also articulates a set of equally concrete obligations which the NAJC needs to uphold vis-a-vis Israel — e.g., fostering love of Israel, opposing delegitimization efforts, and promoting joint economic and social ventures. These obligations reflect each community’s existential dependence on the other.

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2. The Ben-Gurion - Blaustein Agreement, American Jewish Committee Press Statement, AJC ARCHIVES, Sept. 10, 1950, available at [http://www.ajcarchives.org/AJC\\_DATA/Files/508.PDF](http://www.ajcarchives.org/AJC_DATA/Files/508.PDF) (Annex 1 below).

### The Normative Framework Provided by the Covenant and its Challenges

The Covenant constitutes a normative framework. It is prescriptive in stating how the relationship between the two communities should be. Drafting such a document bears inherent difficulties. First, there is a philosophical hurdle. There are no well-established political theories that address the relationship between a state and a non-state community. Political philosophy assumes a state, or states, as the actors. Some would argue that this field is somewhat “under-theorized.” The Covenant is thus “breaking ground” not only in its specific content, but also in working its way to set forth a political theory that is relevant for this special, perhaps unique, type of relationship.

A second aspect is the question of representation. Who should be the parties to this Covenant? On the Israeli side – is it the State of Israel? The government? The Jewish community of Israel? Individual Israelis who sign on? Eventually, the group of drafters decided to draft the Covenant in the name of the State of Israel, with all that it stands for. With respect to the NAJC, the questions of representation is somewhat more difficult: who can represent the various and diverse members of the NAJC? This question was a fair challenge to Blaustein in 1950 and yet, today, this question and the broader question of “who speaks for the Jews?” are even more difficult to answer due to the reluctance, especially by those of the younger generation, to acknowledge the authority of leaders who speak for or represent them. The drafters of the Covenant decided that the leaders of the NAJC would, as a whole, represent the community’s interests.

A third aspect contributing to the challenge of drafting the Covenant is the tension between making affirmative and meaningful statements on contentious issues, on the one hand: and, on the other, using rather ambiguous language (to ensure that statements relate to a wider audience) in the Covenant. This tension can be seen, for example, in the way that Israel expresses its obligation to the various religious groups within Judaism.

Explicit recognition of the shared values and mutual obligations can help provide the foundation for a productive relationship. Also critically necessary are new and more open spaces for engagement between the two communities. Therefore, in its final section, the Covenant proposes the creation of a new platform, open to individuals and organizations alike, to facilitate and encourage engagement and participation by the two communities in an ongoing dialogue on issues of mutual concern.

### The Covenant’s Aims

Founded on the Covenant’s shared values and obligations, the platform’s overarching goal is to enhance the relationship between the two communities by serving as a vehicle for shared decision-making and, importantly, for addressing conflicts and disputes between the two communities in a respectful and civil manner. Another goal of the platform is to increase dramatically the number of people and institutions of different political, social and economic backgrounds that participate in and influence the dialogue between the communities through discussions that are open, unbinding and non-hierarchical. The hope is that the platform would enable not only “good conversations,” but also have the capacity for decision-making (utilizing on-line technologies), offering a moral and normative voice that should be recognized by decision makers in both communities. Based on the shared principles of democracy, pluralism and equality, the Covenant encourages a critical interchange of views that encompass different voices in the two largest Jewish communities today.

The philosopher Jürgen Habermas noted that “Reaching and understanding is the process of bringing about an agreement on the presupposed basis of validity claims that are mutually recognized.”<sup>3</sup> If the present and detrimental trajectory of distancing is to be routed to a course of a strong and lasting partnership of peoplehood, then Israel and the NAJC must engage in ongoing deliberations targeted at resolving the toughest and deepest issues that affect these communities. This work needs a shared normative framework – a Covenant.<sup>4</sup> The views, insights and engagement of Jewish lawyers and jurists in every country where a Jewish community exists are critical in reaching the aims of this initiative – to heal rifts between communities and to build strong and resilient relationships.

*Erez Padan – Attorney, Israel State Attorney’s Office, Deputy Director of the Jerusalem DA since 2017.*

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3. Jürgen Habermas and Maeve Cooke, *ON THE PRAGMATICS OF COMMUNICATION* (MIT Press) (1998), p. 23.
  4. The Covenant is available for reading and commenting. See *A New Covenant Between NAJC and the State of Israel*, June 16, 2019, available at [http:// najcisraelcovenant.org/](http://najcisraelcovenant.org/).

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# Annex 1: Summary of the Ben-Gurion - Blaustein Agreement, August 1950

(full text: <http://najciscovenant.org/wp-content/uploads/2017/02/Ben-Gurion-Israel-and-the-Diaspora-The-Ben-Gurion-Blaustein-Agreement.pdf>)

**Introduction** The exchange below took place on August 23, 1950 during a speech by David Ben-Gurion welcoming members of the American Jewish Committee (AJC) to the new State of Israel and the reply by AJC President Blaustein.

AJC leadership, and in particular President Blaustein, were concerned that the new state would require all Diaspora Jews to come on *aliya* (immigration to Israel) and they were concerned about accusations of dual loyalty. The views expressed by Ben-Gurion were repeated in a briefer joint 1961 statement that reiterated the 1950 statement. A third issue was whether Israel could claim to act on behalf of the entire Jewish people. The 1950 remarks addressed these key issues. Ben-Gurion made two unequivocal statements.

**About loyalty:** The Jews of the United States, as a community and as individuals, have only one political attachment and that is to the United States of America. They owe no political allegiance to Israel.

**About representation,** Ben-Gurion said: In the first statement which the representative of Israel made before the United Nations after her admission to that international organization, he clearly stated, without any reservation, that the State of Israel represents and speaks only on behalf of its own citizens and in no way presumes to represent

or speak in the name of the Jews who are citizens of any other country. For his part, Blaustein added: Jewish communities, particularly American Jewry in view of its influence and its strength, can offer advice, cooperation and help, but should not attempt to speak in the name of other communities or in any way interfere in their internal affairs.

**About *Aliya*,** Ben-Gurion was careful to say: In this connection let me say a word about immigration. We should like to see American Jews come and take part in our effort. We need their technical knowledge, their unrivalled experience, their spirit of enterprise, their bold vision, their "knowhow." We need engineers, chemists, builders, work managers and technicians. The tasks which face us in this country are eminently such as would appeal to the American genius for technical development and social progress. But the decision as to whether they wish to come — permanently or temporarily — rests with the free discretion of each American Jew himself. It is entirely a matter of his own volition. We need *halutzim*, pioneers, too. *Halutzim* have come to us — and we believe more will come, not only from those countries where the Jews are oppressed and in "exile" but also from countries where the Jews live a life of freedom and are equal in status to all other citizens in their country. But the essence of *halutzit* is free choice. They will come from among those who believe that their aspirations as human beings and as Jews can best be fulfilled by life and work in Israel.

## Annex 2: Proposed Covenant between the State of Israel and the North American Jewish Community

(**Hebrew version:** <http://najcisraelcovenant.org/wp-content/uploads/2017/04/draft-for-summit-hebrew-20170413b.pdf>)

Draft for a Covenant between the State of Israel and the North American Jewish Community.

We, citizens of the State of Israel and members of the North American Jewish Community (NAJC), propose the following Covenant to structure and guide our mutual relationships. We urge members of both communities to support the Covenant as individuals and to encourage their state and voluntary organizations to adopt it as a formal statement of their understanding of this relationship.

...

We as formal and informal representatives of the State of Israel and the North American Jewish Community (NAJC), recognize and profoundly value the historic partnership and the deep and indissoluble ties and bonds between our two communities, the two largest Jewish centers of our era. This partnership was articulated in 1950 in a correspondence between Israeli Prime Minister David Ben-Gurion and the American Jewish Committee President, Jacob Blaustein. In the seven decades since, our communities have flourished, developed, and changed in significant and relevant ways. We assert the urgent need to respond to these changes by formally restating our relationship in a way that will strengthen our partnership in the near and distant future, and enhance our ties and bonds through the active participation, creativity and investment of as many members of each community as possible.

### Part I – The Basis of Our Relationship

The State of Israel and the NAJC are committed to a relationship of partnership and equality in the shared enterprise of Jewish peoplehood and its success. We affirm that we share foundational understandings, purposes, and goals deeply rooted in Jewish tradition religion and history.

a. *Zehut Yehudit – Jewish identity.* We affirm the value of connecting to and identifying with a Jewish culture

that spans and encompasses time and space. This culture is grounded in the *Tanakh*, Rabbinic tradition and in orienting practices such as the Jewish calendar. We celebrate that this culture and literature continue to flourish in manifold ways today, including the artistic productions of both our communities.

b. *Arevut – Mutual responsibility.* We hold a commitment at the personal, communal, and national level to support and help one another at all times, regardless of differences and divides, especially in the face of difficulty and hardships.

c. *Tzelem Elokim – Individual dignity.* We recognize in theory and in practice the infinite and intrinsic value and potential of every human being. This recognition encompasses the values of democracy and the protection of inalienable individual and minority rights that are enshrined in Israel’s Declaration of Independence, the U.S. Constitution, and the Canadian Bill of Rights.

d. *Tzedek – Justice.* We must always be a clarion voice calling for vigilance, pursuing justice in all human relations and societies and providing for “the stranger, the orphan and the widow at our gates.” This commitment encompasses an obligation to respect marginalized citizens to provide for the most vulnerable in our societies, both within and outside of our Jewish communities.

e. *Tziyonut – Zionism.* We celebrate the return of the Jewish people to its historic roots and sovereignty in the Land of Israel, and its promise for guaranteeing a Jewish future. We affirm that our celebration of Zionism goes hand in hand with our commitment to the NAJC and its vital ongoing contributions to Jewish life, in the tradition of the simultaneous Talmudic cultures of Babylonia and Jerusalem. We also recognize the responsibilities and obligations of the State to its Arab and other non-Jewish citizens and residents.

f. *Shalom – Peace.* We see ourselves as obligated not only to maintain peace but also to pursue peace between Israel and its neighbors.

g. *Or L’Goyim – Light unto the nations.* We understand Jewishness as neither a right nor a privilege, but rather as an obligation to serve as a moral and ethical exemplar,

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including the willingness to stand alone for the sake of principle. This obligation applies both to the sovereign State of Israel and to Jewish communities in other countries.

Despite operating within a framework of partnership and equality, we recognize that Israel and the NAJC have different Jewish interests, understandings and practices. Partnership and equality do not require perfect symmetry of influence. They do require mutual compassion, shared basic principles, and a commitment to work together to implement those principles. We acknowledge the right and obligation to express our values and concerns to each other; to listen to each other with deep and sustained attention; and, recognizing the imperative that the Jewish peoplehood enterprise be a shared one, to do our best to support each other even at the cost of some self-interest.

We also acknowledge each other's right, after diligent efforts, to act in accordance with conscience even when doing so infringes on the other's deep sensibilities, important values, or central interests. When such deep disagreements occur, we will make every effort to strengthen the relationship in other ways and areas rather than acting in ways that exacerbate the damage that may be done to the relationship by any intractable differences that do exist.

## **Part II – Mutual Obligations**

The State of Israel hereby declares:

1. The State of Israel is the homeland of the Jewish people, and as such will keep its doors open to every Jew who chooses to make *aliya* (immigrate), Israel will invite all members of the NAJC to visit, invest time, and participate in meaningful professional, educational, social, economic or other aspects of Israeli life.

2. When taking major decisions that affect the Jewish people as a whole, the State of Israel will take into consideration the NAJC as well as other Jewish communities.

3. Because certain foreign policy or national security decisions taken by the State of Israel may also have a major effect on the NAJC as well as on other Jewish communities, the State of Israel shall take these implications into consideration.

4. The State of Israel will make itself available and invest resources for all efforts by all elements of the NAJC to ensure their own flourishing continuity, including but not limited to visits to Israel, Jewish Studies scholarships, the study of Hebrew, and social justice projects.

5. Through reciprocal efforts, the State of Israel will continuously seek to deepen its understanding of the

North American Jewish Community, including through the State's educational system.

6. The State of Israel is committed to providing equal rights, liberty, and justice for all its citizens, regardless of faith, ethnicity, race or specific religious denomination.

7. The State of Israel will respect, recognize, and promote diverse expressions of Judaism and will conduct ongoing dialogue with the NAJC on issues that bear directly on the definition and character of Jewish peoplehood.

The NAJC hereby declares:

1. The NAJC will foster in all its members a love of Israel and a sense of responsibility to it.

2. The NAJC will identify with Israel's successes and failures, celebrate its achievements and empathize with its losses.

3. The NAJC will support Israel against all existential threats and efforts to de-legitimize it.

4. The NAJC will support and participate in Israel by various actions. Among those, it will sponsor, foster and encourage:

(a) The substantive education of Jews and non-Jews on Israeli history, culture and society and on current issues facing Israel;

(b) Economic, academic, civic and cultural ties and projects between North America and Israel;

(c) Jewish and non-Jewish travel to and experience in Israel;

(d) *Aliya*;

(e) Philanthropy to Israeli institutions;

(f) Information sharing, technology sharing and other for-profit and not-for-profit joint ventures between the two communities.

5. The NAJC will devote substantial resources to substantive Jewish education, which will include the study of Judaism, Hebrew and the culture and history of Israel.

6. The NAJC will reach out and welcome Israelis living in North America, making every effort to integrate them into the community.

## **PART III - SHARED PLATFORM**

Recognizing these shared values and mutual obligations, we call for the establishment of a unique platform to facilitate and encourage engagement of the two communities and to participate in an ongoing dialogue on issues of mutual interest and concern. The overarching goal of the platform will be to enhance the relationship and to serve as a vehicle for shared decision-making and for dealing with conflicts and disputes between the two communities. Through this new platform, we seek to foster

new and creative ways to connect and share through direct conversations between members of the two communities. We strive to channel many more people into participating in and influencing the dialogue between the communities in discussions that are open, unbinding and non-hierarchical. We invite all interested parties to participate in this project of *Arvut Hadadit* – mutual responsibility. The platform will affirm that different voices not only

can but ought to participate and be heard, and will be based on principles of pluralism and equality. Taking a proactive part in this shared platform, members from both communities will initiate discussions and dialogues between individuals, groups, organizations and communities on issues of mutual interest and concern. We commit to the creation of a Task Force to plan, construct and launch the operation of this platform.

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# Antisemitism, America, and the Law\*

David Wecht

It is a pleasure to visit my alma mater, where I enjoyed the thrill of learning. Learning from books. Learning from teachers. Learning from classmates. In this historic building, I recall hearing many fine lectures by brilliant scholars. I am sure many of you are experiencing that same thrill of learning here at Yale, that same enlightenment. Enjoy every minute of it. The world can wait.

Tonight, I am here to talk with you about that world nonetheless. About a troubling aspect of that world. A challenging aspect. An aspect that is not any less troubling or less challenging because it is a familiar story. It is a story that stretches back through the millennia. It is the story of Judeo-phobia, of Jew-hatred, of antisemitism.

Just over 21 years ago, my wife and I married at the Tree of Life Congregation in Pittsburgh, Pennsylvania, in the Squirrel Hill neighborhood where I grew up. Just over six months ago, on a Shabbat morning, in that very same synagogue – in that very same sanctuary – a domestic terrorist murdered eleven Jews at worship. I knew some of the victims. Many of my fellow Pittsburghers knew them as well. We think of them often. Though you did not know them, perhaps you think of them too.

For those eleven Jews, there was no deliverance from the massacre. But ten days ago, we celebrated Purim, the joyous holiday in which we cheer the deliverance of the Jewish people from Haman's plan to massacre them. In a couple weeks, we will celebrate Pesach, in which we remember another deliverance, this one from slavery in Egypt. Soon after that, we will observe *Yom Hashoah*, when we remember the murder of six million Jews in the Holocaust. And then we will mark *Yom Hazikaron*, when we remember those who gave their lives so that the people of Israel may live. And, as *Yom Hazikaron's* solemn observance ends, we will begin the annual celebration of Israel's independence, *Yom Ha'atzmaut*.

Like many of you, I participate in each of these special days, and, like many of you, I feel their resonance in my soul. These observances, along with all of the recent and ongoing controversies, uproars, and outrages, lead me, and perhaps some of you, to reflect upon *Am Yisrael*, upon the Jewish people, our past, present, and future.

Over 100 years ago, United States Supreme Court Justice

Louis Brandeis declared that, "to be better Americans, we must be better Jews. And to be better Jews, we must become Zionists." Brandeis spoke as a non-observant Jew, even a non-religious one. He spoke at a time when antisemitism was common and accepted in many social contexts. He spoke as a proud American, and he spoke to debunk the myth of dual loyalty.

Since my topic is "Antisemitism, America, and the Law," I hope you will indulge me in a brief digression on Louis Brandeis, on his extraordinary life and brilliant career. Brandeis was born in Louisville, Kentucky in 1856 to Jewish parents who had immigrated from Bohemia, then part of the Hapsburg Empire and now part of the Czech Republic. Though his parents raised him in a secular home, Brandeis was influenced by his maternal uncle, Lewis Naphtali Dembitz, whom he greatly admired, and whose last name he later adopted as his own middle name. Dembitz was a practicing Jew and an avid Zionist.

Louis Brandeis was a remarkable and precocious student, entering the Harvard Law School at age eighteen and graduating from it at the age of twenty with the highest grade point average in that school's history. That is nothing to shake a stick at. After a host of remarkable accomplishments and a brilliant career as a progressive lawyer, Brandeis, in 1916, would be nominated by President Woodrow Wilson and confirmed by the United States Senate as a Justice of the United States Supreme Court. He was the first Jew ever to serve in that position. Brandeis would go on to distinguish himself in a 23-year tenure on the High Court, authoring landmark precedential opinions on privacy, free speech, the New Deal, and many other areas of our law. We continue to study and draw inspiration from his writings today.

Now, a story is told by Professor Eunice Pollack that, back when Brandeis was studying law at Harvard, an antisemitic professor by the name of Peters displayed vast hostility toward him. I have found no proof for the story, and, indeed, the anecdote strikes me as out of

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\* Address at the Yale Center for the Study of Antisemitism, Yale University, April 2, 2019.

character for Brandeis. Still, it is great fun to imagine, dubious though its provenance might be. Consider it, perhaps, as a rather fanciful midrash, an *aggadah*.

Reportedly, one day Professor Peters was having lunch at the university dining room when Brandeis came along with a tray and sat down next to him. Professor Peters said, "Mr. Brandeis you do not understand. A pig and a bird do not sit together to eat." Brandeis looked at him and calmly replied, "Don't worry, professor. I'll fly away," and he went and sat at another table.

Peters decided to take revenge on the next test, but Brandeis responded brilliantly to all questions. Unhappy and frustrated, Peters asked Brandeis the following question: "Mr. Brandeis, if you were walking down the street and found two packages, one a sack full of wisdom and the other a sack full of money, which one would you take?" Without hesitating, Brandeis responded, "why, the one with the money, of course." Peters, smiling triumphantly, exclaimed, "Just like a Jew. Unlike you I would have taken the wisdom." Brandeis shrugged indifferently and responded, "Each one takes what he doesn't have."

Professor Peters' hatred for the Jewish student boiled over as he scrawled on Brandeis' final exam the word "idiot" and handed it back to Brandeis. A few minutes later, Brandeis got up, walked over to the professor, and said to him in a dignified and polite tone, "Professor Peters, you autographed the exam sheet, but you did not give me a grade..."

We can mine Brandeis' epic life and career for many gems, but, on a more serious note, I emphasize that our subject of "Antisemitism, America, and the Law" cannot be addressed without at least taking note of and making reference to the path he cleared. As another great justice, William O. Douglas, wrote years later:

Brandeis was a militant crusader for social justice whoever his opponent might be. He was dangerous not only because of his brilliance, his arithmetic, his courage. He was dangerous because he was incorruptible... [and] the fears of the establishment were greater because Brandeis was the first Jew to be named to the Court.

Over 100 years after Brandeis' elevation to the highest court in the land, how far have the Jews come in the United States of America? Three Jews serve currently on the Supreme Court of the United States. Jews serve as

United States senators, United States representatives, and federal judges. They serve as governors, legislators or jurists in many states. They have run credible campaigns for president and vice-president of the United States. They thrive in the very highest ranks of business and industry, science, academia, the creative and performing arts, and all of the learned professions. They have achieved remarkable success in every realm imaginable.

Still, something is amiss. In 2017, even before the Tree of Life massacre, antisemitic attacks were up by 57 % in the United States alone. (I will leave aside for now the shocking and outrageous waves of attacks on Jews in Europe in recent years. That is a phenomenon which requires our attention and the attention of the world.) Right here, in our country, Jews are assaulted on the street, as has been happening repeatedly, for example, in Brooklyn, New York. On both the left and the right, from the streets to the campuses to the congress, enemies of the Jews express their hatred and bigotry more and more openly and more and more boldly.

At many universities, Jewish students are berated, harassed, and intimidated. Under the thin veneer of "boycott, divest and sanction" ("BDS") or various other labels, antisemites make the campus environment a chilling or even fearful experience, especially for Jewish students who wish to express themselves openly and proudly as Jews. As just one example, many American universities witness an annual spring abomination known as "Israel apartheid week," in which the Jewish state and its supporters are demonized and threatened. Please note well that these college campuses are where the leaders of tomorrow are being trained. Think about that.

In the meantime, too many American Jews go blithely on their way and feel:

It is not I who am intimidated on campus. It is not I who am assaulted on the street. It is not I who am heckled as I enter an event for a Jewish group. It is not I who am targeted by antisemites on social media. It is not I who feels unsafe walking to and from shul. I live in a nice neighborhood. I drive a nice car. I have a nice family.

I make a nice living. I feel safe. I have a comfortable life. Why speak up? Why say anything? Why bring attention to myself? Why stir the pot?

Most groups are proud to celebrate their heritage. They understand – they intuit – that their celebration is a celebration of what the United States of America is all about, a celebration of what it means to be an American. Christopher Columbus Day. St. Patrick's Day. Black history month. Etcetera, etcetera. How many Jews celebrate their

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heritage? Many of you certainly do. Many of you care. Many of you are involved. More and more, I fear, proud, committed Jews are becoming the exceptions in this country.

How many Jews do you know that assimilate and drop out of the picture? How many Jews do you know who suppress or ignore their heritage? How many Jews do you know who fail utterly to educate their children in Judaism, in Jewish history, in Zionism, in *ahavat Yisrael* – the love of Israel and of the Jewish people?

It was right here at Yale, in a class taught by the inspirational Elie Wiesel, of blessed memory, that I first read the work of the great philosopher Emil Fackenheim. Like Wiesel, Fackenheim survived the Holocaust, in his case managing to escape his native Germany after being held in the Sachsenhausen concentration camp. After Auschwitz, wrote Fackenheim, there is now another commandment, a 614th mitzvah: “Jews are forbidden to give Hitler posthumous victories.”

Too many Jews give Hitler such victories every day. It needs to stop. But how? Self-respect. Jewish education. Jewish pride. Jewish insistence on Jewish rights and the defense of Jewish people and Jewish interests.

This brings me to justice. It brings me to the rule of law. As Justice Brandeis observed long ago, the principles upon which our United States constitution is based – including, most prominently, the idea that our government relies for its legitimacy and its authority upon the consent of the governed, and that we are a government of laws, not a government of men and women – can be traced all the way back to our Hebrew Bible. *Avraham avinu. Moshe Rabbenu. David ha’melech*. Each of these people learned that law and justice scrutinize and circumscribe the might and authority of even the most powerful of leaders.

Over the millennia, we Jews have learned that law is, or can be, our protector. There was no rule of law in Nazi Germany. There was the rule of Hitler. Nazi judges swore allegiance to the Führer. There was no rule of law in the Soviet Union. There was the rule of the Communist party and its Politburo. There is no rule of law in Iran. There is the rule of the ayatollahs.

Jews cannot long survive, let alone flourish, in regimes such as these. As a minority throughout the diaspora, Jews know that the protection and vindication of their rights depend on order as well as opportunity, on rules as well as freedom, on tolerance as well as nationalism.

There is a paradox in the acquisition of security and freedom. Since the time of the European enlightenment and the ensuing *haskalah*, and no doubt before, it has often been observed that, when Jews have been persecuted and

denied opportunity and mobility, they have been generally unable to assimilate or to forsake their heritage, even when they wanted to do so. With the loosening of the bonds of discrimination, Jews have been free to abandon their roots. And abandon they have, from Mendelssohn to Mahler, from Disraeli to Marx, from Wittgenstein to Proust, and on and on and on. The process continues, of course, right here. But, that is not the end of the story. It is only the beginning.

How can the law help to shape and protect the destiny of Jews in America? Allow me to share some brief thoughts on the subject. First, as James Madison recognized, our system of laws embraces a constitutional regime of ordered liberty in which the minority is protected from the periodic whims and oppressions of the majority. These minorities and majorities need not be permanent, nor set in stone. Often, a minority or majority will be a temporal one, as occurs over time with respect to changes in predominating political coalitions and trends. In other respects, minorities and majorities may prove more enduring, perhaps in contexts involving religious, ethnic, racial, or other classifications and communities.

At its most basic level, as it relates to American Jews, this constitutional principle of minority protection serves, one hopes, to ensure that depredations akin to those that helped to drive our ancestors toward these shores – the pogroms, the confinement to the pale of settlement, the restrictions on livelihood – never recur here. In the United States of America today, we do not settle disputes by force, by compulsion, by arm wrestling, by pistols at dawn, or by who shouts the loudest. We settle our disputes according to the rule of law.

That brings me to my second point. As the revered and incomparable jurist Oliver Wendell Holmes, Jr., observed long ago, the law provides a system of rules that allows for at least a modicum of predictability, premised upon the idea “that in societies like ours the command of the public force is [e]ntrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.” As Jeremy Bentham observed: “every law is an infraction of liberty.” Unfettered liberty would allow every person to do as he or she pleases, rules be damned. Even a casual review of Jewish history will confirm that disorder and chaos are not conditions conducive to Jewish survival, much less Jewish success.

A cautionary note in this regard. I would submit that justice is a process, not a result. The rules I have discussed – uniformly applied – are what we (and particularly we Jews) ought to mean when we speak of justice. We should

not be in the business of putting our finger on the scales and attempting to preordain and orchestrate the result we want. That is not justice. That is tyranny. You and I, or you and any other person, may very often disagree on what might be the best or “most just” result in a particular dispute or controversy. However, we ought not disagree on the principle that the rules in every case must be the same for everyone. Equal rules, equally applied, are the best guarantor of justice. And they are a safeguard for those who, like Jews, have been the victims of injustice time and again.

Third, and last, a system predicated squarely on the rule of law is one that allows human opportunity to flourish. Principles of equal protection and due process of law enshrined in our Constitution and entrenched in settled precedents of the United States Supreme Court mean that the kinds of discrimination endured by blacks, Jews and others in this country in the past are, one hopes, indeed a thing of the past. A system such as ours, based upon the rule of law, exists to unshackle opportunity and to make opportunity equal for all, rather than to hamper it or to load the dice for or against any person or group. As you may know, this principle has not always been respected or followed by our courts. But in this regard, at least, the arc of the moral universe has indeed, over time, bent toward justice.

So these are some thoughts on law and its place in our lives. Now, here are some thoughts in particular for those who, like me, are fortunate to be the children or descendants of Jews who came to America seeking a better life, a life of freedom and opportunity.

The rule of law does not guarantee our success. It does not guarantee our happiness. It does not guarantee that we will not encounter prejudice. Rather, the rule of law in this country does something that has not been common in the history of the Jewish diaspora: it places our destiny squarely in our own hands.

What will that destiny be? It is up to you. You have the freedom to choose. I hope you will make the most of that freedom and that choice. Too many of our fellow Jews of the diaspora, past and present, have not done so. They have allowed that choice to lead them to end their Jewish

journey, and that of their children and descendants. They have assimilated. They have cowered. They have been ashamed to be Jews. They have abandoned their duty to educate their children in our heritage, our religion, our language, our holy land. They have abandoned their synagogues. They have ignored our holidays and celebrations. They have ignored antisemitism. They have failed to stand up for their Jewish brothers and sisters here and abroad. They have failed to defend and support the State of Israel, or even to attempt to understand it. They have declined the wondrous opportunity – only dreamed about for 2000 years by our ancestors – to visit and experience the marvel and beauty that is *Eretz Yisrael*. They have avoided the need to dirty their hands with politics, to get involved in public life so as to make their voices and priorities heard and respected by their elected representatives. They have failed to learn from the mistakes of the past. In so doing, they have neglected the Jewish future.

I hope and believe that many of you will not neglect that future. The generations of Jews who will follow us will benefit from, and will owe much to, those of you who dedicate yourselves to the welfare of the Jewish people. Remember what the Talmud teaches: “*kol yisrael areivim zeh l’zeh*” – all of Israel are responsible for one another.

We live in a nation governed by the rule of law, affording unprecedented opportunity for every person, Jew or gentile, to pursue his or her dreams and aspirations. I hope you always will encourage others to join you in making the most of that opportunity. I have a hope not only for you, but also for all of those among our Jewish brothers and sisters that you can reach, and that you can influence or encourage. For my fellow Jews, my hope is that you will seek to ensure that our children and grandchildren and those who will follow them will enjoy a future that is not only free but Jewish as well.

*Chazak chazak v’nitkhazek!* Be strong, be strong, and let us be strengthened!

*Urim v’tumim.* Light and truth. May it ever be so.

*David Wecht, Justice, Supreme Court of Pennsylvania.*

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# East West Street: On the Origins of Crimes against Humanity\*

Philippe Sands

I am very pleased to be with you today, and to address the International Association of Jewish Lawyers and Jurists, an organization that makes a significant contribution to the promotion of the rule of law and the protection of fundamental human rights.

My book – *East West Street: On the Origins of Genocide and Crimes against Humanity*<sup>1</sup> – was seven years in the writing. It is not about the life of one person but of four. It seeks to understand how the particular circumstances of each individual contributed to the roads he took, and how the different roads individually travelled changed the system of international law that I encounter in my daily work.

*East West Street* came about by chance, like so much in life. In the spring of 2010, I was immersed in the classrooms of University College London (UCL), in academic articles, and in cases in The Hague. An invitation arrived from Ukraine, an email from the law faculty of the University of Lviv, the city known as Lemberg during the Austro-Hungarian empire (until 1918), then Lwów during the Polish years (until 1939), then Lviv (after 1945). I was asked: Would you visit and deliver a public lecture on your work on “crimes against humanity” and “genocide”? About the cases in which you have been involved? About your academic work on the Nuremberg trial? About the trial’s consequences for our modern world?

Yes, I would, I replied. I had long been fascinated by the trial and the myths surrounding Nuremberg, by the words spoken and read out at the time, the images, and sounds. The trial was catalytic, a moment when our modern system of international justice crystallized into being. I was mesmerized by odd points of detail to be found in the lengthy transcripts, by the grim evidence, and I was drawn to the books and memoirs and diaries that described in forensic detail the testimony that was laid before the judges, and the love affairs that went on behind the scenes. I was drawn to movies like *Judgment at Nuremberg*, the 1961 Oscar winner made memorable by Spencer Tracy’s line from his closing judgment: “We stand for truth, justice and the value of a single human

life.” There was also a practical reason for my interest in accepting the University of Lviv’s invitation, as the trial’s influence on my work had been profound: the Nuremberg judgment had blown a powerful wind into the sails of a germinal human rights movement. Yes, there was a strong whiff of “victor’s justice” that pervaded the proceedings, yet the case was catalytic, inasmuch as it opened the possibility that the leaders of a country could be put on trial before an international court. This had never happened before.

It was probably my work as a barrister, rather than my writing, that caused the invitation to be sent from Lviv. In the summer of 1998, I was involved in the negotiations in Rome that led to the creation of the International Criminal Court (ICC), a body with jurisdiction over “genocide” and “crimes against humanity” and two other international crimes. The essential difference between the two concepts is on who is protected, and why. Assume thousands of people are killed, murdered, exterminated. The systematic killing of such large numbers of individuals will always be a “crime against humanity,” but will it be a “genocide”? That depends on the intent of the killers, and the ability to prove motive. To establish the crime of “genocide,” it is necessary to show that the act of killing is motivated by a special intent, namely to destroy a group in whole or in part. If a criminal prosecutor cannot prove that a large number of people have been killed with that intent, then the crime of “genocide” is not established in law. And so, you have the two concepts operating side by side, and overlapping: every “genocide” is also a “crime against humanity,” but not every “crime against humanity” is a “genocide.”

A few months after both crimes were inscribed into the Statute of the ICC, Senator Pinochet was arrested in

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\* *Editor’s Note:* This article is an abridged version of a lecture delivered by the author at the IAJLJ in Tel Aviv on May 5, 2019.

1. Philippe Sands, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* (First Vintage Books ed., Weidenfeld Nicolson) (2017).

London on charges of “genocide” and “crimes against humanity” laid by a Spanish prosecutor (October 1998). The House of Lords ruled that even as a former president of Chile, he was not entitled to claim immunity from the English courts. That was a novel, revolutionary judgment.

In the years that followed, the gates of international justice creaked open, following five decades of relative quiescence during the Cold War chill that came after the Nuremberg trial. Eichmann in Jerusalem was, of course, a trial before a domestic court, not an international trial.

Cases from the former Yugoslavia and Rwanda landed on my desk in London. Others followed, relating to allegations in the Congo, Libya, Guantánamo, and Iraq, as well as Israel and Palestine. These cases were based on the new rules that came into being after 1945, a revolutionary moment in the making of modern international law, one that recognized that the rights of the sovereign over its people were no longer unlimited. The long and sad list of cases that reached me reflected the failure of good intentions aired in Courtroom 600 of Nuremberg’s Palace of Justice. I became involved in too many cases that involved mass killings. Some concerned crimes against humanity, the killings of individuals on a large scale, others focused on genocide, the destruction of groups.

The two distinct crimes, with different emphases, respectively, on the individual and the group, grew side by side, although over time, genocide seems to have emerged in the eyes of many as “the crime of crimes.” The supposed hierarchy leaves an unfortunate suggestion that the killing of large numbers of people as individuals is somehow less terrible. Occasionally, I picked up hints about the origins of the two term, and their connection to arguments first made in Courtroom 600. However, I never really inquired about what exactly had happened in Nuremberg.

In preparing the lecture for Lviv, I was surprised to discover that the man who had coined the term “crimes against humanity” in international law originated from Lviv. Indeed, he was a student at its university, although those who invited me were blissfully unaware of this fact. His name was Hersch Lauterpacht. He was born in the small town of Zolkiew, about 15 miles north of Lviv, and moved to Lemberg in 1911, when he was fourteen. He enrolled at the University law faculty four years later. In 1919, he moved to Vienna, where he spent four years studying with Hans Kelsen. In 1923, Lauterpacht moved with his new wife to study in London and he then became a renowned academic, first at the LSE, then at Cambridge. In 1945, he published a book that laid a foundation for

the modern system of human rights. Titled *An International Bill of the Rights of Man*, it offered a revolutionary idea: to recognize that every human being on the planet had rights under international law, as an individual. This did not previously exist.

Lauterpacht prepared twenty draft articles that covered much that was new, but was by no means exhaustive. Notable omissions included torture and discrimination against women. Moreover, *realpolitik* informed his approach to the situation of non-whites in South Africa and what he called “the thorny problem of actual disenfranchisement of large sections of the Negro population in some States of the United States.” Yet the draft Bill gave effect to his credo, that “The individual human being ... is the ultimate unit of all law.”

In April 1945, after the war in Europe had ended, Churchill, Roosevelt and Stalin agreed on a criminal trial for senior Nazi leaders. The British hired Lauterpacht to assist in the prosecution and to work with Robert Jackson, the U.S. chief prosecutor. In July 1945, Jackson travelled to London to draft the Charter of the Nuremberg Tribunal. The four powers – America, Britain, France and the Soviet Union – disagreed about the crimes over which the Tribunal would exercise jurisdiction. Jackson turned to Lauterpacht for help. On July 29, Jackson was driven ... to the Lauterpacht’s garden in Cambridge. ... They ... discussed the problem of the list of crimes. Lauterpacht suggested the idea of inserting titles, to help public understanding and add legitimacy. Jackson reacted positively to this idea and Lauterpacht offered another idea: he advised that atrocities committed against civilians, a matter on which the Soviets and Americans were deeply divided, be included in the Charter. ...

Why not refer to the atrocities against civilians as “Crimes against Humanity”? Lauterpacht suggested. ... The term would cover atrocities against individuals on a large scale – torture, murder, disappearance – and introduce the new concept into international law. No legal instrument had ever used the term. Jackson liked the idea, took it back to London, and a few days later, on August 8, “Crimes against Humanity” was incorporated into the Nuremberg Charter as Article 6(c) of the Statute. “[C]learly an innovation,” Lauterpacht told the Foreign Office in London, but one that was necessary to signify that those who break international law “cannot shield themselves behind the law of their State.”

Preparing the Lviv lecture required me to focus also on “genocide.” The man who invented this term – in 1944 – also dwelled for a while in Lviv and studied at the same law school. His name was Rafael Lemkin. He started at

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Lwów university in 1921, two years after Lauterpacht had left, and in 1926 he obtained his doctorate in criminal law.

After law school, he became a public prosecutor in Warsaw. He wrote a paper for a League of Nations meeting in Madrid in 1933, proposing new international crimes to combat “barbarity” and “vandalism” against people. His focus was not on the protection of individuals, like Lauterpacht, but on the protection of groups, sometimes referred to as “minorities.” His ideas bounced around, nothing came of them, as Hitler had just taken power in Germany.

In 1939, when Germany invaded Poland, Lemkin was in Warsaw. He escaped to Sweden, via his parents’ town of Wolkowysk which had come under Soviet control. In 1941 he travelled to America, forced to take on the long route, across Russia, to Japan, by boat to Seattle, then train to Durham, North Carolina, where he was offered a place of academic refuge at Duke University.

He travelled with little money and almost no personal belongings, yet he carried with him a great deal of luggage – trunks filled with paper, thousands of pages of decrees promulgated by the Nazis across occupied Europe that he had gathered and now carted around the world. Once settled in America he analyzed the decrees, and was soon offered a contract to write a book that would describe the patterns of behavior, the indicia of an underlying master plan that had not been made explicit. The book, *Axis Rule of Occupied Europe*, was published in November 1944. Chapter IX was entitled “Genocide.” Lemkin had invented a new word: the crime of the destruction of groups, the Nazi master plan, an amalgam of the Greek word *genos* (tribe or race) and the Latin verb *cide* (killing).

In the summer of 1945, Lemkin was hired by the U.S. Government to begin to work with Robert Jackson and his team on war crimes, separately from Lauterpacht. It was Lemkin who pushed his concept of genocide, a crime for which he wanted the senior Nazis to be indicted. In his view, the destruction of groups was the greatest of crimes and a matter for the Nuremberg Tribunal.

In August 1945, when the Nuremberg Charter was adopted after Jackson had visited Lauterpacht in Cambridge, Lemkin was greatly disappointed that it included “Crimes against Humanity” – the killing of individuals – but made no mention of genocide and thus remained silent about the destruction of groups.

Lemkin did not give up. He flew to London, where the indictments for the defendants were being crafted. He actively pressed for “genocide” to be included in the Charter – a “persistent bugger,” Jackson’s son wrote to

his mother. In Jackson’s office, there was, however, strong opposition to “genocide” being included in the Charter, due to pressure from Southern senators (concerned about discrimination against African-Americans). The British also resisted (as they were concerned about the colonial legacy).

Nevertheless, against the odds, Lemkin’s word made it into the draft indictment. Genocide was included in Count Three, as a “War Crime,” to include the murder of civilians in occupied territories (including Lemberg and Wolkowysk) where his parents had lived.... The indictment alleged that the Nazis “conducted deliberate and systematic genocide,” the first time the word was used in an international legal instrument. It included an agreed upon definition of “genocide,” the “extermination of racial and religious groups.” The indictment mentioned “Jews, Poles, Gypsies and others.”

On October 18, the indictment was filed at the Tribunal. “I went to London and succeeded in having inscribed the charge of Genocide against the Nazi war criminals in Nuremberg,” Lemkin would claim.

The Nuremberg trial opened on November 20, 1945. Lauterpacht was present in the courtroom, with the British team, pushing for the protection of individuals. Lemkin was back in Washington, with the American team pushing for the protection of groups.

One of the 22 men in the dock was Hans Frank, the fourth character in *East West Street*. He too was a lawyer, and from the late 1920s served as Adolf Hitler’s personal lawyer. In 1933, he became Bavarian Minister of Justice and in October 1939 became Governor General of Nazi occupied Poland. On August 1, 1942, he visited Lemberg and Galicia, recently incorporated into his territory. He hosted a concert that concluded with Beethoven’s 9th symphony, and in the very room in which I would lecture seven decades later – the Aula of the university – he gave a speech to announce the elimination of the city’s entire Jewish population. Among those caught up in the horrors in the days that followed, were the families, friends and teachers of Lauterpacht and Lemkin, as well as my grandfather’s family. For each family there would be only a single survivor.

Frank did not seem unduly perturbed by the actions he had unleashed, but he was rather more bothered by other mundanities. He lodged at the home of his deputy, Otto von Wächter, Governor of Galicia – the principle character in the BBC radio and podcast series I have recently made, *The Ratline*, which will be published in April 2020 with that title, the sequel to *East West Street*.

Frank was caught by the U.S. Army near his home in Bavaria in May 1945. With him were his diaries, 42

volumes, and a remarkable collection of artwork. .... In the Nuremberg dock, Frank was charged on three counts, including "Crimes against Humanity" and "Genocide."

On the first day of the trial, the Soviet prosecutors referred the judges to the events in Lviv that had befallen the inhabitants following Frank's visit. They described the acts of murder and torture and other ill-treatment as "genocide." During the Holocaust, more than 130,000 people in Lviv were killed, including 8,000 children murdered in just two months in the Janovska camp, located in the heart of the city. As the words were spoken in Courtroom 600, Lauterpacht and Lemkin did not know that the man they were prosecuting, Hans Frank, was directly implicated in the murder of their own families.

On the first day of Frank's trial, for the first time ever, the terms "genocide" and "crimes against humanity" were used in open court. As I knew Lauterpacht and Frank to have been in the same room on that day, I wondered if there was a photograph showing the two together in the court room. ... Indeed, I found a photograph of the Nuremberg court room on November 20, 1945.

In this photograph, Lauterpacht is sitting at the end of the British table, the second on the left, elbows on the table and hands clenched under the chin. He is attentive, behind the counsel's lectern at which a Soviet prosecutor speaks. Divided by no more than a few tables and chairs, Lauterpacht and Frank are together in the same room.

The trial lasted for a full year, and judgment was handed down over two days, on September 30 and October 1, 1946. ... Over the course of that remarkable year, ... the lives of our three characters became increasingly intertwined. ... The ideas and endeavors of Lauterpacht and Lemkin would continue to influence politics, history, culture, my life and yours.

The concepts of "crimes against humanity" and "genocide" have entered our world, although many are under the impression that they have existed since time immemorial. In fact, they have not: both legal concepts are the product of creative and inventive minds, two men driven by their own experiences, forged on the anvil of a single city. Why Lauterpacht opted for the protection of the individual, and what caused Lemkin to embrace the protection of the group, is a matter of speculation. Their backgrounds were similar, two Polish Jews who studied at the same university with the same teachers. If you want to trace the origins of these crimes, you can trace them to Lemberg, to events at the end of the Great War and to the law faculty of the University of Lviv.

Something else also strikes me as remarkable: despite their common origins, interests and journeys, and despite

the fact that I have located Lauterpacht and Lemkin to have been in the same city on the same day, it seems that the two never actually met, not even in Courtroom 600 where they missed each other sometimes by only a day.

The concepts they put into international law – "crimes against humanity" and "genocide" – inform my working life. I have frequently wondered how it could be that I ended up doing the work I do. My quest to understand Lauterpacht and Lemkin was surely driven by my personal history...

How does one begin to understand these points of connection? The starting point is the ideas of these two remarkable men, Lauterpacht and Lemkin, and the enduring relevance of their ideas until today. By the same token, the relationship between the individual and the group has been contested across the ages.

Lauterpacht believed that we should concentrate on the protection of the individual, and would surely argue, even today, that Lemkin's invention of the concept of "genocide" has been practically useless and politically dangerous, in that it will tend to replace the tyranny of the state with the tyranny of the group. In a way, my own practical experience concords with that view having observed that the focus on the protection of one group against another tends to reinforce the sense of "them" and "us," to amplify the power of group identity and association, a source both of sustenance and danger.

How does this happen? In seeking to prove that a "genocide" has occurred, in law you have to establish the existence and expression of an intent to destroy a group in whole or in part. I have seen for myself how that process reinforces a sense of victimhood felt by the targeted group, and hatred towards the perpetrators as a mass.

Yet I also understand what Lemkin was trying to do. He was surely right to recognize a reality, that in most (if not all) cases, mass atrocity is targeted not against individuals but against those who happen to be a member of a group. Lemkin would say, and it is a powerful argument, that the law must reflect that reality, recognize and give legitimacy to a feeling we all have, of association with one or more groups.

Nevertheless, I am concerned about the hierarchy that seems to have emerged, one that puts "genocide" atop the list of horrors, so that a "mere" "crime against humanity" or "war crime" is seen somehow as a lesser evil. Call something a "genocide" and it will be on page 1, call it a "crime against humanity" and it will only be on page 13. That is the power of the word invented by Rafael Lemkin, and perhaps too of our association with the protection of the group.

What, one might ask, is the enduring legacy of these

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two legal terms? The crime of genocide, and the idea that each of us as individuals has rights under international law, were new in 1945. The moment of creation was significant, revolutionary even, a recognition that sovereignty over human beings is not unlimited. Yet, the crimes continue.

Today, once more, the poison of xenophobia and nationalism is coursing its way through the veins of Europe, and many other parts of the world. The strong leader is back. I see it on journeys to the central and eastern parts of our European continent. I saw it when making the BBC documentary *My Nazi Legacy*, on my relationship with the sons of Hans Frank and Otto Wächter. I saw it in making *The Ratline* podcast, on the fugitive flight and strange death of Otto Wächter in the Vatican. I encounter it travelling across Europe, in Austria, in Viktor Orban's Hungary, in Poland. In these and other places, it is hard to avoid what is stirring, and to wonder to where such stirrings will lead.

The generation that experienced the horrors of the 1930s, that lived through the Second World War, that knows why states came together after 1945 to create a United Nations (to embrace multilateral cooperation and the idea of an international rule of law, to adopt in Paris in December 1948 a Universal Declaration of Human Rights and a Convention on the Prevention of Genocide), will soon be gone. Perhaps the disappearance of actual experience (of first-hand memory) allows our politicians to take for granted what occurred in 1945, and to forget.

It is impossible not to have gone through the experience of writing *East West Street*, and the projects that have followed – an immersion in the world of the years between 1914 and 1945 – and not feel an acute sense of anxiety as to what is stirring.

Two years ago, the man who is now President of the United States, a devotee of lawlessness in this region, called “for a total and complete shutdown for Muslims entering the United States.” The idea of targeting people not because of their individual propensities but because they happen to be a member of a particular group has a long, dark history. The idea of a travel ban based on a person's nationality, religion, or race, is deeply troubling. Experience teaches us to where such a beginning can lead, singling out people not for what they might have done but because they happen to be a member of a particular group. One thing leads to another.

In Britain, too, change is in the air, a move to identity politics, an embrace of antisemitism and Islamophobia. Two years ago the then Prime Minister – who had indicated she would take the United Kingdom out of the European Convention on Human Rights if she could, but

who was unable to deliver on BREXIT, told her party Conference that “If you believe you are a citizen of the world, you are a citizen of nowhere.”

Her words reminded me of a passage in Stefan Zweig's magnificent book *The World of Yesterday* – required reading for our times – published posthumously in 1942, after Zweig committed suicide. “For almost half a century,” he wrote, “I trained my heart to beat as the heart of a citizen of the world. On the day I lost my Austrian passport I discovered that when you lose your native land you are losing more than a patch of territory within set borders.”

One thing leads to another. One former London Mayor offensively evoked Adolf Hitler as a supporter of Zionism. Another former London Mayor who, shockingly, later served as Foreign Secretary, suggested that the EU and Adolf Hitler somehow share common aims. BREXIT and Trump are surely a reflection of a new direction.

And, of course, Israel is hardly untouched by matters of identity, by conceptions of the individual and the group.

From a distance, what one hears and reads is perplexing. Last summer the Prime Minister of Hungary raged against “an enemy that is different from us,” an enemy that is “[n]ot open, but hiding; not straightforward but crafty; not honest but base; not national but international; does not believe in working but speculates with money; does not have its own homeland but feels it owns the whole world.”<sup>2</sup>

To which individual or group might he be referring? George Soros certainly, but not only him. A few weeks later, the Prime Minister of Israel welcomed the same Prime Minister of Hungary, peddler of antisemitic tropes, to this country as “a true friend of Israel.”<sup>3</sup> He did so on the day the Knesset adopted a Basic Law on *Israel – The Nation State of the Jewish People*, which declares that “The state of Israel is the nation-state of the Jewish people,” and retained a conspicuous silence on the matter of equality

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2. Shaun Walker, Hungarian leader says Europe is now under “invasion” by migrants, *THE GUARDIAN*, March. 15, 2018, available at <https://www.theguardian.com/world/2018/mar/15/hungarian-leader-says-europe-is-now-under-invasion-by-migrants>; Harriet Sherwood, Hungary tells UK Jewish group to “mind its own business over antisemitism”, *THE GUARDIAN*, Feb. 13, 2019, available at <https://www.theguardian.com/news/2019/feb/13/hungary-tells-uk-jewish-group-to-mind-its-own-business-over-antisemitism>.
  3. Ilan Ben Zion, Netanyahu greets Hungary's Orban as “true friend of Israel,” *AP NEWS*, July 19, 2018, available at <https://www.apnews.com/938bb193c0894691bf42a6457d1fae4c>.

and equal rights for all citizens. Questions have been raised – understandably – as to whether the intention and effect of the new law is to undermine rulings of the Supreme Court of Israel, to the effect that a citizen of Israel will not have more rights merely because she or he is Jewish, or that a member of another group, for that reason alone, will have less rights.<sup>4</sup> Concerns are hardly put to rest when the Prime Minister of Israel, in response to a comment by the actor Rotem Sela, and citing the new Basic Law, stated that Israel “is not a country of all its citizens.”<sup>5</sup>

The words sound darkly familiar to me, steeped in the cities of Lviv, Vienna and Berlin. In Italy too, the writer Primo Levi knew something about hierarchies amongst the citizenry, and to where that leads, and all the more so when he arrived in Auschwitz. I invite you to read the Preface to his book *If This Is a Man*, published in 1947 (but only available in Hebrew in 1989, after Primo Levi died). He wrote: “Many people – many nations – can find themselves holding, more or less wittingly, that every stranger is an enemy.”

When this happens, he continued: “when the unspoken dogma becomes the major premise in a syllogism, then, at the end of the chain, there is the [concentration camp].”

This is the context – past and present, unspoken dogmas, the stranger, them and us – in which I oscillate between the views of Lauterpacht and Lemkin, between the individual and the group, between the realism of Lemkin and the idealism of Lauterpacht. I can see the force of both arguments, and recognize the tension and the struggle between the individual and the group, between crimes against humanity and genocide, one that will not soon

be resolved. Today, international law embraces both.

We are at a dangerous moment. Our politicians seem not to be able to recognize how precious was the settlement of 1945, and how vulnerable is the acquis that was created – one that has offered a foundation to international relations in our time. We cannot take for granted what was achieved back then.

This is the context – past and present – in which I ended *East West Street*, at a site of mass killing long ago, caught between my head and my heart, intellect and instinct, recognizing the need to value the inherent worth of every human being, yet understanding too the pull of tribal loyalty, the essential truth of the notion that we are indeed haunted by “the gaps left within us by the secrets of others,” and the possibility that the discovery of such a haunting will not necessarily destroy us but may actually make us stronger.

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4. Amir Fuchs, Nation State Bill Strikes Blow to Minorities, JERUSALEM POST, July 18, 2018, available at <https://www.jpost.com/Opinion/Nation-state-bill-strikes-blow-to-minorities-562876>.
5. Amy Spiro, Netanyahu to Rotem Sela: Israel is Not a Country of All its Citizens, JERUSALEM POST, March 10, 2019, available at <https://www.jpost.com/Israel-News/Benjamin-Netanyahu/Netanyahu-hits-back-at-Israeli-actress-after-she-criticizes-Miri-Regev-582959>.



Nuremberg Courtroom 600. Photo credit: Getty Images

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# BOOK REVIEWS

## *Jewish Justices of the Supreme Court: From Brandeis to Kagan*

By David G. Dalin

Brandeis University Press (2017), 384 pp.

Reviewed by Honorable Martin E. Ritholtz

**M**a *Nishtana*? What makes this book different from all the other biographies written about Louis D. Brandeis, Benjamin N. Cardozo, Felix Frankfurter, and the five other United States Supreme Court Justices who are here portrayed? As the title of the book suggests, what distinguishes and makes it a really interesting read is the focus on the Jewish heritage of these eight of the 114 Justices who have served on this highest court, since it was established in 1789. The reader learns about their Jewish family roots, religious or secular leanings, instances of antisemitism in the legal profession and even in the Supreme Court, Zionist activism, and, overall, the Jewish legacy of these gifted individuals. Besides recording many historical Jewish “firsts” in the American judicial and political arenas, the book exposes the delicate and intriguing U.S. Supreme Court Presidential appointment process and the Senate confirmation battles, given the judges’ Jewish background. The evolution of a Jewish seat and its questionable existence today is addressed, as is its great symbolic importance for American Jewry. What may be perceived in contemporary ethical norms as inappropriate, is the revealing documentation of the unusual Jewish communal activities of some of the Jewish Justices while serving on the court, whether fostering a Zionist agenda, or interacting with sitting Presidents on important matters such as the Holocaust.

The author, David G. Dalin, who has also written *The Presidents of the United States and the Jews*,<sup>1</sup> painstakingly researched the material for this book, which includes 1,410 footnotes to be found following the 284 page text. There is no need to review the biographies which are abridged, yet it is to be noted that they are much more comprehensive than Wikipedia depictions. Worthy of this cursory review are the fascinating Jewish tidbits and anecdotes interspersed throughout. The book’s format records the biographies in chronological order, beginning with Brandeis.

### Louis D. Brandeis

Although Brandeis, like his parents, shunned Jewish religious practice, he was very close to his favorite uncle, Lewis Dembitz, an ardent Orthodox Jew. Brandeis, in fact, so admired his uncle that he changed his middle name from David to Dembitz. The relationship was to have a profound influence on Brandeis’ Jewish legacy, and ultimately impacted on his Zionist leadership. When he attended Harvard in the 1870s, he was the only Jewish student at the law school. In 1891, Brandeis married a Jewish woman, Alice Goldmark, which did not help him socially, given the prevalence of social antisemitism.

As one of President Woodrow Wilson’s most trusted political confidants throughout the first three years of the latter’s presidency, Brandeis was a Jewish trailblazer. Eventually, Wilson nominated Brandeis for the Supreme Court on January 28, 1916 which precipitated a four-month Senate confirmation battle with much opposition, antisemitic in origin. Of course, Brandeis prevailed and on June 5, 1916 he was administered the oath, thus becoming the first Jewish Supreme Court Justice. When he joined the court, he experienced antisemitism, especially from a senior colleague, Justice James McReynolds. Prior to Brandeis’ appointment, no Jewish law school graduate had ever been hired to a prestigious Supreme Court clerkship. During his tenure on the Supreme Court, however, Brandeis hired seven Jewish law clerks, thus setting a precedent that subsequent justices, Jewish and non-Jewish alike, would follow.

Before serving on the Supreme Court, Brandeis embraced Zionism, and in 1914 proclaimed: “To be good Americans, we must be better Jews, and to be better Jews, we must

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1. David G. Dalin and Alfred J. Kolatch, *THE PRESIDENTS OF THE UNITED STATES AND THE JEWS* (1st ed., Jonathan David Publishers, Inc., 2000).

become Zionists!" In that same year, he assumed a top leadership position in the American Zionist movement, which he continued to hold until 1921, while serving on the Supreme Court. During his lifetime, Brandeis contributed more than \$1.6 million of his own private funds to the American Zionist movement, and earned the reputation of "probably doing more than any other American Zionist leader, with the possible exception of Stephen Wise, to help effect the establishment of a Jewish state" (p. 76).

Brandeis also played a significant extrajudicial role in advising U.S. President Franklin Delano Roosevelt (FDR) during the latter's presidency, and FDR would affectionately refer to Brandeis as Isaiah, in appreciation of his sage wisdom.

Although born a Jew, Brandeis neither lived nor died as a religious Jew. He died on October 5, 1941, and no Jewish prayers were recited at his funeral service, no Rabbi officiated, and his body was cremated (a practice which is generally contrary to Jewish tradition).

Yet, Brandeis is remembered for his Jewish legacy, and remains the only American Jew after whom a university has been named.

### **Benjamin N. Cardozo**

Cardozo was proud of his family's Sephardic heritage, and was raised in the Orthodox Jewish milieu of the country's oldest Jewish synagogue, Congregation Shearith Israel, also known as the Spanish and Portuguese Synagogue in New York. He followed Jewish Orthodoxy until his bar mitzvah in 1883, after which his religious observance declined. Yet, he remained a devoted, dues-paying member of Shearith Israel throughout his Supreme Court years, and continued to adhere to some Jewish dietary laws.

Interestingly, in 1895, when a controversial proposal to eliminate separate seating for men and women at Congregation Shearith Israel was debated, Cardozo cogently argued that mixed seating would violate the congregation's constitution, and separate seating was retained, with the synagogue remaining strictly Orthodox.

In 1913, a fusion ticket was put together to run against Tammany Hall, and a Jewish lawyer was needed to balance the ticket. Cardozo was selected, eventually elected, and on January 5, 1914 he took his seat as a Justice of the New York Supreme Court. Later that year, Cardozo was appointed by the governor to fill an interim vacancy on the New York State Court of Appeals, the State's highest court, and became the first Jew to serve on that court. In 1917, he was elected to a full fourteen-year term, and in

1927 was elected its Chief Judge, becoming the first Jew to hold the state's highest judgeship. In 1921, while serving as a judge, Cardozo authored a classic book, *The Nature of the Judicial Process*,<sup>2</sup> which would sell 181,422 copies, making it the best-selling book ever written by a Jewish Supreme Court Justice (p. 91).

Influenced by Brandeis, Cardozo joined the Zionist Organization of America, and during the 1920s, he served on the board of governors of the American Friends of the Hebrew University. In 1929, he was elected to the executive committee of the American Jewish Committee.

In 1932, when Oliver Wendell Holmes, Jr. retired from the U.S. Supreme Court, President Herbert Hoover was, at first, reluctant to appoint a second Jew, such as Cardozo, to serve with Brandeis on the court. In fact, there were those who lobbied against him, such as Supreme Court Justice James McReynolds, who had earlier also opposed Brandeis' nomination, and now pressured Hoover not "to afflict the court with another Jew,"<sup>3</sup> Nevertheless, on February 15, 1932, Hoover nominated Cardozo, and among the eight Jewish appointees ever to have been nominated to the Supreme Court, his nomination was unanimously confirmed by the Senate. On March 15, 1932, Cardozo took his seat as the court's second Jewish justice. In his six years on the Supreme Court bench, Cardozo hired two Jewish law clerks out of the four who served him during his tenure.

On July 9, 1938, Cardozo died, and his funeral service was conducted by the Rabbi of Congregation Shearith Israel according to Orthodox Jewish tradition, with mourners reciting the traditional Kaddish at the Synagogue's cemetery where he was interred. As the second Jew to serve on the Supreme Court, he became a role model to New York's Sephardic community, and his legacy was significantly advanced with the establishment of Yeshiva University's Cardozo School of Law in 1976.

### **Felix Frankfurter**

Born in Vienna, Frankfurter was the only Jewish Supreme Court justice not born in the United States. He attended City College and graduated in 1902, in a class that was three-quarters Jewish. While at the college, he was a member of the ZBT Society, the predecessor of the Zeta Beta Tau

2. Benjamin N. Cordozo, *THE NATURE OF THE JUDICIAL PROCESS* (1<sup>st</sup> ed., Yale University Press, 1921).

3. Drew Pearson & Robert S. Allen, *THE NINE OLD MEN*, p. 225 (1<sup>st</sup> ed., Doubleday, Doran, and Company, Inc., 1936).

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Jewish fraternity, whose acronym stood for the Zionist Hebrew motto, "Zion shall in judgment be redeemed."

In 1919, Frankfurter married the daughter of a Protestant Minister, Marion Denman, who, like himself, was an agnostic. Absent from the wedding was his mother, Emma, who opposed the intermarriage.

With the help of Brandeis, his mentor, Frankfurter was the first Jew appointed to the faculty of Harvard Law School, and continued teaching there for 25 years.

Despite the fact that he regarded his Jewish religion "as a mere accident of birth," and as a "barrier to be overcome," Frankfurter professed that he did not "cease to be a Jew or cease to be concerned with whatever affects the fate of the Jews." Prodded by Brandeis, he became an important and active member of the American Zionist movement's leadership.

A very rare, slight inconsistency in the book deals with Frankfurter's relationship with FDR. At one point, Dalin notes that Frankfurter and FDR "remained in close touch" during the 1920s and "Frankfurter emerged as one of FDR's close political confidants in the years approaching his 1928 election as governor." Yet, later in the book, describing FDR's bout with polio in the 1920s, and his rehabilitation, the author comments that "Frankfurter and Roosevelt had not been close enough for Frankfurter to be in touch during his rehabilitation." Nevertheless, after Cardozo died, FDR "felt it appropriate that Frankfurter should replace a fellow Jew" (p. 114 of the text), and despite some opposition from such fellow Jews as Henry Morgenthau, Jr. and Arthur Hays Sulzberger, in 1939 he became the third Jew to serve on the U.S. Supreme Court. There are those who mark this appointment as the emergence of an informally designated "Jewish seat," a tradition Presidents Kennedy and Johnson would follow with their respective appointments.

In the late 1930s, Frankfurter urged FDR to help Jewish German refugees immigrate to the United States, and to persuade Great Britain to open its doors in Palestine to increase Jewish immigrants from Nazi-occupied Europe. What remains an anomaly is that in late summer 1943, having been briefed extensively about the Nazi death camps, Frankfurter never met with FDR to urge allied intervention so as to put a stop to the rampant extermination of Europe's Jews (p. 158).

During his 23-year tenure, Frankfurter followed in the footsteps of Brandeis and hired eighteen Jewish law clerks. One of Frankfurter's law clerks was an Orthodox Jewish graduate of Harvard Law School, Louis Henkin, who "would Friday nights secretly sleep on Frankfurter's office couch because he couldn't travel on the Sabbath."

At the private funeral service of Frankfurter in 1965, instead of a rabbi, Henkin was requested to speak, and he recited in Hebrew the traditional mourner's Kaddish (a Jewish memorial prayer in Praise of God).

### **Arthur J. Goldberg**

Like Cardozo, Goldberg was raised in an Orthodox home, and as a young man, he abandoned strict Orthodox religious observance. Yet, he attended Chicago's Zionist-oriented Theodore Herzl Elementary School, and became a Labor Zionist, a commitment that proved central to his Jewish identity. Upon his graduation from law school at Northwestern University in 1929, Goldberg was barred from Chicago's top firms, because of the then prevailing antisemitism in the legal profession. He landed up practicing law with the Chicago Jewish firm, Pritzker and Pritzker, founded by Reform German-American Jews (p. 204). Eventually he joined a Reform temple, and adopted a more liberal Jewish way of life including temple membership throughout his career. In 1931, he married a Jewish woman, Dorothy Kurgans.

Goldberg's early support for John F. Kennedy (JFK) during the 1960 presidential race, earned him the appointment as labor secretary, becoming the third Jew in U.S. history to be appointed to a presidential cabinet post.

Upon Frankfurter's retirement from the Court in 1962, JFK announced his nomination of Goldberg to fill what was widely considered "the Jewish seat." His nomination was applauded throughout the Jewish community, and Goldberg was easily confirmed with near-unanimous, bi-partisan support. Goldberg served for less than three years, which turned out to be the shortest tenure of the eight Jewish high court justices. During that time, six of his eight law clerks were Jewish, including Alan Dershowitz (p. 192). Moreover, he had the distinction of being the only Jewish justice to have hired a Jewish law clerk, Stephen Breyer who himself would serve on the high court (p. 205).

Goldberg was the first Supreme Court Justice to hold an annual Passover Seder. Upon his retirement from the Supreme Court, while serving as U.S. ambassador to the United Nations, he strongly promoted the safety and security of Israel, especially during the Six Day War. In 1968, he was elected president of the American Jewish Committee. Upon his death in 1990, a memorial service was held at Washington Hebrew Congregation.

### **Abe Fortas**

Fortas grew up in Memphis, Tennessee, in an Orthodox Jewish home. While at college, he rejected Orthodoxy

and no longer observed kosher dietary laws, nor attended synagogue services, not even on High Holy days. Ironically, being Jewish enabled him to obtain a scholarship established by a Memphis Rabbi and to attend Southwestern College, where he launched his legal career. In an age when antisemitism made it practically impossible for Jews to be hired at an elite law firm, Fortas taught at Yale Law School, and also worked in the government's New Deal agencies, where he advanced to the position of undersecretary of the Interior Department.

In 1935, the religiously unobservant Fortas married a Protestant woman, Carolyn Agger. He left government service in 1946, and developed a lucrative private law practice, where he nurtured a close relationship with his most important client, Lyndon Baines Johnson (LBJ).

When Goldberg left the Supreme Court to become UN ambassador in 1965, LBJ continued the tradition of a "Jewish seat," and nominated Fortas, his close friend and advisor, to sit on the Supreme Court. During his less than four years on the bench and being the only Jewish justice whilst on the bench, he endeavored to be more publicly Jewish. At that time, and as a strong supporter of Israel, Fortas acted as an informal liaison between Avraham Harman, Israel's ambassador to the U.S., and the Johnson White House. Chief Justice Earl Warren planned to retire from the Supreme Court in 1968, and LBJ nominated Fortas to succeed Warren as Chief Justice. There was vigorous antisemitic opposition to his nomination, which might best be summed up by the warning James Eastland, chairman of the Judiciary Committee was heard giving to a Senate colleague: "You're not going to vote for that Jew to be Chief Justice, are you?" (p. 236)<sup>4</sup> Eventually, LBJ withdrew the nomination. Subsequently, in the face of damaging allegations that were revealed in the press, Fortas resigned from the Supreme Court on May 14, 1969 to avoid impeachment. With his resignation, the tradition of a Jewish Supreme Court seat abruptly ended and it would be 24 years until another Jewish lawyer Ruth Bader Ginsburg was appointed.

Fortas continued practicing law until his death in 1982, and his Kennedy Center memorial service was completely devoid of Jewish religious content, without any Rabbi officiating.

### Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan

The last chapter of the book, consisting of 40 pages, is dedicated to short biographies of the three Jewish Justices presently sitting on the Supreme Court bench. President Clinton was the first president to appoint two Jews to the

Supreme Court: Ruth Bader Ginsburg in 1993, and Stephen E. Breyer in 1994.

As a teenager, Ginsburg was a "camp rabbi" in the Adirondacks, and celebrated her confirmation at Brooklyn's Conservative East Midwood Jewish Center. When her mother died, she shied away from Jewish religious practice. Nevertheless, in 1954, she married Martin Ginsburg, and Rabbi Robert Gordis, a distinguished Conservative Rabbi, officiated at the wedding.

When Ginsburg took the oath of office as the 107<sup>th</sup> Justice, she not only ended the 24 year gap of Jewish Justices sitting on the Supreme Court bench, she also became the first Jewish woman ever to serve on the bench. Although not a member of any synagogue, she has more recently been attending High Holy Day services at Adas Israel, Washington's largest Conservative synagogue.

Breyer was raised in a Reform Jewish home. He attended Sunday school and celebrated his bar mitzvah at San Francisco's Temple Emanu-El, one of California's largest Reform congregations. In 1967, he married Joanna Hare, the daughter of a British aristocrat, in an Anglican Protestant ceremony, and one of their daughters presently serves as an Episcopal priest.

Notwithstanding his non affiliation with any synagogue, Breyer desists from work on Yom Kippur. Proud to be an Israel supporter, he published an essay, "Zion's Justice,"<sup>5</sup> in *The New Republic* in 1998, and to this day he remains deeply devoted to the modern Zionist ideal, as a universal aspiration toward "democracy and social justice."

Kagan and her family attended the Lincoln Square Synagogue, a modern Orthodox congregation on the Upper West Side of Manhattan, where she obtained a serious Jewish religious education and celebrated her bat mitzva.

In 2003, she was named Harvard Law School's third Jewish dean, and, in effect, became the first female dean in the school's history. Kagan supported Obama for president in 2008, and in 2009 she was nominated to the solicitor generalship. When she was confirmed by the Senate, Kagan became the first female, and the third Jewish, solicitor general in U.S. history.

In 2010, Obama nominated Kagan to the Supreme Court and on August 5, she was confirmed as the 112<sup>th</sup> Supreme Court Justice and the eighth Jewish Justice in American

4. Bruce Allen Murphy, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (N.Y., Morrow, 1987).

5. Stephen G. Breyer, *ZION'S JUSTICE* (New Republic, 1998).

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history. She is also the fourth woman, and the second Jewish woman, to serve on the court.

Nowadays, she considers herself a Conservative Jew, and like Ginsburg, has attended High Holy Day services at Adas Israel synagogue in recent years.

The author ends the book by noting that the once-traditional Jewish seat no longer exists. Yet, three Jews are now serving simultaneously, and “it would seem unimaginable to many .... that there could be a Supreme Court without a Jewish justice.”

Thus, this book encapsulates the Jewishness of eight Supreme Court justices in a thorough and compelling manner.

In closing, and as a personal aside, I encountered a few, although not many challenges as a yarmulke-wearing

New York State Supreme Court Justice. One such instance worth noting was when I was being reviewed in the year 2000, before a 30-member committee of the New York City Bar Association, for the position of Acting Supreme Court Justice. The Jewish chairman of the committee, in my absence, voiced his concern that my wearing a yarmulke would possibly be an impediment. I was told that an Italian member of the committee, Guy Vitacco, a past president of the Queens County Bar Association, admonished the chairman, and proclaimed: “It is not what is on your head that counts, but what is in your head!”

*Honorable **Martin E. Ritholtz** is a retired Justice of the Supreme Court of the State of New York. He presently serves as Special Counsel to Shibolet, LLP.*

*Rooted Cosmopolitans. Jews and Human Rights in the Twentieth Century*

By James Loeffler

New Haven, Yale UP, 2018, 362 pp.

Reviewed by Noemi Gal-Or

In recent years, the body of literature around international human rights law has blossomed, with books offering readers a wide range of perspectives from charting its history, examining the challenges, reconsidering the origins to exploring the current circumstances. *Rooted Cosmopolitans* is a fascinating addition. In what way, however, does this book distinguish itself in this “crowd”?

The subject is too layered and its narratives so interwoven, that to treat it in but a cursory way would not do it justice. This, notwithstanding, I will attempt to broadly outline the main topics discussed before suggesting what I consider the take-away “added value” of this book.

The book offers an analysis of the path of 20<sup>th</sup> century’s Jewish contribution to the modern law of human rights through both micro and macro historical lenses, from the specific to the large-scale historical perspective. Weaving my way through the various engaging discussions provided in the book, I noted the intricate, often conflicting, even contradictory transmutations of the concept of human rights as it has been molded by many individuals, groups and institutions over time. Writing in the 21<sup>st</sup> century, the author alerts us to the fact that as the 20<sup>th</sup> century was nearing its end, “[w]e [were] left with a human rights universalism that pretends to come from *nowhere*...” (p. 299, emphasis added).

*Rooted Cosmopolitans* can also be read as a geo-political narrative. The origins and the development through the decades of international human rights law are explored and it is done through the optics, and the very life experiences, of the central Jewish norm entrepreneurs and activist protagonists of the 20<sup>th</sup> century. Far from international human rights law thus coming “from nowhere,” the reader learns that, in fact, it is imbedded in Jewish tradition and religion and is kindled by the persecution of Eastern European Jews during the 19<sup>th</sup> century. Reading Part One: “Emergence,” gave me pause to wonder whether the bulk of the contributors – indeed not all – to international human rights law, consists of a surprising number of Jewish lawyers.

The emergence and development of international human rights law is indivisible from the phenomenon of antisemitism and the perpetual plight inflicted upon the Jewish people, Loeffler points out agreeing with other historians. The plight relates both to the territory where the Jewish people were residing, as well as to the changing mood of the respective political regimes. To illustrate the point, a macabre joke is said to have circulated in Geneva after World War I, when discussions around international human rights law began: “[t]he Jews may have invented minority rights [...] but it was the Germans who used them” (p. 34). The seed of international human rights law germinated in the concern for minority rights and rapidly branched into two main domains ensuing in what would become a perpetual and inherent dilemma. On the one hand, minority rights have been conceived to be applicable to any and all minorities in their country of abode; on the other hand, minority rights were also seen as reflecting a spiritual connection shared with members of the minority wherever they may reside. The latter has been essential to the Jewish community and, at the time, signified a sense of Zionist internationalism.

The inter-war years saw the collective endeavor of European minorities (spearheaded by Jewish lawyers) result in the codification of an international law that upholds and protects minority rights. As lip-service was paid by state governments to this law, compliance with it, as history teaches, has mostly strayed. In light of this, disappointed human rights advocates realised that in order to succeed in their endeavor, the backing of state power would be indispensable. With this in mind, Loeffler closely examines throughout the book the machinations of state politics – both internal and foreign – studying governments and stakeholders as they switch between abiding by (and even the encouragement to further develop) international human rights law, and resistance to (or support of only some aspects of) international human rights law.

The book covers how Jewish individuals contributed to the design of international human rights law and

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explores how Jewish politics dealt with balancing the relationship between individual and group rights. This dichotomy of universalism versus particularism reflects the two different experiences of antisemitism the American Jewish community encountered versus its British counterpart. In addition, the book reveals how the Jewish legal activist community was split internally over the relationship between politics and law. The essential dilemma faced was (and remains) strategic: Are law and politics separable so that the international human rights agenda can be pursued independently from any political agenda and power politics? Alternatively, is diplomacy the inevitable ally? Together, these issues permeate and accompany the Zionist idea as imagined and realized by Jews in both the Old (European) and New (American) Worlds.

The term “human rights” was introduced – albeit merely incidentally – into diplomatic language thanks to the January 1942 joint American-British-Soviet Declaration of the United Nations. Thereafter, international human rights law continued to be developed in relation to the drafting of the 1945 International Bill of the Rights of Man. Furthermore, various conventions addressing specific issues which pressed for the recognition of international human rights (such as the 1948 Genocide and 1951 Refugee Conventions and the 1948 UN Universal Declaration of Human Rights) have served as cardinal stepping stones in the further pursuit of rooting human rights in law; tackling more areas of protection and doing so exhaustively i.e., exploring each aspect of each area.

While the Holocaust (and antisemitism in particular) were key driving forces to the introduction of the international human rights discourse, other interested parties jumped on the human rights bandwagon and in this hustle, antisemitism was gradually and consistently passed over. It is important to note that even though international human rights law was increasingly becoming recognised as important, “practical” steps in ensuring that international human rights were upheld did not exist in the early 1950s. For example, while the idea of an international criminal court was raised (for the second time), no actual steps were taken in the 1950s to establish a court. Moreover, in the early 1950s, as the Cold War was heating up, America withdrew temporarily from the international human rights enterprise. Was this an instance of defiance of what has nowadays come to be known as a TWAIL [Third World Approach to International Law] claim for a multicultural human rights regime? Certainly, appreciations of, and willingness to, engage with this subject, as chapter 9 suggests, were diverging according

to geo-politics and ideology – West European, American, and Soviet. One wonders whether these have been carried over into the 21<sup>st</sup> century. Did this represent an early Trumpist moment? Xi moment? What will the 21<sup>st</sup> century world (dis)order’s human rights legal terminology look like? Will it add to, or make obsolete, the achievements of 20th century human rights law?

Throughout the 1960s, set in the midst of a bi-polar rivalry, the very concept of human rights that helped advance the claim of national liberation and self-determination, was steered away from its originating track. This stage of the development of international human rights law saw many of the newly independent states, along with their Communist patrons and the Arab Bloc, transform (rather than cultivate) the early ideas of minority and individual rights. The author claims that former colonies, now empowered by their newfound state prerogative, have turned sovereignty into a double-edged sword, all under the guise of advancing international human rights law. Thus, “rights” were transformed from rights protecting from the state to the right of the state to effectively be immune from international human rights law. More recently, evidence that international human rights law has been ambushed to serve extraneous interests has transpired through the so-called lawfare strategy. In a regrettable travesty of justice, suggests Loeffler, as human rights evolved from minority rights to self-determination and then to individual and group rights, antisemitism (which, through this process, has been warded off from the human rights advocates’ ambit) now resurfaced but disguised as legitimate anti-Zionism. Loeffler wonders: “In a world full of unabashed autocrats and genocidal regimes, what explains the human rights community’s unswerving focus on the State of Israel?” (p. 262) For Jews, has international human rights law always been (partly) a chimera?

As Loeffler illustrates, the trajectory of the international human rights endeavor is interspersed with seminal instances and events consisting of legislative and drafting networking, conferences, and judicial highlights, such as the Nuremberg and Eichmann trials (two very distinct experiences). Moreover, genocide and crimes against humanity (coined by the Jewish jurists Lemkin and Lauterpacht, respectively) eventually formed the bedrock of the 1998 International Criminal Court. The establishment of the State of Israel, and later, the Six Day War, played another crucial role in the reshaping of the Jewish human rights engine. Although the State of Israel represents a minority’s rights and dreams come true (the Jewish dream of national self-determination in their aboriginal land),

the interconnection of Zionism and international human rights law has proven challenging to some of Israel's supporters. The latter nevertheless played an indispensable role in the continued shaping of the concept of human rights as well as holding states accountable for human rights violations. Among these supporters were NGOs and other stakeholders. Noteworthy examples mentioned in the book are Amnesty International, which was founded by a British Jewish youth activist and evolved into the leading NGO commanding the most distinct global non-legal activist human rights movement, as well as The World Jewish Congress, which was the first NGO to obtain an official UN-affiliated status.

To be sure, *Rooted Cosmopolitans* is first and foremost a favorable tale of the Jewish founders of international human rights, their personal histories, their characters, fallibilities, their political allegiances, Zionist attachments, efforts, successes and failures. Many of them – mostly men but also a number of women – have been recognized and revered for their accomplishments. They include, to name a few, Hersch Zvi Lauterpacht, Jacob Blaustein, Rabbi Maurice Perlzweig, Jacob Robinson, Peter Benenson and his mother Flora Solomon, Raphael Lemkin, and Bella Ravdin. Others, such as René Cassin, are noted in the book as controversial, while some have faded into oblivion (their names less known and not widely commemorated).

This book offers a wealth of information and a colorful spectrum of the sources and trajectory of international human rights law. Loeffler's proposition that to "[write] Jews back into the history of human rights fulfills a Jewish imperative to look backward into the past in order to rethink the future" (p. 299), certainly strikes a chord. The formative role played by the uprooted "wandering Jew" who, in the 20th century, tirelessly pursued both particular and universal human rights, emerges succinctly and indeed movingly; coining these formidable activists as the most "cosmopolitanly" rooted among human kind is a

compelling statement indeed.

Similar to human rights' serpentine 20<sup>th</sup> century path, often seized by a self-propelling dynamic – at times no longer safely monitored by its founders' nor its stakeholders' – so today, the furtherance of the legal and normative concept of international human rights is again approaching a critical junction. Writing this book review in Canada, it is impossible to ignore the long road navigated by this country since its early days as a member of the United Nations. As Loeffler indicates, back then, an extraordinary contribution was made by McGill University professor, John Humphrey, who in 1946 became director of the United Nations Division on Human Rights. Lately, however, the legal conversation on international human rights has become muddled. This is largely due to a liberal interpretation of the term genocide bypassing the precision so imperative to the effectiveness of the human rights legal regime.

To answer the question posed at the beginning of this review: my "take away" is that globally, modern human rights issues recently generated and challenged by a freewheeling cyber technological industry and careless consumerism, are today begging for a fresh and imaginative approach.

In conclusion, *Rooted Cosmopolitans* is an enticing book, rich in information and will surely inspire the readers to reflect further.<sup>1</sup>

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1. Three paragraphs in the book would have benefitted from additional elaboration, and there are two or three typographical errors.

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***Underground Warfare***  
*Daphné Richemond-Barak*  
*Oxford University Press, 2018, 270 pp.*

**Reviewed by Malcolm N. Shaw**

**U**nderground Warfare is a thoughtful and innovative book by a rising star. Although we may think of underground warfare as a relatively modern phenomenon, thrust onto today's headlines by the tunnels dug into Israel by the Hamas forces of Gaza, in fact, as the author clearly shows in chapter 1, there is a long history of recourse to such unlikely weapons of war. Modern examples also include tunnels under the U.S.-Mexico border for drugs and migration purposes and the conflicts in Syria and Iraq.

Relying upon their opponents' focus upon technological means of intelligence, surveillance and reconnaissance, those constructing the tunnels have sought to by-pass such modern techniques by burrowing under the earth and launching surprise attacks from below. Modern warfare has developed rapidly with regard to the ground, air and sea environment, but the underground domain has remained relatively neglected. Surprise generated by underground means of combat has plagued not just Israelis, but also Americans and others in Afghanistan and Mali and elsewhere, as ably demonstrated by the author. Not only has military theory and practice not dealt with the matter, political responses have lagged, and so has, less surprisingly, the generation of rules in international law to deal with this phenomenon. Law follows fact and this is no exception. Once the practice has emerged and the necessity to deal with it become apparent, the formulation of international law materializes, but slowly.

Richemond-Barak formulates the framework to be followed. She ably sketches the history of the phenomenon of underground warfare. She explains carefully how various states have responded in practice to the threat of underground attack. The U.S. used tear gas in Vietnam, while the USSR used chemical agents and explosives in Afghanistan. The question that the author tackles, however, is how international law has and should respond. Are the existing rules sufficient by way of analogy or otherwise, or are new rules required? This is the essential question posed.

The author takes the view that underground warfare is here to stay and will indeed intensify and diversify. It constitutes an attractive option for non-state actors, in particular, who are engaged in violent pursuits. It reflects the asymmetrical model that is much discussed these days and grants the weaker side a powerful weapon in confrontation.

Having observed this, the question is how should the law respond? After a brief survey of domestic law responses to the question of sovereignty over the underground, Richemond-Barak turns to international law and takes the view that sovereignty over the underground belongs to the terrestrial sovereign, leaving aside, of course, questions relating to private rights, which is another dimension, although useful by way of analogy. The international legal position asserted flows from, for example, a composite of the principle of sovereignty over natural resources, the rules relating to the sea, the law relating to the environment and in particular state responsibility for transboundary pollution, the emerging law relating to aquifers and air law. The point is conceded that although the law is by way of analogy moving towards a clearly recognised sovereignty over the underground, this is not necessarily exclusive or absolute. However, I think that the sovereignty of the state over its underground territory is accepted without serious contention.

Richemond-Barak proceeds to lay down a structural legal framework for dealing with underground threats. Chapter 4 sketches out the skeleton of applicable law, including human rights law, international humanitarian law and general rules of armed conflict before veering off to discuss the strategy of underground warfare. She discusses extensively many of the techniques that are available to detect tunnels crossing the border and ways in which such tunnels may be destroyed. After this digression, useful as it is, we return to the law. Chapter 5 discusses underground warfare and the *jus ad bellum*, which determines the competence to resort to force. This discussion is particularly interesting and raises specific

problems where the entity responsible is a non-state actor. Yoram Dinstein's invocation of "interceptive" self-defence is noted with approval. Richemond-Barak rather controversially declares that the "discovery of several cross-border tunnels would amount to an armed attack" (p. 128), but leaving this point aside, there is no doubt that in certain circumstances the existence and use of such tunnels, coupled with expressions of intent and clear activity, could well amount to a threat of an armed attack which may slide into an armed attack, depending upon the circumstances. The key question of proportionality is tackled carefully and intelligently. In my view, this chapter is particularly resonant and is likely to be widely cited.

Richemond-Barak then turns to the *jus in bello*, or the law governing the actual conduct of hostilities. The difficulties are well laid out. For example, does the underground embody a new domain of war? Are tunnels weapons? Do they constitute military objectives? She points out that the status of tunnels is unclear (p. 163). The focus is, correctly, upon applying the law, not on reinventing it. A clear discussion of the legality and status of tunnels under international humanitarian law (the law of armed conflict or, in the past, the law of war) then transpires. The key principles are laid out: the principle of distinction (i.e., distinguishing between civilians and combatants), the principle of proportionality (i.e., the attack must not cause harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated from it), the need to avoid or minimize harm to civilians and the prohibition of means or methods of warfare that cause superfluous injury or unnecessary suffering. In addition, Richemond-Barak points to the duty of the parties to a conflict to preserve the environment. These principles are then meticulously examined one by one and some surprise is expressed at the failure of international humanitarian law to tackle tunnels *per se* (p. 206). This book will do much to address

this problem.

Of major concern is the topic covered in chapter 7, which is underground warfare in urban areas. We are now familiar with the tactic by nonstate actors (and perhaps not only by them) to locate military facilities, weapons and personnel in crowded urban areas in an attempt to either preclude attacks upon such civilian-inhabited spaces or cynically to use such attacks as do occur with their inevitable civilian casualties for the purposes of garnering international support. While this book focuses naturally upon underground situations, the problem is wider. The difficulties and the challenges posed are well explained.

In conclusion, Richemond-Barak agrees with the assessment of Benny Gantz, a former IDF Chief of Staff, that tunnels pose a strategic, but not an existential, threat to Israel. This is surely right. Despite the actual or potential damage to military and civilian personnel in the border areas and despite the acute psychological harm and apprehension caused, such facilities cannot destroy the state, so that care must be taken in evaluating the phenomenon. Nevertheless, tunnel warfare constitutes a significant challenge to Israel and to other states. History teaches us that challenges of such nature to Israel are invariably replicated with regard to other countries. In dealing with this particular challenge, a range of tools is required, ranging from advanced technology, intelligence, human resources and courage and (let it not be forgotten) the law. It is international law which, however weak and flawed it may be, constitutes the bond that draws states together and enables them to communicate in a common language and to seek solutions together.

In this enterprise, Richemond-Barak's pioneering book constitutes the light which illuminates the way in which the international community needs to respond to the modern phenomenon of the aggressive tunnel.

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# IN MEMORIAM

*Prof. Natan Lerner 1925 – 2017\**

**Alona Hagay-Frey**

*The mediocre teacher tells.*

*The good teacher explains.*

*The superior teacher demonstrates.*

*The great teacher inspires.*

William Arthur Ward

Prof. Natan Lerner was a beloved and admired lecturer, globally respected researcher, incisive journalist, inspiring activist, good friend to so many people in so many places worldwide, loving family man and a generous gentleman with a good sense of humor. He was an international expert on matters of state and religion, minorities, and racism. Every piece in the mosaic of his life reveals his close ties with these subjects – on which he wrote books as well as numerous articles in Spanish, English and Hebrew.<sup>1</sup>

Natan Lerner was born in Krzemieniec, Poland in 1925. In 1939, as part of the Molotov–Ribbentrop Pact, Krzemieniec was ceded to the USSR to which it belonged until the fall of the USSR in 1991, when the town became part of Ukraine.

Back in 1930, Prof. Lerner and his parents emigrated to Argentina. There, he attended an Argentinean state school (where he learned French, English and Italian) and a Jewish school (where he learned Yiddish and became imbued with Zionism). The Jewish school had a respectable library which held Yiddish books confiscated by the police who were unaware of the books' anarchistic content. Because of his knowledge of Yiddish and his affinity to the written word, the young Lerner was appointed librarian. This was his first exposure to anarchist literature. For his Bar Mitzvah, Lerner's parents presented



him with a used Remington typewriter and a typing course – a gift that was to open doors for him in the years to come and tie his fate to the written word.

Lerner was engaged, inter alia, as the personal secretary of Adv. Leon Dujovne, the Argentine writer, philosopher, essayist and journalist who also translated scholarly works. While Lerner had started out as Dujovne's secretary, he would succeed him many years later as editor of the most important Yiddish newspaper published in Buenos Aires. Lerner's proficiency and experience furthermore led the Argentinean Zionist Federation to appoint him as editor of their weekly Spanish publication. This journalistic activity deepened his identification and activities with the General Zionists.

During World War II Argentina "sat on the fence," divided between left and right, and remained neutral. In 1943, the military staged a successful coup d'état. That

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\* This text is based on: Alona Hagay-Frey, *The Mosaic of Prof. Natan Lerner's Life*, 24 LAW & BUSINESS (a volume dedicated to the memory of Prof. Natan Lerner, forthcoming, Hebrew, 2019).

same year, Lerner was sent to detention for having been found to participate at a rally in solidarity with the Allies. The topics of research which Lerner later chose to explore, suggested that he had gained deep insights while spending long hours in detention.

In 1944, Lerner, who always felt himself to be a “bit of a jurist,” enrolled in the Bachelor's program at the Buenos Aires University Faculty of Law. During this period, Lerner was again arrested, this time by the Secret Police. No one knew why he was arrested, apparently not even the police. He was detained for so long that his friends started to refer to him as “Ex Lerner.” Nobody believed that he would return but thanks to the efforts of his father, he was finally released.

Prof. Carlos Fayt, who specialized in “Political Law,”<sup>2</sup> made perhaps the most lasting impression on Lerner during his university years. While Fayt's lectures, according to Lerner, were riveting, his political engagement was no less admirable thus showing Lerner an example of how one can successfully combine an academic life with practical engagement in politics. While Lerner completed his university studies, he was also a teaching assistant for Isidoro Ruiz Moreno, the international jurist – yet another appointment.

Alongside his academic pursuits, the young Lerner was an activist who devoted much time to Jewish projects. He lived and breathed the problems of the Jews of Argentina as well as those of the young state of Israel. He worked in the secretariat of the Zionist Youth Confederation as well as in the administration of DAIA - Delegacion de Asociaciones Israelitas Argentinas – the political organization representing the Jewish community in Argentina where he was elected vice president and occasionally served as acting president.

In 1950, Lerner was admitted to the Bar and continued to work with Adv. Leon Dujovne, but now as a lawyer. Subsequently, Lerner was accepted as a Ph.D. candidate in Law and Social Science. Supervised by Carlos Fayt, he completed his thesis on “Minorities” – a subject close to his heart and a subject hitherto almost entirely neglected in Argentina.

In 1959, the year in which he completed his Ph.D. studies, Lerner attended the World Jewish Congress Assembly in Stockholm (as part of the Argentinian delegation). There, he met and formed strong bonds with the organization's leadership.<sup>3</sup>

In the early 1960s, Lerner and his family emigrated to New York where he worked in the Latin America bureau of the World Jewish Congress. He felt that his time in New York was stimulating and it indeed turned out to

be the start of his very productive career with the publication of his first book in English on “incitement of group hatred.”<sup>4</sup> Three years later, the Lerner family made aliya to Israel.

In Israel, Lerner first worked as the Director of the Israeli Branch of the World Jewish Congress and eventually, in 1970, began teaching courses in international law, human rights, and Latin American studies at University of Haifa, Tel Aviv University, and The Hebrew University of Jerusalem. From 1989, he dedicated himself solely to academic life.

After having reached retirement age, he was offered a position on the founding staff of the IDC in Herzliya. There, for many years, he taught international law and led seminars on subjects close to his heart: racial discrimination, state and religion, etc.

On his old typewriter and, later, on his more advanced computer, Prof. Lerner authored several books and numerous articles. His writings were published by leading publishers and in journals in Argentina, Spain, the United States, Israel and other countries. All of his writings – be they in Spanish, English or Hebrew – touch upon his personal life experiences as a member of a minority group struggling for its rights, freedom of expression, and equality.

He wrote in his capacity as a publicist, journalist, jurist, and activist. Various stages of his life influenced his writings: the period of being an immigrant member of a persecuted minority and later, when he held positions at the World Jewish Congress in New York, then moving to the years when he was a compatriot member of a majority group that relies on the tools provided by international law in order to protect minorities.

His first book “On the Defense of Human Rights” was written in Spanish and published in Argentina in 1958.<sup>5</sup>

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1. I would like to use this article to express my appreciation of Prof. Lerner for the many years during which I was favored with comprehensive knowledge, inspiration, encouragement, and a belief in my abilities. For all this and more, I will be forever grateful.
  2. In 1983, Prof. Fayt was appointed to the Supreme Court of Argentina. He died in 2016.
  3. Natan Lerner, *Minoras*, en ENCICLOPEDIA JURIDICA OMEBA, tomo XIX, Buenos Aires, Driskill 780-818, 1991.
  4. Natan Lerner, *RELIGION, BELIEFS AND INTERNATIONAL HUMAN RIGHTS* (New York, 2000); Natan Lerner, *RELIGION, BELIEFS AND HUMAN RIGHTS* (Leiden, 2006).

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His first English language book dealing with incitement to group hatred, published in 1965, was based on material to which he was exposed during his work at the World Jewish Congress offices in New York.<sup>6</sup>

In 1980, he wrote his well-known book *The UN Convention on the Elimination of all Forms of Racial Discrimination*.<sup>7</sup> In 2003, he authored a further book on the rights of minority groups, discrimination, and International Law.<sup>8</sup> His clear and important insights helped these books become an international success. Some years later Prof. Lerner was asked to update and republish two of his books (in 2012 and 2015 respectively – see footnotes 7 and 8) and these were translated into Spanish and Japanese. Subsequently, Prof. Lerner published two books dealing with religion, belief, and human rights.<sup>9</sup>

His rich academic work did not hamper his political activity. Thanks to his engaging personality, his internationally acclaimed research papers, and his striving towards working to create a better world, he met many people with whom he worked to achieve change in the public arena. He connected, for example, with the Burakumin people<sup>10</sup> in Japan. Numbering some three million people, this group has throughout history suffered discrimination and ostracism, and finds itself at the bottom of the Japanese social order. The Burakumin were extremely interested in Prof. Lerner's book dealing with the UN Convention on Racial Discrimination, and after the book was translated into Japanese, Prof. Lerner was invited to visit Japan. The Burakumin used the book to shed light on their plight.

In the ensuing years and with the Burakumin's situation improving, they never lost touch with Prof. Lerner. In 2006, a second book by Prof. Lerner, *Religion, Secular Beliefs and Human Rights*, was translated into Japanese. Just as before, after the book appeared in Japanese, Prof. Lerner was invited to Japan where he spoke on the book's major themes.

Prof. Lerner also played a central role in strengthening Israeli-Spanish relations and furthered the interfaith dialogue with the Catholic Church. Prof. Lerner's activity in this area led to a committee headed by Itzhak Navon, the former president of the State of Israel, deciding to award Prof. Lerner the Samuel Toledano Prize. Among the reasons stated for awarding Prof. Lerner this prize was "his significant contribution in strengthening the ties with Spain and in particular the interfaith ties between Christians and Jews in the two countries."

His prolific and cogent writing, and expertise in racial discrimination and its elimination, led to him gaining international recognition. Thus, he was invited in 1979

to write a report on the cooperation between the UN and UNESCO (United Nations Educational Scientific and Cultural Organization) relating to the elimination of racial discrimination. Moreover, in 2008, the UN Office of the High Commissioner for Human Rights appointed Prof. Lerner as UN expert on freedom of expression and incitement. Prof. Lerner was also invited to a seminar that discussed the connection between Articles 19 and 20 of the International Covenant on Civil and Political Rights. On the basis of a document he authored,<sup>11</sup> two further sessions relating to the connection between the two articles were held: one in Amman (in Jordan) and the other in Beirut (in Lebanon). Paradoxically, he was not invited to

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5. Natan Lerner, EN DEFENSA DE LOS DERECHOS HUMANOS, UN APOORTE A LA LUCHA POR LA IGUALDAD DEL NEGRO (Delegacion de Asociaciones Israelitas Argentinas, 1958). Six additional books were published in Spanish: Natan Lerner, MINORAS Y GRUPOS EN EL DERECHO INTERNACIONAL. DERECHOS Y DISCRIMINACION, MEXICO, COMISION NACIONAL DE DERECHOS HUMANOS (1991); Natan Lerner, DE LO PARROQUIAL Y LO UNIVERSAL (Aurora, 2010); Natan Lerner, DISCRIMINACION RACIAL Y RELIGIOSA EN EL DERECHO INTERNACIONAL (2002); Natan Lerner, ISRAEL Y LA CONDICION JUDIA: EL DERECHO A SER DIFERENTE (1987); Natan Lerner, JUDIOS Y NO JUDIOS, ANTE LA LEY ISRAELI (1978); Natan Lerner, EN DEFENSA DE LOS DERECHOS HUMANOS (1958); Natan Lerner, ESQUEMA DEL DERECHO ISRAELI (1963).
  6. Natan Lerner, THE CRIME OF INCITEMENT TO GROUP HATRED (New York, 1965).
  7. Natan Lerner, UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (Alphen an den Rijn, 1980). In 2015, a revised updated edition was published: Natan Lerner, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2015).
  8. Natan Lerner, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (The Hague, 2003). This book was updated and reprinted in 2012: Natan Lerner, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (2nd ed. 2012).
  9. RELIGION, BELIEFS AND INTERNATIONAL HUMAN RIGHTS, *supra* note 4.
  10. "Hamlet people" / "village people," "those who live in hamlets / villages."
  11. Natan Lerner, *Freedom of Expression and Advocacy of Group Hatred Incitement to Hate Crimes and Religious Hatred*, CONFERENCE ROOM PAPER # 12 (2008) available at [www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/docs/experts\\_papers/Lerner.doc](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts_papers/Lerner.doc).

either session. There, the document received official recognition and Prof. Lerner was invited to sign it.<sup>12</sup>

Also in 2008, Prof. Lerner was invited to lecture at the University of Buenos Aires in their Faculty of Law on the subject of “minorities,” – the same subject he had researched at that same university five decades earlier.

It is impossible to summarize in this short review the monumental achievements of a great man who encompassed so many personal, political and academic qualities and assumed so many roles. He was my personal teacher, a universal educator, writer, journalist, academic, activist, a person of politics, a jurist and a lawyer. To this day and likely into the future, Prof. Lerner’s writings influence people and international organizations around the world. His eagerness to remain up-to-date with current affairs and his willingness to expound his doctrine on the importance of maintenance and enforcement of international law, the importance of tolerance, equality and acceptance of others, made him an inspiring man who influenced many people’s lives in many languages. I was privileged to be one of them.

In my interview with him in preparing to write his life history, I asked: “if you had to define yourself in light of your history and your academic and political achievements, how would you sum up and define yourself?” “Me,” Prof. Lerner replied with his typical humility, “I am an old Jew.”

*Alona Hagay-Frey is a doctoral student at the Bar Ilan University Faculty of Law. She was one of Prof. Lerner’s many students, served as his teaching assistant, and a friend.*

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12. UN General Assembly Human Rights Council, Tenth session Agenda item 2, A/HRC/10/31/Add3, Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights (Jan. 16, 2009), available at [https://www2.ohchr.org/English/Issues/Opinion/Articles1920\\_Iccpr/Docs/A-HRC-10-31-Add3.Pdf](https://www2.ohchr.org/English/Issues/Opinion/Articles1920_Iccpr/Docs/A-HRC-10-31-Add3.Pdf).

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# Natan Lerner - An Appreciation

Alan Stephens

For several years, starting in the mid-1980s, I had the honor and the great pleasure of working with Natan Lerner when I headed the international law and human rights divisions of the Netherlands-based international academic publishing companies. Many of Natan's books mentioned in Alona Hagay-Frey's charming and heartfelt tribute to his memory were published by these companies and remain in print to this day – often in new and revised editions as the result of demand by academics, diplomats, librarians and others.

The celebrated sixteenth-century French essayist, Michel de Montaigne, when introducing an anthology that he had compiled, once wrote: *J'ai seulement fait ici un amas de fleurs étrangères, n'y ayant fourni du mien que le filet à les lier* (I have gathered a bouquet of other men's flowers, and only the thread that binds them is my own). The work of a publisher has much in common with that of an anthologist, and I know with certainty that my erstwhile colleagues agreed with me that in our bouquet of writers, Natan was among the most cherished.

We admired him for his erudition and breadth of knowledge, for his enormous energy, for his commitment to Human Rights, in particular the rights of minorities, as well as for his writing skills. We loved him for his courtesy, his friendliness and his great conversation.

My first meeting with Natan, which took place in the lobby of a Jerusalem hotel, lasted for hours as I gained insights into the many phases of his life and career and as we swapped stories about events and people in our common fields of interest. He was wonderful company. We stayed in touch over the years and, after my retirement and *aliya*, we continued to meet from time to time in Jerusalem and at the IDC in Herzliya. These meetings were quite often initiated by Natan to introduce me to a student or colleague whom he rated highly and whom he thought I would enjoy meeting. As a result of a number of these encounters, I was able to help young researchers to get their work published. This was never done as a favor to Natan, but because he had identified individuals of high quality who had produced excellent materials. (Among these individuals was the above mentioned Alona Hagay-Frey.) Natan's generosity towards his students and colleagues was among his most endearing characteristics.

It was a privilege to know him and a delight to work with him. ת.ג.צ.ב.ה.

*Alan Stephens is former Publishing Director of Martinus Nijhoff/Kluwer Academic Publishers. He is Advisory Editor of Justice, Publishing Consultant to the Tom Lantos Institute, Budapest and Counsellor to The Hague Initiative for International Cooperation.*

# DOJ Summit on Anti-Semitism

July 15, 2019 ~ Washington, DC.

Remarks by Alyza D. Lewin

*The following remarks were delivered by Alyza D. Lewin, President of the Louis D. Brandeis Center for Human Rights Under Law, at the United States Department of Justice Summit on Anti-Semitism held in Washington, D.C. on July 15, 2019.*

Thank you very much for inviting me to participate in this Summit. It is truly an honor to be included.

Most people today are able to recognize “traditional” or “classical” anti-Semitism – the anti-Semitism we associate with a swastika or the Nazis. It is more difficult, however, for many to identify the anti-Semitism that Jonathan Tobin just described – the anti-Semitism that targets Zionism and denies the right of Jewish self-determination. I’d like to focus a bit more on that form of anti-Semitism. It is not uncommon to hear people say, “I’m not anti-Jewish, I’m only anti-Zionist.” Is that really possible? Is it possible to support Jews but oppose Zionists?

The answer is no. Why? Because Zionism is an integral part of Jewish identity.

Zionism – the yearning and desire of Jews to exercise their right to self-determination and to re-establish a Jewish homeland in the Land of Israel – is an inherent ancestral and ethnic Jewish characteristic. Zionism as a *political* movement may have originated in the 19<sup>th</sup> century. But this “yearning for Zion” – the desire of Jews to return to their ancestral homeland – that is thousands of years old – as old as Abraham and the Bible.

To be a Zionist means to support this right of Jewish self-determination in the ancestral homeland of the Jews. If I celebrate the fact that Jews have returned once again to the Land of Israel, if I celebrate that the Jewish state of Israel exists – then I am a Zionist. Those who oppose Zionism deny Jews this right. Judea Pearl, the father of the late journalist Daniel Pearl, coined a term for this. He calls it “Zionophobia” – an irrational fear or hatred of a homeland for the Jewish people.

The International Holocaust Remembrance Alliance (IHRA) Definition of anti-Semitism includes as an example of anti-Semitism “Denying the Jewish people their right to self-determination, e.g. by claiming that the existence of a State of Israel is a racist endeavor.” The IHRA

definition recognizes that “Zionophobia” – denying this fundamental core Jewish belief – is de facto anti-Semitism.

My maternal grandmother was a sixth generation Jerusalemite. Her ancestors came to live in Jerusalem in the early 1800s – not because there was a modern State of Israel but out of a deep sense that as Jews this was their home.

This “yearning for Zion” is the glue that kept Jews together for millennia. For centuries, Jews have not only prayed facing Jerusalem, but they have prayed to return to Jerusalem. “L’Shana Haba’ah Bi’Yerushalayim” “Next Year in Jerusalem” is heard each year at the Passover Seder and again at the conclusion of Yom Kippur, the Day of Atonement. Do you know that over half of the 613 commandments in the Pentateuch are connected to the Land of Israel and can only be fulfilled in the Land of Israel? The Jews’ connection to the land is so strong that for thousands of years, wherever Jews have lived, they have prayed for rain – not for where they reside but for rain in the Land of Israel.

But Zionism – this essential component of Jewish identity – is now under attack. Those who deny Jews the right to self-determination, and who say Jews do not have a right to a Jewish state in any borders in the Land of Israel, their criticism of Israel is anti-Semitic even if it is cloaked in human rights terminology. Because if you do not believe the Jewish state of Israel has a right to exist, then your criticism of Israel is not intended to reform the policies of the Government of Israel. Rather, it is intended to destroy the Jewish State.

To accurately identify anti-Semitism masquerading as anti-Zionism, we must learn to distinguish between the “Zionophobes” – those who oppose a homeland for the Jewish people and seek to destroy the Jewish State – (on the one hand) and those who genuinely seek coexistence between Jew and Arab (on the other). Groups like Students for Justice in Palestine and Jewish Voice for Peace, who believe the Jews have no right to self-determination, no right to a Jewish state, are not interested in dialogue or compromise. Their goal is elimination.

Make no mistake about it. What is happening today on campuses and beyond is part of an organized well-funded strategy to marginalize pro-Israel Zionists and deny them

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a place in society.

When Students for Justice in Palestine, an organization supported by American Muslims for Palestine, held its annual conference last November at UCLA, they posted their “goals” for the conference on their website. One goal described SJP’s attitude toward Zionism. Goal # 2, titled “Regearing from Mythos to Action” said: “The aim of this theme is to remind us that Zionism is not an insurmountable force. We know that Zionism is ethnic cleansing, destruction, mass expulsion, apartheid and death.”

The “goal” went on to say that “The reason we can have hope is that Zionism is a human ideology and a set of laws that have been challenged and can be destroyed. This is a reminder that the successful challenges to Zionism have come from direct action.” According to SJP’s stated goal, Zionism “can be broken down and dismantled.” Most importantly, however, SJP explained that at the conference they would not just talk theory but rather would also “focus on developing actionable local and regional campaigns with clear targets.”

If you are a student group that equates Zionism with “ethnic cleansing, destruction, mass expulsion, apartheid and death” and your group’s stated goal is to “destroy” and “dismantle” Zionism, and you plan to develop “actionable local and regional campaigns with clear targets” – I ask you – who are your targets?

Pro-Israel Zionists.

And what do those campaigns look like?

They look like what we saw last year at New York University, when 53 student organizations representing the entire progressive community on campus pledged not only to support BDS and to boycott Israel but to also boycott the pro-Israel student groups on campus – meaning they said they would not engage with or dialogue with or co-sponsor events with the pro-Israel students.

What message does that convey to a pro-Israel student at NYU? It is saying to that student, if you want to join our campus community, if you want to be a full-fledged member and demonstrate with us on climate change, women’s rights or LGBT rights, we’ll accept you on one condition – check your support for Israel at the door. Shed that part of your Jewish identity and you can join us. That is no different than demanding that a student stop observing Shabbat or stop keeping kosher in order to gain admission. It’s comparable to demanding that a Catholic student disavow the Vatican, or a Muslim student shed his/her connection to Mecca. Excluding an individual in this manner, on the basis of his/her identity, is discrimination.

This discriminatory conduct is spreading beyond the college campus. Not long ago, here in Washington, D.C. at the DC Dyke March, organizers of the march informed Jewish participants that they could wear religious paraphernalia, such as a kippah or a tallit, but items that reflected support for Israel, such as the Jewish pride flag – a rainbow flag with a Star of David in the middle – were prohibited. The Dyke March leaders, who controlled access to a march designed to celebrate diversity and inclusion, were demanding that Jewish Zionists hide or shed a key component of their Jewish identity in order to participate. No other group was charged such a high price for admission.

Our laws are designed to protect individuals from harassment and discrimination. The law does not protect you from an opinion you find offensive. In the United States, even hate speech is protected speech.

So if we want to be able to effectively utilize our legal tools, such as Title VI of the Civil Rights Act, we must accurately articulate what is happening as harassment and discrimination. If we fail to do this, we won’t be able to use the tools in our toolbox.

If we permit administrators on university campuses and the general public to perceive the situation as merely a political disagreement where each side takes offense at the other side’s position then we disable our most potent weapon.

Ostracizing, marginalizing and excluding pro-Israel Zionists on the basis of their identity is not a “speech” issue. It is racist and unlawful conduct and must be confronted as such.

Students must understand that what they are experiencing is anti-Semitism and that the law can protect them. We have to teach students and parents how to utilize the law to effectively combat Zionophobia and anti-Semitism. We must educate our children so that they don’t ally themselves with groups that deny Jews the right to self-determination or deny Jews the right to express the Zionist part of their Jewish identity. It is imperative that the public understand that this denial is racist, discriminatory and anti-Semitic whether it comes from non-Jews or Jews.

During our panel conversation, I hope to share with you steps that the Brandeis Center is taking to address these issues and change the climate on campus and beyond.

If we want to ensure that history does not repeat itself, we must recognize that if you isolate and dehumanize Zionists and claim they represent society’s greatest evil, you are branding Jews with a virtual “yellow Star of David.” And then, what comes next?

# צדק

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

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

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