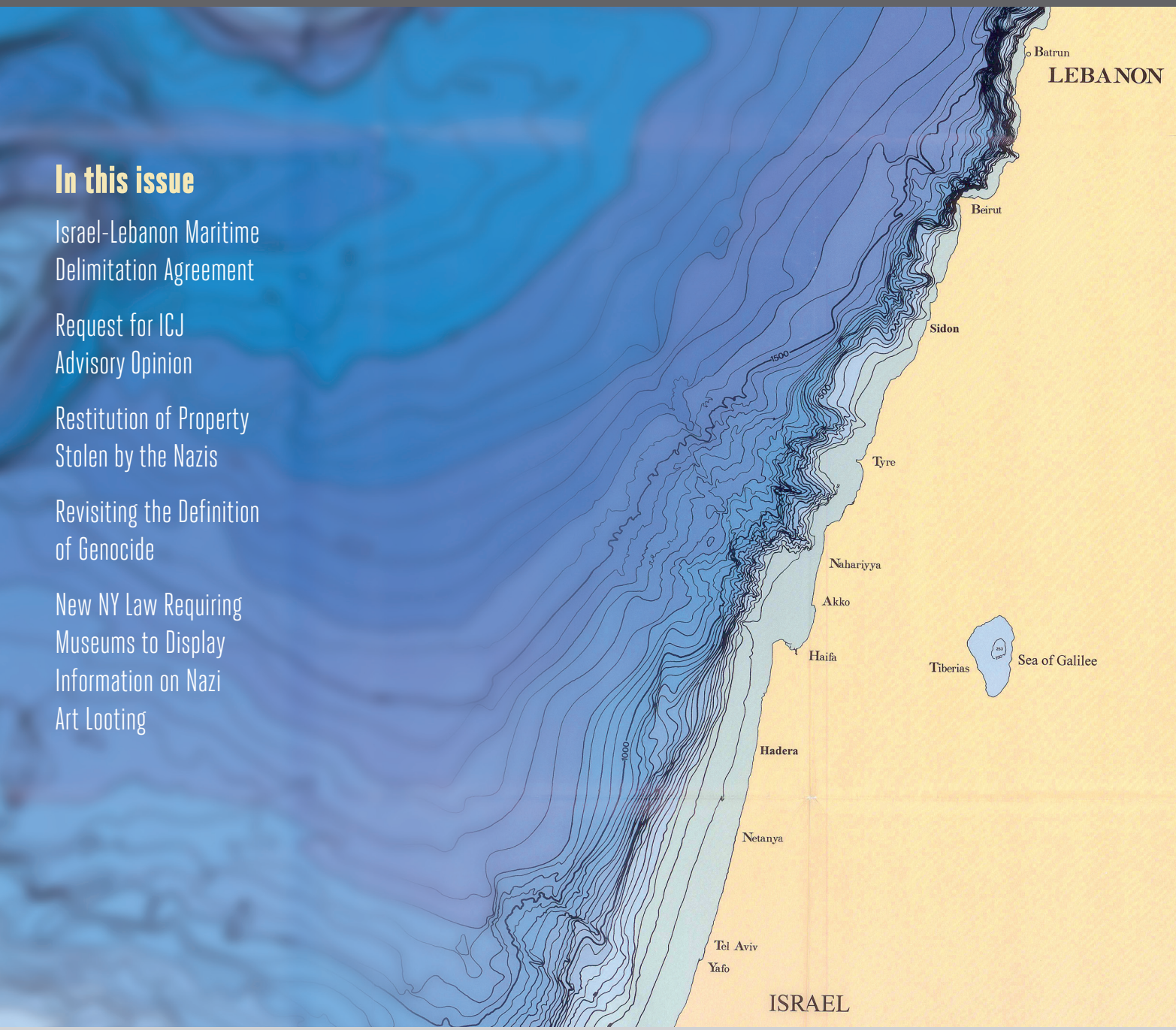
JUSTICE

Spring 2023
No. 69

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

In this issue



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

The International Association of Jewish Lawyers and Jurists

JUSTICE
No. 69, Spring 2023

***JUSTICE* is published by**
The International Association of Jewish Lawyers and Jurists (IJL)
10 Daniel Frisch St.
Tel Aviv 6473111, Israel
Tel: +972 3 691 0673
Fax: +972 3 695 3855
office@ijl.org
www.ijl.org

ISSN 0793-176X

Contents

President's Message

Meir Linzen

As I write these lines, the State of Israel is marking its 75th anniversary.

The creation of the State of Israel was nothing short of a miracle. For 2,000 years, since being exiled from its Homeland, the Jewish people have suffered unparalleled persecution, which reached its climax in the Shoah (the Holocaust) in which 6 million Jews were murdered by the Nazis and their collaborators. No lesser miracle has been the success of the State of Israel during the last 75 years, a story of the ingathering of the Jewish people from around the world, and a series of achievements in the areas of science and technology, economic development and culture that are among the greatest in the world.


Photo: Ami Erlich

A few weeks ago, I participated in the events marking the 80th anniversary of the Warsaw Ghetto uprising. My late mother, Ita Linzen (née Wiseman), like my children's maternal grandmother Yenina Bard (née Bergzam – may she continue to enjoy many more healthy years), survived the Warsaw Ghetto and the Shoah. The comparison could not be more startling between the depths of suffering of our people 80 years ago and the establishment of the sovereign State of Israel in the historical homeland of the Jewish people. Today the Jewish people (even those living in the Diaspora) have the strong support of the State of Israel, the State of the Jewish people.

Yet Israeli society is deeply divided. Jews against non-Jews, religious against secular, Ashkenazi against Sephardi. These divisions are compounded by a deep political divide between Right and Left, which reached its climax in recent months in light of the initiative of the Government and the ruling coalition to bring about fundamental changes to the judicial system in Israel. This latest issue has brought the masses out into the streets, week after week, for many months.

We, as an Organization that champions human rights, support the buttressing of democracy in the State of Israel, the independence of the judiciary, and the protection of rights of the individual citizen. Without wavering from these principles, we nevertheless believe that the only way to solve the current disagreement is through dialogue between the feuding parties. Therefore we welcome and support the dialogue that is taking place under the auspices of President Isaac Herzog.

We must never forget that with all the problems that are affecting Israeli society at this time, the external threat to the State of Israel and to Jewish people around the world has not diminished. We have witnessed an upsurge in antisemitic acts, and we are particularly disturbed by the increase of antisemitic activity in the U.S., the intensifying efforts to delegitimize the State of Israel (see, for example, the recent application to the ICJ on behalf of the United Nations in the matter of the "Continuing Occupation"), and of course the physical threats in the form of increased terror activity both within Israel and from external enemies, especially Iran.

Our Organization is firm in its resolve to fight with all the means available to it (primarily legal means) in all types of forums. We act in the courts of the relevant jurisdictions, in the courts of the European Union and in the international courts at the Hague. As long as there are legal means to meet any of these challenges, the IJL will find ways to meet these challenges. That is our *raison d'être*.

June 23, 2023

Challenges Concerning the Maritime Delimitation Agreement between Israel and Lebanon: Israeli Law and International Law Perspectives

Shani Friedman

Introduction

On October 11, 2022, Lebanon and Israel reached an agreement to delimit their maritime zones, specifically the territorial sea and Exclusive Economic Zones (EEZ), and utilize marine resources in the Eastern Mediterranean Sea (the agreement).[1] The legal instrument that governs this agreement is the 1982 UN Convention on the Law of the Sea (UNCLOS).[2] While Israel is not a party to the Convention,[3] it is considered as customary international law, which obligates all states.[4]

This is a unique agreement since the parties do not have diplomatic relations. The agreement was reached through a mediation process led by the United States and concluded as dual MOUs between Israel and the United States and between Lebanon and the United States.[5] Despite the unique form of the agreement(s), it can still be considered an international treaty governed by international law in accordance with the Vienna Convention on the Law of Treaties (VCLT).[6] In addition, it is the first maritime delimitation agreement between adjacent states in the Eastern Mediterranean. Other delimitation agreements were between opposite states, for example Greece–Egypt,[7] Cyprus-Egypt,[8] Cyprus-Israel,[9] and Cyprus-Lebanon.[10]

This article examines the maritime agreement between Israel and Lebanon and its compliance with Israeli law and international law, and specifically the Law of the Sea (LOS), while highlighting some challenges and issues that did not receive much attention during the negotiations and the public discussion concerning the agreement.

Compliance with Israeli Law

The main challenge with respect to Israeli law is whether there is a requirement to conduct a referendum or obtain approval of a 2/3 majority of the Knesset prior to signing the agreement. If there is such a requirement, then Israel's signature was without jurisdiction, breaching Israeli law.

Israeli law obligates the government to secure approval through a referendum or by a majority of 80 members of the Knesset before signing or ratifying an agreement that states that the law, jurisdiction and administration of the State of Israel shall no longer apply to a territory in which

---

1. *See* press release, Israeli Ministry of Foreign Affairs website, available *at* https://www.gov.il/en/departments/news/israel-and-lebanon-reach-historic-agreement-11-oct-2022#:~:text=PM%20Lapid%3A%20This%20is%20an,the%20maritime%20dispute%20with%20Lebanon
2. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (UNCLOS).
3. *See* list of parties, United Nations Treaty Collection (UNTC) website, available *at* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en
4. *See* for example, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment [1985], I.C.J Rep. 13, para. 34; Donald R. Rothwell and Tim Stephens, The International Law of the Sea 86-87 (2nd ed., 2016); D. P. O'Connell, The International Law of the Sea, Vol. 1, 476 (I. A. Sheare, ed., 1982).
5. Constantinos Yiallourides, Nicholas A. Ioannides and Roy Andrew Partain, "Some Observations on the Agreement between Lebanon and Israel on the Delimitation of the Exclusive Economic Zone," EJIL:Talk! Blog (Oct. 26, 2022), available *at* https://www.ejiltalk.org/some-observations-on-the-agreement-between-lebanon-and-israel-on-the-delimitation-of-the-exclusive-economic-zone/. *See also* advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision concerning the agreement (Hebrew), Knesset website (Oct. 2022), p. 23, para. 6, available *at* http://main.knesset.gov.il/Activity/Documents/LebanonMBLAgreement.pdf
6. 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (VCLT), Art. 2(1)(a); *see also* Yiallourides et al., *supra* note 5.

they currently apply.[11] There is a need to examine whether the maritime zones that are the subject of the agreement can be considered territory in which the law, jurisdiction and administration of the State of Israel apply and would no longer apply under the agreement.

This article argues that the agreement does transfer part of Israel's maritime zones to Lebanon. Israel's position during the negotiations was that the boundary between Israel and Lebanon should follow "point 1" as submitted to the UN,[12] while Lebanon argued for the boundary to follow "point 23."[13] The final agreement, from approximately 2.7 nautical miles (nm) (5 km) from the coast up to the boundary point with Cyprus,[14] ultimately followed "point 23" in accordance with Lebanon's claim.[15] Hence, Israel waived its claim and agreed that most of the disputed area will be part of Lebanon's maritime zones. Thus, there is a need to determine whether the disputed area can be considered as a territory in which the law, jurisdiction and administration of the State of Israel apply.

The agreement delimits the territorial sea and the EEZ.[16] The EEZ does not pose a problem, since it is not a territory under the sovereignty of Israel, but rather a zone where Israel has limited "sovereign rights" to explore, exploit, conserve and manage natural resources.[17]

In addition, Israel never applied its law, jurisdiction and administration in the EEZ. The only Israeli law that is relevant to maritime zones beyond the territorial sea is the Submarine Areas Law (5713-1953).[18] The law only refers to the continental shelf (CS) and not to the EEZ.[19] The language of the law does not indicate that Israel applies its laws and jurisdiction to the submarine areas; it only declares that Israel has such areas.[20] Thus, transferring the disputed area from Israel's EEZ to Lebanon's EEZ does not require securing prior approval by referendum or through approval by 80 Knesset members.

The agreement also transfers part of Israel's territorial sea, between 2.7-12 nautical miles, to Lebanon.[21] Unlike the EEZ, the territorial sea is under the sovereignty of the coastal state, here Israel. It is essentially an extension of the sovereignty over the land territory.[22] However, Israel argued that the Basic Law: Referendum does not apply to the disputed maritime zone subject of the agreement, since there was no prior boundary between the parties and the 2011 deposit chart did not draw such a boundary, although this position addresses mostly the EEZ.[23]

While the basic law does not apply to the EEZ, as explained above, Israel's arguments do not explain why it is not applicable to the territorial sea.[24] The fact that most of the disputed area is part of the EEZ does not mean that Israel should ignore questions relating to the territorial sea. As discussed above, Israeli domestic law mostly does not specifically address Israel's jurisdiction in its maritime zones. However, some scholars maintain that sovereignty means that an expressed statement that domestic laws apply in the territorial sea is not needed.[25] Therefore, the territorial sea, which is under the sovereignty of the coastal states, is a territory in which Israeli law, jurisdiction and administration

---

7. Agreement between the Government of the Hellenic Republic and the Government of the Arab Republic of Egypt on the delimitation of the exclusive economic zone between the two countries, 6 August 2020, UN Treaty Collection website, available *at* https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56237/Part/I-56237-080000028058a22f.pdf
8. Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone, 17 February 2003, DOALOS website, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EGY-CYP2003EZ.pdf
9. Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, 17 December 2010, DOALOS website, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/cyp_isr_eez_2010.pdf
10. *See also* Yiallourides et al., *supra* note 5.
11. Basic Law: Referendum (unofficial translation), Knesset website, available *at* https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawReferendum.pdf
12. *See* Annex 1, figure 1. *See also* Israel deposit of charts to the UN 2011, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/isr_eez_northernlimit2011.pdf; *see also* advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision, concerning the agreement, *supra* note 5, p. 34.
13. *See* Annex 1, figure 1. *See also* advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, p. 34; letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon, 20 June 2011, DOALOS website, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf
14. *See* Annex 1, figure 2. *See also* advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, pp. 37-38.

apply, and any waiver of such areas requires prior approval by referendum or a majority of 80 Knesset members.

There are scholars who argue that the Israeli Basic Law: Referendum does not apply in this case. The Israeli High Court of Justice (HCJ) issued its decision on petitions against the agreement, some of which were based on the Basic Law (HCJ 6654/22, *Kohelet Forum v. Prime Minister*, Dec. 13, 2022). The HCJ accepted the Israeli government's position that the law does not apply since the boundary between the states was never demarcated and delimited and thus the law, jurisdiction and administration of the State of Israel do not apply in the relevant maritime zones and rejected the petitions. Even if we accept that Israel may have signed the agreement ultra vires with respect to part of the disputed area, it is still obligated to abide by the agreement in accordance with international law.[26]

2. Compliance with the Law of the Sea

This section highlights some of the challenges and issues concerning the agreements from the perspective of international law and specifically LOS. To clarify, this article does not address the rules for maritime boundary delimitation or examine the agreement's compliance with these rules. This is not a scientific analysis of the maritime environment of the Mediterranean Sea. Rather, the article highlights several legal issues that may arise in this context.

2.1 Israel's EEZ

The main issue or challenge that may arise with respect to the agreement is the question of Israel's so-called EEZ. Unlike the territorial sea or the continental shelf, there is a need to explicitly proclaim an EEZ,[27] yet Israel never officially proclaimed its EEZ.

It is noteworthy that the 2010 agreement between Israel and Cyprus does not constitute a proclamation, since boundary delimitation agreements cannot establish a maritime zone; they can only divide zones that already exist. The coastal state must unilaterally proclaim its EEZ before agreeing to delimit the zone with its neighbors.

A government decision in 2011 determined the coordinates for the northern limit of the territorial sea and EEZ. That decision was deposited in the UN,[28] but the 2011 decision does not constitute a proclamation of Israel's EEZ for several reasons. First, the decision deviates from state practice since there is no reference to the breadth of the zone, the applicable law in the zone, and the coastal state and other states' rights and obligations in the zone.[29] The decision also refers only to one line and not to the whole zone, which spatially extends seawards. There is no legal significance in "proclaiming" one line out of the four (including the coastline) that comprise the maritime zone. Lastly, the language of the decision indicates that the intention was to delimit the boundary as a reaction to Lebanon's proclamation of its EEZ rather than a proclamation of Israel's EEZ.[30]

Technically, Israel does not have an EEZ. This renders the agreement with Lebanon unnecessary or void.

---

15. Compare the Israel deposit of charts to the UN 2011, *supra* note 12, with the deposit chart of the agreement, DOALOS website, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IsraelCoordinates.pdf
16. *See* Annex A to the agreement, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, p. 7.
17. UNCLOS, *supra* note 2, Art. 56(1)(a).
18. *See* DOALOS website (unofficial translation), Feb. 10, 1953, available *at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ISR_1953_Law.pdf
19. The continental shelf is the seabed beyond the territorial sea and up to at least 200 nm. *See* UNCLOS, *supra* note 2, Art. 76(1). Israeli law mentions only the seabed and subsoil, *see* unofficial translation, DOALOS, *supra* note 18. There was an attempt to legislate a law that regulates all Israel's maritime zones; however, the legislation process has stopped due to changes in the Knesset and government. *See* the Knesset website, available *at* https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=2022714
20. *See also* the explanations to the Maritime Zones Bill (5778-2017) (Hebrew), Knesset website, available *at* https://fs.knesset.gov.il/20/law/20_ls1_392707.pdf, p. 48.
21. Advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, p. 37.
22. UNCLOS, *supra* note 2, Art. 2(1); *see also* John Noyes, "The Territorial Sea and Contiguous Zone," THE OXFORD HANDBOOK OF THE LAW OF THE SEA 91, 97 (Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens, eds., Oxford University Press, 2015).
23. Advisory opinion of Israeli Ministry of Justice, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, p. 48.
24. For example, the claim that Israel does not exercise its jurisdiction and power in the disputed area does not mean that it has no jurisdiction and power in the area. *Id.*, pp. 51-53.
25. Noyes, *supra* note 22, p. 96.
26. VCLT, *supra* note 6, Art. 27.

However, neither Lebanon nor Cyprus ever contested this issue and may have implicitly accepted Israel's EEZ by concluding the agreements. While this deviates from developed practice, it is not prohibited, and if there is no objection from other states, it might be accepted.

2.2 The relationship between the continental shelf and the EEZ

The agreement does not specifically address the continental shelf, only the territorial sea and the EEZ.[31] Some scholars question whether the lack of reference to the continental shelf indicates that the EEZ has absorbed the continental shelf, which they claim is mistaken, although they recognize that the agreement does not necessarily reflect that notion.[32]

While the CS and the EEZ are separate legal regimes under UNCLOS, the EEZ in practice includes both the seabed (the CS) and the superjacent water column.[33] Thus, in practice these separate legal regimes, at least in the area up to 200 nm, have been treated as parallel or even overlapping regimes, not just by states but also by international tribunals.[34] The structure of the CS and the EEZ, and the fact that the latter has to be proclaimed,[35] led to state practice of only addressing the EEZ in domestic legislation and bilateral agreements.

Although inconsistent with UNCLOS and scholars' views, such practice is common. The distinction is only relevant when the CS is beyond 200 nm, which is not the case in the Eastern Mediterranean Sea.[36] The distinction between the legal regimes might also be relevant if we accept the proposition that Israel does not have an EEZ. As discussed above, in practice this might be a moot question.

2.3 Marine resources utilization

Sections 2 and 3 of the agreement address marine resource utilization by the parties in the disputed area known as the "Qana prospect," and utilization of future trans-boundary deposits, respectively.[37] The parties agreed in general on the characteristics of the possible operator of the Qana prospect and how it will operate, and rules concerning cooperation in utilizing future reservoirs.

It is noteworthy that UNCLOS does not address arrangements for utilization of trans-boundary deposits of non-living resources. The only provision is that pending a delimitation agreement, the parties shall make every effort to enter into provisional arrangements, which would be without prejudice to the final delimitation agreement, and not to jeopardize or hamper the reaching of a final agreement.[38] The inclusion of provisions in bilateral agreements, for delimitation or otherwise, concerning marine resources utilization has developed through state practice. In some cases, disputing parties have reached an agreement on the utilization of resources when there is no agreement on a boundary.[39] Thus, state practice essentially circumvents UNCLOS's provisions in this context.

---

27. *See* Shani Friedman, "The Concept of Entitlement to an Exclusive Economic Zone as Reflected in International Judicial Decisions," 53(1) Isr. L. Rev. 101, 102-103 (2020). The paper also analyzes what constitutes a proclamation.
28. Israel deposit of charts to the UN 2011, *supra* note 12.
29. *See* Israel deposit of charts to the UN 2011, *supra* note 12; Shani Friedman, "The Challenges in the Israeli Maritime Zones Bill, 5778-2017," International Law Perspective, Articles in Honor of Prof. Ruth Lapidoth 157, 164 (Yuval Shany and Hilly Moodrick-Even Khen, eds., Nevo Publishing, 2020, Hebrew).
30. Israel deposit of charts to the UN 2011, *supra* note 12.
31. *See* text of the agreement, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, p. 2.
32. Yiallourides et al., *supra* note 5.
33. UNCLOS, *supra* note 2, Art. 56(1)(a); *see also* Continental Shelf (Libyan Arab Jamahiriya/Malta), *supra* note 4, pp. 13, 123; Yoshifumi Tanaka, The International Law of the Sea 145-185 (3rd ed., Cambridge University Press, 2019).
34. *See* examples of state practice, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, p. 13, para. 34; UNCLOS III Documents, A/CONF.62/SR.127 (3 April 1980), pp. 28-29, para. 53. For the practice of international tribunals, *see* for example, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18, Dissenting Opinion of Judge Oda, at paras. 126, 146, and Separate Opinion of Judge Jiménez De Aréchaga, at paras. 54-55; Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, ICJ Reports, 1993, p. 38 at para. 46. Separate Opinion of Judge Oda, at paras. 5, 62, 70, and Separate Opinion of Judge Shahabuddeen at p. 167. In the latter, the Court adopted the notion that the continental shelf is absorbed into the EEZ regime.
35. VCLT, *supra* note 6, Art. 27.
36. There are fewer than 400 nm between states in the Eastern Mediterranean Sea, thus there are no maritime zones beyond 200 nm.
37. Text of the agreement, materials submitted for the Israeli government decision concerning the agreement, *supra* note 5, pp. 3-5.
38. UNCLOS, *supra* note 2, Arts. 74, 83.

Not only do these agreements circumvent the legal regime by addressing activities not regulated in UNCLOS, at least with respect to the CS or EEZ (i.e., resource utilization rather than delimitation), they also circumvent the legal regime by creating permanent rather than "provisional" arrangements. These agreements may jeopardize reaching a final delimitation agreement, since they might alter the environment in a way that will affect the possible area that would be attributed to each party.

It is also interesting that international oil and gas companies have significantly influenced the conclusion of such bilateral agreements. States often rely on the funds, equipment, and expertise of such companies to develop their offshore resources. In addition to geological conditions, political and economic stability also helps promote private investments. Bilateral agreements thus encourage international corporations to operate in disputed maritime zones by increasing legal certainty concerning the rights of the states in these areas.[40]

3. Compliance with Other Agreements of the Parties in the Area

As mentioned above, the agreement between Israel and Lebanon follows two other agreements in the area – between Israel and Cyprus (in force), and between Lebanon and Cyprus (not in force).[41] Israel and Cyprus used point 1 as the northern starting point for their agreement, which Lebanon contested.[42] Lebanon and Cyprus used point 23 as the southern starting point for their agreement.[43]

The fact that Israel and Lebanon agreed on point 23 as the boundary line between them, essentially accepting Lebanon's claim, means that point 1 between Israel and Cyprus is now located in Lebanon's maritime zone. This requires a revision of the relevant agreement. Both agreements with Cyprus recognize the possibility of reviewing and changing the boundary in light of a future delimitation agreement between Israel and Lebanon.

However, the agreements with Cyprus require notification and consultation with Cyprus during the negotiations.[44] If Israel and Lebanon have not done so, this might be a breach of the agreement with Cyprus.[45] Cyprus has requested from the parties notification and consultation on the agreement,[46] but there is no indication that the parties have done so. The language used by the Cypriot Ministry of Foreign Affairs indicates that there is no claim of a breach of agreement with Cyprus or denial of the request for consultations.[47] However, the Ministry's spokesperson indicated that Cyprus requested official information from Lebanon after the conclusion of the agreement.[48] This may confirm that the procedural requirements concerning Cyprus have not been met.

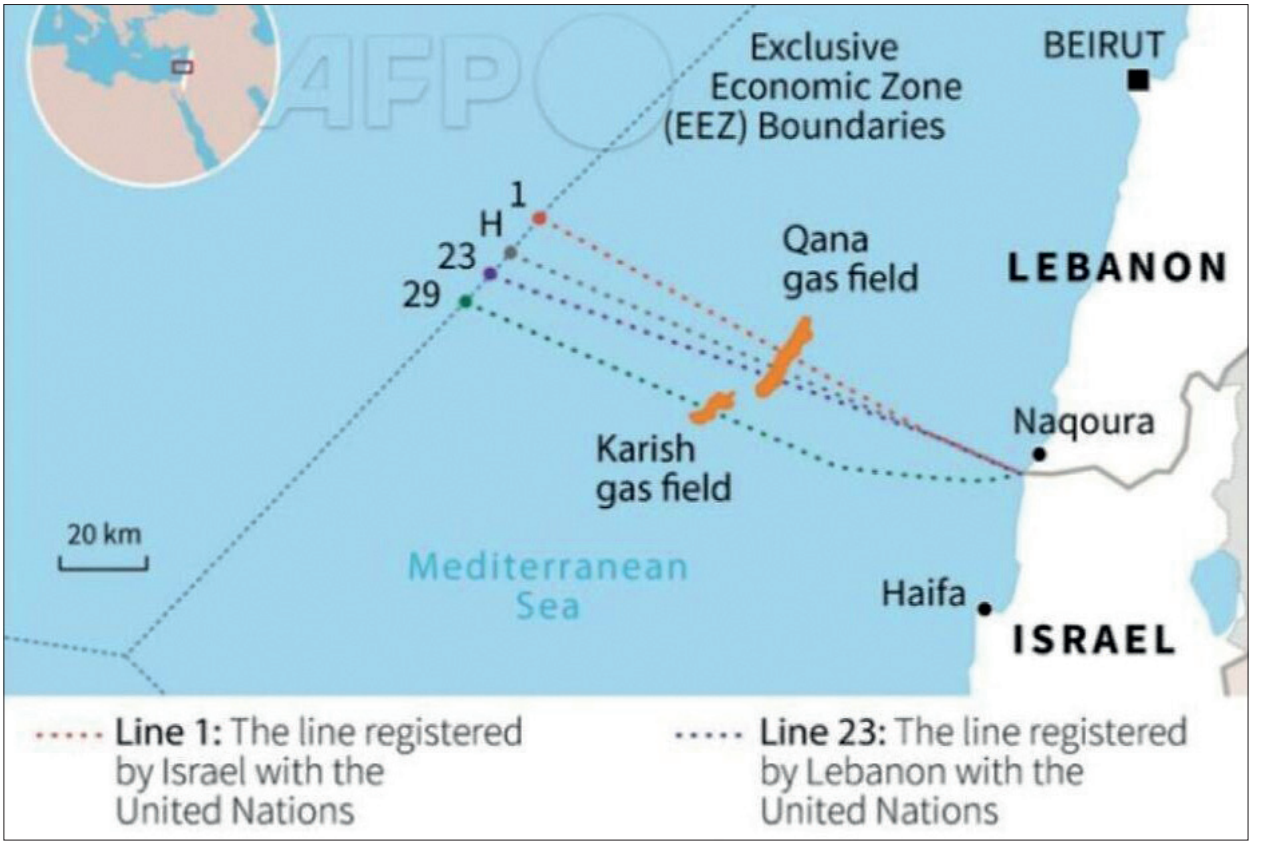
Concluding Remarks

The maritime delimitation agreement between Israel and Lebanon is a historical and unique agreement that grants benefits to both parties. The agreement may also encourage delimitation of the boundary between Lebanon and Cyprus. While the agreement poses a few challenges to Israel from the perspective of both Israeli law and international law, it seems that the agreement promotes the purpose of peaceful resolution of disputes in the Eastern Mediterranean Sea, in accordance with international law. ■

Adv. Shani Friedman is a PhD student and a research fellow at the Law Faculty, Hebrew University of Jerusalem.

---

39. Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea, case no. 1996-04 "Award of the Arbitral Tribunal in the Second Stage - Maritime Delimitation," Dec. 17, 1999 [PCA], at para. 84; Julia Lisztwan, "Stability of Maritime Boundary Agreements, 37 YALE J. INT'L L. 153, 180-181 (2012); Constantinos Yiallourides, Joint Development of Seabed Resources in Areas of Overlapping Maritime Claims: An Analysis of Precedents in State Practice, 31 U.S.F. MAR. L.J. 129 (2018); Youri van Logchem, THE RIGHTS AND OBLIGATIONS OF STATES IN DISPUTED MARITIME AREAS 249 (Cambridge University Press, 2021).
40. Yiallourides, *supra* note 39, pp. 138-140; Vasco Becker-Weinberg, JOINT DEVELOPMENT OF HYDROCARBON DEPOSITS IN THE LAW OF THE SEA 128 (2014).
41. Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus, *supra* note 9; Yiallourides et al., *supra* note 5. It seems that Cyprus and Lebanon agreed to continue diplomatic talks to ratify the agreement. *See* https://www.timesofisrael.com/after-israel-deal-lebanon-and-cyprus-agree-to-move-forward-on-maritime-border-talks/
42. *Supra* note 12. For Lebanon contestation, *see* letter dated 20 June 2011 from the Minister for Foreign Affairs and Emigrants of Lebanon, *supra* note 13.
43. *Supra* note 13.
44. *See* for example, Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus, *supra* note 9, Art. 3.
45. *See* further discussion, Yiallourides et al., *supra* note 5.
46. *See* press release, Cyprus's Ministry of Foreign Affairs, available *at* https://mfa.gov.cy/press-releases/2022/10/12/agreement-israel-lebanon-oct-2022/
47. *Ibid*.
48. *See* examples of reports *at* https://knews.kathimerini.com.cy/en/news/cyprus-probes-dotted-line-in-israel-lebanon-deal



Annex 1

Figure 1: The Israel-Lebanon borderlines as defined in the finalized accord

Available *at* https://www.timesofisrael.com/lebanon-years-away-from-gas-riches-even-if-it-closes-border-deal-with-israel/

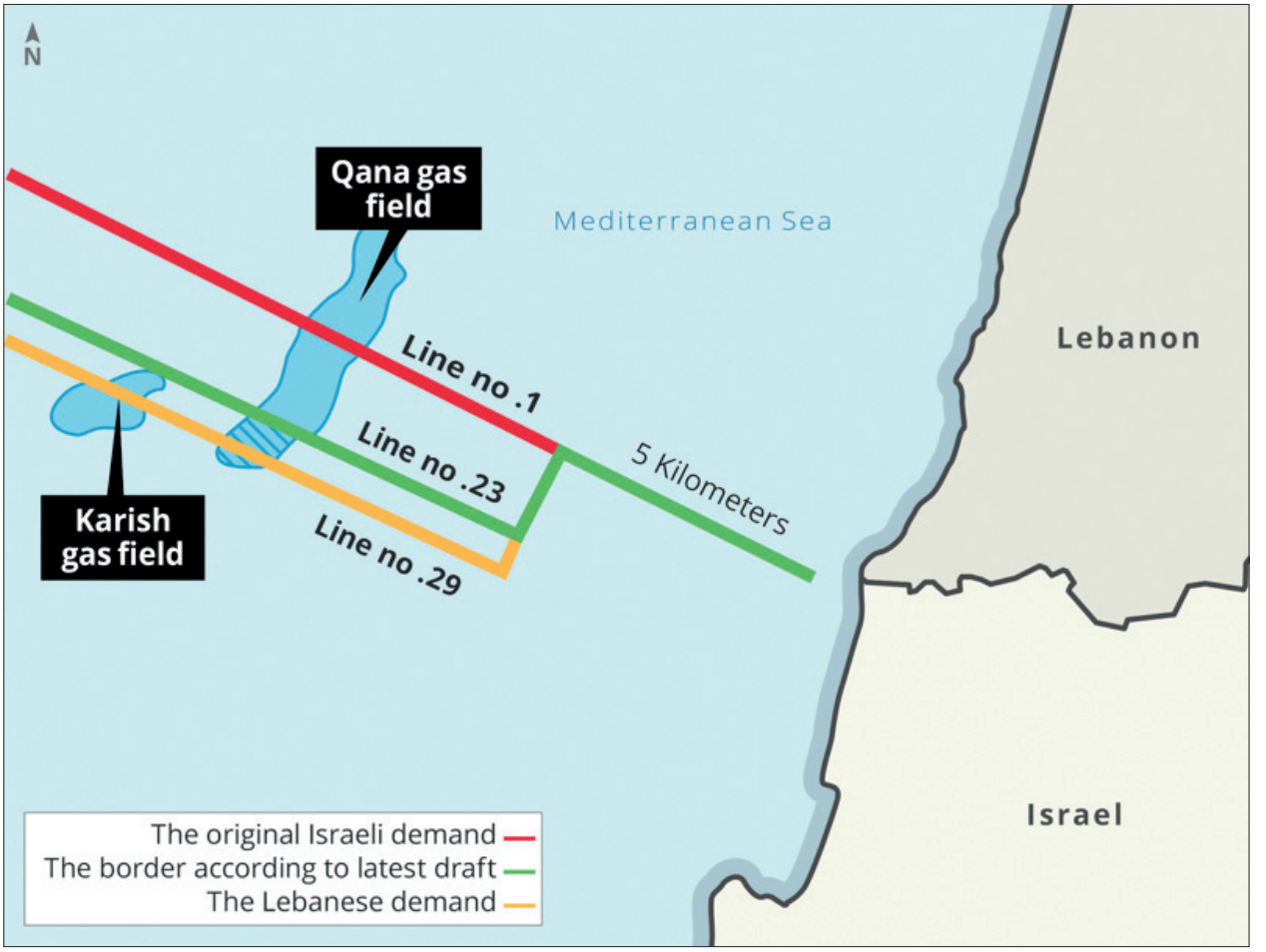


Figure 2

Available *at* https://www.msn.com/he-il/news/news-middle-east/us-and-israel-set-to-sign-letter-of-guarantee-regarding-lebanon-maritime-border-deal/ar-AA13whaf

Request for ICJ Advisory Opinion

Robbie Sabel

The United Nations General Assembly has requested an advisory opinion from the International Court of Justice on the legality of the Israel "occupation of Palestinian territory occupied since 1967." Should Israel participate in the proceedings?

In addition to its primary function of adjudicating disputes between states, the International Court of Justice in the Hague (ICJ) can also render advisory opinions to the UN General Assembly and to other UN bodies.[1] On December 30, 2022, the UN General Assembly adopted a Resolution requesting an advisory opinion from the ICJ on two questions:

> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
> (b) How do the policies and practices of Israel … affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?[2]

ICJ advisory opinions are not binding on states, nor are they binding on the UN General Assembly which requested the opinion. Nevertheless, they are considered as binding by the UN Secretariat and UN administration. Moreover, many UN bodies and international organizations accord much credence and legal weight to ICJ advisory opinions. Organizations that have a record of anti-Israel actions, such as the UN Human Rights Council, may want to rely on such an advisory opinion to justify future anti-Israel activity.

The UN General Assembly Resolution was initiated by the Palestinian delegation to the UN as part of a concerted effort to delegitimize Israel. Victor Kattan, a well-regarded Palestinian international lawyer, commented that if the ICJ gives an advisory opinion as requested, "Western governments may also find it harder not to put pressure on Israel to end the occupation."[3] Some have argued that it is better that the Palestinians engage in international legal maneuvers rather than in terrorism, though a response could be that they continue at the same time to support terrorism by granting financial inducements to the families of terrorists, the so-called "pay to slay" policy.

It is not the first time that the Palestinians have initiated such a tactic. In 2003, the UN General Assembly requested an advisory opinion from the ICJ as to "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory."[4] The ICJ rendered an opinion that the construction of the "wall" was illegal and violated Palestinian human rights. The Court concluded that it would not examine the wall in the context of Israel's right to self-defense since the terrorist attacks, which the "wall" was aimed to prevent, did not emanate from a foreign state. This conclusion was subject to much criticism by international lawyers, and it is possible that this criticism will temper the enthusiasm of the International Court to again be used as part of a Palestinian political campaign. Although posed in legal language, the Court is, in fact, being asked to give an opinion on a highly divisive political issue.

The ICJ has discretion as to whether to render an advisory opinion, but in the past, it has never declined such a request from the UN General Assembly. The secretariat of the Court has already requested extra financing to enable the Court to prepare an advisory opinion on the issue. In this case, the Court may, however, take into consideration that the resolution requesting an

1. UN Charter, Art. 65.
2. UN GA Res. A/Res/77/400 DR 1, Dec. 30,2022, adopting the recommendation of the UNGA Fourth Committee.
3. Victor Kattan, "Thanks to Putin, the world has noticed the occupation," HAARETZ, English ed., Nov. 21, 2022.
4. UN GA Res. ES-10/14, adopted Dec. 8, 2003.

opinion was adopted by a majority that was far from overwhelming. Seventy-seven states either voted against the resolution or abstained.

If the International Court nevertheless decides to give an advisory opinion, the secretariat of the Court will invite all states, members of the United Nations, to submit opinions or comments on the issue and to appear before the Court if they so wish.[5] In the *Wall* case, Israel decided not to officially submit comments as to the substance or to appear before the Court, but to limit itself to submitting a legal brief as to why the Court should decline to give an advisory opinion. This conduct was based on the apprehension that by raising arguments as to the substance of the issue, it would legitimize the procedure. In its legal brief, Israel argued that the issue was political and not legal and that it involved the rights of Israel, and Israel had not agreed to request an opinion from the Court. Israel further argued that the request for an advisory opinion on what was essentially a dispute between Israel and the Palestinians was an attempt to circumvent the need for the parties to agree to submit an issue to a judicial body. Israel also argued that since the Security Council was dealing with the issue, it was not within the competence of the General Assembly to request an advisory opinion and that the Oslo agreements had stipulated an agreed upon mechanism for solving disputes. Several western states also recommended to the Court not to render an opinion on the issue. The Court nevertheless decided to render an opinion, claiming that it was not adjudicating the dispute between Israel and the Palestinians, but only giving a legal opinion to the UN General Assembly.

It is to be hoped that the Court will decline to render an advisory opinion. If the Court does decide to render an opinion, the Israeli government will face the same dilemma as in the *Wall* case. It might be worthwhile, this time, for Israel to submit comments on the substance, in addition to again arguing that the Court should decline to give an opinion. There are several fair and impartial judges on the Court, and they should be made aware of Israeli legal arguments. In the *Wall* case, friendly judges on the Court heard only arguments from the opposing side, and this appears to have influenced their decision. It is not clear that Israel's absence from the Court in the *Wall* case did, in fact, delegitimize the proceedings. The many criticisms of the substance of the Court's decision in the *Wall* case were not related to the legitimacy of the proceedings.

Israel has a strong legal case. The legal issues that Israel can raise include the fact that this is a *sui generis* situation. Israel has security rights in the territories that derive from the Oslo agreements with the PLO itself. It may be worthwhile reminding the Court that the Oslo agreements were signed by the PLO representing the Palestinian people, and witnessed by representatives of the United States, Russia, Egypt, Jordan, the European Union and Norway. Furthermore, the agreements were endorsed by the UN General Assembly[6] and earned the negotiators the Nobel Peace Prize. Other issues that can be raised include the fact that military occupation is not illegal under international law, and that the UN Security Council has never designated Israeli occupation as illegal. The Israeli government has a first-rate team of international lawyers. It might be wise to utilize them in this instance to present the case for Israel, rather than trying to defend Israel's position by silence *in abstentia*. ■

Robbie Sabel is a professor of international law at the Hebrew University of Jerusalem, and a member of the Academic Advisory Board of Justice.

5 UN Charter, Art. 66.

6. UN Doc. ES-10114, adopted 8 December 2003.

Failure to Enact Restitution Laws for Property Stolen by the Nazis and their Collaborators

Lord Eric Pickles

In November of last year, I had the honor of chairing a session titled, "*Tackling Injustices from the Time of the Holocaust – Immovable Property and Looted Art*" at the Terezín Declaration Conference convened during the Czech Presidency of the Council of the European Union.[1] The panel was comprised of a number of experts, including Ferdinand Trauttmansdorff, former Austrian Ambassador in Prague; Anne Webber, co-chair of the Commission for Looted Art in Europe; Dr. Wesley Fisher, Director of Research, Conference on Jewish Material Claims Against Germany (Claims Conference); David Zivie, head of the Mission for the Search and Restitution of Spoliated Cultural Property 1933-1945 in the French Ministry of Culture; and Dr. Pia Schölnberger, head of the Commission for Art Restitution and Provenance Research at the National Fund of the Republic of Austria for Victims of National Socialism since 1945.

In his remarks to the conference, Stuart Eizenstat, the former U.S. Ambassador to the European Union and an expert in restitution issues, and now serving as a special advisor on Holocaust issues to U.S. Secretary of State Antony Blinken, said:

> This Conference gives us the last, best hope to help the 275,000 remaining Holocaust survivors live out their last years in greater dignity than they knew in their tragic youth. It is unlikely there will be another international conference with this breadth of participation in their lifetimes. They are passing away at the rate of six percent a year.[2]

The Terezin Declaration, signed by 47 countries, is recognized as the most comprehensive set of international commitments for Holocaust justice and for ensuring that the memory of six million Jewish men, women, and children, as well as other victims of Nazi persecution, are not forgotten. It calls for welfare benefits for elderly survivors living in poverty and the recovery of or compensation for immovable property of both a communal or religious nature, as well as private or heirless property. It also supports the identification and protection of Jewish cemeteries and burial sites, the return of Nazi-confiscated and looted art as well as the identification, cataloguing and return of confiscated Judaica and Jewish cultural property. Finally, it demands increased access to archival materials and the promotion of Holocaust education, remembrance, research and memorial sites.

Holocaust restitution is not about money. It is about victims. It is about individuals who have waited almost 80 years for justice and recognition of their loss of property. What we know about the Nazis is that they were many things: they were murderers; they were psychopaths; they were bigots; they were racists, and they were antisemites. But they were also thieves. They looted and plundered throughout Europe. They stole from citizens; they stole from states, and, because there is no honor among thieves, they stole from one another. Elie Wiesel articulated this far more eloquently than I, saying that this Nazis' thievery was a process: "They stole your living, they stole your belongings, they stole your individuality. And they tried to wipe you out. To wipe out the fact that you ever existed."[3]

In their book *Justice After the Holocaust: Fulfilling the Terezin Declaration and Immovable Property Restitution*, Michael J. Bazyler, Kathryn Lee Boyd, Kristen I. Nelson and Rajika I. Shah describe the hurdles that survivors faced when attempting to recover their property in the aftermath of the Holocaust:

> [R]eturning survivors had to navigate a frequently unclear path to recover their property from governments and neighbours who had failed to protect them and who often had been complicit in their

1. https://www.mzv.cz/jnp/en/foreign_relations/terezin_declaration/index.html
2. Terezin Declaration Conference Remarks by Ambassador (ret.) Stuart E. Eizenstat, Special Adviser to the Secretary of State on Holocaust Issues, Nov. 3, 2022, Prague, Czech Republic ("2009 Terezin Declaration"), available *at* https://www.mzv.cz/public/4b/66/97/4846140_2947474__20221103_Eizenstat_Remarks.Version_for_Program_Printing.docx
3. Elie Wiesel, M Wiesel, NIGHT (Penguin Classics, 2004).

> persecution. While the return of Nazi-looted art has garnered the most media attention, and there have been well-publicized settlements involving stolen Swiss bank deposits and unpaid insurance policies, there is a larger piece of Holocaust injustice that has not been adequately dealt with: stolen land and buildings, much of which today remain unrestituted.[4]

Nearly eight decades after the Holocaust, the number of survivors of Nazi atrocities diminishes each year. Sadly, many have died before receiving restitution that they had sought for decades. Experts on the demography of the remaining Holocaust survivors believe that more than one-third live in poverty. In addition, a 2020 report from the U.S. State Department issued a troubling assessment of the state of Holocaust restitution. The report found that "[b]ureaucratic inertia has delayed the resolution of too many restitution claims."[5] Claims are often not considered in a timely manner, let alone making it to the correct agency. In some countries, the regulations are so stringent that it is nearly impossible for survivors no longer living in the country of their birth to receive any restitution. This is a particular obstacle for communities of survivors living in the U.S., Israel, and the UK.

In November 2022, I joined diplomats from 46 other nations, gathered in the Czech Republic to take stock of the state of property restitution. Almost fourteen years have passed since 47 countries signed the 2009 Terezin Declaration and committed to right the economic wrongs from the Holocaust-era.

There has been some progress. Many Central and Eastern European nations have adopted a special approach or enacted specific legislation to provide restitution of, or compensation for, confiscated assets. But sadly, this is not enough. Many Holocaust survivors have persevered for years, attempting to recover their family's property with little evidence or hope that they succeed. One example is 91-year-old Leo Wiener, who came to London before the outbreak of war with his parents from what was then Czechoslovakia. Leo's family had several businesses across Ostrava, all of which were confiscated by the Nazis. Leo's grandparents, aunts and uncles were all murdered at Treblinka. After the war, Leo's father returned to Czechoslovakia in an attempt to retrieve the family businesses and home. The family home was still standing but had been looted. Leo's father was unable to retrieve any of the businesses and only managed to recover a few pieces that had been left behind. He tried over many years to retrieve the family's property – first under the Communists and again when the Berlin Wall fell, but to no avail. Leo eventually adopted his father's quest, but despite years of effort, he was told that he was not a close enough relative to his grandparents to claim compensation. This is a common "explanation" given to families trying to get their property returned.

Leo's circumstances are not unusual. Despite years of campaigning, Poland still lacks any compensation scheme for recovering private property. Poland was home to approximately 3,300,000 Jewish men, women and children prior to the Second World War, the vast majority of whom were murdered in the Holocaust. Scandalously, the Polish government still has not addressed the concerns of dispossessed Holocaust survivors and their heirs. Nor have they addressed the return of property taken from non-Jewish Poles.

Imagine if we were to announce that henceforth, property rights would be determined by the Nazis' Nuremberg laws – people would be rightly outraged. However, this is effectively what has happened in large parts of the world by putting so many obstacles in the way of restituting stolen property.

The recent Terezin Conference brought home the fact that while the vast majority of signatories to the declaration have made excellent progress on Holocaust education and remembrance, there is still a long way to go regarding real property and looted cultural property.

Ferdinand Trauttmansdorff, who was instrumental in drafting the original 2009 Terezin Declaration, told the Conference that "naming and shaming" is not the answer and that collaborative partnerships and highlighting best practice is more successful. It was hoped that the European Shoah Legacy Institute (ESLI), which was established in 2010 and sought to establish systematic solutions on an international level, leading to the restitution of immovable property, art, Judaica and Jewish cultural assets stolen by the Nazis, would be the catalyst for change. However, Trauttmansdorff told the conference that ESLI was unable to secure the necessary follow-up concerning the restitution

4. Michael J. Bazyler, Kathryn Lee Boyd, Kristen I Nelson and Rajika I. Shah, Searching for Justice After the Holocaust: Fulfilling the Terezin Declaration and Immovable Property Restitution (Oxford University Press Inc., 2019).
5. The Justice for Uncompensated Survivors Today Act (JUST Act) Report (2020), available *at* https://www.state.gov/reports/just-act-report-to-congress

or compensation of property.

Since its inception, there seems to have been confusion regarding the mission of ESLI. Many Holocaust survivors who had spent decades trying to retrieve their property were under the impression that the Institute would be able to deal with individual claims. However, it was never envisaged that the Institute would deal with individual cases. Rather, ESLI's task was to promote restitution at a governmental level and to lobby for legislative changes. ESLI is no longer functioning.

A staggering five million artworks were stolen by the Nazis and their collaborators. According to Anne Webber,

> anything considered sufficiently Aryan, such as Rembrandts, were earmarked for the Führermuseum that Hitler planned for his hometown of Linz, Austria. But anything seen as "degenerate," such as work by Egon Schiele or Van Gogh, were sold at so-called "Jew auctions" to raise cash for the Nazi war machine. Other paintings were simply burned.[6]

Anne added that it is also important to realize that "everybody always thinks it's just rich people's paintings the Nazis took, but they took everything – your tablecloths, your towels, your pots and pans." It was all part of "Hitler's aim to annihilate the Jewish people, he wanted to erase people's identity."[7]

Around the world, thousands of artefacts, properties and belongings remain in the wrong hands – in the hands of national collections, local authorities, museums and private individuals. People and communities are often very proud of their collections and may even be well meaning, but stolen property in the most benign and cultured hands is still the result of theft. It is shocking that, even today, thousands of injustices remain uncorrected.

Those who think that we are gently winding down discovery of stolen artworks should think again. When I was in Bern, Switzerland, in 2017, I visited an exhibition which showcased the art from the home of Cornelius Gurlitt. His father, an art dealer, had sold what Hitler dismissed as "degenerate" art. At the time of its discovery in a Munich flat in 2012, leading figures in the German and Austrian art worlds asked: "What is the problem? Everybody knew about Gurlitt's collection." Yes, everybody did know, except for the families from whom the works were stolen.

The looting of cultural objects was a key focus of the recent Terezin Conference, where Anne Webber noted that despite the Washington Principles, the Vilnius Forum Declaration and the Terezin Declaration, the possibility of achieving the purpose of those commitments, namely the provision of justice through expeditious restitution, remains erratic and restricted. Webber further argued that there is no consistency, no level playing field, and limited progress.

Webber raised three key areas of concern:

a. Only 17 out of the 47 signatories to the 2009 Terezin Declaration have undertaken any kind of provenance research and subsequently published any of the results.
b. Only a handful of countries have identified and/or provided access to archives, records, and other information essential for supporting claims.
c. Only five signatories have established a national claims process while only three have passed a law to enable restitution. There is also a lack of agreed definitions of loss, forced sales and sales under duress. Furthermore, in countries without a national claims process or a restitution law, there is also a lack of agreement on who is eligible to file a claim and an absence of published guidelines for qualifying for and filing claims.

Webber also raised the absence of national reporting and the provision of assistance for museums and families trying to locate their stolen artworks.

Dr. Wesley Fisher of the Claims Conference addressed the problem of art looted in one country and taken to a second, a key issue in restitution claims. This issue arises through a number of historical and current circumstances, including border changes; changes in the art market since the War; because of the Soviet Trophy Brigades; and mistakes and policies in repatriation made by the Western Allies. Dr. Fisher mentioned several examples including the 2016 Serbian law which refers only to objects taken in Serbia, but not to items brought in by Ante Topic Mimara after World War II, who allegedly, "tricked Americans supervising the return of displaced art into turning over to Yugoslavia property that may have belonged to Holocaust victims… some works ended up in museums in Belgrade and Zagreb."[8] For example, Poland retains Greek Judaica in Warsaw and paintings in Gdansk, while France retains items repatriated to France instead of to Belgium.

---

6. Ham & High, "Beyond the Woman in Gold: On the Hunt for the Nazis' Looted Art," LOOTEDART.COM (April 9, 2015) available *at* https://www.lootedart.com/news.php?r=R740UR158321
7. *Ibid*.
8. Konstantin Akinsha, "Ante Topic Mimara, 'The Master Swindler of Yugoslavia,'" LOOTEDART.COM (Sept. 2001), available *at* https://www.lootedart.com/MFEU4T15383

Dr. Fisher also raised the continuing problem of a lack of archival access in Hungary, Romania and Slovenia and pointed out that the Russian Federation's archives are closed, and while France has digitized archives, they are not permitted to be published on the internet.

The panel raised many concerns with the current status of restitution and the need to increase our efforts. The Austrian National Fund has taken up the challenge and is often singled out as an exemplar in its positive approach to restitution. Dr. Pia Schölnberger, head of the Commission for Art Restitution and Provenance Research at the National Fund, focused on how the Fund ensures that claimants can access the information and documents required to receive restitution. An interesting development (and one of which I hope other countries take note) is that Austrian legislation allows for the possibility to reopen a case with the arbitration panel after 50 years where an "extreme injustice" occurred. I believe this approach should be adopted by other countries that have time-limited schemes or who insisted on strict criteria including documentation and citizenship, since such scenarios lead to many claimants losing any opportunity for restitution.

David Zivie, from France's Ministry of Culture, also offered some hope about looted art and cultural property. He said it was still possible to seek financial compensations for all looted property (moveable and immoveable) in France, thanks to the CIVS (Commission for the Compensation of Victims of Spoliations). He mentioned the positive growth in provenance research in French public museums and public libraries. He also mentioned the extension of the definition of "looted art" to include "spoliation" and "sale under duress," which is a more flexible and favorable approach to the owner's heirs.

Clearly, there has been progress since the 2009 Terezin Conference. The UK, Austria, Germany, France, and the Netherlands have improved their work to resolve looted art claims based upon the Washington Principles and the Terezin Declaration. According to Ambassador Eizenstat, American museums have made a promising start to provenance research, which is the foundation for restitution. Additionally, he told the conference that Christie's and Sotheby's, two major auction houses, have full-time staff in their New York and London offices that review artworks that passed through European hands between 1933-1945. To that end, they will not auction or sell any artworks with doubtful Holocaust provenance. In fact, Christie's alone has resolved over one hundred claims of Nazi-confiscated art.

Ambassador Eizenstat pointed out that the EU has been on the side lines with respect to most issues covered by the Terezin Declaration. But in 2019, the European Parliament passed legislation recognizing the Washington Principles on Nazi-Confiscated Art and urged the European Commission to support the cataloguing of all data on looted cultural goods and to establish principles for dealing with cultural property in future conflicts. In 2016, Serbia became the first country to enact comprehensive legislation on heirless and unclaimed property, following the 2009 Terezin Declaration. Ambassador Eizenstat also said that several other European countries had earlier adopted legislation that partially addressed heirless and unclaimed Jewish property, although some have yet to put their laws into practice. But other countries have yet to adopt any laws in this area.

Regrettably, many of the promises made in the 2009 Terezin Declaration remain unfulfilled. The core message of the recent Terezin II Conference was the importance of fulfilling our moral obligations to pay restitution to the victims of Europe's greatest tragedy. As U.S. Secretary of State Antony Blinken powerfully stated, "The international community failed these people in their early lives...it must not fail them in their final years." He also reminded delegates of the "enduring responsibilities to their descendants."[9]

Time is running out; we have a moral obligation to ensure that Holocaust survivors and their families receive justice. That is why the UK hosted a meeting in London in March 2023, which brought together Post-Holocaust Issues Envoys with restitution as part of their remit. They agreed to build a network across the world, to address the injustices of the past and bring closure to those families who not only lost loved ones but their homes, businesses, art and culture.

When visiting countries across Europe, I am always struck by how the heart – the Jewish community – was torn out of them; how once thriving communities are no more. Therefore, it is only right that property, whether it be fixed, heirless or movable, be returned. ■

Lord Pickles was appointed Special Envoy for Post-Holocaust Issues in September 2015. Along with the former Labour Cabinet Minister, Ed Balls, he Co-Chairs the United Kingdom's Holocaust Memorial Foundation, which advises the UK Government on the planned Holocaust Memorial and Learning Centre next to the Houses of Parliament, Westminster. He was made a Life Peer in 2018. This article was completed on February 16, 2023.

---

9. U.S. Department of State, "Secretary Blinken Remarks to Terezín Conference, YouTube (Nov 4, 2022), available *at* https://www.youtube.com/watch?v=sgsbw95cWkI&t=1s

Antisemitism: A Fresh Look*

Yehuda Bauer

The term "antisemitism," or "Anti-Semitism," is nonsensical because there exists no Semitism one can oppose. There are no Semites. There are people who speak Semitic languages because there exists a group of languages we call Semitic, but the groups that speak those languages are of widely different origins, have different cultures, and do not necessarily look alike. Arabic is a Semitic language, but some groups of people living in Mali and speak Arabic follow different traditions from those practiced by Arabs living in the Yemen and have different skin color. Some non-Arabic people speak languages closely related to Arabic, e.g., Eritreans and Tigrayans.

The term *Antisemitismus* in its original German was used and popularized around 1879 by Wilhelm Marr, a German nationalist, racist, atheist and violently anti-Jewish journalist who was looking for a pseudo-scientific term (with an "ism") to replace "Jew-hatred" (*Judenhass* in German), and similar terminology in different European languages. The point, of course, is that opposition to Jews is an ancient phenomenon. Usually, the explanation offered regarding the origin of this group-hatred is connected to the rise of Christianity and its struggle against the group from which it sprang, and the need to differentiate itself from that group. But there is clear evidence of anti-Jewishness before the Christian era, in the Hellenistic world. Post-Alexandrian Hellenism was not only political. There was an attempt to unify the different groups under the rule of the Hellenistic kings culturally, by accepting the polytheistic beliefs of the different ethnic units within an inclusive framework. You could call your gods by different names, but they had basically the same functions. Zeus and Ba'al were really the same deity, and the Hellenistic kings assumed the roles of the gods' representatives and/or claimed divine status for themselves. A united culture was a tool for political supremacy. The Jews could not live with that. Jewish culture, originally polytheistic, slowly developed, as a result of intense internal conflicts, into a belief in a God who was both tribal, i.e. concerned with that small ethnicity that developed into a Jewish people, and universal; some parallels with the polytheism that surrounded them continued to exist. The god that developed among the Jewish elites could not be represented by statues that were the results of human creativeness. He was unseen, though he had human qualities. This was anathema to Hellenistic concepts.

One can see this conflict in the Scroll of Esther. That legend supposedly described events that took place in Persia, where opponents of Jews wanted to get rid of them. The Jews are described as a dispersed minority living among others. The reason why the Jews should be eliminated is stated in Chapter 3, verse 8: "There is one nation dispersed and separated among the nations in all of the countries of your kingdom and their customs are different from those of any [other] nation and they do not observe the customs of the king" [my translation]. In other words – the Jews must be eliminated because they are different in their culture and belief system. The scroll purports to describe the situation in Persia in the fifth century B.C.E., but that is clearly out of context. The Persian Empire was not anti-Jewish in any sense, and under Cyrus and his heirs the Jews were a protected minority. Nehemia was sent by the Persians to rebuild the walls of Jerusalem and establish a protected Jewish vassal unit. It seems obvious that the scroll was written under Greek, not Persian, rule, and the story was transposed into an earlier time to avoid problems with the Greek Seleucid rule. The Seleucids did indeed act against those Jews who opposed their policy of unification under one culture, and therefore one political rule. The Hasmonean rebellion, which began in 161 B.C.E., was the result. If this is correct, we can place the origins of what we today call antisemitism in Hellenistic times, and the most basic reason for it is the cultural, and hence the political, difference between the group that came to be defined as Jewish (and identified itself as such) and the surrounding groups. This theological argument can be seen as based on social and political foundations.

---

* This is a slightly edited text of a webinar with Prof. Yehuda Bauer: "Antisemitism — A Fresh Look," as part of the Beinner Family Speakers Series, January 15, 2023, sponsored by the Institute for the Study of Contemporary Antisemitism, Indiana University Bloomington.

This helps us understand modern antisemitism. Pre-modern anti-Jewishness rose since that small ethnic group dispersed among the various ethnicities in the Roman and Persian (and Parthian) empires, for political reasons. This dispersion started in 586 B.C.E. with the destruction of the First Temple in Jerusalem because of the war of the Judean King against the overwhelming might of the Babylonians. The result was the creation of the first diaspora of Jewish elites exiled to Mesopotamia. Then, with the opening of trade routes in the Roman Empire, Judeans settled in different places within the Empire. This was accelerated after the Judeans rebelled against Rome, and the destruction of the Second Temple in 70 A.D. It is probably the case that between 25 and 35 thousand Judeans were sold into slavery, and many others fled. Most of the Jews, however, stayed in their small country, and their supposed mass exile by the Romans is only a legend. There was a Jewish majority in what is now Israel for hundreds of years following the destruction of the Temple, but a growing number of Jews were now minorities living in different countries. The difference in culture and religion made itself felt, increasingly, with the rise of Christianity and later with the spread of Islam. When crises arose in the host countries, occasionally the small and defenseless Jewish minority was attacked as a substitute for dealing with the real causes for the crises, or as a ploy to redirect attention from the failings of the rulers, or to confiscate Jewish property to pay for wars, and so on. This, though, was not always the case and most of the time and in most places the Jews were not persecuted. Antisemitism became a part of European self-understanding, and was supported by the Catholic church, and after the Lutheran revolution, by most Protestants.

The change in Christian attitudes toward the Jews came after the Holocaust because it became obvious that Christian churches were either indifferent to the fate of the Jews during the war, or actively collaborated with the Nazis and their allies. After the dimensions of the genocide of the Jews became known, in general terms at least, Christian soul-searching, first and foremost by the Vatican, as well as a result of the establishment of Israel in 1948 (which contradicted the Christian theology that said that because the Jews denied the divinity of Jesus, God punished them by permanently denying their hope of returning to their ancient homeland), led to radical change. Beginning with Pope John XXIII (Angelo Roncalli), and continued by Pope Paul VI (Giovanni Montini), the Catholic church redefined its attitude toward the Jews in the 1965 Second Vatican Concilium, publishing the Nostra Aetate, which denied the responsibility of the Jews as a people for the death of Jesus. Contrary to many Catholic theologians, the Church's policy toward the Jews had not simply been theological anti-Judaism, but active antisemitism. By changing its theological explanation and explicitly condemning antisemitism, the Vatican (not necessarily all adherents of Catholicism) became an ally of the fight against Jew-hatred, with the Jesuits, formerly implacable enemies of Jews and Judaism, in many ways leading the fight against anti-Jewishness.

The story of the relationship between Jews and Islam is different. Islamic enmity to Jews and Judaism has a historical basis in the relationship between the Prophet Muhammad and the Jewish tribes that lived in the relatively fertile areas of the Hijjaz, mainly in the area of Yathrib (the later Medina). To secure his hold over Medina, the prophet had to eliminate the power of three strong Jewish tribes that were part of the city's population. One of the tribes was forced into conversion, a second was murdered, and the third was exiled, and later exterminated. It was after this that the prophet defeated his opponents in Mecca and turned it into his capital. The birth of Islam was therefore tied to a Jewish defeat, and the theology that developed into Islam constantly returns to and relates to these events, so that Moslem sermons deal with them as if they were current, especially, of course, the radical ones. At the same time, though, the fact that Islam is based on biblical texts and worships the same God is not only not denied, but indeed emphasized, as is Judaism's development into Christianity. Jews, Christians (and Zoroastrians in Persia) are viewed as People of the Book, who are represented by Moses and Jesus as prophets sent by God, but superseded by God's sending the Prophet Muhammad as his final intervention in the history of mankind. As long, therefore, as the Jews (and the Christians) accept Moslem superiority and their own relegation to a lowly social status, and refrain from arming themselves and trying to convert others to their faiths, they are protected in body and property.

Today, radical Islam aims at converting the whole world to its belief system, mainly by force ("Jihad") but the Jews remain the traditional ultimate enemy, and there are very many cases of radical clerics (Imams) demanding their extermination. There is doubtlessly an influence of Nazi ideology there, and the language and argumentation are familiar to anyone acquainted with Nazi texts. Contrary to Nazi ideology, though, the role of the liberal or relatively liberal West is emphasized, as, for example, when the Shi'ite dictatorship in Iran talks about the West as the Big Satan and of the Jews as the Little Satan – but in many radical texts the West is under Jewish rule, thus uniting

contemporary antisemitism with fantasies about Jewish world rule, which originated in medieval Europe.

Nazi antisemitism is a mutation of all this. Actually, as far as the ideological elements go, there is nothing new in it, compared to the different forms of pre-Nazi Jew-hatred. But the crucial element is turning these phobias into a political tool possessed by ideology. This becomes very clear in Hitler's memorandum to his Number Two, Hermann Göring, in August 1936, in which he explained that Nazism's chief enemy is Soviet Bolshevism, whose only purpose is to replace all world governments with International Jewry. The idea of a Jewish bid for world government, so blatantly stated in the so-called Protocols of the Elders of Zion, becomes a political program at the end of which stands what we term the Holocaust. This ideology becomes a moving force in the development of World War II, and in this way, it is a danger for all societies where antisemitism gains the upper hand. Antisemitism is therefore a mortal danger not just to the small Jewish people, which is obvious, but to all societies infected by it. It played a crucial role, as we have seen, in the outbreak of World War II, becoming a major factor in the death of many millions of non-Jews, and a danger to all humanity. ■

Yehuda Bauer is a historian of the Holocaust, Academic Adviser of Yad Vashem, and Member of the Israeli Academy of Science and Humanities.

Genocide in International Law: Revisiting the Definition of Genocide in the Convention on the Prevention and Punishment of the Crime of Genocide (1948)*

Hilly Moodrick-Even Khen

Introduction

The international community accepted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention") in 1948.[1] This unprecedented Convention was the international community's response to the horrors of World War II in general and the Shoah in particular. The discussions in the Ad Hoc Committee established by the UN[2] and the writings of legal scholars, especially the Polish Jewish lawyer Raphaël Lemkin, served as the basis for the Convention. The Convention's text had numerous ground-breaking achievements, including defining genocide as an international crime to which both individual criminal responsibility and state responsibility are attached, determining the acts constituting the crime and the special intent required for its commission – an intent to destroy the national, ethnic, religious or racial group in whole or in part – and imposing an international legal obligation upon states to prosecute or extradite suspects of committing the crime.

The Convention also gained the following practical achievements in international law and in particular, in international criminal law: it set the infrastructure for lawsuits brought to the International Court of Justice (ICJ),[3] and submitted against states suspected of the commission of genocide; it established a definition of genocide that was later accepted by the ad hoc international criminal tribunals[4] and the International Criminal Court (ICC), and thus provided the basis for criminal prosecution of state leaders and army commanders for the commission of crimes.[5]

Nevertheless, the Convention was criticized for its narrow definition of genocide, which excluded both destruction of culture of the groups protected by the Genocide Convention and the physical destruction of political groups (cultural genocide and political genocide) from its purview. The acts constituting the crime of genocide which are enumerated by the convention are physical acts including: killing, causing physical and mental harm, inflicting damage on a group by conditions of life intended to bring about its physical destruction

---

* This article is based on a lecture given at AUCRSG Inauguration Conference: "The Holocaust and Genocide in the 21st Century: A Grievous Yet Never Ending Story," held at Ariel University, November 15-17, 2022.

1. Convention on the Prevention and Punishment of the Crime of Genocide Convention, 12 January 1951, 78 U.N.T.S. 277 (1951) (hereinafter: "Genocide Convention").
2. United Nations Economic and Social Council, Draft Convention on the Prevention and Punishment of the Crime of Genocide, UN Doc. E/AC.25/12. (1948) (hereinafter: "Genocide Draft").
3. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, Judgment, ICJ Reports 43 (2007) ; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 3 (2015) ; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Provisional measures, 23 January 2020, §§ 79-80, available *at* https://www.icj-cij.org/en/case/178/provisional-measures
4. International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR).
5. The ICC has not yet dealt with genocide cases, but there is a pending arrest warrant against Omar al-Bashir, Sudan's former president, for the commission of three counts of genocide: killing, causing serious bodily or mental harm, and deliberately inflicting on each target group conditions of life calculated to bring about the group's physical

and forcibly transferring children and preventing births within the group.[6] The groups to which the Convention refers are national, ethnic, racial, and religious.[7] This article sheds light on the criticism raised against the narrow definition, and focusses on two aspects: the importance of the inclusion of cultural, and not only physical genocide, as an integral element of the crime; and the inclusion of political affiliation among the groups protected by the Convention.

2. Cultural Genocide

Cultural genocide refers to the systematic destruction of a group by targeting its cultural heritage, including its tangible and intangible cultural structures. According to the analysis of genocide by Raphaël Lemkin, cultural genocide is one of eight techniques of implementing genocide. These techniques comprise a wide spectrum of physical and non-physical means of destroying a group, including political, social, cultural, economic, religious, and moral means. Cultural aspects include "the destruction of cultural symbols… [which] menaces the existence of the social group which exists by virtue of its common culture."[8] Lemkin views this type of destruction as genocide.

Cultural genocide is like the concept of genocide in the sense that it targets a group and not individuals per se. Groups are a fundamental element of genocide because of their crucial significance to the sustainability and continuity of a nation, race, ethnos, and religion. When a group is destroyed, its heritage and even its intergenerational connections may be destroyed. Even though the members of the group are not physically exterminated, they lose the role the group played in their lives, a crucial and irredeemable loss of both external recognition and self-acknowledgment.[9]

The United Nations Draft Declaration of the Ad Hoc Committee on Genocide established by the Economic and Social Council in 1948 included cultural genocide in the definition of the crime, stating that genocide "also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief."[10] The committee also provided examples of such acts: the prohibition on the use of the language of the groups and the destruction or prevention of the use of libraries, attending museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. The draft nevertheless excluded from its definition the forced assimilation of a national group, and determined that a policy of forced assimilation does not constitute genocide.[11]

One reason for excluding forced assimilation from the purview of "genocide" in the Genocide Convention can also explain the final decision to ultimately exclude cultural genocide from the convention. This explanation rests on some of the political constraints in the background of the drafting of the Genocide Convention. In 1948, when the convention was drafted, colonial states such as the United States, France, and the United Kingdom,[12] and other states with indigenous peoples under their sovereignty, such as Canada and Australia, two of which (the United States and France) were members of the Ad Hoc Committee on the Genocide Convention,[13] warned that the inclusion of cultural genocide might impede legitimate efforts by states to foster a national community and "civilize" the peoples under their control.[14]

Therefore, except for the prohibition on transferring children from the targeted group to another – an act that can be interpreted as intending to sever the cultural connection between those children and their national,

---

destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan. Some examples of genocide case law in the ad hoc tribunals are: Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, Sept. 2, 1998; Judgment, *Jelisic* (IT-95-10-T), Trial Chamber, Dec. 14, 1999 ("*Jelisic* Trial Judgment"); Judgment *Krstić* (IT-98-33-T), Trial Chamber, Aug. 2, 2001 ("Krstić Trial Judgment"); Judgment, *Brdanin* (IT-99-36-T), Trial Chamber, Sept. 1, 2004.

6. Genocide Convention, Art. 2.
7. *Ibid*.
8. Raphaël Lemkin, "The Concept of Genocide in Anthropology," NYPL, Box 2, Folder 2.
9. Larry May, Genocide: A normative Account 10-87 (Cambridge University Press, 2010).
10. Genocide Draft Convention.
11. *Ibid*.
12. The United States and France were members of the Ad Hoc Committee on the Genocide Convention. *See* Jeffrey S. Bachman, "An Historical Perspective," in Law, Politics, and Global Manifestations 48 (London: Routledge, 2019).
13. Jeffrey S. Bachman, "An Historical Perspective," in Law, Politics, and Global Manifestations 48 (London: Routledge, 2019).
14. Julie Cassidy, "Unhelpful and Inappropriate? The Question of Genocide and the Stolen Generations," 13(1) Australian Indigenous Law Review 114-139, 130 (2009); Johannes Morsnik, "Cultural Genocide, the Human Rights Declaration on Minority Rights," 21 (4) Human Rights Quarterly 1009-1060, 1025 (1999).

ethnic, or religious origin – cultural genocide was finally removed from the Genocide Convention. The Convention defines the crime of genocide as including five acts of which four pertain exclusively to the physical destruction of the members of the group (and thus, the group itself): killing, causing serious bodily or mental harm, deliberately inflicting specific conditions of life on the group calculated to bring about its destruction, and imposing measures to prevent births within the group. Thus, currently, there is no legal support in a treaty and state practice for the idea that "the destruction of culture short of physical destruction of such protected groups [constitutes] an act of genocide."[15]

Nevertheless, this is not to say that the concept of cultural genocide has no relevance in the legal arena and beyond. While studies have identified cultural genocide as part of the process of genocide, they also address it as a process of its own, called ethnocide. In this sense, cultural genocide has an independent existence as a crime in itself: genocide without murder.

Cultural genocide has also remained of crucial importance in the legal arena. Various branches of international law address many facets of the concept. In international criminal law, international courts have applied the concept of cultural genocide to maintain that under certain circumstances, cultural genocide can amount to genocide or serve as evidence for the specific intent (*mens rea*) to destroy the group.[16] The ICC prescribed that this can be the case when "such a practice… brings about the commission of the objective elements of genocide… with the *dolus specialis* [special intent] to destroy in whole or in part the targeted group."[17] The ICTY discussed the mass killing of between 7,000 and 8,000 Bosnian Muslims in Srebrenica and suggested that when a physical or biological destruction takes place, it is often accompanied by attacks on religious property and symbols of the religious group. This can indeed serve as evidence of intent to destroy the group.[18] The ICTY, therefore, saw the destruction of mosques and houses of Bosnian Muslims as evidence for the specific intent to commit genocide.[19] This argument was also endorsed by the ICJ in the *Bosnia v. Serbia* case, in which the court applied the decision of the Krstić Trial Chamber when it assessed the special intent of the perpetrators of the Srebrenica genocide.[20]

In addition, beyond the crime of genocide, international criminal law includes the constitutive acts of cultural genocide within "persecution" – an offence included in crimes against humanity in the ICC Statute.[21] International human rights law treaties also protect culture, and the UN Declaration on the Rights of Indigenous Peoples[22] (UNDRIP) makes more specific references to Indigenous Peoples' right not to be subjected to forced assimilation or destruction of their culture.[23] This is perhaps because the cultural genocide of indigenous groups is more egregious than other forms of ethnocide.

The connection between physical and cultural genocide has practical implications that could also serve to warn of genocide in advance and perhaps prevent the genocide. If evidence of cultural genocide is collected before the physical destruction begins, relevant monitoring bodies such as the UN Human Rights Council, the UN human rights treaty bodies, and especially the UN Office on Genocide Prevention and Responsibility to Protect could intervene to warn of the possibility of genocide.

Moreover, the importance of cultural genocide exceeds the legal realm and has broader implications for the social and political context. The fact that the non-physical destruction of a group is a fundamental factor in determining its overall destruction means that the legal understanding of genocide, entrenched by the Genocide Convention, is too limited. Outside the narrow lens of international law in general, and international criminal law in particular, a broader concept of genocide should be endorsed. A sharp distinction between what destroys a culture and what kills a people is often not possible. On the contrary, it is more likely that the two concepts of physical and cultural destruction are inextricable; the

15. James Anaya, cited by Cassidy, *supra* note 14, n.15, at 129.
16. Genocide Convention, Article 2 determines that a crime of genocide requires "[the] intent to destroy in whole or in part a national, ethnical, racial or religious group, as such."
17. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, March 4, 2009, ¶ 145.
18. Judgment *Krstić* (IT-98-33-T), Trial Chamber, Aug. 2, 2001 (*Krstić* Trial Judgment), § 580; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, April 19, 2004 (*Krstić* Appeal Judgment), § 53.
19. *Krstić* Trial Judgment, § 580.
20. Bosnia v. Serbia, § 344.
21. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/Conf.183/9 (entered into force July 1, 2002) ("ICC Statute"), Art.7 (1)(h), 1009-1060, 1025.
22. UN Office of the High Commissioner for Human Rights (OHCHR), The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, HR/PUB/13/2.
23. UNDRIP, Art. 8(1), 8(2).

interpretation of the former has repercussions on the interpretation of the latter.[24]

Thus, although the codification and criminalization of cultural genocide do not seem foreseen developments in the near future, the fact that cultural genocide has not disappeared from the legal and the socio-political discussion points to its potential resurgence in international law and beyond. This is especially, but not exclusively, relevant to the right of Indigenous Peoples to culture and language. It seems that the infringement of this right is not only a violation of international human rights law but also amounts to cultural genocide under certain circumstances; it should also be recognized as such by the international community.[25]

Crucially, arguments against expanding the definition of genocide to include ethnocide (or cultural genocide) should be considered. Conceptually, it could be argued that expanding the definition will dilute the force of the core meaning of genocide. Practically, a narrow definition is more administrable and serves as a better basis for enforcing criminal liability. This may thus justify not changing the definition of genocide in the Genocide Convention. It does not, however, rule out the possibility of expanding the definition in other and broader contexts.

To conclude this section, an implication of cultural genocide for the present should be addressed: the physical and cultural genocide of the Uyghur minority in northwest China, which has been taking place since 2017. The Uyghurs are an ethno-religious Turkic minority group, who are predominantly Muslim. Most of them (approximately twelve million people) reside in Xinjiang Uyghur Autonomous Region of northwest China, and they comprise about half of the total population of the region.[26] The meaning of their name is "unity" or "alliance," distinguishing their ethnic identity.[27]

China has acted to repress the Uyghur minority almost since the beginning of its establishment as the People's Republic of China in 1949. The Chinese regime's response to the struggle for self-determination of the Uyghurs – a struggle that began in the 1940s – has intensified over the years. Beginning with attempts to forcibly assimilate the Uyghur community, the regime then placed sanctions on the Uyghurs' religious and cultural expression. In May 2014, in response to an act of terrorism committed by Uyghur extremists in Urumqi, the Capital of Xinjiang,[28] the Chinese government launched "The Strike Hard Campaign against Violent Terrorism" (Strike Hard Campaign), that expanded into an aggressive assault on the Uyghurs' culture and heritage.[29]

Since 2014, evidence has been collected to prove allegations that the gross violations of human rights that China has committed against the Uyghur population in northwest China amount to crimes against humanity[30] and genocide.[31] Among them are acts that can be referred to as cultural genocide. These include the incarceration of people belonging to the Uyghur community in hundreds of camps, where according to human rights non-governmental organizations (NGOs), people are held in appalling conditions, forced to work, and face sanctions on their freedoms of religion, culture and faith, including prohibitions on using the Uyghur language and practicing Islam, the Uyghur religion.[32]

---

24. To further elaborate on cultural genocide and its connection to physical genocide, *see* Hilly Moodrick-Even Khen, "The Uyghurs: A Case for Making the Prohibition on Cultural Genocide a Soft Law Norm in International Law," 30 Int'l J. on Minority and Group Rights 76-109 (2023).
25. Note, for example, Canada's Truth and Reconciliation Commission report on the abduction of 150,000 First Nations' children committed by the government between 1867 and 1996 and their forced assimilation in residential schools as a form of cultural genocide. *See* "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015), available *at*: https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf
26. "To Make Us Slowly Disappear," The Chinese Government Assault on the Uyghurs, United States Holocaust Memorial Museum Report, Nov. 2021, at 5 (USHMM report).
27. Sumaya S. Bamakhrama, "Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; Re- Education Camps," 55 U.S.F.L. Rev. 399, 404 (2020-2021).
28. The extremists set off explosives that killed 31 people and injured more than 90.
29. Brennan Davis, "Being Uighur… With 'Chinese Characteristics': Analyzing China's Legal Crusade Against Uighur Identity," 44 Am. Indian L. Rev. 81, 98 (2019-2020).
30. Such as killings, torture, mass incarceration, rape, arbitrary deprivation of life, forced disappearances, and forced labor.
31. Committed through transferring Uyghur children from their group (putting them in state-run institutions when their parents are detained or in exile) and applying measures of forced sterilization or birth control.
32. China describes these camps as "re-education" centers set up in response to "terrorist activities" committed by Uyghur organizations and objects to the allegations it faces, as described above.

The Chinese regime is also accused of additional acts of cultural genocide outside the camps. These include: 1) laws and policies instituted to limit and criminalize the practice of both Islam and Uyghur culture and language,[33] and making any violation of the prohibitions on the exercise of religious freedom a basis for arrest or detention;[34] 2) aggressive promotion of marriage between Han Chinese and Uyghurs, in particular between Han men and Uyghur women;[35] and 3) destruction of Uyghur religious and cultural property.

While the restrictions on the Uyghur community with regard to their right to express their religion and culture in daily life and outside detention centers are clear violations of human rights law instruments that determine the right to freedom of religion and the right to perform cultural practices,[36] they are not in and of themselves a form of cultural genocide intended to systematically destroy the Uyghurs by means of eliminating their culture and religion. However, considering the establishment of internment camps (in which at least one million people have been incarcerated so far)[37] that provide evidence for the special intent to replace the Uyghurs' culture with that of the dominant Han group, these camps constitute a form of cultural genocide. As noted above, China has strongly objected to the accusations. It has also limited the international community's access to Xinjiang and its ability to intervene.[38] Yet, when supported by the endorsement of the theoretical concept of cultural genocide, the evidence collected by NGOs and reports of the UN monitoring bodies that proved China's violations of international law could eventually bring about a strong international condemnation and significant actions against China.[39]

3. Political Genocide

Another form of genocide included in Lemkin's description of the "eight techniques of genocide" is political genocide. In contrast to cultural genocide, political genocide is a physical form of genocide, and thus should have more naturally fit within the criteria of the crime of genocide as defined in the Genocide Convention. However, the convention limited the protected groups to national, ethnic, racial, or religious groups. The rationale for this limitation was identified by the ICTR as focusing on "stable groups," that is, groups whose belonging is determined by birth.[40] Political groups have thus not gained the protection of the convention since they are not defined as "stable" groups.

Nevertheless, the exclusion of political genocide from the purview of the definition of genocide in international law has not gained support across the board. For example, the Extraordinary Chambers in the Court of Cambodia – established as a hybrid court[41] in June 2006 to try perpetrators of mass atrocities committed in Cambodia between April 1975 and January 1979 by members of the Communist Pol Pot regime – included the crime of genocide in its jurisdiction.

---

33. "Like We Were Enemies in War, China's Mass Internment, Torture and Persecution of Muslims in Xinjiang," Amnesty International Report 25 (2021), (Amnesty Report); USHMM Report, at 18.
34. USHMM Report, at 19.
35. USHMM Report, at 10-11. Given that a person who refuses such marriages risks being detained, the "aggressive promotion" may be rightfully described as forcing the marriage.
36. These rights are enumerated in the customary law; UN GA, Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III); UN GA, Elimination of all forms of intolerance and of discrimination based on religion or belief, Dec. 16, 1976, A/RES/31/138, and in treaties to which China is a party such as the UN GA, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, U.N.T.S. vol. 660, p. 195.
37. The Chinese government does not supply any official data on these centers so exact numbers are not available. These estimates are based on NGO reports. *See* Amnesty report, at 23; Bamakhrama, *supra* note 27, at 404.
38. *See* for example, the former UN High Commissioner for Human Rights report on September 15, 2021, on her failure to gain access to Xinjiang. Sophie Richardson, "UN Rights Chief to Report on China's Abuses in Xinjiang," Human Rights Watch, https://www.hrw.org/news/2021/09/15/un-rights-chief-report-chinas-abuses-xinjiang
39. For the implications of the international community's recognition of the cultural genocide of the Uyghurs on the development of cultural genocide as a soft law norm of international law, *see* Moodrick-Even Khen, *supra* note 24, at 106-109.
40. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, Sept. 2, 1998, ¶ 511.
41. Hybrid courts are ad hoc courts with mixed characteristics of domestic and international courts, established to try perpetrators of core crimes including war crimes, crimes against humanity and genocide. The "hybrid characteristics are found in their applicable law, and in the rules of their composition, procedure and jurisdiction." For more on hybrid courts, *see* Hybrid Courts, in Ariel University Center for the Research and Study of Genocide: https://www.ariel.ac.il/wp/rsg/hybrid-courts/

There is reason to believe that the interpretation of the Genocide Convention may be revisited to include political genocide under the broader definition of genocide.

4. Conclusion

This article addressed the question of whether the time has come to revisit the definition of genocide in the Genocide Convention and include two forms of genocide that were intended for inclusion by the draftsmen of the convention but were eventually excised from the convention's final provisions. The article answered these questions in the affirmative. It provided theoretical and practical arguments for including cultural and political genocide in the definition of genocide and presented their implications for current events, such as the genocide of the Uyghurs in China, and for past events (that are nevertheless still dealt with by national and international courts) such as the mass atrocities committed in Cambodia between 1975 and 1979.

The argument for broadening the definition of genocide stems from the view that the legal concept of genocide in general and in international criminal law in particular is just one aspect of the broad phenomenon of genocide. While the broadening of the definition of genocide may have direct legal implications (such as providing evidence for anticipated acts of genocide and their prevention), it will also have implications for the interpretation of genocide in other contexts. Such interpretation is required for a more nuanced and accurate understanding of the concept of genocide that may serve as well for fulfilling the most important mission of combatting genocides and aiming at their eradication. ■

Dr. Hilly Moodrick-Even Khen is a Senior Lecturer of international law at the Faculty of Social Sciences and Humanities in Ariel University, and chair of Ariel University Center for the Research and Study of Genocide (AUCRSG). Her research interests are international humanitarian law, international criminal law, and genocide studies. In addition to her publications in scientific journals, Dr. Moodrick-Even Khen published two books and two edited volumes. The most recent one is: The Syrian War: Between Justice and Political Reality (co-edited with Nir Boms and Sareta Ashraph, CUP, 2020).

New York Law on Display of Information about Nazi-Displaced Art Promotes Understanding but Raises Questions

Nicholas M. O'Donnell

In August 2022, New York Governor Kathy Hochul signed into law an amendment to New York Education Law Section 233-AA,[1] which now requires museums to publicly identify any object in their collection that was displaced by the Nazis during the Holocaust, which Congress rightly described as the "greatest displacement of art in human history."[2] The amendment reflects a response to the widely varying degree of candor with which American museums proactively approach the issue of Nazi-looted art in their collections. Many have shown admirable initiative in probing their collections, while others have shown a regrettable passivity in waiting to receive claims which they ultimately deflect. New York is the center of the art world, and its museums hold a unique place of prominence. Whether this bill will finally stimulate passive institutions into action is the question. While the amendment serves many of the modern restitution era's defining ideals of transparency and disclosure, it could create some unintended consequences and posit some uncomfortable questions about compelled speech under the First Amendment.

The law states:

> Every museum which has on display any identifiable works of art known to have been created before nineteen hundred forty-five and which changed hands due to theft, seizure, confiscation, forced sale or other involuntary means in Europe during the Nazi era (nineteen hundred thirty three-nineteen hundred forty-five) shall, to the extent practicable, prominently place a placard or other signage acknowledging such information along with such display.[3]

There are two key concepts at work here. First, the amendment's bracketing of 1933-1945 is vital. It reflects the importance of acknowledging the full extent of Nazi crimes during the entirety of the regime, rather than focusing on a specific type of hateful act or arbitrary period within the Third Reich such as the enforcement of Reich Citizenship (Nuremberg Race) Laws beginning in 1935. Second, the law takes an appropriately broad view of Nazi art crimes. One of the practical limitations of the Washington Conference Principles on Nazi-Confiscated Art is the term "confiscated" itself. The scope of Nazi art theft was so much broader than cartoonish scenarios of deprivations at gunpoint. The Nazis were driven by an insatiable quest to pretend they were buyers rather than thieves, and rendered their victims unable to make real legitimate and uncoerced decisions,[4] as recognized in dictates like Military Government Law No. 59's

1. N.Y. Education Law § 233-AA (Aug. 19, 2022), available *at* https://www.nysenate.gov/legislation/laws/EDN/233-AA; *see* generally "Governor Hochul Signs Legislation to Honor and Support Holocaust Survivors in Educational, Cultural, and Financial Institutions," New York State (Aug. 10, 2022), available *at* https://www.governor.ny.gov/news/governor-hochul-signs-legislation-honor-and-support-holocaust-survivors-educational-cultural; Clara Cassan, "New York Museums to Display the History of Nazi-Looted Artworks," International Bar Association (Nov. 7, 2022), available *at* https://www.ibanet.org/New-York-museums-to-display-the-history-of-Nazi-looted-artworks#_edn1
2. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, § 4(3) (2016).
3. N.Y. Education Law § 233-AA (Aug. 19, 2022), available *at* https://www.nysenate.gov/legislation/laws/EDN/233-AA
4. For example, the Military Government Law No. 59 presumes that confiscation occurs where their possessor–rather than the claimant–bears the burden of proving that the work was not stolen. Presidential Advisory Commission on Holocaust Assets in the United States and Art & Cultural Property Theft, "Military Government Law No. 59," Clinton Digital Library, available *at* https://clinton.presidentiallibraries.us/items/show/30179

presumption of confiscation without proof by the possessor not the claimant.

This new law understands the more nuanced reality of Nazi art theft practices. Explicitly acknowledging forced sales is a considerable improvement over the language of the Washington Principles or even the museum associations' guidance. Additionally, the amendment's inclusion of "other involuntary means" will address several scenarios like so-called "flight goods," where the owners simply had to choose between fleeing without their art in order to stay alive or remaining, temporarily keeping their art, yet almost certainly facing deportation and death.

The critical question is how the amendment will change the current dynamic within the museum community of New York. Here, some historical background is instructive for context. Since the resurgence of the issue in the 1990s, there was a renewed awareness of the breadth and complexity of the issue of Nazi-looted art. In response, various institutions promulgated principles regarding how to handle Nazi-looted art, and such principles have remained in play ever since. For example, America's leading museum associations that affect the possible possession of Nazi-looted art are the Association of Art Museum Directors (AAMD), and the American Alliance of Museums (AAM). Neither have the force of law, nor do they pretend to. Rather, they provide ethical guidance either to member institutions or more broadly. (Nearly all American museums, whether of art or otherwise, belong to AAM, and while AAMD is a small group of art museums' directors, its guidance is extremely influential.)

The AAMD's Task Force recommendations encourage member museums to "begin immediately to review the provenance of works in their collections to attempt to ascertain whether any were unlawfully confiscated during the Nazi/World War II era and never restituted"[5] and "search their own records thoroughly and, in addition, should take all reasonable steps to contact established archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers who may be able to provide Nazi/World-War-II-era provenance information."[6] From 1998 onward, the recommendations included several aspects (including applying those principles to future gifts and acquisitions).[7] Relevant to the New York law, the AAMD recommended that "If a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should make such information public."[8]

For its part, the AAM published guidelines on the "Unlawful Appropriation of Objects During the Nazi Era."[9] Those guidelines include the recommendation that museums:

(1) identify all objects in their collections that were created before 1946 and acquired by the museum after 1932, that underwent a change of ownership between 1932 and 1946, and that were or might reasonably be thought to have been in continental Europe between those dates (hereafter, "covered objects");
(2) make currently available object and provenance (history of ownership) information on those objects accessible; and
(3) give priority to continuing provenance research as resources allow.

Further, AAM recommends that

> If credible evidence of unlawful appropriation without subsequent restitution is discovered through research, the museum should take prudent and necessary steps to resolve the status of the object, in consultation with qualified legal counsel. Such steps should include making such information public and, if possible, notifying potential claimants.[10]

The point of comparing existing guidelines to the new amendment is this: for more than two decades, seemingly analogous principles on how to handle Nazi-looted art have been in place as both an aspirational matter and a

---

5. AAMD Task Force, "Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945) AAMD Task Force," Association of Art Museum Directors, June 4, 1998, available *at* https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf
6. *Id*.
7. *Id*.
8. *Id*.
9. AAM Board of Directors, "Unlawful Appropriation of Objects During the Nazi Era," American Alliance of Museums (November 1999; amended April 2001), available *at* https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/
10. *Id*.

matter of ethics. Every museum under the jurisdiction of the recent New York law operates in the context of these existing principles. Some outside the jurisdiction of New York law, like the Museum of Fine Arts Boston or the Nelson-Atkins Museum in Kansas City, have hired dedicated experts to assess their collections' provenance.[11] Others have resisted even acknowledging the obvious likelihood that their collections include Nazi-looted art, and made little effort towards transparency.

The New York amendment is therefore a classic example of attempting to compel behavior that was previously only suggested. There is no enforcement mechanism for the AAM or AAMD guidelines, and any museums that flouted the guidelines are generally met with silence from the associations themselves. It would seem that the threat of legal liability under the new amendment supports the notion that something more than best practices might be a good idea.

However, this is a law, and what actions constitute compliance versus a violation will depend on a careful reading of the statute's text. Moreover, even allowing for the admirably broad-minded description of what constitutes Nazi art theft, it is unclear what or who determines whether art "changed hands due to theft, seizure, confiscation, forced sale or other involuntary means in Europe during the Nazi era." The Attorney General? Presumably, if a museum had reason to believe that it possessed a piece that fell under this definition, the museum could be compelled to indicate as much in a sign. But what degree of certainty is required? The law does not say. Finally, in some ways the law could act as a disincentive to further inquiry, rather than a galvanizing force. After all, the law does not compel investigation, nor does it condemn a lack of knowledge. Arguably, a museum would be safer to cease further research lest that research uncover information that would then have to be disclosed.

Notable disputes that have unfolded in New York bear this out. Museums ranging from the Metropolitan Museum of Art, to the Guggenheim, to the Museum of Modern Art have steadfastly rejected the underlying premise advanced by claimants that works in their collections, "changed hands due to theft, seizure, confiscation, forced sale or other involuntary means in Europe during the Nazi era."[12] Moreover, if museums came to that conclusion and were prepared to defend it in litigation – as they had every right to do – this law may not lead to any different disclosure. Indeed, those museums have again been sued in multiple cases since the original law was passed,[13] and no one seriously expects any museum to admit that a piece in the midst of litigation is covered by the law. To be sure (and perhaps by coincidence), there have been disputes elsewhere in which the parties all agreed that the art met the criteria to be considered Nazi-looted art, but the museums resisted restitution for one reason or another. In that scenario, a museum in New York would be obliged at least to display the information about the piece's provenance.

The elephant in the room is the nature of the law's command: speech. Distilled to its essence, the law requires the museums to say something. At a certain level such compelled speech is antithetical to the First Amendment. The First Amendment does not permit the government to require private actors to speak, even if the subject is something about which there is broad agreement. We live in an age where social media posts trumpet obvious falsehoods, but the First Amendment does not condone requiring those speakers to make a correction. How can something that often involves judgment and opinion be required, if outright believers in the 9/11 truth movement and election deniers are free to spread objective falsehoods? This is not to suggest New York museums have done anything akin to denying the reality of a terrorist attack or the legitimacy of a U.S. presidential election. Instead, state authority stands on firmer ground when promoting awareness in primary and secondary education, which was addressed in another law passed and signed at the same time as the one discussed here, by mandating a survey regarding instruction on the Holocaust within New York State public school districts.[14]

---

11. *See e.g.*, "Nazi-Era Provenance Research" (https://www.mfa.org/collections/provenance/nazi-era-provenance-research); *see also* Claire Smith, "World War II Art Restitution Exhibitions: A Step in the Right Direction or Not Far Enough?" Summer 2022, THE IJOURNAL, available *at* https://theijournal.ca/index.php/ijournal/article/download/39327/29957
12. N.Y. Education Law § 233-AA (Aug. 19, 2022), available *at* https://www.nysenate.gov/legislation/laws/EDN/233-AA
13. *See Silver, et al. v. Basil and Elise Goulandris Foundation, et al.*, 3:2022cv08914, Justia (N.D. Cal); *Bennigson, et al. v. The Solomon R. Guggenheim Foundation*, Index No. 650416/2023, Court House News (N.Y. Sup. Ct.).
14. Chapter 490 of the Laws of 2022 (A.472C /S.121B); *see also* "Governor Hochul Signs Legislation to Honor and Support Holocaust Survivors in Educational, Cultural, and Financial Institutions," *supra* note 1.

Even if the law can theoretically ease the tension between compelling speech and First Amendment rights, there is an unfortunate trend which will likely apply to this newest amendment. Running parallel to a history of laws establishing a broad consensus on Nazi art theft is a history of lawmakers promptly forgetting the contents of such laws. In 2016, Congress passed the Holocaust Expropriated Art Recovery (HEAR) Act to extend claimants' ability to have their day in court.[15] The law was accompanied with great fanfare, and co-sponsored by unlikely allies like Ted Cruz and Chuck Schumer. It passed unanimously. Yet when the Supreme Court stated (in dicta) in 2021[16] that the HEAR Act was primarily to promote non-litigation resolutions (at complete odds with the statute's text), was there any Congressional objection? No. Similarly, when Congress amended the Foreign Sovereign Immunities Act explicitly to define "Nazi era claims" to mean the entirety of the Nazi era between 1933 and 1945, SCOTUS held that Congress only meant some of them. The Congressional response to this defiance was . . . nothing. Not a bill, not a speech, not a hearing. One wonders if the attention of the New York politicians – who were happy to call attention to themselves last year when the bill was signed – will be similarly fleeting. ■

Nicholas M. O'Donnell is an attorney in Boston, Massachusetts. He has served as lead counsel on a variety of lawsuits concerning restitution and fine art sales and has advised museums, dealers, auction houses, and collectors worldwide about restitution, copyright, and de-accessioning issues. Mr. O'Donnell is also the author of numerous articles and papers on the subject of art disputes and regulation, as well as "A Tragic Fate—Law and Ethics in the Battle Over Nazi Looted Art" (2017), which was the first comprehensive overview of disputes regarding Nazi-looted art in the U.S. The work included his clients' claims for the Guelph Treasure or "Welfenschatz," which he argued before the Supreme Court in 2020.

15. *Supra* note 2.
16. *F.R.G. v. Philipp*, 141 S.Ct. 703 (2021).

The Federal Republic of Germany's Creation of Compensation Laws for Nazi Wrongdoing

Avraham Weber

Introduction

This article explores the creation of a Federal German legal order for the restitution of stolen properties and compensation for personal injuries caused by Nazi persecution. It examines the roots of such a legal order in light of the 70th commemoration of the Luxembourg Agreement, signed by the Federal Republic of Germany, the State of Israel, and the Jewish Claims Conference (JCC). This article further delves into the legal disciplines that were utilized to create such arrangements, as well as their following developments. This includes the shift of legal disciplines and manners of solving compensatory needs vis-à-vis financial restrictions imposed by the national budget (such as article 104a or 115 German Federal Basic law).[1]

We will review the various internal and external factors that influenced the Federal Republic to create individual compensation mechanisms for the first time in modern history, based on international law obligations (some that existed prior to World War II and others that were only created afterwards). The purpose was to take the necessary steps to allow Germany to return to the "family of nations," and reintegrate the U.S.-backed Western European block.

Legal Historical Background for the Federal Republic of Germany's Creation of Compensation Laws

As early as the end of 1942, the Allied forces,[2] led by the U.S. and Great Britain, discussed post-war issues. A specific declaration outlining the need to return looted and plundered properties was concluded in 1943 by sixteen countries, all fighting alongside the Allied forces. However, it was only in August 1945 that the London Agreement established an international tribunal for the trial of Nazi war criminals.[3]

Shortly afterwards, and mostly due to Raphael Lemkin's strong lobbying, the UN General Assembly agreed to include the term "genocide" in its resolutions, and ensured that Nazi war crimes be declared a gross violation of international law (1946 decision).[4] This declaration would soon be known as the Convention on the Prevention of Genocide (December 9, 1948), and adopted alongside the Universal Declaration of Human Rights.[5]

Simultaneously, two important processes took place in Germany. The first led to the end of the three military occupation zones in Germany, which were controlled by the Western powers, as well as the ensuing establishment of the Federal Republic of Germany (West Germany). This establishment was accompanied by the passing of a new constitution: the Basic Law of 1949, which set forth basic rights and protections. It also denounced key flaws of the German Nazi regime, such as the violation of human liberty and property rights. These concepts became entrenched in the new constitution, so that no Dual State (a term coined in 1941 by German refugee Ernst Fraenkel in his analysis of the Nazi regime: *The Dual State: A Contribution to the Theory of Dictatorship*) would be able to rise again in Germany. This entrenchment helped prevent the violation or deprivation of minorities' basic rights.

The second development pertained to international relations. In order to be accepted into the international

---

1. Michael J. Thomerson. "German Reunification — The Privatization of Socialist Property on East Germany's Path to Democracy," 21 Ga. J. Int'l & Comp. L. 123-143 (1991), available *at* https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1541&context=gjicl
2. Secretary of State to the Chargé in the United Kingdom (Matthews),"Inter-allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation of Control; Establishment of Inter-Allied Sub-Committee on Acts of Dispossession" (Dec. 31, 1942, 5 pm), available *at* https://uscbs.org/assets/inter-allied-declaration.pdf
3. Yale Law School, Nuremberg Trial Proceedings, Vol. 1, "London Agreement of August 8th 1945," available *at* https://avalon.law.yale.edu/imt/imtchart.asp
4. UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96, available *at* https://www.refworld.org/docid/3b00f09753.html
5. UN, Universal Declaration of Human Rights, available *at* https://www.un.org/en/about-us/universal-declaration-of-human-rights

community, the Federal Republic of Germany was obliged to settle new national debts owed to the victorious countries, in addition to what remained of its post-WWI national debt. The debt was so considerable that the Federal Republic was forced to negotiate and consolidate it under a special debt agreement, which was finally concluded at the end of 1953.[6]

In light of these events, internal and external processes propelled Germany to understand that in order to be accepted by the international community, it needed to implement measures that showed the world that it was now ready to repair Nazi wrongdoing. Germany was pressured by the Jewish world, mainly through Dr. Nachum Goldmann, founder of the World Jewish Congress (WJC), to hold talks with the State of Israel and Jews at large, to find a way to allow Germany to conclude an international binding agreement with the Jewish state. This was to be done even though Israel did not exist at the time of the Nazi wrongdoings.[7]

The first steps were filled with obstacles. The German Chancellor offered a rather small sum as compensation. This led many to question Germany's willingness to resolve this issue in a dignified and honorable way. The proposal was immediately rejected by Israel.[8]

The Federal Chancellor's speech of December 1951, in which he acknowledged Germany's war crimes, was of paramount importance. This speech paved the way for Germany to compensate victims of Nazi persecution within the scope of its financial means.[9] This declaration was groundbreaking in international law. Not only did the Federal government conclude a reparations agreement with Israel as "the State of the Jewish people," but it also allocated compensation to individuals with the help of a third party: the Conference of Jewish Material Claims against Germany (Claims Conference). That organization represented all Jewish organizations that sought to obtain compensation for Holocaust survivors around the world.

Not everyone in the Jewish world responded positively to this agreement despite its financial scope. The ongoing negotiations between the German government, the Israeli government and Jewish organizations were not well received in Israeli society. There were unprecedented demonstrations against the agreement which placed heavy political pressure on Israeli Prime Minister David Ben-Gurion. The idea that money could compensate or contribute to "*Wiedergutmachung*" [making things right again], was rejected by many in Israeli society.[10]

However, since Israel was a young state struggling to get its economy going, Ben-Gurion was compelled to follow Dr. Goldmann's advice and move forward with the negotiations. This led to the signing of the 1952 Luxembourg Agreement which created a legal structure for payment to the State of Israel as reparation. This enabled the Jewish state to fulfil its commitment in the May 1948 Declaration of Independence: becoming financially capable to be the nation state for "*she'erit hapleita*" [the surviving remnant]. Furthermore, the German government recognized the Jewish Claims Conference as the roof organization responsible for compensating survivors living outside of Israel.

The Bundesentschaedigungsgesetz (BEG): Administrative Law as a Compensation Mechanism BEG - 1957

The solution in the 1952 Luxembourg Agreement was different from resolutions found in other treaties that had been concluded until then under international law principles of reparation agreements. In addition to paying reparations to the State of Israel and a supplementary sum to the victims living in the diaspora, the Federal Republic of Germany enacted the *Bundesentschaedigungsgesetz (BEG)*,[11] which aimed to create a civil law catalogue to resolve outstanding survivors' individual rights to file claims.

The legislation sought to ensure personal compensation, primarily to individuals who endured physical and psychological injuries caused by the Nazis. Additionally, an administrative mechanism was introduced based on the situation prior to the period of persecution. Until then,

---

6. United Kingdom of Great Britain and Northern Ireland, Agreement on German External Debts (Feb. 27, 1953), available *at* https://treaties.un.org/pages/showDetails.aspx?objid=080000028013dc13
7. Mark A. Raider, Ed., Nahum Goldmann, STATESMAN WITHOUT A STATE (N.Y.: State University of New York Press, 2009).
8. Yeshayahu A. Jelinek,"Israel und die Anfänge der Shilumim," in WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK 119, 128 (Ludolf Herbst & Constantin Goschler, eds., 1989).
9. Deutscher Bundestag -- 165. Sitzung. Bonn, Sept. 27, 1951, p. 6697.
10. Yaakov Sharett, "Reparation Controversy," available *at* https://www.sharett.org.il/cgi webaxy/sal/sal.pl?lang=he&ID=880900_sharett_new&act=show&dbid=misc&dataid=11
11. Government of Germany, Federal Law on Compensation for Victims of National Socialist Persecution (Federal Compensation Law-BEG) (Sept. 18, 1953), available *at* https://www.gesetze-im-internet.de/beg/BJNR013870953.html

the "Jewish issue"— the claim of the Jewish people vis-à-vis the government — was understood by the Germans as only creating a personal compensation measure initiated by the German government, and not reparations. The idea now was to implement parallel administrative law solutions as a means of addressing the issue — ensuring a speedy track for creating personal compensation programs.[12]

Shortly after the law was enacted, the Länder (Federal States) administrative branch began to adjudicate individual claims for atrocities which took place in occupied territories such as Poland, and not on the territory of the Third Reich. Most of these acts of atrocity were considered legal under the Nazi regime. This complication, especially when combined with the requirement for a high burden of proof set by the administrative law, created numerous issues. One such issue is that the law was highly complex and lacked clarity, and this compelled legal authorities to deal with its interpretation.

The introduction of administrative demands alongside issues pertaining to procedural law was not conducive to the development of a successful method for dealing with the root problem. These first steps were subsequently defined as a "dialogue of the deaf," two sides that did not understand each other and were unable to develop acceptable solutions.

One example of this was the request that compensated Holocaust survivors would belong to the "German Cultural Circle" (*Deutsche Kulturkreis*). As such, they were to receive the support rendered to other persecuted groups, such as the postwar foreign Germans (*Volksdeutsche*) who were "repatriated," deported from the formerly occupied countries in Eastern and East-Central Europe in which they had lived to the Federal Republic. They were now called "*vertriebende*," that is, expelled, or displaced. Those who could not show an affiliation to the German nation had to prove that they had been in German Displaced Persons (DP) Camps as of January 1, 1947.[13]

Difficulties did not end with these administrative issues. The legislation's territorial scope was also relevant: Which territories would this legislation include? Are we only limiting the scope of legal responsibility to German Reich territories, or German occupied territories, or perhaps also include satellite nations that received direct assistance and orders? Clarity was required on how to resolve the "Jewish issue."

Lastly, once the claimants were recognized as such, they had to prove the damage that the Nazis had inflicted upon them. This created one of the most complicated procedural law issues: "The burden of proof." This meant that the Holocaust survivor had to prove that he or she was healthy prior to the war, that he or she was medically examined during the persecutions and still found to be healthy, and that only in the aftermath of the persecutions did health-related damage become evident.[14]

BEG Schluss 1969: The Reasoning Behind the Legislation

In light of the aforementioned difficulties, and primarily in order to create a cut-off date for the process of adjudicating Holocaust survivors' personal claims, the German Federal government enacted the *Bundesenstchaedigungsschlussgesetz* (*BEG-Schluss*)[15] (Federal Compensation Ending Law) (BEG-End), setting December 31, 1969 as a "cut-off" date for personal compensation claims. From an administrative perspective, it was only reasonable to establish a limit on the time allowed for Holocaust survivors to file claims.

Legal Difficulties Caused by the BEG-Schluss and the Creation of the Special Relief Fund

The inclusion of a final date in the legislation was initiated by the German Finance Ministry which sought to create a cap on compensations. Claims could not be submitted past this cut-off date, and so if legal issues arose, they would still only be relevant for claims that had already been submitted.[16]

An example of such a phenomenon was a decision by

---

12. Helmut Buschbom, "*Die völkerrechtlichen und staatsrechtlichen Maßnahmen zur Beseitigung des im Namen des Deutschen Reiches verübten nationalsozialistischen Unrechts*," in Das Bundesrückerstattungsgesetz 1, 52 (Friedrich Biella et al. eds., 1981); Israel Foreign Office, Israel's Claims Against Germany: The German Economic Background (1951); Letter to Felix Eliezer Shinnar (Fall 1951) (on file with Israeli State Archives, Foreign Office, 2417/3) (presenting the position of the Israeli government).
13. José Brunner, Norbert Frei & Constantin Goschler, "*Komplizierte Lernprozesse—Zur Geschichte und Aktualität der Wiedergutmachung*," in Die Praxis Der Wiedergutmachung: Geschichte, Erfahrung Und Wirkung In Deutschland Und Israel 9, 16 (Norbert Frei, José Brunner & Constantin Goschler, eds., 2009).
14. Daniel Cohen, "*Unfaire Prozeßführung*," 1965 Zeitschrift Für Recht Und Rechnungswesen [RWZ] 530.
15. Government of Germany, Second Federal Compensation Act BEG Final Law (Sept. 14, 1965), available *at* https://www.gesetze-im-internet.de/begschlg/BEGSchlG.pdf

the Federal Supreme Court (BGH) in the late 1960s, which ruled that Jews who escaped from Nazi forces to the USSR and crossed an international demarcation line were to be regarded as Holocaust survivors. Since the deadline had passed, this important decision could not lead to a substantial new wave of recognitions.

An additional issue that arose related to the wave of Holocaust survivors who fled from the Eastern to the Western Bloc. For the first time, this enabled survivors to file claims under the auspices of the BEG. Since they had been residing in territories under Soviet control, they were not permitted to receive compensation payments.

Over 1,200 million DM were allocated for the creation of a special relief fund under Article 5 meant to allow ghetto victims to file claims which they were unable to do under the previous law. In the context of this fund, the German legislator created a mechanism to allocate a one-time symbolic payment to survivors. This was, however, only limited compensation relative to what would have been allocated by the original BEG (i.e., being allocated a one-time payment instead of receiving a monthly pension payment).[17]

Developments in the 1970s

In the process of defining social security legal rights for Jews who were expelled from Germany (*Vertriebende*), the Federal Government implemented significant changes to legislation and created fictitious recognition of payments made to the German Social Security system. As those were never really made, legal fictions for such contributions were created by law. In doing so, social security rights could be reconstructed under various legislation such as RVO (*Reichversicherungsordnung*), and the FRG (*Fremdrentengesetz*).

Survivors were not overlooked, and administrative legislation was created for their benefit: the WGSVG (*Gesetz zur Regelung der Wiedergutmachung Nationalsozialistischen Unrechts in der Sozialversicherung*). This legislation sought to correct the flaws of the current social security legislation so that Holocaust survivors would be able to meet the legal obligations set forth by the Federal Social Security Law and thus allow them to receive "Old Age Pension" payments (*Altersrente*).

Crucially, periods of worktime that were completed prior to the war (including training and schooling time) could be fictitiously calculated under the RVO legislation in conjunction with the FRG, and further compensation could be allocated by the so-called substitute qualifying period (*Ersatzzeiten*). This worktime would be included in order to meet the legal demands of the Social Security law and thus enable the payment of an "Old Age Pension" under Federal Law.[18]

However, a legal fiscal problem arose under this arrangement. First, only local survivors were eligible to receive such payments. In addition, in order to calculate and allocate pension payments, a retroactive payment of social contributions had to be made (*Nachentrictung*). Israeli Holocaust survivors were therefore not eligible as Israeli law made it nearly impossible for foreign currency to be sent outside the country without permission from the Israeli Finance Ministry, and this was rarely given.

The Creation of the Hardship Fund and the Article II Agreement

In the early 1980s, the German Federal government ended its role of program administrator under the German Federal Legislation (BEG and *BEGSchluß*). It opted for a different way to adjudicate legal structures and administrative measures. This was largely due to the political parliamentary complexity of amending compensation laws (a process that requires consultation between the different federal states), and the criticism it faced since the 1950s, most particularly regarding a restrictive and narrow interpretation of the law that caused great delays in approving individual compensation claims.

The solution was an ex-lex form, a regulation enacted by the German cabinet, triggering the creation of the "Hardship Fund" meant to replace Article 5 *BEGSchluß*. This fund formed the legal structure for the allocation of the one-time symbolic recognition payment for Nazi persecution, to be administered by the Jewish Claims Conference. The process would then be faster, more efficient, and less complicated as it was no longer part of the administrative mechanism that had dealt with such claims in the past. The arrangement was, however, still governed by German administrative law. Due to the limited scope of the judicial review, the fund was only permitted to deal with individual administrative mistakes, and not with adjudication of basic definitions, such as the definition

16. Richard Hebenstiert, "*Sonderfonds nach Art. V BEG Schlussgestz, Das Bundesentschädigungsgesetz*," in Das Bundesentschädigungsgesetz 690 (Hans Giessler, Otto Gnirs & Richard Hebenstreit, eds., 1983).
17. *Aus Politik und Zeitgeschichte*, June 17, 2013, available *at* https://www.bpb.de/system/files/dokument_pdf/APuZ_2013-25-26_online.pdf
18. S. Simon and A. Weber, "Ghetto Pensions," 14(9) German L. J. 1787-1815 (2013), doi:10.1017/S2071832200002509

of a survivor. It would also not be able to allow the extension of legal definitions beyond the agreed upon guidelines between the Federal government and the Jewish Claims Conference.[19]

This important change made by the Federal government, as well as the support of the ex-lex solution, constituted the first legal basis for solving one of the most daunting questions regarding individual compensation. The collapse of the Soviet Union and the fall of the Berlin Wall brought an end to the historical embargo on compensation payments to Holocaust survivors who lived in these territories. The outstanding issue of compensation payments to Holocaust survivors from Central and Eastern Europe, still unresolved at the fall of the Iron Curtain, had to be settled.

The German Unification Agreement constituted the legal structure for solving this issue. This constitutional agreement mainly addressed the issue of property restitution in East German territories. The Jewish Claims Conference was also granted the status of successor organization, enabling it to claim Jewish-owned properties prior to the war. Moreover, this structure enabled the creation of the Article II agreement, allocating for the first-time pensions to Holocaust survivors, defined as such under Article V to the *BEGSchluß* (importing that legal definition). This allowed the Federal government to find an ex-lex solution for the administration of a new program for monthly compensation payments to ghetto, KZ and labor camp survivors.

The solution under this system was regulated under administrative law, enlisting the JCC to run the program as administrator, following the guidelines agreed upon with the Federal government. This facilitated a simpler track for filing claims and limited administrative issues regarding implementation of the BEG or *BEGSchluß*. The ongoing negotiations between the Federal government and the Jewish Claims Conference enabled recognition of new groups of survivors, thus paving the way for a quicker administrative process that granted them a monthly compensation payment. This mechanism, introduced by the Article II fund, resulted in a simplified structure, as well as a universal pension system. These universal pensions were not calculated individually, were not based on individual persecutions and the survivor's post-war economic situation, and thus as of 1993 contributed to the establishment of a worldwide program allocating payments to tens of thousands of survivors.

It is noteworthy that in 2007, based on the legal agreement creating Article II, the Jewish Claims Conference urged the Federal German government to not only address individual compensation, but also provide services needed by Holocaust survivors, such as home care. Since more Holocaust survivors are now in need of more accessible medical support, this became a paramount issue throughout the annual negotiations between the Federal German government and the Jewish Claims Conference. Since then, the JCC has created new programs that better assist Holocaust survivors to meet their needs, going beyond the material needs already covered by the compensation programs.[20]

German Industry Contributes to the Compensation Efforts

One of the most fascinating legal developments that unfolded is the role of German industry in compensating Holocaust survivors and slave laborers of Slavic background (*Ostarbeitern*) through separate, non-state backed programs.

As early as the 1960s, some German companies created compensation programs to supplement existing Federal German BEG and *BEGSchluß* state-backed compensation arrangements. This is novel, as these arrangements are not an outcome of international law obligations undertaken by Chancellor Adenauer in the early 1950s. Some German industrialists claimed then, and still claim today, that the Jewish leaders' attempt to pressure companies to make amends and admit to their wrongdoing under the Nazis, and their subsequent call for additional compensation on behalf of Holocaust survivors and former Jewish slave laborers, are unjust demands for what was already provided by the state.

The Holocaust era litigation in the 1990s, following the U.S. Foreign Sovereign Immunity Act of 1976 that authorized civil lawsuits against countries, gave rise to major litigation issues, most particularly regarding Swiss bank accounts and insurance companies. The combination of political pressure by some state comptrollers, such as

19. *Wiedergutmachung Regelungen zur Entschädigung von NS-Unrecht*, available *at* https://bundesfinanzministerium.de/Content/DE/Downloads/Broschueren_Bestellservice/2018-03-05-entschaedigung-ns-unrecht.pdf?_blob=publicationFile&v=19
20. Government of Germany, Press Statement on the Annual Negotiations Between the Jewish Claims Conference and the Federal Government (1992), available *at* https://bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2022/11/2022-11-04-jaehrliche-verhandlungen-jcc-bundesregierung.html

Alan Hevesy of New York State, the threat of a class A action, and harming the reputation of German industry in the U.S., compelled companies to negotiate with world Jewish organizations and survivor organizations to reach an agreement about compensation.

For industry, legal peace was crucial and therefore, together with the Federal German government, it created a German Federal law known as the Fund of Remembrance, which allocated over five billion euros to offset outstanding claims. The fund created a framework to address individual claims by slave laborers exploited by German industry during the Holocaust. The program was to be administered by the Jewish Claims Conference. The Federal German legislation that was introduced following the negotiations created the so-called Slave Labor Fund, which included criteria for the allocations of funds for compensating those individuals. The law that was introduced elevated this compensation agreement to the normative level of a Federal law (as opposed to administrative regulation of government). This ensured that the compensation is also recognized as a moral step of the Federal government and German industry.

The remainder of the fund – the so-called Future Pillar created in 2007 – was of great importance, as the personal compensation program then ended. The proceeds of the remaining capital of the fund were to be used to finance projects in the fields of education and remembrance.[21]

Ghetto Pension Law – Social Security Law Returns

In 1997, the German Federal Supreme Court acknowledged that in some cases, an employment relationship, as defined under the General Federal Social Security Law, could be recognized and a ghetto working industry could be identified. The specific case was forced labor in the Lodz ghetto. However, a technical problem remained unsolved: a deadline that appeared in the existing combination of the RVO and FRG did not enable survivors to file cases or allow them to obtain old age pensions that they might have received as a result of their forced labor in ghettos.

In June 2002, the German Bundestag adopted the ZRBG – *Gesetz zur Zahlbarmachung von Renten aus Beschäftigungen in einem Ghetto* (the law enabling payments of pensions created due to employment in ghettos). Like other German Federal compensation laws, it did not provide an appropriate legal definition of a ghetto. This created confusion regarding the definition of various concepts, such as what is a ghetto, the definition of work out of free will, and remuneration [the last two classical demands of Federal Social law]. This subsequently sparked great frustration on the part of Holocaust survivors as the rejection rate of claim, for various reasons, was nearly 95%.[22]

The Federal Social Court denied, therefore, most of these claims between 2003 and 2004, reasoning that remuneration must be a financially viable benefit. Thus, the Federal Social Court shared the legal interpretation of the social security institutions, maintaining that for a social benefit, core elements of the law, also named in Art. I to ZRBG, must be fulfilled. The Federal court also accepted the position of the authorities about the lack of "free will" regarding ghetto work, whereas many Holocaust survivors were compensated by the aforementioned Slave Labor Fund, and thus could not be eligible for social payment based on freely assumed work in ghettos. Survivors continued to fight against the authorities, and in June 2009, following a series of Federal Social Court decisions, monumental changes took place to enable Holocaust survivors to make use of this legislation, finally recognizing the tragic conditions under which the Holocaust survivors were living in ghettos (incarcerated without basic freedoms).[23]

Like in the 1950s, litigation revolved again around the territorial scope of the legislation, and the debate remained: which ghetto locations were to be included. At the same time, due to other international treaties signed by Germany, such as the German-Israeli Social Security Treaty, survivors were once again split into two groups: those who would receive high monthly pensions, and those who would receive pensions and retroactive payments starting in July 1997.

In 2014, the German Bundestag approved the ZRBG AndrG – ZRBG *Änderungsgesetz* amendment, thus enabling applicants to receive retroactive payments as of July 1997. The law also covered the territories of Bulgaria and Romania. A lengthy examination began, once again, to determine which ghettos in Bulgaria and Romania were to be regarded as such under this legislation. This process

---

21. Foundation EVZ, available *at* https://www.stiftung-evz.de/
22. Jürgen Zarusky, "History on Trial before the Social Welfare Courts: Holocaust Survivors, German Judges, and the Struggle for Ghetto Pensions," Authenticity and Victimhood After the Second World War (University of Toronto Press, 2021), available *at* https://www.degruyter.com/document/doi/10.3138/9781487528225-006/pdf
23. Kirstin Platt, K. (Jan. 1, 2012), Bezweifelte Erinnerung, verweigerte Glaubhaftigkeit. Leiden, The Netherlands: Brill Fink. doi: https://doi.org/10.30965/9783846753736

has recently been promoted through the intensive historical work of Yad Vashem and the United States Holocaust Memorial Museum (USHMM), in conjunction with researchers from the Jewish Claims Conference and Israeli historians. In May 2020, a Federal court decision simplified the definition of a ghetto under this law, stipulating once again the compensatory elements of the new legislation and formulating a rather broad interpretation of this term. The legal question at stake was if one should remain with the classical definition of ghettos with all its visual segregators elements, or create a legal definition of ghetto for the purpose of allocating compensations for survivors, thus recognizing similar realities like incarceration in a ghetto as justification for receiving compensation.[24]

The New Ghetto Workers' Directive

In 2007, a Federal governmental directive came into force. The latter was intended to create a compensation arrangement, as opposed to a social security arrangement, to provide payments to individuals who claimed social security rights under the ZRBG. As discussed above, the idea of a directive was to create a fixed compensation sum – 2,000 Euro per claim. This sought to ensure that, although Holocaust survivors did not have access to social security rights, they would not be denied special symbolic recognition by the Federal government.[25]

These payments were (and still are) executed by the Federal Office for Central Services and Unresolved Property Issues – BADV, a German Finance Ministry body. The latter enabled quick solutions for an existing legal situation via governmental regulations, but allowed the Federal government itself to administer the program. That possibility had been rejected in principle as of 1980 with the establishment of the Hardship Fund.

This directive was set as an alternative payment, a sort of compensatory Federal Finance Ministry payment for those who were not able to make a claim under the ZRBG and receive a social security pension for their work in ghettos. However, as of June 2009, in light of the new jurisprudence announced and declared by the Federal Social Court, thousands of survivors were to receive these social security payments. This Federal regulation was not needed anymore, as the road to secure social security pensions due to work in ghettos became clearer, and no new applications under this regulation were to be submitted, as the chances of Holocaust survivors to receive their payments under the ZRBG were much higher.

The German Cabinet adopted an amendment to this regulation in 2011, allowing Holocaust survivors to access payments they had not received in the past. The deadline for the original regulation was waived, enabling further recognition of ghettos, and allowing Holocaust survivors to file new claims under this regulation.

Conclusion

Following the Adenauer speech on the moral responsibility for Nazi wrongdoing, and as part of the accountability for crimes committed by the German people, a special legal discipline was developed in Germany, structuring a legal platform for individual compensations for Nazi wrongdoings.

The complexity of repairing the wrongdoings committed by the Nazi Reich under "normal" legal norms created in many cases a clash between procedural law and individual claimants. This often did not allow for sufficient flexibility or sensitivity in processing individual claims for the recognition of collective Nazi wrongdoings and prevented the inclusion of non-administrative fiscal factors into the equation.

As illustrated in this article, each legal decision creating compensation laws has advantages and drawbacks. A broader spectrum of rights as foreseen by the BEG created an appropriate individual solution for the claimant. However, since personal compensations are provided by the Federal German government, the later introduction of administrative procedures to create speedy processes of personal payment has its advantages as well, creating a measure of equality among Holocaust survivors.

It is noteworthy that the Adenauer declaration of December 1951, regarding the moral obligation of the Federal government for the unthinkable crimes committed in the name of the German people, has been reaffirmed both by the current Chancellor Stoltz and Finance Minister Lindner. They have declared that Germany will always take care of every Holocaust survivor, and will even thereafter continue to be a key player in the battle for Holocaust memory. ■

Avraham Weber, LL.M., Dr. iur.; Adjunct Lecturer, Phillips Marburg University, Germany; Visiting Scholar, CUNY, Brooklyn College.

---

24. "Federal Social Court" (May 20, 2020), available *at* https://www.bsg.bund.de/SharedDocs/Downloads/EN/Decisions/2020/2020_05_20_B_13_R_09_19_R_en_sum.pdf?__blob=publicationFile&v=3
25. Dirk Langner, "Die Wiedergutmachung von NS-Unrecht und die neue Richtlinie zur Ghettoarbeit," GHETTORENTEN, (2010), available *at* https://www.degruyter.com/document/doi/10.1524/9783486708325.113/html

25 Years of the Washington Principles on Nazi-Confiscated Art

Olaf S. Ossmann

A Refugee's Freedom of Choice

Those who assert justified claims surrounding the return of art works are nevertheless often confronted with significant and challenging hurdles during court proceedings. These hurdles are introduced by decontextualising the circumstances of a single story, so that isolated personal decisions are presented as if they were examples of normal everyday actions, and one consecutive course of action.

Hans Erich Emden, a German Jew, was forced to flee to Chile to escape Nazi persecution. His new life as a refugee in South America was his only course of action, after being stripped of his German citizenship and being refused a residence and a work permit in Switzerland where his father held a Swiss passport. To obtain capital for his new life in South America, he was forced to sell his artwork, as explained by an experienced provenance researcher in a court proceeding to reclaim the art.[1] A question that arises from cases like this is whether the sale of art under duress should be considered a forced sale, almost equivalent to expropriation and therefore reversible, or a sale freely made that cannot be reversed.

1998: Evaluating the Restitution Claims Following an Extended Period of Silence

In 1998, representatives of 44 governments, twelve NGOs and the Vatican met in Washington to discuss what should happen regarding works of art stolen from Jews by Nazis. The original idea of developing binding norms had failed. To achieve a declaration, non-binding principles were passed – prompted by the Swiss – that recognized the different legal systems of the signatory states. In the declaration, the states are charged with integrating these principles into their own national legal systems.[2]

Since then, the non-binding nature of these principles has been seen as an advantage for handling this complicated topic. The practice of restitution and material compensation for cultural assets confiscated and looted through Nazi persecution since the end of the war should, however, be sufficient reason for introducing binding norms that deviate expressly from the applicable principles of civil law.

As this has not happened to date, the number of "just and fair solutions" since the Washington Principles of 1998 is marginal relative to the number of cultural assets for which searches have been initiated.

The Original Idea of the Allies Concerning Restitution During and After WWII

Many studies that focus on restitution begin with the Washington Declaration of 1998, and in doing so they fail to recognize that it is based on considerations, requirements and definitions that go back to the years 1943-1947. The Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, also known as the London Declaration of 1943, states that the Allied powers reserve the right to declare the trading in and acquisition of cultural assets to be illegal. It can be asked whether this relates to the sale of everything or just to stolen goods.

When WWII ended, attempts were made to counteract the redistribution of private assets by devaluing this type of "expropriation." However, issues arose in trying to define what type of assets were covered by this policy and what expropriation of this kind means. Numerous problems emerged in the practical implementation of this policy, as the court findings required that this type of claim could only be asserted if the principles and prescriptions of general civil law were suspended.

According to a report by the U.S. Department of State, there were no historical models outlining legal interventions addressing the ownership of private property

---

1. "In fact, these sales by Hans Erich allowed him to get a hold of capital for his new life in South America." Expert Report of Laurie A. Stein, Sept. 20, 2021, U.S. District Court Southern District of New York, Civil Action No. 19-10155-RA-KHP.
2. U.S. Department of State, "Washington Conference Principles on Nazi-Confiscated Art" (December 3, 1998), available *at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/

that once belonged to persecuted and suppressed minorities. The report also determined that regulations within civil law fail to provide satisfactory outcomes, because basic contracting principles such as freedom of contract, contract compliance and legal stability stand in the way of this path. These contracting principles are still regularly brought as a defense in cases dealing with ownership disputes.

Upholding Contract Formation Principles Amidst Asymmetrical Power Dynamics

How can one defend the freedom to contract and ensure contract compliance when the legal position of the parties upon signing the contract is totally asymmetrical? We are familiar with such considerations from consumer protection law. In cases like this, a consumer does not have any negotiating freedom vis-à-vis a company that dominates the market. As a result consumers are seen as members of an "at risk" group.

The Exclusion of Principles of Civil Law and Definitions Used in the Restitution Laws

The Allied regulations pertaining to the return of ascertainable assets between 1947 and 1949 can only be explained in the context of asymmetrical power dynamics between the parties. The notable regulations include:

A. Law No. 59 of November 10, 1947 (Restitution of Identifiable Property) of the Military Government of Germany - American Control Area - (Official Gazette of the Military Government of Germany - American Control Area - Issue G of November 10, 1947 p. 1).
B. Ordinance No. 120 of November 10, 1947 (Restitution of Looted Property) of the Military Government of Germany - French Control Area - (Official Gazette of the French High Command in Germany No. 119 of November 14, 1947 p. 1219).
C. Law No. 59 of May 12, 1949 (Restitution of Identifiable Property to Victims of Nazi Oppression) of the Military Government of Germany - British Control Area - (Official Gazette of the Military Government of Germany - British Control Area - No. 28, p. 1169).
D. Ordinance BK/O (49) 180 of July 26, 1949 (Restitution of Ascertainable Property to Victims of National Socialist Repressive Measures) of the Allied Kommandantura Berlin (Ordinance Gazette for Greater Berlin Part I 1949, p. 221).[3]

All regulations followed a general assumption: Transactions of the persecuted that took place between January 30, 1933, and May 6, 1945 were the result of persecution.[4] It is from this basic assumption that the necessity of a reversal of the burden of proof and of proof of individual persecution for members of a persecuted group, such as the "Jewish race" as defined by the Nazis, arises.

The term "act of seizure" in the meaning of these laws is also relevant for our discussion today, as – in addition to state measures in the narrowest sense – it also includes:

(a) any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;
(b) any transfer or relinquishment of property made by a person who belonged to a class of persons which the German government or the NSDAP intended on any of the grounds referred to in Article 1 to eliminate in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.[5]

Preventing the Enforcement of the "Special Right" by Prejudiced Parties in Civil Cases

One might assume that such clear rules would have led to numerous proceedings in which assets, including many works of art and culture, would be returned. This has not been the case. Legal experts from public offices responsible for resolving questions of compensation and the courts responsible for awarding and enforcing reparations attempted to introduce principles of civil law through the back door. This would allow them to reject claims of "violation of the obligation of good faith," or "objection to the abusive exercise of rights." In fact, the Higher Regional Courts, and the superior court responsible for reparations (ORG), regularly rejected such arguments for several years. They posited that the arguments were not convincing enough for many applicants, especially in view of the precarious situation in which many of the

3. Law No. 59 - American Control Area - of 11/10/1947 ABI. Edition G, p. 1 (USREG); Ordinance No. 120 of 10.11.1947, OJ of the French High Command in Germany No. 119 of 14.11.1947; Law No. 59 of the Military Government - British Control Area - OJ No. 28, p. 1169 (BrREG); BK/O (49) 180 of the Allied Command of 6/26/1949, VOBl. f. Gross-Berlin, I, p. 221 (REAO).
4. Art. 3 of the order BK/O (49) 180 of the allied command dated July 26, 1949, REAO.
5. Art. 3, Sec. 1, (a) and (b) of the order BK/O (49) 180 of the allied command dated July 26, 1949, REAO.

applicants found themselves following years of persecution and flight.

Moreover, there were additional requisites that were required to allow for the return of art works. First, the applicant needed to locate the work of art, as the jurisdiction of the courts, and the applicable law which were assigned to one of the Allied forces, depended on this. If the supposed owner denied that the asset in question was at the alleged location, then the claim was null and void. The claimant's ability to obtain information was very limited. Art dealers lacked any willingness to cooperate, and the public administrations and museums often denied possession of said artworks or maintained that they had been lost or destroyed.

An End to the Post-war Efforts and the Enforceability of Claims

Although a considerable number or works of art were returned to their original owners or their countries of origin thanks to the "Monuments Fine Art and Archives (MFAA) Program" of the "Central Collecting Points," only a small percentage of looted artwork was returned. Today, we refer to these two initial phases as the "primary phase" (Allied law) and the "secondary phase" (from the provisional law of 1952 to the end of the 1960s, including BEG and BRueG).

Following these initial phases, attempts were made to curtail these corrective measures. Many European countries rejected most lawsuits and applications from the end of the 1960s onwards because statutes of limitations had passed. This heralded the end of the special law pertaining to restitution, and subsequent claims under civil law were rejected due to the statute of limitations or other obstacles.

However, various factors in the 1990s would bring these issues to the forefront. First, provenance-related issues arose in the art trade and at exhibitions in the late 1990s in the United States, resulting in applications for artworks to be returned. Some of these applications led to pieces being confiscated for the purposes of a judicial review of the claims. Additionally, the opening of archives after the fall of the Iron Curtain highlighted the extent of the expropriation of cultural assets from their Jewish owners. These factors led the subject to be placed again on the international agenda and ultimately led to the Washington Conference of 1998.

Accusations that Current Claims to Looted Art Were Motivated by the Increased Value of the Artworks

In view of the limited nature of the post-war art restitution procedures, accusing the legal heirs of the original Jewish owners of not doing enough or waiting too long to assert their claims, is an unjustified argument. It was determined that, apart from the short period immediately following the war, very little time remained for submitting applications to recover property. That is why, when assessing the efforts by former owners, both the time constraints and a claimant's personal living circumstances must be considered. Factors include their economic situation, their ability to prove the circumstances in which the purchase and the loss took place, as well as tracking down where the artwork is currently located. If it is difficult for the actors in the art market to provide such information, then more weight must be given to Jewish vendors who were in the process of fleeing and did everything possible to obtain financial resources to save the lives of their families. Furthermore, the art dealers who were involved in the market at the time failed to provide Jewish victims with any support whatsoever. They feared that they would be held liable by the buyers themselves. This indeed was the case in a few successful civil cases in the post-war period. An example of this was the case of *Emil G. Bührle v. Theodor Fischer, Galerie Fischer and the Swiss Confederation*, July 5, 1951.[6]

The German Interpretation of the Washington Principles and the Deviation from Principles and Terms Used in the Allied Laws

In Germany, museums and collections, both at the national and municipal level, jointly committed themselves to the Washington Principles and issued a "handout" and "guidelines."[7] Like the previous legal regulations in Germany, the handout refers to Allied laws and decisions associated with the terms "persecution-related loss of assets" and "confiscation," and their subsequent interpretations.

---

6. Judgment of the Federal Court of July 5, 1951 (Emil G. Bührle against Theodor Fischer, Galerie Fischer and the Swiss Confederation), unpublished decision. Commentary: Emile Thilo, "La restitution des rapines de guerres," JOURNAL DES TRIBUNAUX 386 ff. (1952).
7. German Minister of State for Culture and the Media, "Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property of December 1999" (2019), available *at* https://www.kulturgutverluste.de/Content/08_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?__blob=publicationFile&v=8

An editorial in the newsletter published by the Advisory Commission on September 14, 2022, said:

> The Guidelines for verifying whether a work of art was Nazi-confiscated and for preparing decisions on restitution claims [p. 29] offered here are essentially based on the US Military Government Law No. 59 of 10 November 1947. While the Washington Principles are limited to works of art "confiscated by the National Socialists," the Guidelines – in accordance with US Military Government Law No. 59 – expand the definition of Nazi-confiscated art to include property lost as a result of forced sale or for other reasons. US Military Government Law No. 59 was not intended to apply to the appraisal of a sale of cultural property outside the borders of the Nazi sphere of power: the Act was exclusively focused on business transactions that took place within territory under Nazi control. The criteria enumerated in the Guidelines are therefore not readily applicable to the appraisal of a legal transaction which took place outside this domain.[8]

Meanwhile, the current version of the 2019 Guidelines states: "However, even if an item changed hands outside of those territories [German Reich and occupied territories], it still cannot be ruled out that the item changed hands as a result of Nazi persecution" (p. 21).

This passage is a mistaken account of the historical events. The planners of the 1998 Washington Conference and the authors of the Principles used the restitution and compensation regulations, laws and practices created by the Allies from 1947 onwards as a basis for the final Principles. In the 2009 Terezin Declaration, the terms "looted and confiscated" explicitly refer to the same concepts that are used in the Allied laws of the post-war era and all subsequent legal regulations that draw reference to these, including the 1990 law regulating unresolved matters relating to assets for the former territory of the GDR.[9] Opponents see in this an "expansion" of the original area of application of the Washington Principles, although it is in fact a clarification.

The Swiss Interpretation of the Washington Declaration

In Switzerland, the terms "looted and confiscated" were initially interpreted literally. How can such a dissenting point of view and interpretation come about? The Swiss delegation representatives discussed their literal interpretation of the terms "looted and confiscated" in the context of Swiss political neutrality, just as they had already done in the period immediately after the war. Switzerland was neither an occupier nor was it occupied, and therefore cannot be held responsible for the acts committed by those who participated in the war.

The "Glossary of Nazi-looted art" of the Federal Office of Culture (BAK) reflects this position by defining three relevant terms as follows:

> Nazi-looted art
> The Washington Guidelines of 1998 define Nazi-looted art in the title and under numbers I, III-V, VII-X as "works of art confiscated by the National Socialists."
> In the exercise of its ethical and moral responsibility, the central government assumes that – irrespective of a categorization – every individual case requires a comprehensive examination. The decisive question for the central government in the sense of the Washington Guidelines is whether a change of hands between 1933 and 1945 had an expropriating effect. In addition to direct confiscation, bogus sales, sales at bargain prices and sales without legitimation also fall under the term "Nazi-looted art." In cases of "escape art," "escape assets," or "displacement due to persecution," it must be correspondingly assessed whether the change in ownership was expropriating and therefore a case of Nazi-looted art, so that just and fair solutions can be found or achieved.

8. https://www.beratende-kommission.de/media/pages/netzwerk/newsletter-september-2022-n014/8b602c3c46-1673948266/newsletter_2022-14.pdf
9. https://www.gesetze-im-internet.de/vermg/BJNR211590990.html, § 1, 6: "Pursuant to Section II of Order BK/O (49) 180 issued by the Allied Command in Berlin on July 26, 1949 (VOBl. for Greater Berlin I p. 221). The beneficiary is presumed to have lost property as a result of the persecution."

> Confiscation
> The confiscation of goods or property without compensation; as a rule, by state organs (cf. the term "Nazi-looted art" above).
> Cultural assets confiscated due to Nazi persecution
> The term "persecution-related withdrawal" is not part of the international regulations. In Germany, it is applied in the "Declaration of the Federal Government, the Länder and the National Associations of Local Authorities of 1999 to find and return cultural assets withdrawn due to Nazi persecution, in particular from Jewish ownership (joint declaration)" and the "German Handout."[10]

The Glossary omits terms from the Terezin Declaration like "forced sale" or "sale under duress"[11] which have an explicit connection to earlier legal wordings and definitions. It also omits the "presumptions"[12] and regulations pertaining to the "shift in the burden of proof."[13] It was important to the signatory parties in Washington to clarify these backgrounds, terms and principles as well as the extent of the transactions. Without the presumption provisions relating to the persecution of entire groups of people, many claims would not be assertable, in either the post-war era or today, particularly because certain acts are barely provable. However, in the eyes of a civil law expert, the term "confiscated" cannot be applied to a sale between private parties. The same must also apply for the reversal of the burden of proof because of the presumption provision.

This "other" approach has a long tradition in Switzerland. It was the Allies who forced Switzerland in 1945 and 1946 to pass two resolutions in the Bundesrat (Federal Council) that suspended the principle of good faith in civil law until at least December 31, 1947. However, the only works of art covered by this suspension were those that had been directly confiscated or expropriated by German authorities or by occupying institutions. Of the hundreds, if not thousands, of artworks that were circulating on the Swiss market at that time, only 70 were returned to their original owners due to a decision by the so-called "Raubgutkammer" (Chamber for Looted Art).

While the claimants did not have to compensate the alleged purchasers when the artwork was returned, the purchasers who returned the art were entitled to compensation from the dealers. At the same time, the purchasers of the works were often able to buy them back again and in doing so exploited the current financial situation of the owners as well as the crumbling art market. In addition, the Swiss courts confirmed during legal proceedings that the legal presumption of "good faith" was difficult to disprove and that collectors like Bührle were not experts but at best only "educated laymen" who could not be subjected to any high standards of care. It is no wonder that, almost without exception, all claims for return in Switzerland have failed right up to this day.

Court Assumptions of Equal Bargaining Power can Frustrate Claimant Success

As part of the work carried out by the "Independent Expert Commission Switzerland Second World War" (UEK) that was established in Switzerland in 1996, two historians introduced the term "escape art/escape assets." These terms do not appear in any previous law, declaration, or regulation, and they only describe a group of persecution-related losses of assets with certain common features from a historical perspective. Here, the perspective of the persecuted person is ignored, as this concept assumes that the persecution had come to an end in the directly occupied territories and therefore the coercion to sell had also come to an end. This point of view also ignores the continuing precarious life situations that were caused by the persecution, as well as the threat to life or physical

10. https://www.bak.admin.ch/dam/bak/de/dokumente/raubkunst/merkblatt_hinweis/glossar-ns-raubkunst-neu-de-fr.pdf.download.pdf/Glossar_NS_Raubkunst_03.22.pdf
11. "Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence." *See* https://2009-2017.state.gov/p/eur/rls/or/126162.htm
12. U.S. Department of State, "2009 Terezin Declaration on Holocaust Era Assets and Related Issues" (2009), available *at* https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/
13. *See also* Principle 4, "Washington Conference Principles on Nazi-Confiscated Art" (1998), available *at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art

condition of the persecuted persons. Switzerland very rarely issued a residence permit, and it was almost impossible for those without one to earn a living.

In cases dealing with the principle of "escape art," the contractual parties are seen to be negotiating partners of equal standing who are free to agree to a price at the time of the sale. The claimant bears the burden of showing that the actual circumstances deviated from this and must show that the principles of freedom to contract and private autonomy under the law do not apply. The primary issue in these cases is that the courts view the circumstances that ultimately led to the sale of the artwork as separate from the claimant's status as a persecuted person.

Appraisals of "Persecution-Related Withdrawal of Assets" Manipulate the Facts to Omit the Effect of Persecution on the Sale and Focus Only on the Concrete Transfer

To be able to reject claims to restitution, it is sufficient for many museums to prove that the former owner had already offered the work of art for sale at least once before 1933. Furthermore, every detail from private relationships is resurrected to weaken, if not completely eradicate, the causal relationship between the persecution of the vendor and the specific sale. This process of "cherry picking" is presented under the auspices of "searching for the truth," and leads to a minimization of the vendor's persecution at the time of the sale. One vendor was accused of having sufficient wealth at his disposal to finance his survival and escape, meaning that a sale "was not really necessary for him." In another case, the fact that a vendor even wanted to negotiate a price to possibly make a small profit was seen as evidence that they had freedom to contract. In another case, the collector lost his wife and all hope and "therefore just wanted to sell."[14] The pressure to flee and the constant threat of deportation hardly play any role whatsoever in such considerations. Those involved in such discussions allow themselves to make appraisals that one can only describe as presumptuous. The result cannot do justice to the requirements of the Washington Principles and their aims.

Switzerland Moves Toward a Context-Based Provenance Research and an Independent Commission

There is, nevertheless, reason to be optimistic. The parliamentary initiative of Jon Pult, a member of the Nationalrat (National Council) from December 9, 2021, states:

> The Bundesrat is instructed to establish an independent commission to make recommendations for "just and fair solutions" in cases of Nazi-confiscated cultural assets in accordance with the "Washington Conference Principles on Nazi-Confiscated Art" from December 3, 1998 (Washington Principles 1998) and the "Terezin Declaration on Assets from the Holocaust Era and Related Matters" from June 30, 2009 (Declaration of Terezín 2009). It should also be examined whether the Commission should make corresponding recommendations for cultural assets from other, specifically colonial, contexts as well.[15]

The part of his motion cited was affirmed by the Swiss government on February 16, 2022, by the Nationalrat on May 11, 2022, and by the Ständerat (Council of States) on September 26, 2022. Earlier, it was said that the lack of an independent commission was due to the lack of cases. But how can there be cases when the claimants have no hope of successfully asserting their claims? We must therefore wait and see what guidelines and scope for action a Swiss commission will be granted. Cases pertaining to art sales between 1933 and 1945 that resulted from Nazi persecution will no doubt turn up.

In this regard, Kunstmuseum Bern has adopted a leading role in the wake of a dispute arising from the bequest of Cornelius Gurlitt of his controversial collection of Nazi-era art to that institution. Gurlitt, who died in 2014, had inherited the collection from his father, a dealer for the Nazis who bought art plundered from the Jews. The question was under what conditions the Kunstmuseum Bern should accept Gurlitt's bequest and what standards should be used to check the provenance of the works of art. It was decided, deviating from the Swiss standards that were common at the time, to use context-based in-depth research according to German standards. Harshly criticized for its dissent of the Swiss position just a year

14. "Although Glaser emigrated and auctioned off a considerable part of his art collection as a result of Nazi persecution, the extent of the duress to sell his goods (instead of exporting them) is unclear." Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 27-29, available *at* https://kunstmuseumbasel.ch/fr/recherche-scientifique/recherche-de-provenance/curtglaser
15. https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214403, parliamentary motion of the deputy Jon Pult, Dec. 9, 2021.

ago, an appraisal of the inventory of Kunstmuseum Zürich is now pending. Now, research is to be carried out in line with the principles of context-based provenance research and include all alternative forms of withdrawal, as well as persecution-related sales in Switzerland.[16]

Germany's Advisory Commission Is Criticized for Its Interpretation of the Washington Principles

Switzerland is now determined to adopt a new approach. Instead of ignoring the causal relationship between the persecution and the asset sales that took place in Nazi-controlled territories, Switzerland now considers the persecution process having been uniform and ongoing. However, the former German office supervisor and current consultant to the Advisory Commission criticizes the guidelines and decisions of the Commission in the aforementioned Newsletter of the Advisory Commission from September 2022:

> While the Washington Principles are limited to works of art "confiscated by the Nazis," the Guidelines – in accordance with U.S. Military Government Law 59 – expand the definition of Nazi-confiscated art to include assets lost through foreclosure or for other reasons. U.S. Military Government Law No. 59 was not intended to apply to the appraisal of a sale of cultural assets outside the boundaries of the Nazi sphere of power: The law was aimed exclusively at business transactions that took place within the Nazi area of control. The criteria listed in the Guidelines are therefore not readily applicable to the appraisal of a legal transaction that has taken place outside this scope.[17]

In this context, it becomes clear that once again the role of persecution at the time of a sale is being overlooked, and such sales are being justified based on principles of contract formation under civil law. And yet, the Washington Principles, like all restitution regulations to date, aim exclusively at establishing a causal relationship between the persecution and the legal act that led to the loss of an asset. Generally, those who managed to obtain a visa for a third country did so at great personal risk and at high financial cost. They also faced an uncertain future, including moving to another antisemitic milieu, and in most cases lost their entire wealth in Germany. Works of art were often the only liquid assets that could be exchanged for foreign currency, which made selling them the only available resource to escape National Socialism.

This is why evaluating a restitution claim based solely on an assessment of the vendor's other economic assets is not well suited to achieving the desired goals of the Washington Principles. While on the one hand it is undoubtedly difficult to estimate the actual value and availability of a person's resources, there is the question of what the person needed to accomplish, and what assets could be used to achieve their specific goals. For example, a court may ask how many expenditures a person had to manage, the cost of traveling to one destination versus another, or what life changes seem appropriate from today's point of view. What should the benchmark be? In some of the most recent cases, this approach has led to catastrophic outcomes.

The Washington Principles try to recognize the impossibility of undoing the past by trying to offer a framework to at least return the artworks to their rightful owners. However, a more suitable method of achieving this goal would be to finally remove the remaining obstacles that stand in the way of asserting claims, for example, by allowing the unilateral appealability of cases to the German Advisory Commission and to stop allowing cases to hide behind the federal system, which never presented a problem for uniform regulations.

What Länder arguments against unilaterally commissioning the Advisory Commission stand in the way of a regulation by Germany's central government? The same question applies to the parliamentary initiative in Germany (which simply petered out) to lift the statute of limitations for cases where a sale took place in bad faith.

The British Way of Comparing Moral Fortitude with the Strength of a Legal Title

As the proceedings before the Spoliation Advisory Panel in England show, a purely moral consideration leads to a comparison between the moral strength of the claimant's position and the legal strength of the current owner's interest in the artwork. From the current owner's perspective, their position is far removed from the aims of the Washington Principles, especially when one

16. Gerhard Mack, "The Kunsthaus Zürich softens its position in the debate about art that was acquired during the Nazi era," Magazin der NZZ, March 11, 2023, p. 61.
17. https://www.beratende-kommission.de/media/pages/netzwerk/newsletter-september-2022-n014/31cd62e614-1664873516/network_newsletter_14_september_2022.pdf

considers that the Terezin Declaration deems bringing about a "just and fair solution by returning the asset" as the best solution.

This procedure was already criticized during an independent evaluation in 2015:

> Recommendation 14
> The Terms of Reference should not be changed to require the loss to be more closely linked to the actions of the Nazis or their allies.
> Recommendation 16
> I recommend that the Terms of Reference should be clarified to make it clearer that, if spoliation is established on the balance of probabilities, the conduct of the institution will generally be irrelevant. I further recommend that the Panel make it clear that they will not generally entertain arguments about an institution's behaviour.[18]

Based on this, one can conclude that current methods of evaluating such claims always ignore the legal and considerable systematic disadvantages faced by a persecuted group and the resulting factual and decision-making constraints.

Conclusions

Although it is a positive outcome when every solved case (apart from direct rejections) is carried out under the designation "fair and just solution," it must be acknowledged that in many cases, upon closer inspection, the claimants simply give up as they just want the topic to finally end. Moreover, they are realistic enough to realize that they cannot expect assets to be returned if they lack necessary evidence or if there are other legal or factual barriers standing in their way. Therefore, one can hardly claim that every solved case is in fact "just and fair."

I have often come to realize that a court or commission would not successfully handle a case in the near future and therefore recommended a settlement as a means to achieve something resembling justice in the shorter term.

With every country-specific interpretation and differentiation between case categories, we move farther and farther away from the insights that seemed obvious in 1943. Between 1933 and 1945, every tier of society ranging from the institutions and authorities of Nazi Germany, its collaborating public authorities in the occupied territories, to ordinary citizens both inside and outside of the German sphere of power, greatly profited from the predicament of the Jewish population, which had been stripped of its rights. The consequences of such an unprecedented phenomenon cannot be remedied with instruments of civil law that proceed from the notion that the subjects involved have equal status. This is also true in the case of alternative dispute settlement, where the principles of civil law shine through as an evaluation criterion. In these cases, disenfranchised vendors are treated as if they had the same rights of the other party, rather than as a party that was completely stripped of its rights.

Moving forward, we must develop definitions and standards that consider the context of an asset sale, including both the legal and actual positions of the persons and institutions involved. Falling back on civil law to interpret the facts of transactions with such extreme examples of disproportionate positions is not an option for the above stated reasons.

If we continue utilizing so-called "soft law" as a means of avoiding a special legal regulation that deviates from civil law, then an interpretation is left to the discretion of the Commission's members. Experience has shown that legal experts among Commission members tend to fall back on instruments of civil law or try to work without any definitions at all.

There is also a risk that individual cases will be wrenched out of their original context, and that decisions will be taken based on criteria such as the vendor's circumstances upon escaping persecution, their current position in society, or even how closely related today's applicant is to the original vendor.

All these considerations prevent victims of the Nazi regime from retrieving property that they never would have lost without the regime's rule. By squabbling about who has the right to interpret family histories, we run the risk of missing this last opportunity to correct this matter. We should do everything in our power to prevent any further delay. ■

Olaf S. Ossmann represents claimants as an attorney worldwide. He teaches law and history in Berlin and Amsterdam and is a longterm member of the IJL Board of Governors.

18. Sir Paul Jenkins KCB QC, Independent Review of the Spoliation Advisory Panel, 2015, available *at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415966/SAP_-_Final_Report.pdf

Farah Maraqa Case

Steffen Kaemper

I. Introduction

In November 2021, the German newspaper *Sueddeutsche Zeitung* reported for the first time that, according to its own research, employees of the Arabic editorial department of the German broadcasting producer Deutsche Welle had taken openly antisemitic or anti-Israeli positions.[1] In response, Deutsche Welle terminated the employment of the five staff members concerned and launched an external investigation.[2]

In February 2022, the German ex-Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger and the psychologist, Ahmad Mansour, determined following their external audit that it was a matter of individual misconduct. Evidence of structural antisemitism in the Arabic editorial staff had not been established by the external investigation team.

In addition to the five "separation proceedings," Deutsche Welle is investigating eleven other suspected cases. Besides eight cases of suspected antisemitism on the part of employees that had arisen from the external audit, three further cases were discovered in the course of Deutsche Welles's own investigations.

One of these three, Farah Maraqa, a Palestinian-Jordanian freelancer at Deutsche Welle since 2017, is no longer a journalist at Deutsche Welle.[3]

Maraqa stood out because she had already made several anti-Israeli statements in journalistic contributions in the past. In the Arabic-language online newspaper *Rai Alyoum*, Maraqa had already compared Israel to a "cancer" that had to be "cut out" in 2014. In 2015, she wrote that she would join the terrorist group IS if it "kicked the Israelis out of the Holy Land."[4]

Deutsche Welle attempted to end its relationship with Maraqa without notice, in a letter dated February 11, 2022. She then filed an unlawful dismissal action against her employer. The 5th Chamber of the Bonn Labor Court has ruled on this matter.

II. Judgment of the Bonn Labor Court

In its judgment of July 6, 2022, file reference 5 Ca 322/22, the Bonn Labor Court upheld the action for protection against dismissal. Accordingly, the court ruled that the termination of Maraqa's contract with Deutsche Welle was invalid. The court found that the contractual relationship between the parties was not an employment relationship, but a service relationship, with Maraqa conducting self-employed, freelance activity.

Farah Maraqa was employed by Deutsche Welle on the basis of a fee framework agreement, as a video producer and editor for the internet and social media channels. The parties' contractual relationship was limited until December 31, 2023. This "fee contract" would then end on December 31, 2023.

Deutsche Welle based the termination, among other things, on posts Maraqa published while engaged as a freelancer for them, on her private Facebook page, as well as on other social media platforms in Arabic, which, in the opinion of Deutsche Welle, were considered anti-Israel and antisemitic, and questioned Israel's right to exist. As a result of Farah Maraqa's statements, the reputation of Deutsche Welle had been permanently damaged.

However, the court only ruled that the distinction between an employment relationship and a freelance relationship of a program-making employee was a case-by-case decision.

Furthermore, the court held that the extent of the burden of presentation and proof in connection with the observance of the two-week notice period under the

---

1. "Deutscher Auslandssender: Ein Sender schaut weg" (Dec. 28, 2022, 9:35 AM), available *at* https://www.sueddeutsche.de/medien/deutsche-welle-antisemitismus-israel-1.5476895?reduced=true
2. "Antisemitismusvorwürfe: Noch viel zu tun bei der Deutschen Welle" (Dec. 28, 2022, 9:35 AM), available *at* https://www.sueddeutsche.de/medien/deutsche-welle-antisemitismus-untersuchung-1.5490747
3. "Deutsche Welle entlässt mehrere Israel-Hasser" (Feb. 7, 2022, 5:52 PM), available *at* https://www.bild.de/politik/inland/politik-inland/antisemitismus-skandal-deutsche-welle-entlaesst-mehrere-israel-hasser-79073042.bild.html
4. "Antisemitismusvorwürfe-Deutsche Welle beschäftigte israelfeindliche Journalistin" (Dec. 28, 2022, 9:35 AM), available *at* https://www.spiegel.de/kultur/deutsche-welle-beschaeftigte-israelfeindliche-journalistin-a-80832531-479a-4441-a903-5d6030a5dc8f

German Civil Code (Bürgerliches Gesetzbuch - BGB) does not generally change as a result of the employee having been the subject of private investigations carried out in order to clarify the possible facts of the termination.

Therefore, the court did not discuss the question of whether, and to what extent, Ms. Farah Maraqa had made antisemitic statements. The court only had to rule on the two legal questions (type of agreement and observance of notice period).

III. Analysis of the Judgment

The Labor Court's website states that "In the oral hearing, compliance with the notice period, the possible priority of a warning and the weighing of the plaintiff's freedom of expression and the programming principles of Deutsche Welle (were) discussed." The latter were not mentioned in the judgment.[5] Accordingly, Maraqa's prior anti-Israel and antisemitic behavior was not discussed in the judgment.

IV. Conclusions, Outlook

As a result, Ms. Farah Maraqa won the dismissal protection proceedings. However, there was no discussion about the accusations of antisemitism.

Since the Labor Court's decision, Deutsche Welle has now opened an office in Jerusalem. "The aim is to expand reporting on Israel and the Palestinian territories," said Director-General Peter Limbourg at the opening of the studio in Jerusalem on October 12, 2022. For this purpose, two permanent correspondents are now on site. The step had been planned for some time but had been moved forward in the course of dealing with the internal cases of antisemitism. According to the report, Director-General Limbourg stated that the content from the region should contribute to raising awareness about antisemitism and Jewish life.[6]

This incident has, at least, led Deutsche Welle to explicitly declare that they will "not tolerate any form of antisemitism, racism or discrimination such as sexism, both in its operational interaction and in its offerings." In addition, a values document has been drawn up for the relationship with partners abroad – i.e., broadcasters who include Deutsche Welle content in their programs – which is derived, among other things, from the Basic Law and the UN Declaration of Human Rights.[7] ■

Steffen Kaemper, LL.M., Lawyer and Notary Public, Kaemper & Maiwald, Guetersloh, Germany.

---

5. Sarah Dempke, Pressesprecherin des Arbeitsgerichts Bonn, "Arbeitsgericht Bonn: Außerordentliche Kündigung bei der Deutschen Welle" (Dec. 28, 2022, 9:33 AM), available *at* https://www.justiz.nrw/JM/Presse/presse_weitere/PresseLArbGs/12_07_2022_/index.php
6. "Zwei feste Korrespondentinnen- Nach Antisemitismus-Fällen: Deutsche Welle eröffnet Büro in Jerusalem," RedaktionsNetzwerk Deutschland (Dec. 28, 2022, 9:31 AM), available *at* https://www.rnd.de/medien/jerusalem-deutsche-welle-eroeffnet-nach-antisemitismus-faellen-buero-6EF6B3K3JDNDMMM5AQ37D2PHLY.html
7. "Nach Antisemitismusvorwürfen: Deutsche Welle schärft interne Abläufe," RedaktionsNetzwerk Deutschland (Dec. 28, 2022, 9:29 AM), available *at* https://www.rnd.de/medien/deutsche-welle-schaerft-interne-ablaeufe-nach-antisemitismusvorwuerfen-6NLIORQ3IIVHLZXJLQBG-KQDZL4.html

BOOK REVIEWS

International Law and the Arab-Israeli Conflict

By Robbie Sabel

(Cambridge: Cambridge University Press, 2022, v-446 pp.)

Reviewed by Nicholas Rostow*

Professor Robbie Sabel of the Hebrew University Faculty of Law, who earlier in his career served as Legal Adviser to the Israel Foreign Ministry, has written a significant book on an important and vexing subject. Among its virtues are broad historical coverage, including from before the Balfour Declaration to contemporary controversies over exploitation of water resources, extensive documentation reflected in footnotes (not endnotes—hurrah!), and dispassionate tone. The book presents the views of Arab, Israeli, and other governments, international bodies, and statesmen/scholars on the legally relevant historical record. The reader therefore sees the issues in dispute, and the arguments advanced on all sides, whether or not Professor Sabel agrees with them.

The book's premise is that there is "a substantial role for international law in international relations in general and the Arab-Israeli conflict in particular."[1] Professor Sabel understands that parties to international disputes, including the parties to the Arab-Israeli conflict, invoke international law to advance, justify, and legitimate their positions. Russia has done so with regard to its war with Ukraine. China also has made legal arguments to defend its claims of sovereignty over the South China Sea or large portions of that Sea. International law may provide a common language even when the parties disagree on the substantive law. Without being either a panacea or a chimera, as Professor Sabel quotes J.L. Brierly,[2] international law plays a role in the effort to bring a peaceful end to the Arab-Israeli conflict, as well as other conflicts.

Professor Sabel's method is instructive and useful. He takes each topic and offers a dispassionate review of the legally relevant facts. Professor Sabel then presents the principal alternative interpretations of the historical and legal meaning of events and documents. He includes sufficient quotation so that the reader can judge. He concludes with his own reflections on the issue in question. One example from the first part of the book makes the point. Professor Sabel wrote that

> The 1948 war is regarded by Israel as its war of independence in which it managed to repel attacks by all the neighboring Arab States. The Arab population of Palestine regard[s] the war as a catastrophe, *al Nakba*, that caused the exodus of some 700,000 Arabs from the areas held by Israel. . . . International law issues arising from the war include complaints from both sides of deliberate killing of civilians, clearly a violation of the laws of war. Expulsion of civilians, where it occurred, was justified by Israel as an act of legal military necessity; this is disputed by the Palestinians who viewed it as an illegal act. A smaller number of Jewish civilians were expelled from areas held by Arab forces. A legal issue in dispute is whether the objection of the Arabs of Palestine to partition allowed them to use force and whether the intervention of the neighbouring Arab States was a legitimate exercise of the right of collective self-defence.[3]

---

* I have served in senior U.S. government legal and policy positions, 1985-2005, and, over many years, have had occasion to meet and correspond with Robbie Sabel. I regard him as a friend and professional colleague. The views expressed are my own and do not necessarily reflect the views of any organization or institution with which I have been or am affiliated.

1. Robbie Sabel, INTERNATIONAL LAW AND THE ARAB-ISRAELI CONFLICT 1 (Cambridge University Press, 2022). References by page number only are to the book under review.
2. *Ibid.*, p. 13.
3. *Ibid.*, pp. 137-38.

By acknowledging and presenting the persistent, differing interpretations of the parties, Professor Sabel provides an instructive presentation for the reader.

Professor Sabel's treatment of two notorious episodes during the 1948 war is illustrative. On April 9, 1948, prior to the declaration of the establishment of Israel on May 14, 1948, members of the Irgun (two Israeli armed groups, Etzel and Lehi, which later were compelled by the government of Israel to join the Israel Defense Forces, and which for years had engaged in terrorist attacks against British and Arab forces and individuals), attacked the village of Deir Yassin near Jerusalem, killing more than 100 civilians. Reports of this attack and rumors of others help explain why Arab villagers fled their homes. At this stage of the war, moreover, there was no State of Israel and so no international armed conflict. Nonetheless, as Professor Sabel notes, the attack constituted a "gross" violation of the laws of war. On April 13, 1948, an Arab attack on a convoy mainly of doctors and nurses heading to the Hadassah Hospital also constituted a war crime. According to Professor Sabel, relying on a number of different historians with different perspectives on the conduct of military operations in 1948, irregular armed forces on both sides thus committed war crimes. War crimes diminished in number after Israel's declaration of statehood when all belligerents agreed to abide by the laws of war.

The Palestinian refugee issue originated in the 1948 war. Professor Sabel examines the origin of the problem, the differing views as to its causes, and efforts to resolve it. Today, as they have for several years, the Palestinians claim an international law "right of return," meaning that all Palestinian Arab refugees who in the course of the 1948 war left homes in what is now Israel, and descendants of those refugees, have a right to return to the homes that they left. Israel disputes that such a right exists in international law. In July 1950, Israel adopted a domestic immigration law providing that "Every Jew has the right to come to this country as an 'oleh' [a Jew immigrating to Israel]." Every state has the right to adopt immigration policies and laws. Israel is no different in this regard. Its law is known as the Law of Return. That does not mean such a right of return exists in international law. While perhaps as many as 700,000 persons constituted refugees in 1948, adding their descendants to this number increases the figure to some seven million people. Toward the end of his presidency, Bill Clinton noted that Israel cannot agree to such a claim without risking destruction by demography.

Professor Sabel takes the reader through the legal literature on refugees and their rights. UN General Assembly Resolution 194 (1948) stated that refugees wishing to return to their homes and live in peace "should be permitted to do so." Arab governments, the Palestinians, and a number of academic commentators have insisted that this resolution represents international law, even though the General Assembly's power under the UN Charter does not include, per se, the power to make international law or say what it is. Even such a clever politician as President Bill Clinton was unable to find a solution to the Arab refugee problem that Israel and the Arabs could accept. It has not been possible even to reach agreement on a claims commission to assess compensation for both Palestinians and Jews forced out of their homes. Professor Sabel suggests that Israel has the capacity to take in living refugees from the 1948 war, but not their descendants who might want to live in Israel; he notes that parties have never entertained the idea. So far, what UN Security Council Resolution 242 (1967) called a "just settlement of the refugee problem" has eluded negotiators.

The unwillingness of Palestinians and some Arab states to accept Israel's existence is the source of the so far insoluble Arab-Israeli problems. Thus, for example, the parties have not been able to accept in a formal sense practical solutions to conflicting claims and needs to shared water resources dating back to sensible proposals by the Eisenhower administration. That said, Professor Sabel notes as an example that Syria and Israel will have to find a compromise if they are ever to achieve an acceptable regime regarding water resources.

Robbie Sabel's book is an outstanding contribution to understanding how international law runs through the Arab-Israeli conflict from the beginning, however one dates the start of the conflict. Among the inescapable conclusions are that true Arab-Israeli peace must be grounded in law, law all parties can accept. That will require compromises by both sides. ■

Nicholas Rostow is a Senior Research Scholar, Yale Law School; Senior Partner, Zumpano, Patricios & Popok, PLLC (New York, N.Y.), and Visiting Professor, Cornell Law School, Spring 2023.

Antisemitism on Social Media

By Monika Hübscher and Sabine von Mering

(Routledge, 2022, 270 pp.)

Reviewed by Lev Topor

This book explores antisemitism displayed on social media platforms such as Facebook, Twitter, YouTube, and TikTok. Antisemitism, and hate speech in general, has increased its online presence in the last decade, due to the proliferation of social media and the greater use of the online domain for cybercrimes. The increase in antisemitic posts does not necessarily indicate a rise in hatred toward Jews since a single person can operate dozens of accounts and publish numerous antisemitic posts. This does not even necessarily indicate an increase in antisemitism within a specific population. Nevertheless, increased antisemitism online does pose a significant concern, as it can reach a wider range of people, normalize hatred, and incite individuals to take violent actions against Jews.

Monika Hübscher and Sabine von Mering have edited a volume of fourteen chapters that outline, review, develop and discuss various aspects of online antisemitism. The book in its entirety is greater than the sum of its parts. While specific chapters are often limited, the entire collection successfully manages to describe antisemitism on social media and suggest possible solutions and measures that can be implemented to tackle the issue. I recommend this book to those who seek to better understand online antisemitism and how social media platforms often play a role in its facilitation. While I possess knowledge about antisemitism and the online domain, I am not an expert on every single online platform or case study presented. My notes and criticism should be read with this in mind.

Chapter 1 is written by the book's editors – Hübscher and von Mering. They provide a snapshot of antisemitism on social media up to 2021, and rightfully argue that hate speech can lead to radicalization. They claim that not only is technology utilized for spreading hatred, but also to create social disruption, thus lowering the prospect of eradicating online antisemitism and racism. After explaining this business model, Hübscher and von Mering address strategies, as well as their weaknesses, to counter this phenomenon. These include integrating artificial intelligence (AI) measures, human content moderation and counter-speech. They also address interesting research gaps and challenges such as how to deal with constantly changing, non-textual and/or indirect manifestations of antisemitism on TikTok. (This is addressed more thoroughly by Gabriel Weimann and Natalie Masri in Chapter 10.) They note as an introduction to the rest of the chapters, that the study of antisemitism on social media is currently limited, and that it should evolve in an interdisciplinary manner.

In Chapter 2, Armin Langer introduces the phenomenon of QAnon-related antisemitic conspiracies online, such as conspiracies about the "Deep State," Jewish influence and control, child sacrifice, and sexual abuse. Langer's chapter is descriptive and adds illustrative examples to the book. It also attempts to explain how online contemporary conspiracies can be traced back to historical conspiracies. Some examples could have been explained in more detail. For instance, Langer's attempt to understand the "Deep State" conspiracy through the fact that Jewish communities often lived in separate societies in Europe and elsewhere might require additional details and justifications, as Jews in secluded communities do better in observing Jewish laws and traditions. Langer does mention the constantly changing cues of antisemitism that are indicative of antisemitism, even though they are not purely or explicitly antisemitic. For instance, the mention of "family values" as reference to the values of a White Christian Family, that is often associated with the alt-right and its roots, can be traced to Nazi Germany.

In Chapter 3, Sophie Schmalenberger and Monika Hübscher also tackle similar indirect and inexplicit cues. They analyze the case of the *Alternative für Deutschland (AfD) Party*, demonstrating how antisemitism can derive from non-antisemitic texts, and emphasize that in cases of such propaganda, the context is crucial. The historical context provided focuses most specifically on Germany's defeat in World War II. The AfD party and its members do not spread content directly in reference to Jews, but rather spread victimhood on social media platforms, notably Facebook, Twitter, and YouTube, claiming that the Germans were the victims of WWII, and that those

who should have carried the blame and borne the punishment were able to escape. The authors claim that AfD's posts are sometimes very similar in nature. Since the AfD utilizes dedicated strategies to propagate its message and create effectivity, the danger of such propaganda, they conclude, is that it has enabled the AfD to circulate an "alternative memory" that is, in its nature, populist, and more appealing to the right-wing sphere.

Chapter 4 presents the case of antisemitism on Facebook pages related to and supportive of the British Labour Party. As the author Jakob Guhl notes, left-wing antisemitism can be counterintuitive, as the left is often an opponent of racism. Yet, antisemitism exists among leftist partisans as well. Guhl bases his research on dozens of keywords that he searched on public Facebook pages. Guhl notes that while no posts fell under common definitions of antisemitism, he nevertheless suggests that "there may be a connection between the length of the comment section and the likelihood that they will contain antisemitic comments" (p. 63) – a problematic statement with no statistical support. He also notes that in any case, 41% of antisemitic comments were challenged by other users.

Since some Facebook groups are public, non-followers can also comment on posts, and since such semi-official Facebook groups are often aware of social correctness, this raises the question of the need to investigate open Facebook groups in the first place. Overt racism and antisemitism are often less prevalent among leftist or mainstream communities. As Guhl discovered, most posts were related to the State of Israel, adding further complexity to the understanding of what constitutes antisemitism. The greatest contribution of Guhl's analysis is the verification of social manners – fortunately, both semi-official and official Facebook groups online understand the need to avoid explicit antisemitism. This is probably because they not only understand the reasoning behind avoiding antisemitism, but because they also do not embrace those beliefs. Furthermore, administrators of these pages could have deleted antisemitic comments to their non-antisemitic posts, something that was not dealt with in this chapter.

In Chapter 5, Monika Hübscher and Vanessa Walter explore the phenomenon of trolling attacks on social media, specifically on YouTube, using qualitative examples of comments to a livestream YouTube event and quantitative analysis (by a textual-analysis tool – Voyant). Their findings confirm the traditional definition of the phenomenon of internet trolling, according to which trolls disrupt organized discourse whether on textual, vocal, or visual levels. In the case presented by Hübscher and Walter, trolls managed to disrupt a YouTube event associated with Jewishness by publishing a significant number of antisemitic comments. The authors argue that trolling is a deliberate attack on democracy. I agree with them. Yet, preventing participation from factions of society we do not "like" can also be perceived as a nondemocratic act. This could have been further developed by the authors as no suggestions for countermeasures were provided. However, it is important to mention that such countermeasures were raised by Hübscher and von Mering in Chapter 1, with the example of counter-speech.

In Chapter 6, Cassie Miller presents the development, growth and significance of neo-Nazi movements using "alt-tech," that is, alternative and often more private, secure, and anonymous social media platforms. By analyzing several cases of neo-Nazi individuals using such alt-tech (i.e., Iron March forum, Atomwaffen Division on Discord, groups on Gab and channels on Telegram of The Base movement), Miller suggests that these secluded groups are dangerous for several reasons. First, such groups use alternative platforms of communication and develop their own methods and language that is meant to avoid regular social media moderation. They are therefore avoiding not only AI-based moderation but also counter-speech, as these secluded platforms are often not frequented by mainstream users. Second, Miller importantly suggests that the migration of both users and their extreme antisemitic propaganda from mainstream social media to secluded social media has de facto created a radical community that is greater than its members. That is, even if members are banned or arrested, as in the case of "The Base movement," the "spirit" of the radical community lives on in other, similar groups. Miller's observation, with which I completely agree, raises a question about the benefits of regulation and moderation on social media by censoring antisemites – are we encouraging them to find more convenient platforms to spread their hatred? As a disclaimer, I also argue this in my research about antisemitism on the dark web and on Telegram.

In Chapter 7, Navras J. Aafreedi introduces an interesting and often overlooked subject: antisemitic posts in languages other than English, German, Russian or Arabic and Persian. The focus of this chapter is on the Urdu language spoken by many Muslims in South Asian countries like India and Pakistan. As Aafreedi suggests, YouTube has failed both to offer guidelines and policies, as well as to monitor antisemitism in uploaded content, since most of the platforms' efforts are aimed at the English-speaking public. This monitoring failure should

not be overlooked, as Urdu is so vastly used, and its reach can be measured in billions. For instance, Aafreedi presents YouTube channels with antisemitic content, including ARY Digital, which, at the time that this article was being written, had over 20.6 million followers and 13,729,039,184 views. Other, similar channels have tremendous reach as well. On these channels, traditional antisemitism, antizionism, and Holocaust denial are often promoted. Aafreedi's chapter is a particularly important contribution to the book, as it provides a glimpse into a world rarely paid attention to by Western researchers.

In Chapter 8, Hendrik Gunz and Isa Schaller examine the phenomenon of propaganda by Attila Hildmann, an antisemitic conspiracy theorist and Holocaust denier who publishes videos and other forms of content online. Through various platforms like YouTube and Telegram, Hildmann promotes a "superconspiracy" that combines Nazi ideology, antisemitism, and COVID-19 denial. The authors utilize a hermeneutical approach and descriptive statistics to analyze Hildmann's conspiracies. Their human interpretations raise the bar significantly for AI-based analysis. As asked previously in the book, can AI-based moderation tackle online antisemitism? At times, it appears that Gunz's and Schaller's interpretation is more effective than that of AI. This argument can be made for other chapters as well. As a holder of a doctorate in antisemitism studies and having dedicated considerable time to researching this phenomenon, I can suggest that, for now, AI-only moderation is incomplete, as Gunz and Schaller demonstrate in this chapter.

In Chapter 9, Hendrik-Zoltán Andermann and Boris Zizek examine antisemitic illustrations and memes shared on social media. This adds depth to the book, which, until now, dealt with text and YouTube videos. Andermann and Zizek examine Facebook, YouTube, TikTok and Instagram and explain the dangers posed by antisemitic memes, as they are easily disseminated and clearly understood by others. These memes and depictions are not new, but they showcase traditional prejudice and stereotypes of Jews. The broader public easily recognizes many of these memes and depictions, as people worldwide have prior knowledge and preconceived ideas of what is for them a Jew. Nevertheless, the authors note that not all antisemitic memes are immediately recognizable by users, since some memes are coded in a way that only hard-core antisemites will understand. This makes the process of content moderation more complex.

In Chapter 10, Gabriel Weimann and Natalie Masri examine the Chinese TikTok application (app). The authors use a systematic analysis of antisemitic content in its many forms (i.e., text, illustrations, videos) to uncover the rise of antisemitism on the app. They specifically explain that many antisemites have migrated to this new platform and, with TikTok's growing market, are able to have a greater impact. Moreover, the danger of the radicalization of youth via the app is exceedingly high, since children and teens use it frequently. Weimann and Masri argue that young people are more susceptible and naïve when it comes to dangerous content, whether it be antisemitism, racism, terrorism, or other forms of extremism or taboo.

In this chapter, a non-western social media platform is analyzed in the book for the first time. This Chinese app is interesting as it raises new questions and concerns, for instance, how to make a Chinese business compliant with Western norms. TikTok is owned by a Chinese company that is less open to Western public pressure, criticism, or international regulation, making it less likely for non-revenue related topics to be addressed. Weimann and Masri mention that while TikTok forbids hate speech in its Terms of Service, hate speech is often not properly addressed. Weimann's and Masri's research is significant and should be developed further since, to date, attention has been focused almost exclusively on American-based social media platforms.

In Chapter 11, Quint Czymmek examines how Jewish social media users perceive and react to antisemitism online. Czymmek draws inspiration from research previously conducted by the European Union Agency for Fundamental Human Rights, published in 2019. The author conducted his research through a qualitative method using semi-structured interviews to find out how the targets of this online hatred – Jews – feel about this phenomenon and what, if at all, they are doing to counter it. However, the author only conducted three interviews (two females, aged 20-29 and one male, aged 30-39). While the answers of the interviewees are interesting, it is not possible to infer from their responses information relating to the findings on other cases, as the perception of various events differs from one person to the next, especially with such a limited number of participants. As the author notes, they all use various social media platforms, either for personal use or as part of their affiliation with a Jewish organization. They all experience antisemitism online and are aware that preventive measures should be taken. While there are methodological limitations in this research, it is an important addition to the book as it does not focus on the perpetrators, but rather on the victims. This is an important aspect of online hatred that must be researched further since, as made evident by the presented findings, online hatred and antisemitism have a significant impact

on the victims. It is not only a feeling-based impact (i.e., making Jews feel diminished or offended), but also an action-based impact: the interviewees have taken measures to conceal their identities or enhance their online privacy and security.

In Chapter 12, Günther Jikeli, Damir Cavar, Weejeong Jeong, Daniel Miehling, Pauravi Wagh and Denizhan Pak suggest an annotation method to build and use an algorithmic definition of antisemitism for use by AI technology to identify antisemitism. The authors used a sample of Twitter to create what they refer to as a "Gold Standard" of annotation. The attempt to create an antisemitism-related algorithm is interesting, although the authors do acknowledge problems related to human annotation and the fact that many antisemitic posts that do not include explicit text about Jews can fly under the radar. I also note that social media platforms rarely address antisemitic discourse since many posts are not textually antisemitic. The authors note that their project can be of value to other parties – an important mention that may nudge others to further develop the standard and contribute to the creation of an algorithm for antisemitism.

In Chapter 13, Yfat Barak-Cheney and Leon Saltiel map the intervention methods used by Civil Society Organizations (CSOs) for dealing with antisemitism on social media. They review several related projects which research and report as well as develop AI software for combating antisemitism online. One example is the "Decoding Antisemitism" project led by Dr. Matthias J. Becker and Prof. Helena Mihaljević. CSOs' effort is very important, since governments and social media companies are often slow to respond to such issues or demonstrate a lack of interest in dealing with online hate speech. This raises the question of accountability: who should be responsible for dealing with online antisemitism – governments, companies, CSOs or individuals? CSOs and individuals' role in reporting antisemitism does not mean that governments and companies should be relieved of this responsibility. Is one's need to rely on local governments or social media companies for protection too much to ask in liberal progressive democracies in the 21st century?

Finally, in Chapter 14, Michael Bossetta presents an overall perspective. First, as noted, although antisemitic content is disturbing, it is only a small fraction of the online content available and should be regarded as an issue that should be dealt with, but not taken out of proportion. Second, counter narratives against antisemitism are not often considered a research topic. Most efforts attempt to define and mark antisemitic content, but disregard counter-posts and comments about it. Third, Bossetta notes that the sheer amount of online antisemitism is less important than the potential outcome – radicalizing people to the extent that they translate ideas into actions. Although I partially agree with this argument, I note that as more antisemitic content is available, the more there will be opportunity for widespread and greater and faster radicalization. ■

Dr. Lev Topor is a visiting ISGAP scholar at the Woolf Institute, Cambridge, a senior research fellow at the Center for Cyber Law and Policy, University of Haifa, a former research fellow at the International Institute for Holocaust Research, Yad Vashem. He is the author of "Phishing for Nazis: Conspiracies, Anonymous Communications and White Supremacy Networks on the Dark Web" (Routledge, 2023) and the co-author, with Prof. Jonathan Fox, of "Why Do People Discriminate Against Jews?" (Oxford University Press, 2021).

Land Law and Policy in Israel: A Prism of Identity

By Haim Sandberg

(University of Indiana Press, 2022, 254 pp., Notes, Bibliography, and Index)

Reviewed by Havatzelet Yahel

The relationship between land and identity has been discussed in scholarly writings from many different angles.[1] In his book, law Professor Haim Sandberg chose to study the connection through the prism of land laws.

Sandberg's main argument, presented clearly and convincingly, is that the analysis of land laws, especially the changes they underwent in a particular society, sheds light on the characteristics of that society and its fundamental challenges. The book, formulated in an accessible style and clear English, deals with six main aspects, some of which have been previously discussed in various formats.[2] Although each aspect is important on its own merit, what makes the book particularly noteworthy and interesting is the integration of all aspects within the framework of a monograph.

The manner in which the arguments are presented goes far beyond the legal discussion of land law; it is done in a way that provides the reader with an image of Israeli society and the challenges it faces. The book is thus relevant not only to jurists and academic researchers, but also to a broad public outside the legal world and the borders of Israel. In fact, the questions the book deals with are some of the same questions that have been at the center of Israeli public discourse for many years: Jewish-Arab relations, majority-minority issues, the debate over Israel's being both a Jewish and democratic state, the relations between the State of Israel and the Jewish National Fund (*Keren Kayemet LeYisrael*),[3] judicial activism, privatization, the relations between capital and governance, and more.

Hence, although written by a jurist, Sandberg's contribution extends to fields of planning and geography, political science, economics, sociology, etc. The observations beyond the legal study are also reflected in the opening of some chapters with quotations from literary sources, which enriches the reading and helps connect the reader to broader contexts. For example, a passage by Shaul Tchernichovsky opens the introduction: "What is Man but the earth of his small domain, the imprint of his native land" (p. 1), and the second chapter begins with a quotation from Theodore Herzl's *Altneuland* (p. 45).

In the introduction to the book, Sandberg presents his broad use of the term "identity," after which he lays out six main themes:

- Israel's coping with history – or with the "burden of history";
- The transition from socialism to capitalism and a free market economy;

---

1. Edward Relph, Place and Placelessness (London: Pion, 1976); David W. Orr, Earth in Mind (Washington DC, 1994); Simon Schama, Landscape and Memory (London: Harper Perennial, 1995); Erica-Irene Daes, "Indigenous Peoples and their Relationship to Land," UNE/CN.4/Sub.2/2001/21, UN Commission on Human Rights, Geneva, 2001, available *at* https://www.refworld.org/docid/3d5a2cd00.html; Christine Berberich, Neil Campbell, and Robert Hudson, Land & Identity: Theory, Memory, and Practice (Amsterdam & New York, NY: Rodopi B.V., 2012).
2. Haim Sandberg, "Distributive Justice vs. the Denial of the Jewish Nation State," in Yitzhak Schnell et al., eds., Land, Democracy and the Relations of the Majority-Minor 23 (Tel Aviv: Walter Leach, Tel Aviv University, 2013, Hebrew); *id.*, "Expropriations of Private Land of Arab Citizen in Israel: An Empirical Analysis of the Regular Course of Business," 43 Israel Law Review 590 (2010); *id.*, Land Title Settlement in Eretz-Israel and the State of Israel (Jerusalem: Sacher Institute, Hebrew University of Jerusalem, 2001, Hebrew); *id.*, The Lands of Israel: Zionism and Post-Zionism (Jerusalem: Sacher Institute, Hebrew University of Jerusalem, 2007, Hebrew); *id.*, "The Politics of 'Over-victimization:' Palestinian Proprietary Claims in the Service of Political Goals," 19 Israel Affairs 488 (2013); *id.*, "Strategic Considerations behind Normative Explanations: Lessons from Israel's Supreme Court Expropriations Case," 11 International Journal of Constitutional Law 751 (2013).
3. The Jewish National Fund was founded by the Zionist organizations in 1901 for the purpose of buying and developing land for Jewish settlement in *Eretz Israel* (the land of Israel).

- The country's small dimensions and dense population;
- Democracy, equality and majority-minority issues;
- Scarcity of natural resources alongside human resources in the fields of innovation; and
- Judicial activism and the criticism of such activism.

In the first chapter, "The Fingerprints of History in Land Inventory," Sandberg shows that the current inventory of private and public land in Israel reflects the "ongoing fingerprint of history." Starting with Ottoman rule through the British Mandate, continuing with the Arab-Israeli conflict, the Zionist vision, and the socialist ideology of the founding fathers, this comprehensive set of legislation denotes important changes in Israel's identity. According to Sandberg, while Israel feels a constant need to demonstrate its legal independence by freeing itself from the influence of the legal systems that preceded its establishment, in practice, the mark of legal history is present and influential in the Israeli real estate market of the 21st century and reflected in the daily life of every Israeli.

In the second chapter, "Culture, Nation and Socialism in the Administration of Public Lands," Sandberg contends that the management of the inventory of public land is based on preserving most of Israel's territory – 93 percent – as public land, in which the transfer of ownership is prohibited or restricted under the second constitutional law enacted in Israel, in 1960 – Basic Law: Israel Lands, which stipulates in Article 1 that "the ownership of Israel Lands, which are the real estate belonging to the State, the Development Authority, or the KKL, shall not be transferred by sale or in any other manner."[4]

According to Sandberg, the principle of preserving ownership is based on three motives. The first deals with cultural and symbolic aspects – the return of the Jewish people to their homeland and the biblical context of "The Land Shall Not Be Sold in Perpetuity."[5] The second, a national motif – fear of an Arab or foreign takeover of the land, makes it difficult to transfer ownership to non-Jews. The third motif is economic – socialist, derived from the worldview of the nation's founders, according to whom joint ownership of the land should be maintained to promote equality and social justice. Sandberg shows that the change in attitudes toward these three aspects, which are essentially identity-related, is reflected in the management of public land – in the way in which the ideological change is reflected in the decline in Israel's adherence to public ownership through the transfer of ownership and land privatization.

The third chapter, "Privatization of Public Lands: A Slow Maturation Process," reveals the long and gradual privatization process of public lands in Israel, which are an expression of a dramatic transition from a socialist government to a market economy. Sandberg shows how legal and administrative frameworks coped with the changing reality and how gradually, informal privatization turned into a formal one. In the last decade, the phenomenon has been widely reflected in the privatization of urban and agricultural land.

The fourth chapter, "National Land Planning in a Small Country: Challenges and Innovation," discusses the combination of the significant entrepreneurial component and density. These components, related to Israel's characteristics, highly affect Israel's land planning policy. Sandberg shows the creativity and innovation required to cope with the land shortage and the abundance of needs, illustrated in the book by two innovative projects of mapping and designing a three-dimensional and multi-layered cadastre in Israel,[6] as well as regulating marine space.

The fifth chapter, "Jewish and Democratic: Land Policy and Arab Minority," analyzes how land policy relates to the Arab minority. Israel aspires to be both a nation-state of the Jewish people and a state that guarantees full equality to all its citizens. Israeli land laws reflect this duality within reference to the consequences of the Independence War on land ownership – such as the issue of restitution of property of present-absentees,[7] as well as in its relation to the land allocation policy – the expropriation issue, questions of separation versus mixed localities (for Arabs in localities with a Jewish majority and vice versa). In both, the discussion of land laws is accompanied by identity dilemmas. One case discussed in the book, in which I was involved as litigator, deals

4. Basic Law: Israel Lands, 5720-1960, Sefer Hahukim (Book of Laws) 56 (Hebrew).
5. Yossi Katz, The Land Shall Not Be Sold in Perpetuity: The Jewish National Fund and the History of State Ownership of Land in Israel (Berlin: De Gruyter, 2016).
6. Cadastre is comprehensive official legal recording concerning the location, ownership and other data relating to parcels of land.
7. The term "present-absentees" refers to Arabs who left their homes during the War of Independence and their property was confiscated by virtue of the Absentee Property Law, but they remained within the boundaries of the State of Israel, or returned to it at a later date. These people were absent according to the definition of the law, but were present in the country.

with the ownership claims of Bedouins from the Al-Uqbi family in the Negev, who claim ownership over thousands of dunams.[8] This lawsuit is part of broader ownership claims that Bedouins have regarding hundreds of thousands of dunams in the Negev.[9] Before rejecting Al-Uqbi's claim, the court heard arguments regarding questions of Ottoman land laws, the Mandate, the implications of the Independence War, and the Land Acquisition Law of 1953.[10]

An identity question brought before the court was about indigeneity. The people of Al-Uqbi claim that the Bedouin population in the Negev are "indigenous people" as the term is used in international law and defined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, and therefore entitled to ownership of the Negev lands. Ruling over the issue of indigenousness involves weighty questions such as: who was in the Land of Israel first? Who has historical rights to the land?[11]

The Bedouin claim of indigeneity rests on the assumption that Zionism is a colonialist movement and that the Jews are foreign immigrants to the region. Hence, accepting the indigenous argument would conflict with the Jewish conception of the Land of Israel as the historical homeland of the Jewish people, a concept that is expressed, inter alia, in the Balfour Declaration, the British Mandate granted by the League of Nations, and Israel's Declaration of Independence.[12]

In the sixth chapter, "Creative Judiciary: Equitable and Constitutional Safeguards to Property Rights," Sandberg seeks to show, under the heading "Creative Judiciary," how land laws are intertwined with issues relating to the status and independence of the judicial system. Israel, he claims, is blessed with an independent judiciary renowned throughout the world, while at the same time, its creativity and the boundaries of its authority are central in a heated public debate regarding the identity and character of the state as a democratic state. Sandberg focuses on two arenas of discussion of legal activism. First, the applicability of equitable remedies in land laws as a legacy of British law, and second, the constitutional protection afforded to private property.

In the epilogue, Sandberg concludes that the analysis of the changes in land laws reflects the changes in the identity conflict as well as the current situation in which Israel finds itself – a struggle for independence and difficulty disengaging from the past. The author simulates the identity analysis of the characteristics of Israel to the analysis done through Freudian therapy. According to him, "the underlying theme of this analysis is that Israel is in a constant state of flux, looking to the future while remaining haunted by the past," a reality which "The Freudian analyst would probably conclude that the imaginary patient is a conflicted soul fraught with dilemmas and uncertainty" (p. 209).

Alongside the many praises accorded to this book, one element is missing. Sandberg does not deal with issues of de-facto implementation and enforcement of land laws, which raises the question of whether it is enough to discuss laws in isolation from their actual application. Can discussing and analyzing "land law" be complete without such aspects? Does the law only include what is written and ruled by judges, or is it also what happens in practice? Moreover, does not the lack of enforcement by itself create a law?

In Israel, there are large areas in which land laws have systematically not been enforced over the years. In those areas, court rulings are no more than ink on white paper. The largest and most prominent of this phenomenon is

---

8. Civil Further Hearing 3751/15 Al-Uqbi v. State of Israel (2015); Civil Appeal 4220/12 Al-Uqbi v. State of Israel (2015).
9. *See* Havatzelet Yahel, "The Conflict over Land Ownership and Unauthorized Construction in the Negev," 6 Contemporary Review of the Middle East 3-4, 352 (2019). In contrast *see* Alexandre Kedar, Ahmad Amara, and Oren Yiftachel, Emptied Lands: A Legal Geography of Bedouin Rights in the Negev (Stanford, CA: Stanford University Press, 2018).
10. Land Acquisition (Validation of Acts and Compensation) Law, 5713-1953, Sefer Hahukim 58 (Hebrew).
11. Havatzelet Yahel, "The Jewish People and Indigenous Resilience," in David Danto and Masood Zangeneh, eds., Indigenous Knowledge and Mental Health: A Global Perspective, 145 (Cham: Springer, 2022).
12. The Declaration of Independence opens with the words "Eretz Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained statehood, created cultural values of national and universal significance, and gave the world the eternal Book of Books," which expresses the Jewish identity element and the concept of an unbreakable connection between the territory and the Jewish people. *See* Havatzelet Yahel, "The Declaration of Independence and the Discourse of the Indigenous Peoples," in Dov Elbaum ed., The declaration of Independence with an Israeli Talmud: Sources and Midrashim, Literature and Studies 80 (Rishon Lezion: Bina, 2019, Hebrew).

in the Negev. Examining the written law alone, in a reality where there is a considerable gap between it and what occurs on the ground, misses an element that could have contributed to the discussion. Tracing the development of non-enforcement phenomena in a particular area, and examining its causes, could provide a complementary layer to the book. It could also contribute to the current debate over the question of governance in Israel.

In conclusion, this is an important research book written from a broad perspective that bridges the sphere of law to issues of identity and history. The contribution is particularly significant for being the first book in decades on Israeli land law in English. Thus far, only Hebrew readers have enjoyed the author's original and refreshing approach, reflected in the variety of books he has published, but now English readers will have the privilege to enjoy his writing as well. ■

Dr. Adv. Havatzelet Yahel is a Senior Faculty Member, the Head of the Woodman-Scheller Israel Studies International Program and holds the Michael Feige Career Development Chair in Israeli Society at the Ben-Gurion Research Institute for the Study of Israel & Zionism, Ben-Gurion University of the Negev. Before joining the academy, Yahel was Deputy to the Southern District Attorney (Civil Matters) in the Ministry of Justice in Israel and the Head of the Land Department.

צֶדֶק

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

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

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

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

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

INTERNATIONAL JEWISH LAWYERS
IJL

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

10 Daniel Frisch St., Tel Aviv 6473111
Telephone: + 972 3 691 0673 Fax: + 972 3 695 3855
www.ijl.org

Membership Application

I, Mr./Ms., First Name _____ Last Name _____,
Title (Prof., Adv. etc.) _____ would like to pay membership fees for the year/s _____, U.S. $100 (or equivalent in NIS) per year, Total _____ U.S. Dollars ( ) / NIS ( )

(ישראלים: נא למלא שם בעברית ובאנגלית)

Address

Home ☐ Office ☐

Office Name

_____

Street Address

_____

City _____ Postal Code _____

State _____ Country _____

E-mail _____

Phone Number _____

(ישראלים: נא למלא כתובת בעברית)

How did you hear about us?

LinkedIn ☐ Facebook ☐ Friend ☐
Google ☐ YouTube ☐

Payment Method: Check ☐ Visa ☐ Mastercard ☐ Amex ☐

Expiration Date Month _____ Year _____

Credit Card Number _____

ID/Passport Number of Card Owner _____

Name on the card _____

I would like to receive news, updates and promotional material by e-mail ☐

Cancellation Policy: According to Israeli Regulations

I agree to receive digital receipts via e-mail ☐

Signature _____

Date _____

Please complete this form and send it to our offices by e-mail, fax or post
Members who wish to appear in our directory of lawyers are welcome to contact us at: avraham@ijl.org

office@ijl.org | www.ijl.org

THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A)
10 DANIEL FRISCH St. TEL-AVIV 6473111 | Tel: 972-3-6910673 Fax: 972-3-6953855

If undeliverable, return to
IJL - JUSTICE
10 Daniel Frisch Street
Tel Aviv 6473111
Israel