

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-17-044030-081

DATE: September 18, 2009

IN THE PRESENCE OF: THE HONOURABLE LOUIS-PAUL CULLEN, J.S.C.

BIL'IN (VILLAGE COUNCIL)
and
THE LATE AHMED ISSA ABDALLAH YASSIN
Plaintiffs
and
BASEM AHMED ISSA YASSIN
and
MAYSAA AHMED ISSA YASSIN
and
MAZIN AHMED ISSA YASSIN
and
LAMYAA AHMED ISSA YASSIN
and
NORA AHMED ISSA YASSIN
and
TAGREED AHMED ISSA YASSIN
and
MOHAMMED AHMED ISSA YASSIN
and
ABDULLAH AHMED ISSA YASSIN
and
ESRAA AHMED ISSA YASSIN
and
YOSRA YOUSEF MOHAMMED YASSIN
and

AYESHA ALABED YASSIN DAR YASSIN

Plaintiffs in continuance of suit

v.

GREEN PARK INTERNATIONAL INC.

and

GREEN MOUNT INTERNATIONAL INC.

and

ANNETTE LAROCHE

Defendants

JUDGMENT

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The Palestinian people still yearn for the freedom and dignity denied them for decades. The Israeli people yearn for long-term security. Neither can achieve their legitimate demands without a settlement of the conflict. Today, we are at a critical juncture in efforts to move beyond crisis management and renew efforts toward genuine conflict resolution.

United Nations Secretary-General Ban Ki-moon, February 2007¹

Preamble

- [1] The State of Israel captured the West Bank of the Jordan River in June 1967.
- [2] Military occupation continues more than forty years later.²
- [3] Plaintiff Bil'in Village Council (hereafter, the "Council") is the municipal authority over the Palestinian village of Bil'in.
- [4] Plaintiff Ahmed Issa Abdallah Yassin passed away in 2009. The Plaintiffs in continuance of suit are his heirs.
- [5] The Plaintiffs' civil action is largely summarized in the following paragraph of the motion introducing their action:

24. The Village pleads that the corporate Defendants, on their own behalf and as agents of the State of Israel, are constructing residential and other buildings and are creating a new dense settlement neighbourhood on the lands of the Village and are marketing and selling therein condominium units and other built up areas to the civilian population of the occupying power, the State of Israel, for the purpose of transferring the civilian population of Israel to the village's land and removing the population of the Village from their land. In so doing, the corporate Defendants are aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose. The Defendant, LaRoche, is deemed legally to be liable for the conduct of the corporate Defendants in her capacity as their sole registered director and officer. The Defendants, and each of them, are therefore in violation of the aforesaid Article 49(6) of the *Fourth Geneva Convention* dated August 12, 1949, Section 3(1), Schedule V Protocol 1, Part 1, Article 1 (1) and Schedule V Protocol 1, Part V, Section 11, Article 85 (4)(a) of the *Geneva Conventions Act*, R.S. 1985, c. G-3, Articles 8(2)(b)(viii) and 25 (c) of the *Rome Statute of the International Criminal Court* dated July 17, 1998, Section 6(1)(c), 6(3) and 6 (4) of the Canadian *Crimes against Humanity and War Crimes Act* S.C. 2000, c. 24, Sections 6 and 8 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 and Article 1457 of the *Civil Code of Québec*.

¹ The Question of Palestine and the United Nations, United Nations, New York, 2008
<<http://unispal.un.org/pdfs/DPI2499.pdf>>.

² For an overview of the situation since 1917, see <<http://www.un.org/Depts/dpa/qpal/history.html>>.

[6] More succinctly, the Plaintiffs allege that by transferring part of its civilian population to territory it occupies in the West Bank, Israel is violating international law as well as Canadian and Québec laws and that by constructing and selling condominiums exclusively to Israeli civilians, the Defendants are assisting Israel in the perpetration of war crimes.

[7] On those bases, the Plaintiffs seek declarations that the Defendants are in violation of the legal provisions mentioned above. They also seek punitive damages, the immediate cessation of the Defendants' activities, the demolition of the buildings in dispute and a complete accounting.

[8] The Plaintiffs ask that their action be decided according to Canadian and Québec laws, rather than the laws where the injurious acts and injuries allegedly occurred, arguing that the courts of Israel will refuse to find that Israel is in violation of the international instruments on which they rely.

[9] The Defendants are domiciled in Québec.

[10] They present preliminary motions to immediately dismiss the Plaintiffs' action. To this end, they seek recognition of judgments rendered in Israel.

[11] This judgment does not determine whether Israel or the Defendants have perpetrated an illegality. It only decides whether the Superior Court of Québec will recognize judgements rendered in Israel and, at a later date, hear the merits of the Plaintiffs' civil action, where issues of public international law, private international law and domestic law intersect.

[12] This judgment is drafted in the language that the parties have used in their proceedings and arguments.

I- THE PROCEEDINGS

(a) The "Second Further Amended and Particularized Motion Introducing a Suit (article 110 Code of Civil Procedure)" dated June 12, 2009 (hereafter, the "Action")

[13] The Action has grown in length from 14 to 32 pages, excluding notices, primarily in response to the Defendants' request for particulars.³ It is often repetitious and circular, occasionally contradictory.⁴

³ On June 12, 2009, the Plaintiffs amended the Action by adding paragraph 39. This paragraph purports to describe the lands in dispute through a television documentary (Exhibit P-18). The Court was shown exhibit P-18 without sound. During submissions, the amendment was authorized. The issues before the Court are unaffected.

⁴ For example, on the one hand, the Council states that it does not claim ownership of the disputed lands (paras. 13 iii) and 33 i). On the other hand, it alleges that it has been denied peaceful enjoyment of its property (para. 22 ii). The Plaintiffs allege that Defendant Laroche is the sole director and officer

[14] In substance, the Action contains the following allegations:

- 1- The village of Bil'in (hereafter, "Bil'in") is located in the West Bank, in Palestinian territory occupied by Israel.
- 2- The Palestinian Authority appointed the Council in 2003, pursuant to the Oslo accords. Democratically elected in 2003, the Council has the mandate and authority to commence the Action. The Council claims municipal jurisdiction over the lands at the center of the dispute, not their ownership, and brings the Action on its own behalf and on behalf of the residents of Bil'in.
- 3- Defendants Green Park International Inc. and Green Mount International Inc. (hereafter, the "Corporations") are registered in the Province of Québec. They are building condominiums on Bil'in lands and selling those buildings illegally.
- 4- Defendant Annette Laroche is the sole director and officer of the Corporations. As such, she is deemed to be their principal and controlling mind and is therefore personally liable for their illegal conduct. By allowing herself to be named their director, she is deemed to be a participant in their illegal activities.
- 5- The late Mr. Yassin was Head of the Council from 2003 to January 20, 2009, when he passed away.
- 6- Mr. Yassin owned two parcels of the land on which the Corporations are carrying out their activities, specifically parcel 35, which straddles the area where the Corporations are carrying out construction, and parcel 62, which is situated entirely inside that area. Mr. Yassin had no title deed, but had Jordanian Land Tax documents, which are usually and customarily relied upon by Israel as the basis for determining land ownership claims in cases of disputed land ownership. The only available description of the location of Mr. Yassin's lands is a fiscal map.
- 7- In 1991, Israel declared that portions of Bil'in lands were "state land". (The preliminary motions were not argued on the basis that this was an "annexation", i.e. a unilateral declaration of sovereignty over a territory.) The Plaintiffs admit to having no knowledge of what the Defendants knew about this.
- 8- In 1996, Israel unlawfully assigned the state lands mentioned above to the local council of Modi'in Illit for the construction of a Jewish settlement in the pursuit of a policy of populating the West Bank with Israeli civilians and removing its Palestinian population to ensure that such settlements would remain part of Israel in any future agreement with Palestine (hereafter, the "Policy"). The

of the Corporations, but nonetheless seek injunctive relief against the Corporations and their directors and officers.

Plaintiffs admit to having no knowledge of what the Defendants knew about the assignment of those lands by Israel to Modi'in Illit.

- 9- Afterwards, the local council of Modi'in Illit assigned the lands to the Corporations. The Corporations have claimed and will claim that they have purchased the lands (hereafter, the "Lands") for development.
- 10- Bil'in residents could access the Lands for agricultural purposes until 1998, when the Israeli Army severely restricted their access. Since late 2000, they cannot access the Lands.
- 11- Israel has never annexed the West Bank. The Lands are therefore subject to international law, including "International Humanitarian Law".
- 12- As an occupying power, it is unlawful for Israel to re-assign land over which it only has military control for non-military or security uses.
- 13- Israel and, either wilfully or negligently, the Defendants, are in breach of the following provisions:
 - (1) Article 49 (6) of the *Fourth Geneva Convention*, dated August 12, 1949, ratified by Israel in 1951:

49. ("...")

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

[Emphasis added.]

- (2) Subsection 3(1) of Part I of the Canadian *Geneva Conventions Act*⁵ and Article 85(4)(a) of Schedule V of the same act:

3. (1) Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule I, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V is guilty of an indictable offence, and

(a) if the grave breach causes the death of any person, is liable to imprisonment for life; and

(b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

⁵ R.S.C. 1985, c. G-3.

SCHEDULE V
(Subsection 2(2))

PROTOCOL I

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12
AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS
OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

Article 85 — Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

("...")

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

("...")

(f) Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

[Emphasis added.]

(3) Articles 8(2)(b)(viii) and 25 (3)(c) of the *Rome Statute of the International Criminal Court*, dated July 17, 1998 (hereafter, the "*Rome Statute*"):

Article 8
War crimes

("...")

2. For the purpose of this Statute, "war crimes" means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

("...")

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

("...")

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

("...")

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

[Emphasis added.]

(4) Subsections 6 (1)(c) and (4) of the Canadian *Crimes Against Humanity and War Crimes Act*.⁶

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada

(a) genocide,

(b) a crime against humanity, or

(c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

("...")

⁶ S.C. 2000, c. 24.

(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

[Emphasis added.]

(5) Articles 4, 6 and 8 of the *Québec Charter of Human Rights and Freedoms*⁷ (hereafter, the "*Québec Charter*"):

4. Every person has a right to the safeguard of his dignity, honour and reputation.

("...")

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

("...")

8. No one may enter upon the property of another or take anything therefrom without his express or implied consent.

(6) Article 1457 of the *Civil Code of Québec* (hereafter, the "*C.C.Q.*"):

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

14-The Corporations are carrying out the Policy for their profit, on their own behalf and as agents of Israel with the latter's support, by the construction on the Lands, since February 2005, of residential and other buildings as well as by the marketing and selling of condominium units or other built-up areas exclusively to the civilian population of Israel, thereby aiding, abetting, assisting and conspiring with Israel in carrying out an illegal purpose.

⁷ R.S.Q. c. C-12.

- 15-The Defendants have acted wilfully: upon consenting to her appointment as sole director and officer of the Corporations, Defendant Laroche was aware or deemed to be aware that she would be liable for all the wrongdoing of the Corporations. In the alternative, the Defendants have negligently violated the laws upon which the Plaintiffs rely.
- 16-The Defendants have the mental capacity to know and understand the consequences of their acts and to be able to discern right from wrong.
- 17-The *Fourth Geneva Convention* was ratified by Israel. It is considered "customary international law"⁸ binding on all countries. (This allegation is central to the dispute.)
- 18-The Plaintiffs make no allegation that the Corporations are occupying powers.
- 19-The Council relies on the policy of the Government of Canada with respect to Israeli settlements in occupied territory.
- 20-With respect to Mr. Yassin, the Defendants are in breach of art. 1 of the *Québec Charter*, which provides that "Every human being has a right to life, and to personal security, inviolability and freedom."

⁸ At <http://www.nyulawglobal.org/globalex/Customary_International_Law.htm#_ednref4>, Silke Sahl describes "customary international law" as follows:

Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." [Reference omitted.] "This definition was published in §102 (2) of the *Restatement of the Law, Third, Foreign Relations Law of the United States*, published by the American Law Institute in 1987. The *Restatement's* reporters' notes for this section state that "No definition of customary law has received universal agreement, but the essence of Subsection (2) has wide acceptance" and goes on to explain various difficulties in defining custom." [Reference omitted.] When is state practice considered to be customary international law? The *Restatement* calls for two-pronged approach to determining custom requiring both a general and consistent practice and a sense of legal obligation (*opinion juris sive necessitates*). J.L. Brierly describes it as follows: "Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor." (Brierly, J. L. *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. Oxford; New York: Oxford University Press, 1963. p. 59.) Obviously, terms such as "a feeling that", "will probably" and "ought" are difficult to prove. As Mark Janis puts it in his book, *An Introduction to International Law*, "The determination of customary international law is more an art than a scientific method." (Janis, Mark W. *An Introduction to International Law*, 4th ed. New York, Aspen Publishers, 2003, p. 44.) This is a complex and fascinating area of law that is addressed by the many excellent books and articles on customary international law.

- 21-The Plaintiffs and the residents of Bil'in are denied freedom of movement and access to the Lands.
- 22-The dignity and honour of the Council are violated, it is has been denied peaceful enjoyment of its property and the Defendants deprive it and its indigenous population of the peaceful enjoyment and free disposition of their Lands, thereby also depriving them of sources of income from agricultural activity that took place previously on the Lands.
- 23-The damages suffered by the Plaintiffs are the direct and immediate result of the Defendants' faults and were reasonably foreseeable.
- 24-The Plaintiffs expressly acknowledge that no claim for compensatory damages will be sought in the Action and that, with respect to damages, the only claim made is for punitive damages.
- 25-The matters at issue before the Superior Court are not "justiciable" by the Israeli courts, i.e. not capable of being decided according to legal principles. (This allegation is also central to the dispute.)
- 26-The Plaintiffs have exhaustively and to the best of their knowledge, information and belief provided full particulars and complete documentation of every allegation.

(b) The preliminary motions before the Court

[15] The Defendants bring two preliminary motions:

(a) An "Exception to Dismiss Action and, *de Bene Esse*, to Recognize Judgments (Art. 165(1), 785, 165(3) and 165 (4) C.C.P.)" (hereafter, the "Exception to Dismiss"), and

(b) an "Application to decline jurisdiction – forum non conveniens (Art. 3135 C.C.Q.)" (hereafter, the "Declinatory Exception").

[16] The Exception to Dismiss concludes in the immediate dismissal of the Action on several alternative grounds:

- The Defendants are entitled to jurisdictional immunity as alleged agents of Israel.
- The High Court of Justice of Israel (hereafter, the "HCJ") has already rendered judgement on the substance of the Action (*res judicata*). In this respect, the Defendants specifically seek recognition of three judgements of the HCJ, nos. 3998/06, 143/06 and 1526/07.
- The Plaintiffs do not have sufficient legal interest to bring the Action.

- The Action is unfounded in law, even if the facts alleged are true.

[17] Finally, the Defendants' Declinatory Exception concludes in the dismissal of the Action on the single ground that although the Superior Court has jurisdiction over the Action, the HCJ is clearly in a better position to decide.

II- THE ISSUES

[18] The preliminary motions therefore raise the following issues:

- 1- Are the Defendants entitled to immunity?
- 2- In the negative, should the Superior Court recognize HCJ judgments nos. 3998/06, 143/06 and 1526/07?
- 3- In the affirmative, have those judgments finally and completely settled all of the issues in the Action (*res judicata*)?
- 4- In the negative, do the Plaintiffs have the necessary legal interest to bring the Action?
- 5- In the affirmative, is the Action unfounded in law, even if the facts alleged are true (art. 165 (4) *C.C.P.*)?
- 6- In the negative, is the HCJ clearly in such a better position than the Superior Court to decide the Action that the exceptional exercise of the power to decline jurisdiction is warranted?

[19] These issues will be considered in the same order, bearing in mind that the Plaintiffs' allegations are assumed to be true only with respect to the Exception to Dismiss based on art. 165 (4) *C.C.P.*:

165. The Defendant may ask for the dismissal of the action if:

1° There is *lis pendens* or *res judicata*;

("...")

3° The plaintiff has clearly no interest in the suit;

4° The suit is unfounded in law, even if the facts alleged are true.

[Emphasis added.]

III- DISCUSSION

1- Are the Defendants entitled to immunity?

[20] Pursuant to s. 3(1) of the *State Immunity Act*⁹ (hereafter, the "*SIA*"), a "foreign state" is immune from the jurisdiction of any court in Canada.

[21] An agency of a foreign state is also entitled to the same immunity.

[22] The *SIA* defines as follows "agency of a foreign state" and "foreign state":

2. In this Act,

"agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

"foreign state" includes

- (b) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
- (c) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
- (d) any political subdivision of the foreign state;

[Emphasis added.]

[23] The inclusive definition of a "foreign state" has been found to encompass functionaries.¹⁰

[24] The Defendants do not claim that they are agents or functionaries of Israel.

[25] They argue nonetheless that the Action is entirely based on the allegation that they are acting as "agents of the State of Israel".

[26] This contention is inaccurate. The Plaintiffs also plead in the alternative that the Defendants are acting "on their own behalf".¹¹ Those allegations are reinforced by the allegation that the Corporations are "conspiring" with Israel in carrying out an illegal purpose.¹²

⁹ R.S.C. 1985, c. S-18.

¹⁰ *Jaffe v. Miller et al.*, (1993) 13 O.R. (3d) 745 at paras. 27-34 (Ont. C.A.).

¹¹ Action at paras. 9, 9 iii), 23 and 24.

¹² *Ibid.* at para. 9. Whether conspiracy is possible between an agent and its principal is questionable: see *Janssen-Ortho Inc. v. Amgen Canada Inc.*, [2004] O.J. no. 2523 at paras. 32-34 (Ont. Sup. Ct.).

[27] The allegations that the Corporations are acting on their own behalf are undisputed. If this is true, the Corporations cannot claim jurisdictional immunity pursuant to the *S/A*.

[28] Defendant Laroche is also alleged to be an agent of Israel.¹³ This general allegation is repeatedly particularized, however, by the allegation that she is "deemed" to be an agent of Israel¹⁴ because she is the sole director of the Corporations, which are themselves allegedly acting as agents of Israel.¹⁵

[29] It follows that if the Corporations are acting on their own behalf rather than as agents of Israel, Defendant Laroche isn't an agent of Israel.

[30] Above all, the Defendants do not contend that they are truly agents of Israel. Moreover, one of their alternative arguments is predicated on the opposite assumption.¹⁶ It is axiomatic that pursuant to the *S/A*, immunity may only be claimed legitimately by a "foreign state" or by an "agency of a foreign state".

[31] The Defendants are therefore not entitled to state immunity on the basis of the Plaintiffs' unproven and alternative allegations that they are agents of Israel.

2- Should the Superior Court recognize HCJ judgments nos. 3998/06, 143/06 and 1526/07?

[32] Each judgement will be reviewed briefly.

(a) Summary of HCJ no. 3998/06

[33] The petition named "Ahmad Isa (sic) Abdallah Yassin, Head of Bil'in Village Council" as one of the 21 petitioners¹⁷ whereas the respondents included "Green Park Inc." and "Green Mount Inc."

[34] The petitioners were arguing that the declarations issued in 1990 and 1991 by the Commissioner for State Property in the Judea - Samaria Region (hereafter, the "Commissioner"), whereby specific areas in Bil'in became state property, were illegal by reason of deceitful misrepresentations.

[35] They were seeking to annul the 1990 and 1991 declarations by the Commissioner and to freeze all planning and authorization proceedings of Detailed Outline Plan 210/8/1 for the Mattiyahu East neighbourhood in Modi'in Illit.

¹³ Action at para. 23.

¹⁴ *Ibid.* at paras. 9, 9 i) and 9 iii).

¹⁵ *Ibid.* at para. 9 v).

¹⁶ At para. 145 of this judgment.

¹⁷ Schedule 8 to the affidavit of Renato Jarach at 1. However, the judgement of the HCJ identifies the petitioners as: "Ahmad Issa Abdallah Yassin and 21 others" (see Schedule 11 to the affidavit of Renato Jarach at 1).

[36] On November 9, 2006, the HCJ dismissed the petition without costs.

[37] The HCJ found that "it was not proven that the Declarations ... were made with the aim of circumventing the processes determined in Law of the purposes of bestowing rights to land of the type under discussion."¹⁸

[38] The HCJ did not determine whether "Green Park Inc." and "Green Mount Inc." were the owners of the areas in dispute. It emphasized, however, that "perusal of the petition does not reveal that the Petitioners have any basis for the claim that they hold rights to the land that is the subject of the Declarations".¹⁹ In this connection, the HCJ commented:²⁰

(We must mention that the claims made to the Appeals Committee, inter alia by some of the Petitioners, concerning rights to the lands that are the subject of Declaration 10/91 – were rejected, while no appeal whatsoever was submitted in reference to Declaration 20/90).

[39] Mr. Yassin was one of the unsuccessful claimants before the Appeals Committee.

[40] As appears from the petition, Mr. Yassin implicitly admitted that the "Appeals Committee" had dismissed his claim to part ownership of parcel 62, whereas the same authority had partially maintained his claim to part ownership of parcel 35 as a result of which a portion of that parcel had been removed from the declarations of state property.²¹

[41] The judgements of the HCJ in nos. 143/06 and 1526/07 were delivered together on September 5, 2007.

(b) Summary of HCJ no. 143/06

[42] The petitioners included "The Head of the Bil'in Village Council, Ahmad Issa Abdallah Yassin". The respondents again included "Green Park Inc." and "Green Mount Inc."

[43] While the petition was pending, the HCJ found that construction work was being carried out illegally in Mattihyahu East, i.e. without the required permits. It granted an order *nisi* and issued an interim order preventing any further building or occupancy.

[44] Israel cancelled Detailed Outline Plan 210/8 (hereafter, the "First Plan") and recommenced the planning process. Detailed Outline Plan 210/8/1 (hereafter, the "Second Plan") addressed the defects in the First Plan: enclaves of private land

¹⁸ Schedule 11 to the affidavit of Renato Jarach at para. 3.

¹⁹ *Ibid.* at para. 4.

²⁰ *Ibid.*

²¹ Schedule 8 to the affidavit of Renato Jarach at paras. 1, 6 and 41.

belonging to Palestinians were to be returned to their original condition, fenced off, and access to them was to be ensured. The Second Plan was submitted anew to the approval process and was ultimately approved in February 2007.

[45] The petitioners argued that the approval process of the Second Plan for the Mattihyahu East neighbourhood in Modi'in was fatally flawed by reason of various defects, including failure to publish the Plan in Arabic, deviations from the jurisdictional boundaries of the local council of Modi'in and, once more, the alleged illegality of the Commissioner's declarations in 1990 and 1991 that the land was state property.

[46] The petitioners sought to enforce applicable planning laws, to freeze all construction pursuant to the Second Plan, and to bring to trial those responsible for the illegal construction as well as for other violations of existing laws.

[47] The HCJ awarded costs to the petitioners but found that the Second Plan had cured the defects of the First Plan.

(c) Summary of HCJ no. 1526/07

[48] The petitioners included "The Head of the Bil'in Village Council". "Green Park Inc." and "Green Mount Inc." were again among the respondents.

[49] The petitioners had initiated their petition after the approval of the Second Plan but before it had become valid.

[50] They argued that the existence of an Outline Plan was a condition precedent to the approval of a Detailed Plan. They had not raised this argument before.

[51] The petitioners also argued for the following reasons that the planning authorities had illegally refused to consider their claims of title:

- i) The alleged illegality of the Commissioner's declarations in 1990 and 1991 that the lands were state property. Following the judgment in HCJ no. 3998/06, the petitioners abandoned this argument.

- ii) Instead of their earlier general claim challenging the status of state property of the entire area of the Plan, the petitioners were submitting specific claims contesting this status with respect to each plot of land.

[52] The HCJ found that the argument that the existence of an Outline Plan was a condition precedent to the approval of a Detailed Plan could have been raised in 1999 and was therefore no longer debateable, the only matters remaining open to dispute being the changes between the First Plan and Second Plan.

[53] The HCJ also dismissed the additional arguments raised by the petitioners because they had not been submitted in due course.

[54] Regarding land rights, the HCJ stated: "The planning decision does not determine rights to land. The petitioners' rights, to the extent that any such exist, remain theirs".²²

(d) Discussion

[55] Article 785, para. 2 *C.C.P.* allows a Defendant, in response to a claim, to apply for recognition and enforcement of a decision rendered outside Québec.

[56] A Québec court shall recognize a decision rendered outside Québec except in any one of the six cases enumerated in art. 3155 *C.C.Q.*:

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

[57] The Plaintiffs object that the HCJ had no jurisdiction over the subject matter of the judgments (art. 3155, para. 1 *C.C.Q.*).

[58] This argument stands in complete contradiction to their consistent conduct before the HCJ. Having repeatedly petitioned the HCJ and, in one case, been awarded costs, the Plaintiffs cannot argue now that the HCJ did not have jurisdiction over the subject matter of their own petitions.²³

²² Schedule 7 to the affidavit of Renato Jarach at para. 16.

²³ *National Bank v. Soucisse et al.*, [1981] 2 S.C.R. 339.

[59] The rules pertaining to the recognition of decisions rendered outside Québec lead to the same conclusion.

[60] To determine whether the exception to recognition set out in art. 3155, para. 1 C.C.Q. should be given effect, reference must be made to arts. 3164 to 3168 C.C.Q. and, if necessary, to arts. 3134 to 3140 C.C.Q.²⁴

[61] Article 3164 C.C.Q. determines that the jurisdiction of a foreign court will be established if (i) a Québec court would have had jurisdiction over the dispute and (ii) the dispute is substantially connected with the foreign country:

3164. The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

(i) Jurisdiction of the HCJ

[62] In order to determine if a Québec court would have had jurisdiction over the subject matter of the judgments, one must refer to Title Three of Book Ten of the *Civil Code of Québec*, i.e. to arts. 3134 to 3154 C.C.Q.

[63] Under these articles, specific rules regarding jurisdiction vary according to the nature of the action: arts. 3141 to 3147 C.C.Q. apply to personal actions of an extrapatrimonial and family nature, arts. 3148 to 3151 C.C.Q. apply to personal actions of a patrimonial nature and arts. 3152 to 3154 C.C.Q. apply to real and mixed actions.

[64] In *Bern v. Bern*,²⁵ the Court of Appeal confirmed the accuracy of the following definitions of "real actions", "personal actions" and "mixed actions":

In *Vocabulaire juridique*, Association Henri Capitant, 3rd Edition, P.U.F., "action réelle", "action personnelle" and "action mixte" are accurately defined as follows, at pages 20-21:

réelle. Action par laquelle on demande la reconnaissance ou la protection d'un droit réel (droit de propriété, servitude, usufruit, hypothèque) et qui est mobilière si le droit réel exercé porte un meuble. Ex. action en revendication d'un meuble perdu ou volé; immobilière si le droit porte sur un immeuble. Ex. action en revendication d'un immeuble.

²⁴ *Canada Post Corp. v. Lepine*, [2009] S.C.J. no. 16, at paras. 22 and foll. (S.C.C.); H. Patrick Glenn, "Droit international privé", *La réforme du Code civil*, T. 3 (Ste-Foy: Presses de l'Université Laval, 1993) at 769 para. 116.

²⁵ *Bern v. Bern*, [1995] R.D.J. 510 at 516 (C.A.).

personnelle. Action par laquelle on demande la reconnaissance ou la protection d'un droit **personnel** (d'une créance) quelle qu'en soit la source (contrat, quasi-contrat, délit, quasi-délit) et qui est, en général, mobilière, comme la créance dont l'exécution est réclamée (ex. action en recouvrement d'un prêt d'argent) mais qui peut être immobilière, si cette créance l'est aussi. Ex. l'action en délivrance de tant d'hectares de terre dans un terrain de lotissement.

mixte. Action par laquelle le demandeur agit tout à la fois en reconnaissance d'un droit réel et en exécution d'une obligation. Ex. l'action en résolution de la vente **exercée** contre l'acheteur pour défaut de paiement du prix; l'action par laquelle l'acquéreur ou le donataire demande à être mis en possession de l'immeuble dont il est devenu propriétaire par la vente ou la donation.

[65] The Plaintiffs argue that the judgments were of an administrative nature only. Neither the nature nor the subject matter of the final judicial decisions rendered by the HCJ constitutes a bar to their recognition.

[66] The Plaintiffs further argue that the judgments pertain to real property situated in an occupied territory, not within Israel. In this connection, the Plaintiffs do not indicate, however, which domestic law applied in the West Bank other than the law of the occupying power.

[67] In any event, the nature of the rights in dispute before the HCJ was not "real" or "mixed".

[68] In HCJ no. 3998/06, the HCJ emphasized that the petitioners' alleged property rights in the lands were not in issue. Consequently, the nature of the dispute cannot be characterized as "real". The same can be said in respect of HCJ nos. 143/06 and 1526/07.

[69] Various authorities of the State of Israel were named respondents.²⁶ In addition, the Corporations clearly submitted to the jurisdiction of the HCJ.

[70] Consequently, whether the judgments concerned personal actions of an extrapatrimonial or patrimonial nature, the HCJ had jurisdiction pursuant to arts. 3141 or 3148, par. 5 C.C.Q.:

²⁶ In HCJ no. 3998/06: "The Military Commander of the West Bank" and "The Commissioner of State Property in the Judea and Samaria Region"; in HCJ no. 143/06: "The Minister of Defence", "The Commander of IDF Forces in the West Bank" and "The Judea and Samaria Civil Administration's Supreme Planning Committee"; in HCJ no. 1526/07: "The Head of the Judea and Samaria Civil Administration", "The Judea and Samaria Civil Administration's " and "The Supreme Planning Committee's Subcommittee for Objections".

3141. A Québec authority has jurisdiction to hear personal actions of an extrapatrimonial and family nature when one of the persons concerned is domiciled in Québec.

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

("...")

(5) the Defendant submits to its jurisdiction.

[71] Finally, arts. 3165 to 3168 *C.C.Q.* must also be considered.

[72] Here, only arts. 3165 and 3168 *C.C.Q.* are potentially relevant.

[73] Article 3165 *C.C.Q.* plainly does not bar the jurisdiction of the HCJ:

3165. The jurisdiction of a foreign authority is not recognized by Québec authorities in the following cases:

(1) where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;

(2) where, by reason of the subject matter or an agreement between the parties, Québec law recognizes the exclusive jurisdiction of another foreign authority;

(3) where Québec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator.

[74] To the extent that the petitions were of a patrimonial nature, art. 3168 *C.C.Q.* further confirms the jurisdiction of the HCJ by reason of the fact that the Corporations submitted to the court's authority:

3168. In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:

(1) the Defendant was domiciled in the country where the decision was rendered;

(2) the Defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;

(3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the Defendant has recognized the jurisdiction of the foreign authority.

[Emphasis added.]

(ii) Substantial connection of the dispute with the foreign country

[75] Whether the HCJ had jurisdiction because one of the respondents was domiciled in Israel or because the Corporations recognized its jurisdiction, there appears to have been a substantial connection between the petitions and Israel.

(e) Conclusions with respect to recognition of the HCJ judgments

[76] The three judgments must be recognized.

3- Have the judgments of the HCJ finally and completely settled all of the issues in the Action (res judicata)?

[77] In *Rocois Construction Inc. v. Québec Ready Mix Inc.*, Gonthier J. indicated that *res judicata* is essentially designed to avoid a multiplicity of court proceedings and the possibility of contradictory judgments for the ultimate purpose of protecting the security and stability of social relationships.²⁷

[78] The conditions under which a party to a proceeding is bound by an earlier judgment are expressed in art. 2848, para. 1 C.C.Q. The earlier judgment must be final, the two demands must be based on the same cause, involve the same juridical parties and seek the same thing:

2848. The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

(a) Finality

[79] Renato Jarach, an attorney at law, opposed on behalf of the Corporations the petitions that led to HCJ judgments nos. 143/06 and 1526/07.

[80] Mr. Jarach executed an affidavit on February 1, 2009 in support of the Defendants' preliminary motions.

²⁷ *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440 at 448.

[81] Paragraph 15 of his affidavit states that "all the judgments of the High Court of Justice referred to in this affidavit are final and not subject to further appeal". HCJ judgment no. 3998/06 is mentioned in para. 6 f) ii) of his affidavit. HCJ judgments nos. 143/06 and 1526/07 are mentioned in para. 6 g) i).

[82] The Plaintiffs do not dispute those statements. They argue, however, that Mr. Jarach should not be accepted as an expert witness because he represented the Corporations before the HCJ.

[83] They rely in this respect on the case of the *Ikarian Reefer*²⁸ where Cresswell, J. of the Queen's Bench Division enumerated, *in obiter*,²⁹ the duties and responsibilities of expert witnesses in civil cases. Such duties and responsibilities include "that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies of litigation", [References omitted.] that an expert witness "should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise" [References omitted.] and that an expert witness in the High Court "should never assume the role of an advocate".³⁰

[84] The fact that Mr. Jarach represented the Corporations before the HCJ in respect of two of the three judgments does not disqualify him from providing opinion evidence to this Court, although it may affect the weight given to his evidence.³¹

[85] Except for Mr. Jarach's statement that the interest of justice supports the Defendants' Exception to Dismiss,³² his affidavit does not run afoul of the principles enunciated by Cresswell J.³³

[86] Mr. Jarach's other statements include that:

- Various Israeli courts, including the HCJ, rejected the claims of ownership made by Mr. Yassin regarding parcels 35 and 62.
- The *Jordanian Villages Administration Law of 1954* governs the village of Bil'in.
- Under the applicable Israeli, Jordanian or military occupancy laws, neither the village of Bil'in nor the Council would have legal interest or standing to institute the Action.

²⁸ *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Rep. 68.

²⁹ Cresswell J. did not exclude any expert evidence for those reasons.

³⁰ *Supra* note 28 at p. 81-82.

³¹ Jean-Claude ROYER, *La preuve civile*, 3rd ed. (Cowansville: Yvon Blais, 2003) at 300 para. 468.

³² Affidavit of Renato Jarach at para. 28.

³³ Mr. Jarach also refers to several judgments of the HCJ, which the Defendants have not formally asked the Court to recognize. These unrecognized judgments are not considered with respect to *res judicata*.

- The Plaintiffs attorned to the jurisdiction of the HCJ.
- The judgment rendered by the HCJ in *Bargil v. The Government of Israel* does not support the Plaintiffs' contention that the matters at issue in the Action are not justiciable before the Israeli courts; such matters are justiciable before the Israeli courts and have already been submitted to various tribunals and the HCJ.
- None of the applications made by Mr. Yassin or others against the Corporations with respect to the Lands have been deemed by the HCJ to be non-justiciable.
- The Plaintiffs have sought and obtained injunctive orders against the Corporations with respect to the Modi'in Illit construction development, have unsuccessfully advanced proprietary rights to parcels of land on which the project is being developed and have invoked international Conventions, namely the *Fourth Geneva Convention*, the *Rome Statute of the International Criminal Court* and the *Geneva Conventions Act*.
- The residence of all Plaintiffs and of all witnesses except Defendant Laroche, is in Israel or in the West Bank where all elements of proof are also situated.
- The issues raised by the Plaintiffs in Israel invoked and called for an understanding of various laws that are foreign to Canada.
- The Plaintiffs' injunctive proceedings would require recognition and enforcement overseas.

[87] Subject to procedural requirements, relevant opinion evidence is admissible if a person is shown to possess specialized knowledge beyond that of the judge or jury.³⁴

[88] Mr. Jarach received an LL. B. in 1969 and an LL. M. in 1974, both from the Hebrew University of Jerusalem, as well as a license to practice law in 1970. He practiced as an assistant to the State Attorney of the State of Israel from 1970 to 1986, at which time he held the position of Head of the High Court of Justice Litigation Department. He opened a private practice in 1986 and, today, is a senior partner in one of Israel's biggest law firms. His practice focuses on constitutional, administrative, civil and commercial litigation.

[89] Mr. Jarach is duly authorized to practice before the courts of Israel.

[90] He is amply qualified to provide the Court with opinion evidence regarding matters that relate to his practice as an attorney including whether the judgments of the HCJ are final and open to any further appeal.

[91] The Court accepts Mr. Jarach's evidence in this respect: the three HCJ judgments are final and not subject to further appeal.

³⁴ *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25 para. g; *R. v. B  land*, [1987] 2 S.C.R. 398 at 415.

(b) Juridical identity of the parties

[92] The Plaintiffs submit that the judgments do not meet the requirement of identity of parties for the application of *res judicata*.

[93] Pointing out that the word "International" does not appear in the name of the corporate entities appearing in the judgments, they argue that there is no evidence that the Defendants are the same entities.

[94] This disingenuous submission is plainly incompatible with the Plaintiffs' own allegations in paras. 9, 14 and 27 of the Action, where they implicitly acknowledge that the Corporations are the same entities that appeared as respondents to their petitions before the HCJ. In addition, the Plaintiffs allege that exhibits P-9, P-10, P-11, P-14 and P-15 relate to the Corporations. These exhibits explicitly refer to "Green Park Inc." and "Green Mount Inc", not to "Green Park International Inc." or "Green Mount International Inc."

[95] The Corporations are without doubt the same entities that are named in the three judgments of the HCJ.

[96] The Plaintiffs further argue that the Council and Mr. Yassin are not named together as parties in any one of those judgments.

[97] This assertion is also incorrect: in HCJ no. 3998, "Ahmed Issa Abdallah Yassin" is named as one of the petitioners.³⁵ However, Mr. Yassin is described in the relevant petition as "Ahmad Issa Abdallah Yassin, Head of Bil'in Village Council" and, paragraph 6 of the petition indicates that he "...is the Head of Bil'in Village Council, who, by virtue of his position, represents all the residents of the village. In addition, the Appelant (Mr. Yassin) is one of the owners of plot 62 ... and also one of the owners of plot 35 ...".

[98] Mr. Yassin was therefore apparently petitioning on his own behalf as well as on behalf of the other residents of Bil'in.

[99] The evidence is unclear, however, regarding the other two judgments. In HCJ no. 143/06, one of the petitioners is described as "Chairman of the Village Council Bil'in Ahmed Issa Abdallah Yassin"³⁶ or "The Head of the Bil'in Village Council, Ahmad Issa Abdallah Yassin".³⁷ In HCJ no. 1526/07, one of the petitioners is described as "Chairman of the Village Council "³⁸ or "The Head of the Bil'in Village Council".³⁹

³⁵ Schedule 11 to Mr. Jarach's affidavit.

³⁶ P-14.

³⁷ Schedule 7 to Mr. Jarach's affidavit.

³⁸ P-14.

³⁹ Schedule 7 to Mr. Jarach's affidavit.

[100] In short, Mr. Yassin was apparently acting both on his own behalf and on behalf of the Council in HCJ no. 3998 but he may have been acting solely as a Council representative in HCJ nos. 143/06 and 1526/07.

[101] As a result, if the remaining conditions of *res judicata* are met, the judgment of the HCJ in no. 3998 can be asserted against all Plaintiffs, whereas the other two judgments can only be asserted against the Council.⁴⁰

(c) Identity of object

[102] In the *Rocois Construction* case,⁴¹ Gonthier J. cited the following to describe the "object" of an action:

In *Traité de droit civil du Québec*, vol. 9, 1965, at pp. 478-79, Nadeau and Ducharme define the "object" of an action at law as follows:

[TRANSLATION] In an action the object is the right which the plaintiff is exercising; it is the immediate legal benefit he seeks to have recognized by the court.

It is thus not necessary for the two actions to have identical conclusions; it will suffice if the object of the second action is implicitly included in the object of the first [References omitted.]

In *Le droit civil canadien*, vol. 6, 1902, discussing the conditions necessary for *res judicata*, Mignault writes the following comment on the object of an action, at p. 105:

[TRANSLATION] It is of course the immediate legal benefit which is being sought in bringing it, namely the right the party is seeking to assert . . . but it is important to complete the rule by saying that it is not necessary for the two actions to have exactly the same conclusion: *res judicata* will exist when the object of the second action is implicitly included in the object of the first.

[103] The immediate legal benefits sought in the Action are as follows:

1- Judicial declarations that the Defendants' conduct is in violation of the legal provisions on which the Plaintiffs rely;

2- orders that the Defendants cease their activities on the Lands, remove their buildings from the Lands, return the Lands to their prior condition and provide an accounting for their activities on the Lands; and

3- punitive damages.

⁴⁰ Jean-Claude Royer, *La preuve civile*, *supra* note 31 at 610.

⁴¹ *Rocois Construction Inc. v. Québec Ready Mix Inc.*, *supra* note 27 at 451-452.

[104] The essential objects of the judgments are as follows:

No. 3898/06

- 1- Annulment of the declarations that the Lands were state property;
- 2- orders to cease building activities in Modi'in Illit.

Nos. 143/06 and 1526/07

- 1- Annulment of planning process;
- 2- ceasing construction on the Lands.

[105] The HCJ was not asked for the declarations the Plaintiffs are seeking from the Superior Court nor was it asked to award punitive damages or to order an accounting.

[106] The judgments and the Action share only one essential object: ending construction activities on the Lands.

(d) Identity of cause

[107] In the context of *res judicata*, the concept of "cause" describes the essential legal characterization given to facts in accordance with a rule of law.⁴²

[108] Gonthier J. formulated the applicable rule as follows:⁴³

... where there is a single set of facts alleged to which two provisions are presumed to be applicable, there will be an identity of cause when the substance of each provision by the same legal principle produces an identical effect on the rights and obligations of the parties.

[109] The relevant facts in the judgments of the HCJ are not the same as in the Action. Their essential legal characterization also differs, as do the potential effect on the rights and obligations of the parties of the application of the legal rules to such facts.

[110] Contrary to what is essentially at issue in the Action, the judgments did not determine whether Israel was acting in violation of international agreements and whether the Defendants were liable on an extracontractual basis to punitive damages, to an accounting of their activities and to declarations that they had violated the legal rules on which the Action is based.

[111] In other words, the HCJ did not adjudicate on the facts and law relating to the issue of whether the Defendants were wrongfully assisting Israel for the purpose of an

⁴² *Ibid.* at 453 and foll.; Jean-Claude Royer, *La preuve civile*, *supra* note 31 at 616 and foll.

⁴³ *Rocois Construction Inc. v. Québec Ready Mix Inc.* *supra* note 27 at 458.

illegal transfer by the latter of a portion of its civilian population into the occupied territory of Bil'in in violation of either the *Fourth Geneva Convention* or the *Rome Statute*.

[112] The cause in the judgments and the Action is therefore not identical.

(e) Conclusions with respect to *res judicata*

[113] To sum up, the Corporations were parties to all of the judgments, whereas Defendant Laroche was not. Mr. Yassin was a party in HCJ no. 3898/06, whereas the Council was a party in the other two judgments but perhaps not Mr. Yassin personally.

[114] The only essential common object pertains to the stoppage of construction on the Lands.

[115] The cause differs.

[116] There is therefore no risk of contradictory judgments.

[117] The judgments did not completely settle all of the issues that are raised in the Action.⁴⁴

[118] The presumption of *res judicata* therefore does not apply to the Action.

4- Do the Plaintiffs have the necessary legal interest to bring the Action?

[119] Access to the courts is not absolute or unlimited.

[120] Whoever brings an action must have a sufficient interest in the matter at issue (art. 55 *C.C.P.*):

55. Whoever brings an action at law, whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, **must have a sufficient interest therein**.

[Emphasis added.]

[121] Interest is sufficient if it is direct and personal.⁴⁵

⁴⁴ For similar reasons, this is also true of HCJ no. 8414/05, where the Council petitioned against a section of a fence constructed in Bil'in, following seizure orders issued in 2004. HCJ no. 8414/05 sets out the history of the numerous proceedings opposing the process through which the Lands were declared state property.

⁴⁵ *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du théâtre du Nouveau-Monde*, [1979] C.A. 491 at 493. In the context of the Geneva Conventions see: *Turp v. Chrétien*, J.E. 2003-1037 (S.C.).

[122] Article 165 (3) *C.C.P.* allows for the preliminary dismissal of an action where the plaintiff has "clearly" no interest in the suit. In other words, absence of interest must be obvious.⁴⁶

[123] Where a Defendant seeks the preliminary dismissal of an action on the basis that a Plaintiff's interest is insufficient, the facts alleged in the action are not assumed to be true and evidence may be presented.⁴⁷

(a) The Plaintiffs in continuance of suit

[124] The Plaintiffs in continuance of suit are not alleging any personal rights other than those of the late Mr. Yassin. The latter alleged owning two parcels of land that were directly affected by the activities of the Defendants, i.e. parcels 35 and 62. This allegation is not supported by an affidavit. It is admitted that Mr. Yassin did not have a title deed.

[125] Mr. Yassin did not produce any of the Jordanian Land Tax documents on which he alleged to be relying.

[126] In addition, as mentioned above, in paragraphs 1, 6 and 41 of the petition filed in HCJ no. 3898/06, Mr. Yassin implicitly admitted that his claim to part ownership of parcel 62 had been dismissed by an "Appeals Committee",⁴⁸ whereas his claim to part ownership of parcel 35 had been partially maintained by the same authority, as a result of which a portion of that parcel had been removed from the declarations of state property. He also admitted in the Action that the Corporations will claim that they own the Lands, including parcels 35 and 62.

[127] In short, on the one hand, Mr. Yassin's allegation of ownership is not sworn, is unsupported by any document, an administrative body has already dismissed his property claims insofar as they relate to the Lands and the Corporations claim ownership of the same parcels.

[128] On the other hand, according to the HCJ, Mr. Yassin's claims of ownership have never been finally determined.

[129] As already seen, the HCJ has repeatedly left open the substantive issue of who owns the disputed parcels. In this connection, in HCJ no. 1526/07, the court referred to para. 39 of HCJ no. 8414/05.

[130] Judgment no. 8414/05 was delivered on September 4, 2007 at the request of the Council. The Corporations were among the respondents. The Council was opposing

⁴⁶ *Société d'habitation du Québec v. Leduc*, 2008 QCCA 2065 at para. 15.

⁴⁷ *Ibid.* at para. 16.

⁴⁸ For an objection to a declaration of state property to succeed, the opponent must apparently establish his or her right of ownership of the land at issue: see para. 98 of the petition in HCJ no. 3998/06.

the seizure of land by Israel for the purpose of erecting a "security fence" on lands in Bil'in.

[131] In para. 39, the HCJ reiterated that the disputed administrative decisions had not determined the Corporations' property rights in the land and that such rights remained to be decided according to law:

39. We have not ignored the claims made by the Real Estate Companies that moving the fence to the west will cause harm to their title rights and economic expectations. However, those claims do nothing to change the conclusion that the Respondents must reconsider the route. There are several reasons why. First, there is a gap between the position taken by the Respondents, stating that the area on which the construction of the Mattityahu East Neighborhood is planned is State Land and the position taken by the Real Estate Companies stating that it is private land, purchased by them or for them. In accordance with the decision taken by the Court in HCJ 3998/06, Yassin and others vs. The Military Commander of the West Bank and Others (not yet published, November 9, 2006), the land that is subject of Outline Plan 210/8 were declared State Property based on their status as State Land and not based on the ownership claimed by private bodies. This declaration of itself does not determine or create ownership rights in the area. To date, there has been no determination in accordance with the substantial law, granting the ownership rights to any of the Real Estate Companies. The discussion of the fence route of itself is not the appropriate forum for the clarification of ownership rights. ("...")

[Emphasis added.]

[132] Whether Mr. Yassin or the Corporations own any portion of parcels 35 and 62 apparently remains to be determined in accordance with the "substantial law".

[133] The Defendants have not clearly or obviously disproved Mr. Yassin's claim of ownership.

[134] One cannot conclude that Mr. Yassin does not have any property rights in parcels 35 and 62 beyond those that the Appeals Committee has already recognized.

[135] A total absence of personal interest of the Plaintiffs in continuance of suit in the outcome of the Action insofar as it concerns unimpeded access to, and use of, land which Mr. Yassin alleged owning cannot be termed "obvious".

[136] At this stage of the pleadings, the Court is not of the opinion that the interest of the Plaintiffs in continuance of suit is insufficient and therefore cannot refuse to render a declaratory judgment pursuant to art. 462 *C.C.P.*:

462. No action will be dismissed merely because it is intended to obtain a declaratory judgment; but the court may, if it is of opinion that the interest of the

plaintiff is insufficient, or that a judgment will not put an end to the uncertainty or controversy which gave rise to the action, refuse to render judgment.

[Emphasis added.]

(b) The Council

[137] The Council does not claim ownership of any portion of the Lands. If it has any interest in the Action, it is not as a landowner.

[138] The Council alleges that it has municipal jurisdiction over the Lands,⁴⁹ the authority to speak on behalf of each family of Bil'in residents and a mandate as well as authority to commence the Action. It alleges that the Corporations' delicts have caused it to suffer damages. In this respect, it further alleges that the Corporations have denied it the use of land owned by Bil'in residents and violated its dignity and honour.

[139] The mere existence of municipal jurisdiction over the Lands does not confer any right to their use nor does it otherwise confer to the Council a sufficient interest to seek for its own benefit the conclusions of the Action.

[140] Only a physical person may claim violation of his or her dignity or honour.

[141] The Council does not share with the residents of Bil'in a common interest in the Action and did not file a mandate to appear on their behalf. Therefore, pursuant to art. 59 *C.C.P.*, it cannot represent them in the Action:

59. A person cannot use the name of another to plead, except the State through authorized representatives.

Nevertheless, when several persons have a common interest in a dispute, any one of them may appear in judicial proceedings on behalf of them all, if he holds their mandate. The power of attorney must be filed in the office of the court with the first pleading; thereafter the mandate cannot be revoked except with leave of the court and is not affected by the death or change of status of the mandators. In such case, the mandators are jointly and severally liable with their mandatary for the costs.

("...")

[Emphasis added.]

[142] This is not a case where standing should be granted to a person having no personal interest in the action so that a matter of public interest may be litigated.⁵⁰ Mr.

⁴⁹ Action at paras. 13 iii), 33 i) and 39.

⁵⁰ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

Yassin's claim patently demonstrates that proceedings at the initiative of the Council are not the only reasonable and efficient way to litigate the matters raised in the Action.

[143] In *Canadian Council of Churches v. Canada*,⁵¹ Cory J. stressed on behalf of a unanimous court how granting public interest standing requires a delicate balancing of access to the courts and the preservation of judicial resources:

("...") However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

[144] The Council does not have the sufficiently personal and direct interest in the conclusions of the Action that Québec law generally requires from a litigant. Its claim must therefore be dismissed.

5- Is the Action unfounded in law even if the facts alleged are true (art. 165 (4) C.C.P.)?

[145] The Defendants further argue in the alternative that:

- 1- The rights created by the *Fourth Geneva Convention* inure to the exclusive benefit of signatory states. Only states and their agents are subject to its obligations. If the Defendants are not agents of Israel, they are not subject to its application nor may a private party claim from them civil redress for its alleged violation.
- 2- Even if they are subject to the application of the *Fourth Geneva Convention* and the *Rome Statute*, violation of these international instruments does not constitute a fault under Québec law.
- 3- Neither the *Québec Charter* nor the *Civil Code of Québec* apply to the Action.
- 4- The allegations against Defendant Laroche are insufficient to entail her civil liability.

[146] The first three arguments are interrelated and will be considered together. This will require an examination of the law that applies to the Action.

⁵¹ *Ibid.* at 252.

(a) The law that applies to the Action

[147] A very brief overview of the sources of legal obligations that are pleaded by the Plaintiffs is in order.

(i) *Fourth Geneva Convention*

[148] Professor Claude Emanuelli describes as follows the *Fourth Geneva Convention*.⁵²

In 1949, four new Geneva Conventions were adopted [Reference omitted.]...Convention IV is new, since it is the first one dealing exclusively with the protection of civilians in times of war. Indeed, until 1949, IHL [International Humanitarian Law] was mainly concerned with the protection of combatants. However, the Convention supplements some Hague Regulations on land warfare relating to civilians. The Convention focuses on the treatment of civilians who are under the jurisdiction of the enemy, either in its territory or in occupied territory. To a lesser extent, it also seeks to protect civilians from attacks and other effects of war.

[Content in brackets added.]

[149] In Article 1, the High Contracting parties undertake to respect and ensure respect for the Convention "in all circumstances".

[150] Article 49(6) provides that "The Occupying Power shall not (...) transfer parts of its own civilian population into the territory it occupies".

[151] The Plaintiffs allege that Israel has ratified the *Fourth Geneva Convention*.⁵³

[152] They further allege, and this is of vital importance, that the *Fourth Geneva Convention* is considered "customary international law binding all countries".⁵⁴ If so, the *Fourth Geneva Convention* is part of the domestic (or "municipal") law of Israel.⁵⁵

(ii) *Geneva Conventions Act*

[153] The *Geneva Conventions Act* allows prosecution in Canada of persons accused of having perpetrated war crimes pursuant to the four Geneva protocols.

[154] Subsection 2(2) of the *Geneva Conventions Act* approves the *Fourth Geneva Convention*. The latter is set out in Schedule V of the act.

⁵² Claude Emanuelli, *International Humanitarian Law*, (Montreal: Yvon Blais, 2009) at 63.

⁵³ Action at para. 15.

⁵⁴ *Ibid.*

⁵⁵ Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 151.

[155] Subsection 3(1) of the *Geneva Conventions Act* provides that the commission of a "grave breach" pursuant to Article 85 of the *Fourth Geneva Convention* is an indictable offence punishable by imprisonment. "Grave breaches" include the transfer by the occupying Power of parts of its own civilian population into the territory it occupies in violation of Article 49 of the *Fourth Geneva Convention*.

[156] Subsection 3(4) provides that "Proceedings with respect to an offence referred to in subsection (1), other than proceedings before a service tribunal (...) may only be commenced with the personal consent in writing of the Attorney General of Canada or the Deputy Attorney General of Canada and be conducted by the Attorney General of Canada, or counsel acting on behalf thereof.

(iii) Rome Statute

[157] The *Rome Statute* creates the International Criminal Court (hereafter, the "ICC ") to investigate and try international offences.

[158] According to Article 1, the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions.

[159] Article 8 provides that the ICC shall have jurisdiction with respect to war crimes in particular when committed as part of a plan or policy. It defines "war crimes" as a list of "grave breaches of the Geneva Conventions of 12 August 1949" and as "other serious violations of the laws and customs applicable in international armed conflict" which include "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies."

[160] Pursuant to Article 25, the ICC is given jurisdiction over natural persons. The ICC may find a person criminally responsible and liable for punishment for a crime within its jurisdiction, including where a person "for the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing means of commission."

(iv) Crimes Against Humanity and War Crimes Act

[161] The *Crimes Against Humanity and War Crimes Act* has two main purposes: to implement Canada's obligations under the *Rome Statute* and to further Canada's capacity to prosecute persons accused of crimes against humanity and war crimes and to punish those convicted.⁵⁶

[162] Subsection 6(1) of the *Crimes Against Humanity and War Crimes Act* provides that a person who commits a war crime outside of Canada is guilty of an indictable

⁵⁶ Legislative history of Bill C-19.

offence and may be prosecuted for that offence in accordance with s. 8. Subsection 6(1.1) further provides that a person who conspires to commit an offence referred to in subsection (1) is guilty of an indictable offence. Pursuant to s. 6(2), life imprisonment may be imposed.

[163] Subsection 6(3) defines "war crime" as follows:

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

[164] Crimes described in paragraph 2 of article 8 of the *Rome Statute* are deemed to be crimes according to customary international law (s. 6(4)).

[165] Pursuant to s. 9(3), no proceedings for an offence under s. 6 may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.

(v) Québec Charter

[166] The Québec Charter is a quasi-constitutional statute that guarantees fundamental human rights and freedoms.

[167] The Plaintiffs claim punitive damages. Under Québec law, punitive damages cannot be awarded unless specifically provided for by law.⁵⁷

[168] Article 49 of the *Québec Charter* entitles the victim of unlawful and intentional interference with a protected right or freedom to obtain the cessation of such interference, monetary compensation for moral or material prejudice resulting from such interference and punitive damages.

[169] Article 49 of the *Québec Charter* does not create a compensation system parallel to art. 1457 C.C.Q.⁵⁸

⁵⁷ Art. 1621, para. 1 C.C.Q., *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345 at paras. 20 and 126; *Quantz v. A.D.T. Canada inc.*, [2002] R.J.Q. 2972 at para. 37 (C.A.); *Melocheville (Municipalité de) v. Fournier*, J.E. 99-2023 (C.A.).

⁵⁸ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, *supra* note 57 at 404-406.

(vi) Civil Code of Québec

[170] There are no provisions for civil remedies in the *Fourth Geneva Convention*, the *Geneva Conventions Act*, the *Rome Statute* or the *Crimes Against Humanity and War Crimes Act*.

[171] In this respect, the Plaintiffs plead that the Defendants are liable pursuant to art. 1457 C.C.Q., the foundation of extracontractual liability in Québec, on the basis that the Defendants' alleged wilful participation in Israel's alleged war crime constitutes a civil "fault".

[172] In *St. Lawrence Cement Inc. v. Barrette*,⁵⁹ LeBel and Deschamps JJ. opined on behalf of a unanimous court that in some situations, the violation of a statutory rule also constitutes a civil fault pursuant to art. 1457 C.C.Q.:

[33] As we noted above, the general rules of civil liability set out in art. 1457 C.C.Q. are based on fault (Baudouin and Deslauriers, at p. 149). [TRANSLATION] "This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules" of art. 1457 C.C.Q. (P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?" (1984), 44 *R. du B.* 222, at p. 223). To answer this question, the standards provided for in statutes and regulations, often called "legislative standards", must be analysed in light of the basic concept of civil fault.

[34] In Québec civil law, the violation of a legislative standard does not in itself constitute civil fault (*Morin v. Blais*, [1977] 1 S.C.R. 570; *Compagnie d'assurance Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707 (C.A.), at p. 712; Jobin, at p. 226). For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. (*Union commerciale Compagnie d'assurance v. Giguère*, [1996] R.R.A. 286 (C.A.), at p. 293). The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

[35] The French position is different. In French law, the violation of a legislative standard in itself constitutes civil fault (Jobin, at p. 229). This means that it is not necessary [TRANSLATION] "to find negligence, imprudence, carelessness or something deficient in the conduct of the person who caused the injury" (Viney and Jourdain, at p. 328). Thus, where a legislative standard is violated, the general rules of civil liability transform the standard into an obligation of result, since the victim can [TRANSLATION] "establish fault by proving a simple material fact without having to show that the conduct of the person who

⁵⁹ *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

caused the injury was also morally or socially blameworthy” (Viney and Jourdain, at p. 342).

[36] In Québec, art. 1457 C.C.Q. imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances. As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct — the content of which may be reflected in the relevant legislative standards — having regard to the law, usage and circumstances.

[Emphasis added.]

[173] The relation between the violation of a statutory obligation and a civil fault was considered in *Compagnie d'assurances Continental du Canada v. 136500 Canada inc.*,⁶⁰ where the insurer of a large industrial building sued its tenants in damages. One of the tenants, Canadel, used flammable liquids and, on a daily basis, hundreds of rags that were soiled by these liquids by the end of the day. Each day, the rags were gathered and stored in a metal container outside. A fire destroyed the building. The trial judge rejected the insurer's contention that Canadel had violated its regulatory obligations regarding storage and use of dangerous flammable products thereby creating a presumption that this violation had caused the fire. He also found that the cause of the fire was impossible to determine and dismissed the claim.

[174] The Court of Appeal affirmed the dismissal of the action. Noting that no regulatory violation had been proven, LeBel J.A., as he then was, added that a violation of a statutory obligation does not constitute a civil fault unless that obligation corresponds to an elementary norm of prudence.

[175] A war crime is an indictable offence. As such, it is an imperative rule of conduct that implicitly circumscribes an elementary norm of prudence, the violation of which constitutes a civil fault pursuant to art. 1457 C.C.Q.

[176] In theory, a person would therefore commit a civil fault pursuant to art. 1457 C.C.Q. by knowingly participating in a foreign country in the unlawful transfer by an occupying power of a portion of its own civilian population into the territory it occupies, in violation of an international instrument which the occupying power has ratified. Such a person would thus be knowingly assisting the occupying power in the violation of the latter's obligations⁶¹ and would also become a party to a war crime, thereby violating an elementary norm of prudence.

⁶⁰ *Compagnie d'assurances Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707 (C.A.).

⁶¹ *Trudel v. Clairol Inc. of Canada*, [1975] 2 S.C.R. 236.

[177] The essential question, however, is whether the application of the law of Québec with respect to extracontractual civil liability would be engaged in that context rather than the law of the foreign country.

[178] Before a Québec court, the law of the country where the injurious act occurred,⁶² i.e. the *lex loci delicti*, governs extracontractual civil liability unless the injury appeared elsewhere (art. 3126 C.C.Q.):

3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.

In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

[Emphasis added.]

[179] A similar rule exists in the common law provinces of Canada. In *Tolofson v. Jensen*,⁶³ the Supreme Court of Canada overruled *McLean v. Pettigrew*, refused to follow the English precedent of *Chaplin v. Boys*,⁶⁴ and held that the rule of private international law that should generally apply when adjudicating on wrongs committed in another country is the law of the place where the activity occurred, the *lex loci delicti*. In this connection, La Forest J. wrote the following with which four of his peers unreservedly concurred:⁶⁵

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong ("...")

[180] La Forest J. favoured the *lex loci delicti* for practical reasons as well.⁶⁶

The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and

⁶² Here, the alleged "injurious act" is the construction and sale of condominium units.

⁶³ *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022.

⁶⁴ *McLean v. Pettigrew*, [1945] S.C.R. 62; *Chaplin v. Boys*, [1969] 2 All E.R. 1085 (H.L.).

⁶⁵ *Tolofson v. Jensen* *supra* note 63 at 1049-1050.

⁶⁶ *Ibid.* at 1050-1051.

expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. ("...")

[181] Thus, applying the law of a foreign country to conduct and injury suffered in that country is reasonable where extracontractual liability is in issue.

[182] Consequently, the law that properly applies to the Action is not the law of Québec but the law governing the West Bank, i.e. the law where the injurious acts allegedly occurred and where the injuries were also allegedly suffered.

[183] Pursuant to art. 165(4) *C.C.P.*, the Court must postulate that the allegations in the Action are true. Consequently, the *Fourth Geneva Convention* applies in the West Bank as it has become part of customary international law and such law is automatically part of the domestic law of Israel.⁶⁷

[184] This being so, it does not necessarily follow that the Defendants would be liable under the rules governing extracontractual liability in the West Bank. No evidence was offered regarding such rules.

[185] As already noted, the Plaintiffs do not plead the domestic law that applies in the West Bank with respect to extracontractual civil liability. On the contrary, they ask that the Superior Court substitute the law of Québec to that legal regime as if the Defendants' alleged wrongful conduct had occurred in Québec.

[186] Art. 2809 *C.C.Q.* supports their position. It provides that Québec law is applied if the law of the country where the injurious act occurred is not pleaded or proven:

2809. Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult.

Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec.

[Emphasis added.]

[187] Since the domestic law of extracontractual civil liability that applies in the West Bank is not yet pleaded⁶⁸ or proven, in addition to the *Geneva Conventions Act* and the *Crimes Against Humanity and War Crimes Act*, the *Québec Charter* and the *Civil Code*

⁶⁷ Malcolm N. Shaw, *International Law*, *supra* note 55 at 151.

⁶⁸ The Defendants have not filed a defence.

of *Québec* also find application at this stage, i.e. for the purpose of deciding the Exception to Dismiss pursuant to art. 165(4) *C.C.P.*

[188] On this basis, as already noted, the Defendants would be under the general obligation not to prejudice the Plaintiffs by favouring even indirectly a breach by Israel of its undertakings as a High Contracting Party pursuant to the *Fourth Geneva Convention*. Knowingly participating in such breach would constitute a civil fault, as would an intentional participation to a war crime.

[189] Allegations of this nature are made against the Corporations and Defendant Laroche.⁶⁹

[190] The Defendants' contention that the rights created by the *Fourth Geneva Convention* inure to the exclusive benefit of signatory states and that only states and their agents are subject to its obligations are therefore not decisive: if the Plaintiffs' allegations are true, a trial judge could find that the Corporations are at fault for knowingly participating in Israel's alleged illegal Policy.

[191] The Defendants argue that the Action should be dismissed against Defendant Laroche, however, on the ground that the allegations against her are insufficient to attract extracontractual civil liability.

(b) Defendant Laroche's alleged extracontractual liability

[192] According to the Action, the construction of the buildings on the Lands commenced in February 2005.

[193] The Corporations were created in 2004. At the time, Defendant Laroche was neither a director nor a shareholder. This remained true until at least April 2007. As of May 2008, she was their sole director.

[194] The Defendants note the absence of allegation that Defendant Laroche had any actual knowledge of the Corporations' activities and contend that being their sole director and officer does not suffice, in and of itself, to attract personal liability on an extracontractual basis.

[195] The Plaintiffs respond that by allowing herself to become the sole registered director and officer of the Corporations, Defendant Laroche became their principal and controlling mind and that, as such, she is legally deemed to have participated in all of their wrongful acts and therefore to have automatically become liable for their wrongful participation in Israel's allegedly illegal Policy. The Plaintiffs are not attempting to lift the corporate veil.

⁶⁹ Action at para. 27.

[196] The Defendants submit a letter dated January 6, 2009 from the Plaintiffs' counsel admitting that Defendant Laroche's personal participation in the Corporations' alleged fault is strictly presumptive:

At this time, the Plaintiffs have no information that the Defendant LaRoche was personally and directly involved in the construction, marketing or selling of condominium units or that she personally solicited or otherwise encouraged or facilitated members of the civilian population of the State of Israel to transfer and maintain their place of residence in the Occupied Territories as alleged against the corporate Defendants in the Further Amended and Particularized Motion Introducing a Suit.

[197] This extrajudicial admission is inadmissible in the context of a motion based on art. 165(4) *C.C.P.* where no evidence is allowed.⁷⁰

[198] Under Québec law, a director and officer of a corporation does not incur personal liability on an extracontractual basis merely because the corporation itself has committed a fault.⁷¹ Such liability is contingent upon his or her own extracontractual fault (i.e. where his or her conduct differs from that of an ordinarily prudent and diligent director or officer in the same circumstances)⁷² or his or her actual participation in the commission of a fault by the corporation.⁷³

[199] As the Action is framed, the Corporations would be at fault for having knowingly participated in Israel's alleged war crime, whereas Defendant Laroche would be at fault on the basis of the allegation that she knowingly directed the Corporations to so act.

[200] The following allegations also allow to infer Defendant Laroche's knowledge:

- Defendant Laroche was the sole director and officer of the Corporations for a period of time during which the Corporations were building and selling condominium units in the West Bank;
- the Corporations sold these units only to Israeli citizens pursuant to the illegal Policy;
- Israeli settlements in the occupied territories of the West Bank are illegal.

[201] Under the circumstances, particularly the location, nature, size and complexity of the development project, it may reasonably be inferred that, being the only person in

⁷⁰ *Dial Textile Ltée v. Ste-Foy (Ville de)*, [1982] C.A. 220 at 225.

⁷¹ *Constructions Serafini inc. v. Gold Coin Development Corp.*, J.E. 2000-2173 (C.A.); Raymonde Crête & Stéphane Rousseau, *Droit des sociétés par actions*, 2nd ed. (Montreal: Les Éditions Thémis, 2008) at para. 989.

⁷² *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, 182-183.

⁷³ *Boucher v. Pitre*, J.E. 2001-950 at para. 5 (C.A.); Raymonde Crête & Stéphane Rousseau, *Droit des sociétés par actions*, *supra* note 71 at para. 986.

authority, Defendant Laroche was aware of the above activities and that she personally authorized them knowing that this was wrong.

[202] If proven, these allegations and inferences are sufficiently serious, precise and concordant⁷⁴ to allow the trial judge to conclude that Defendant Laroche knowingly directed the Corporations to participate in the commission of a grave illegality by Israel - an extracontractual fault - and, that in so doing, she also personally committed an extracontractual fault pursuant to Québec law.⁷⁵

[203] Given that the Plaintiffs' injuries may have resulted from such fault, her personal liability cannot be excluded on the mere basis of the allegations found in the Action.

(c) Conclusions whether the Action is unfounded in law even if the facts alleged are true

[204] To summarize, the Superior Court has jurisdiction over defendants domiciled in Québec regarding a civil action based on extracontractual liability for an injury caused and suffered in a foreign country. The law that normally applies in such case is the law of the country where the injurious act occurred, i.e. where the injury was caused. That law must be proven. In the absence of proof, by default, the Superior Court will apply the substantive law of Québec.

[205] Under Québec law, a defendant will incur civil liability if he causes damages to another by his fault. Knowingly favouring a breach of a High Contracting Party's undertakings pursuant to an international instrument or knowingly assisting a state in the perpetration of a war crime are both civil faults. Assuming for purposes of discussion that the Defendants knowingly assisted Israel for the purpose of committing a war crime as alleged, the Defendants committed a civil fault and are liable to appropriate civil remedies. This is consistent with a restrictive interpretation of state immunity that limits its benefit to sovereign entities and their agents.

[206] Given the grave consequences of dismissing an action without a hearing on the merits, as a rule, an action ought not be dismissed summarily on a motion based on art. 165(4) *C.C.P.* unless such action is obviously not founded.⁷⁶ In the case at bar, a generous reading of the Action, considered as a whole, does not lead to the inescapable conclusion that it is unfounded in law even if the facts alleged are true.

⁷⁴ Art. 2849 *C.C.Q.*

⁷⁵ Paul Martel, « Le « voile corporatif » - l'attitude des tribunaux face à l'article 317 du Code civil du Québec », (1998) 58 R. du B. 95, quoted in *Lanoue v. Brasserie Labatt Ltée*, J.E. 99-857 (C.A.).

⁷⁶ *Entreprises Pro-Sag inc. v. Groupe Oslo Construction inc.*, J.E. 2006-115 (C.A.).

6- Is the HCJ clearly in such a better position than the Superior Court to decide the Action that the exceptional exercise of the power to decline jurisdiction is warranted?

[207] The Superior Court has jurisdiction over the Action. The general provisions of art. 3134 C.C.Q. are unambiguous:

3134. In the absence of any special provision, the Québec authorities have jurisdiction when the Defendant is domiciled in Québec.

[208] The Defendants argue that the judicial authorities of Israel are so clearly in a better position to decide the Action that pursuant to art. 3135 C.C.Q. the Court should exceptionally exercise its discretion to decline jurisdiction in their favour.

[209] The seminal case with respect to the application of art. 3135 C.C.Q. is *Spar Aerospace v. American Mobile Satellite Corp.*,⁷⁷ where on behalf of the Supreme Court of Canada LeBel J. emphasized the exceptional nature of a decision to decline jurisdiction and noted the explicit requirement that another country be in a better position to decide.

[210] The decision whether to decline jurisdiction is based on the overall consideration of various and variable relevant factors,⁷⁸ none of which is individually determinant.⁷⁹ In this respect, evidence is admissible.⁸⁰

[211] The following factors were considered relevant in *Spar*:

- 1- The parties' residence, that of witnesses and experts;
- 2- the location of the material evidence;
- 3- the place where the contract was negotiated and executed;
- 4- the existence of proceedings pending between the parties in another jurisdiction;
- 5- the location of the defendant's assets;
- 6- the applicable law;
- 7- the advantages conferred upon the plaintiff by its choice of forum, if any;
- 8- the interest of justice;

⁷⁷ *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 at 238-244.

⁷⁸ *Bourdon v. Stelco Inc.*, [2005] 3 S.C.R. 279 at para. 37.

⁷⁹ *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, *supra* note 77 at para. 71.

⁸⁰ *Ibid.* at para. 32.

9- the interest of the parties;

10-the need to have the judgment recognized in another jurisdiction.

[212] Additional factors may also be relevant according to the specifics of a claim and contestation. In the present case, the country where the injurious act occurred and the country where the injuries were suffered are also relevant.

(a) The parties' residence, that of witnesses and experts as well as the location of the material evidence

[213] Other than the three Defendants who are Québec residents, the eleven Plaintiffs in continuance of suit, all ordinary witnesses and all expert witnesses likely reside in the West Bank or in Israel. This includes the occupants of the buildings in dispute and probably their owners.

[214] One may reasonably expect that the Plaintiffs in continuance of suit will testify regarding the ownership of parcels 35 and 62, alleged restrictions to their free access to such parcels and, in general, the prejudice they allegedly suffer from the Corporations' activities.

[215] In support of the Declinatory Exception, the Defendants have filed the affidavit of businessman Gideon Badt, a resident of Israel. Mr. Badt was not examined. He states, among other things, that:

- The Corporations were incorporated upon his instructions for domestic Israel tax reasons only;
- the Corporations act as alter egos for and on behalf of a corporation that is not a resident of Canada and that does not have any assets in Canada;
- the Corporations have no assets whatsoever in Québec or elsewhere in Canada;
- Defendant Annette Laroche has not participated in any manner in the development project in Bil'in.

[216] Most if not all of the factual evidence will likely pertain to events that have occurred and are occurring in the West Bank or in Israel, and little or no evidence to events in Québec. Expert evidence will likely pertain to ownership of the Lands as well as to the laws and customs that apply in the West Bank.

[217] Most if not all of the relevant material things are situated in the West Bank. This includes the Lands, particularly parcels 35 and 62, the buildings allegedly constructed and sold by the Corporations and the promotional material used to attract purchasers.

[218] As the Plaintiffs in continuance of suit seek the demolition of those buildings, their inspection and valuation may assist the court and require expert evidence. In this respect, the court may order an appraisal and wish to visit the premises.

[219] The HCJ would clearly be the preferable venue in light of the residence of the parties and the witnesses as well as the location of the evidence.

(b) The place where contracts were negotiated and executed

[220] Although the Action is based on extracontractual liability, one may reasonably expect that contracts entered into in the West Bank or in Israel will be relevant. These would include contracts regarding the property of the Lands as well as the construction of the buildings in dispute and their sale or rental. Most if not all of the relevant contracts are likely to be written in Hebrew or Arabic.

[221] The HCJ would clearly be the better venue with respect to this factor.

(c) The country where the injuries were allegedly suffered

[222] All injuries were allegedly suffered in the West Bank.

(d) The country where the injurious act allegedly occurred

[223] In light of the extrajudicial admission contained in the letter from the Plaintiffs' counsel to the Defendants' counsel dated January 6, 2009 and of the undisputed evidence of Mr. Badt, the injurious act, if any, did not occur in Canada but rather in the West Bank or in Israel.

[224] This factor also clearly favours the HCJ.

(e) The existence in another jurisdiction of proceedings pending between the parties

[225] No such proceedings have been brought to the Court's attention. However, the HJC of Israel would certainly be in a better position than the Superior Court to appreciate the significance, if any, of any previous proceedings between Mr. Yassin and the Corporations.

[226] According to the evidence of Mr. Jarach, issues raised by the Plaintiffs in Israel called for an understanding of various laws that apply in the West bank and that are foreign to Canada.

[227] To the extent that this factor may be relevant, it would therefore clearly favour referral to the HCJ.

(f) The location of the Defendants' assets

[228] The Corporations are sued for punitive damages in the amount of \$2,000,000.

[229] According to Mr. Badt, the Corporations have no assets in Québec. Their assets, if any, would appear to be located in the West Bank, where the buildings in dispute are situated.

[230] The Plaintiffs claim \$25,000 in punitive damages from Defendant Laroche. In the absence of any evidence to the contrary, it is reasonable to assume that her assets are situated in Québec.

[231] Under Quebec law, punitive damages cannot be awarded unless compensatory damages are also awarded.⁸¹ The Plaintiffs have renounced compensatory damages,⁸² but a future amendment of the Action seeking compensatory damages cannot be excluded.

[232] The plaintiffs also seek costs.

[233] On balance, the location of the Defendants' assets clearly favours the HCJ.

(g) The need to have the judgment recognized in another jurisdiction

[234] The Plaintiffs seek, among others, injunctions against the Corporations, their directors, officers, agents or any other person under their direction or control to cease all construction and sales activities with respect to the buildings in Bil'in, the demolition of such buildings and the restoration of the Lands to their condition prior to construction.

[235] A Québec court may issue an injunctive order with extra-territorial effects.⁸³ However, as Mr. Jarach points out, if the Superior Court delivered a final judgment in favour of the Plaintiffs, they would be obliged to have it recognized and enforced overseas. This additional procedure would be unnecessary if the Action were brought before the HCJ.

[236] This factor again clearly favours the HCJ.

(h) The applicable law

[237] As already seen, the applicable law is that which applies in the West Bank, not in Canada or in Québec, unless the former is not pleaded or proven.

⁸¹ *Syndicat des cols bleus regroupés de Montréal (SCFP, section locale 301) v. Coli*, [2009] R.J.Q. 961 at para. 108 (C.A.).

⁸² Action at para. 33 ii).

⁸³ *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, [2007] 1 S.C.R. 867.

[238] On the merits, the Defendants may plead and prove the law that applies in the West Bank.

[239] The Plaintiffs argue, however, that such law is "manifestly inconsistent with public order as understood in international relations", insofar as the HCJ refuses to adjudicate on the basis of the "universal principles" expressed by the *Fourth Geneva Convention* and the *Rome Statute* regarding civilian population transfers. Referring to various precedents, they further argue that Canadian courts will not give effect to confiscatory acts of a foreign state that purport to have extraterritorial reach.

[240] As a result, the Plaintiffs submit that pursuant to article 3081 *C.C.Q.* the law that applies in the West Bank should not be considered in determining whether the HCJ would be in a better position than the Superior Court to decide the Action:

3081. The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations.

[241] The burden lies with the Plaintiffs to show that the law that applies in the West Bank should be disregarded.

(i) The position of the HCJ regarding the application of the *Fourth Geneva Convention* in the occupied territories

[242] The Plaintiffs did not file any judgment where the HCJ discussed the application of the *Rome Statute* in the occupied territories. The Plaintiffs contend that the HCJ would be unwilling to adjudicate on the alleged violation by Israel in the occupied territories of the *Fourth Geneva Convention*. In support, they have filed the affidavit of Professor Orna Ben-Naftali.

[243] Professor Ben-Naftali is a Professor of Law and serves as Head of the International Law Division at the School of Law, The College of Management Academic Studies, in Israel. She holds an LL.B. from Tel-Aviv University Law Faculty, Israel, an AM degree (History) from Harvard University, U.S.A., a Master in Law and Diplomacy and a Ph.D. from the Fletcher School of Law and Diplomacy in Massachusetts, U.S.A.

[244] Her research and publications focus on International Humanitarian Law and particularly the Israeli Occupation. She has lectured in International law in the U.S.A., Israel and in Italy. She is the author of *International Law Between War and Peace*, a book published in Israel in 2006, of numerous articles as well as of chapters in books and papers, many of which pertain to the Occupied Palestinian Territory and the conduct of the State of Israel.

[245] Professor Ben-Naftali's credentials undoubtedly qualify her to give opinion evidence with respect to International Humanitarian Law and, to a lesser extent, to the

views of the HCJ with respect to the legality of settlements in the Occupied Palestinian Territories.

[246] Professor Ben-Naftali describes as follows the core question raised in the present case:

The Plaintiffs (hereafter Bil'in) have brought suit against the corporate Defendants and their registered director (hereafter "the Green Park Companies") under the provisions of the *Geneva Conventions Act*, R.S. 1985, c. G-3 and the *Crimes against Humanity and War Crimes Act* S.C. 2000, c. 24. Pursuant to the advice given by Mark H. Arnold, Canadian counsel to the Plaintiffs, I understand that those statutes have been incorporated into Canadian Domestic Law, and that they incorporate principles of International Humanitarian Law as found at Article 49(6) of the *Fourth Geneva Convention* dated August 12, 1949 and Articles 8(2)(b)(viii) and 25(c) of the *Rome Statute of the International Criminal Court* dated July 17, 1998. The law is clearly set out at paragraphs 15 to 20 of the pleading.

The claim alleges that the Canadian Green Park Companies have acted unlawfully, *inter alia*, by developing, marketing and constructing a residential settlement (hereafter "settlement") for the population of the State of Israel on the Municipal Lands of Bil'in, which are located on the West Bank of the Jordan River in the Occupied Palestinian Territory, thereby violating International Humanitarian and Canadian Domestic Law. That legal regime prohibits the transfer, directly or indirectly, or the civilian population of an occupying power into the occupied territory (page note omitted). The claim further alleges that in so doing, the Canadian Green Park Companies have aided, abetted and assisted the State of Israel in carrying out an illegal purpose.

[247] Professor Ben-Naftali openly acknowledges that the Israeli Supreme Court has accepted the *Hague Regulations of 1907* as customary international law. These Regulations are not in dispute. She is less transparent, however, with respect to the *Fourth Geneva Convention* which is at the heart of the dispute: she deals with it only in a footnote. There, she states that it "is also recognized as customary international law". This, as we shall see below, is inconsistent with the evidence as it pertains to the views of the HCJ with respect to Article 49. Professor Ben-Naftali also states that "its humanitarian provisions" have been routinely applied by the Israeli High Court of Justice. She does not discuss any further these two key statements nor the two judgments she mentions in the same footnote and which the Plaintiffs have chosen not to enter into evidence:

The Israeli Supreme Court, operating in its capacity as a High Court of Justice,² [Reference omitted.] has accepted the Hague Regulations of 1907 as customary international law.³ [References omitted.] In addition, Israel ratified the Fourth Geneva Convention "Relative to the Protection of Civilian Persons in Time of War" in 1951.⁴ These two bodies of law contain the main provisions comprising "Occupation Law" also known as "The International Law of Belligerent

Occupation" that forms part of International Humanitarian Law.⁵ [Reference omitted.]

4 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. The Fourth Geneva Convention is also recognized as customary international law and its "humanitarian provisions" have been routinely applied by the Israeli High Court of Justice. *E.g.* HCJ 7015/02 Ajuri v. IDF Commander PD 56 (6) 352; HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, PD 58 (5) 807.

[248] Professor Ben-Naftali refers to "International Humanitarian Law". According to Sir Ian Brownlie⁸⁴ the similar expression of "International Human Rights Law" is a convenient but perhaps confusing category of reference devoid of intrinsic substance:

Many lawyers in academic life refer to an entity described as "International Human Rights Law" which is assumed to be a separate body of norms. While this is a convenient category of reference, it is also a source of confusion. Human rights problems occur in specific legal contexts. The issues may arise in domestic law, or within the framework of a standard-setting convention, or within general international law. There is thus the law of a particular State, *or* the principles of the European Convention on Human Rights, *or* the relevant principles of general international law. In the real world of practice and procedure, there is no such entity as "International Human Rights Law".

[249] Professor Ben-Naftali's confirms that she was asked to provide an opinion on the issue of justiciability of the Action before the Israeli Court and to answer the following question:

Is the issue alleged by the Plaintiffs of violation of International Humanitarian Law and Canadian Domestic Law justiciable before the Israeli Court, and are those Courts willing to adjudicate on the question of the legality of settlements in the Occupied Palestinian Territories in this case?

[250] She answers as follows:

In my opinion, the answer is negative: the core question of the legality of the establishment of settlements is non-justiciable before Israeli Courts. In the following, I shall (a) detail the document reviewed and briefly summarize the core question raised in the petition; (b) offer a review and analysis of the jurisprudence of the Israeli High Court of Justice on the matter; and (c) offer my conclusion based on the review and analysis of said jurisprudence.

[Emphasis added.]

[251] Although professor Ben-Naftali confirms that "The Israeli Supreme Court, sitting as the High Court of Justice, has legal jurisdiction in Israel over matters brought against

⁸⁴ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008) at 554.

the State, its military and their agencies", following a brief outline of so-called challenges of the legality of settlements in the Occupied Palestinian Territory decided by the HCJ between 1972 and 2005, she ultimately concludes:

Given that Israeli courts are unwilling to address the core question of the legality of settlements in the OPT as a policy and practice under International Humanitarian Law, and have declared the question of whether settlements are legal to be non-justiciable, there appears to be no legal redress before Israeli Courts to the claims made by Bil'in in its Québec proceeding.

[252] The Defendants contest this conclusion.

[253] They offer in this respect the affidavit of attorney Jarach and judgments of the HCJ.

[254] In particular, Mr. Jarach disputes that the decision of the HCJ in *Bargil v. Government of Israel* supports the statement contained in paragraph 29 of the Action, that "the matters at issue herein are not justiciable before the Israeli Courts". The judgement in the *Bargil* case is one of the judgements of the HCJ on the basis of which professor Ben-Naftali expresses her opinion⁸⁵ and the only judgment of the HCJ that the Plaintiffs have filed in this connection.

[255] The *Bargil* case was decided in August 1993. The petitioners opposed the legality of Israeli settlements in the occupied territories on the ground, among others, that such settlements were prohibited pursuant to the *Fourth Geneva Convention*. Three judges unanimously denied the petition.

[256] The majority concurred that the issue was "unjusticiable" by reason of the absence of a concrete dispute. Justice E. Goldberg was the only judge to hold that the case lacked "institutional justicity".⁸⁶

[257] Professor Ben-Naftali nonetheless briefly summarizes the *Bargil* case as follows:

Indeed, when the matter was raised again just over a decade later, in *Bargil v. Government of Israel*, the Court declined jurisdiction. In this case, the Petitioner challenged the legality of a settlement policy of the State of Israel for the Occupied Palestinian Territories under International Humanitarian Law. The Petitioner alleged that State policy for settlements in the Occupied Palestinian

⁸⁵ *Khelou v. Government of Israel* (1973) 27 (2) PD 169 (where, according to Professor Ben-Naftali, the HCJ "did not examine the question of whether a settlement of civilians from the occupying power may lawfully be established in an occupied territory"); *Ayub v. Minister of Defense* (1978) 33 (2) PD 113; *Dweikat v. Government of Israel* (1979) 34 (1) PD 1; *Bargil v. Government of Israel* (1991) 47 (4) PD 210; *Iyad v. Commander of IDF Forces*, (1998) Law 55 (1) PD 913; HCJ 7957/04 *Maraabe et al. v. Israeli Prime Minister et al.* (2005) Takdin-Alyon (3) 3333 and HCJ 10024/04 "Nirit" *Village Community Settlement v. Minister of Defense*, (2005) Takdin-Alyon (1) 2122. Professor Ben-Naftali also cites HCJ nos. 8414/05, 143/06 and 3998/06 but she does not discuss those cases.

⁸⁶ P-17 at 11.

Territories was without military necessity and for the sole purpose of creating permanent settlements. [Reference omitted.] In its decision, the Court reaffirmed its reasoning in the *Beth El* case, and stated that the matter was non justiciable:

....not because we lack the legal tools to give judgment, but because a judicial determination, which does not concern individual rights, should refer to a political process of great importance and great significance.

[258] President M. Shamgar opined that the issue in the *Bargil* case was "unjusticiable" based on a combination of three aspects: intervention in questions of policy that are in the jurisdiction of another branch of government, the absence of a concrete dispute and the predominantly political nature of the issue. He stressed, however, that the petition was "characterized by its generality, namely by the absence of any attempt to establish a concrete set of facts as a basis for the argument".⁸⁷

[259] In this respect, President Shamgar cited two cases decided by the United States Supreme Court. In *Warth v. Seldin*,⁸⁸ the Supreme Court denied a petition "because it violated the rule that the judiciary, by virtue of its judicial self-governance, does not consider abstract matters of sweeping public significance that are merely general objections on matters of policy, best considered by the legislature or the executive".⁸⁹ In *Schlesinger v. Reservists to Stop the War*,⁹⁰ the Supreme Court reaffirmed that "the court does not deal with abstract problems, unless they are linked to a dispute with concrete implications; it will certainly not do so if the case is one of abstract problems of a predominantly political nature".⁹¹

[260] President Shamgar also cited Professor A. Barak who underlines, in *Judicial Discretion*,⁹² that a court's central role lies in deciding disputes.

[261] President Shamgar considered that it was irrelevant that the matter before the HCJ concerned land in the occupied territories and further emphasised that the court would not adjudicate in the abstract on matters of public policy unrelated to a defined dispute.⁹³

In order to remove any doubt, I would add that it is not the fact that the matter regards a dispute about land in the occupied territories that stops us from intervening; this court has in the past dealt more than once with petitions about a concrete dispute with regard to Jewish settlements in Judea, Samaria or the Gaza Strip [References omitted.]. The courts, however, are only prepared to

⁸⁷ *Ibid.* at 6.

⁸⁸ 95 S. Ct. 2197 (1975).

⁸⁹ P-17 at 6.

⁹⁰ 418 U.S. 208 (1974).

⁹¹ P-17 at 6.

⁹² Tel-Aviv, Papyrus, 1987 (in Hebrew).

⁹³ P-17 at 7-8.

hear objective, defined and specific quarrels and disputes, not abstract political arguments. For this reason, the High Court of Justice has, for instance, refrained from considering the proper or desirable water policy [Reference omitted.] ... It is not inconceivable that the court will consider a concrete issue concerning non-compliance with the law in so far as it relates to issues of water administration, but it is not reasonable for the court to turn itself into a body that outlines the general water policy.... In other words, the court will not deal with foreign, defence or social policy, when the claim or petition are unrelated to a defined dispute, merely because the petitioner or plaintiff attempt to cloak their claim or petition on legal language.

[Emphasis added.]

[262] President Shamgar also indicated that while the court would not hear cases where the predominant nature of the dispute was political, it would take on a case even if the issue was a mixed legal-political one:⁹⁴

... However, if it is argued that the issue is a mixed legal-political one, I would refer to what was explained, *inter alia*, in HCJ 852/86 *Aloni v. Minister of Justice* [Reference omitted]. As we said there, attempts have been made to bring predominantly political disputes into the jurisdiction of the court. In that case I pointed out that I personally do not believe that it is, in practice, possible to create a hermetic seal or filter that are capable of preventing disputes of a political nature from penetrating into litigation before the High Court of Justice. The standard applied by the court is a legal one, but public law issues also include political aspects, within the different meanings of that term. The question which must be asked in such a case is, generally, what is the *predominant* nature of the dispute. As explained, the standard applied by the court is a legal one, and this is the basis for deciding whether an issue should be considered by the court, that is, whether an issue is predominantly political or predominantly legal.

[263] Justice T. Or opposed the petition on the single ground that it did not raise a dispute relating to a specific settlement.

[264] His entire reasons read as follows:⁹⁵

The petition refers to issues of a general nature, and is, in fact, a request to the court to give its opinion to outline in general what is permitted and prohibited with regards to settlements in Judea, Samaria and the Gaza area.

This is not a concrete petition relating to a specific settlement, with all the special factual details and conditions relating to such a settlement, or to an infringement of any property rights of one of the residents of the said areas.

⁹⁴ *Ibid.* at 9.

⁹⁵ *Ibid.* at 11.

A petition formulated in such a way cannot be heard. Therefore, I agree with the conclusions of my esteemed colleague, the President, that the petition should be denied.

[265] On its face, the *Bargil* case plainly does not support the view that the HCJ would refuse to hear the Action on the basis that the alleged violation of Article 49(6) of the *Fourth Geneva Convention* is non justiciable. It merely expresses the well-established principle of judicial economy whereby a court may abstain from considering a question in the abstract.

[266] A particular expression of this principle is found in art. 453 *C.C.P.*:

453. Any person who has in interest in having determined, for the resolution of a genuine problem, either his or her status or any right, power or obligation the person may have under a contract, a will or any other written instrument, a statute, an order in council, or a by-law or resolution of a municipality, may, by way of a motion to institute proceedings, ask for a declaratory judgment in that regard.

[Emphasis added.]

[267] In general, Canadian courts may decline to hear a case that merely raises a hypothetical or abstract question.⁹⁶ This discretion cannot be characterized as "manifestly inconsistent with public order as understood in international relations".

[268] The Defendants have filed two of the other cases reviewed by Professor Ben-Naftali in support of her opinion: *Ayub v. Minister of Defense* (1979) and *Dweikat v. Government of Israel* (1979).

[269] Professor Ben-Naftali summarizes the *Ayub* case as follows:

The second case in which the Israeli High Court of Justice was asked to address the issue is *Ayyub v. Minister of Defense* (1978), known locally as the "*Beth El*" case. [Reference omitted.] The petitioners challenged the establishment of an Israeli Settlement in the OPT. In that case, the Israeli military seized lands privately owned by Palestinians in the West Bank, in order to build a new settlement, "Beth El". The Israeli Army alleged that the settlement was part of a broader "Regional Defence Plan". The Court upheld the claim by the Israeli Military that the settlements are lawful when they fulfil legitimate military needs. The Court went on to rule with respect to the challenge to the legality of settlements under Article 49(6) of the Fourth Geneva Convention (relied on in the Bil'in claim here) and held:

this court must refrain from considering this problem of civilian settlement in an area occupied from the viewpoint of international law... it is best that matters that naturally belong in

⁹⁶ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

the sphere of international policy are considered only in that sphere. In other words, although I agree that the petitioners' complaint is generally justiciable, since it involves property rights of the individual, **this special aspect to the matter [international law] should be deemed non justiciable**, when brought by an individual to this Court (J. Landau) [emphasis and term in brackets added].

[270] The five judges delivered the judgment in *Ayub* in March 1979. Landau J. agreed with Witkon J. and their three colleagues expressed agreement with both. As will be seen, Landau J. clearly considered that Article 49(6) of the *Fourth Geneva Convention* was "non justiciable" on legal grounds and not for political reasons.

[271] The *Ayub* case involved two petitions by landowners whose lands were situated, respectively, near the Beth El military base and near the Jordan Rift.

[272] Following orders for the seizure of the lands belonging to the Beth El petitioners "for urgent and necessary military needs", a Jewish civilian settlement was established on the lands. The petitioners disputed military necessity and further argued that the settlements had been established in violation of international law.

[273] Witkon J. expressed the opinion that "Jewish settlement in an occupied territory - as long as there is a state of belligerency - serves substantial security needs".⁹⁷ He questioned whether international law, including Article 49 of the *Fourth Geneva Convention*, had been incorporated into the domestic law of Israel and referred in this respect to the precedents of *El Jemmiyah El Masizia, Lalaratzi El Makdasah v. The Minister of Defense* and *Abou El-Tin v. The Minister of Defense*, that "dealt specifically with the Hague Agreement and Geneva Agreements".⁹⁸ Witkon J. went on to note that "In the opinion of the judges who gave these rulings, the two agreements are in the realm of international constitutive law, and therefore one cannot rely upon them in a municipal court in Israel".⁹⁹

[274] In other words, the domestic (or municipal) courts of Israel do not apply international instruments unless they are incorporated into Israel's domestic law.¹⁰⁰

[275] A similar requirement exists in Canada, where international instruments require legislative action to form part of Canadian domestic law.¹⁰¹ This requirement is not "manifestly inconsistent with public order as understood in international relations".

⁹⁷ Schedule 14 to Mr. Jarach's affidavit, "The Hilou Trial", at 6.

⁹⁸ These cases have not been filed.

⁹⁹ Schedule 14 to Mr. Jarach's affidavit, "The Situation According to International Law", at 7-8.

¹⁰⁰ In Witkon J.'s own words: "absorbed into municipal internal law".

¹⁰¹ *Ahani v. R.* 208 D.L.R. (4th) 66 at para. 34 (Ont. C.A.); Malcolm M. Shaw, *International Law*, *supra* note 55 at 151-152.

[276] Witkon J. added that according to an article published by Professor Yoram Dinstein regarding the "*Rafiah Sea Front*" case and to other authorities, including Schwarzenberger,¹⁰² contrary to the *Hague Convention of 1907* which was considered customary international law and which, as such, formed part of the domestic law of developed nations, Article 49 of the *Fourth Geneva Convention* was not considered customary international law and had therefore not been incorporated into the domestic law of Israel:

...The [1949] Geneva Agreement has still remained in the realm of international constitutive law (and therefore did not become a part of municipal law), while the instructions of the [1907] Hague Agreement merely give expression to a law which was at any rate accepted by all developed nations, and is therefore considered international customary law. As a result of this article I again reviewed the matter, and I am now satisfied, that the Hague Agreement is accepted as customary law, which can be claimed in a municipal court. [References omitted.] This is not so for the [1949] Geneva Agreement. [Reference omitted.]

("...")

Intermediate Conclusion

From the material thus far we see that we must discuss the claims of the petitioners to the extent which they rely on the Hague Agreement which is considered international customary law, and that there is no place in this court to discuss claims which are based on regulation 49 of the [1949] Geneva Agreement...

[Contents in brackets and emphasis added.]

[277] Witkon J. thus acknowledged that the status of the *Hague Convention of 1907* had changed. In addition, his refusal to decide in 1979 on the basis of Article 49 of the *Fourth Geneva Convention* was based on the ground that, in his opinion, the latter had not become customary international law and that, being conventional international law, it did not then form part of Israel's domestic law as it had not been incorporated by statute into such law. His reasons for finding that the subject matter of the dispute was non justiciable were therefore juridical, not political.

[278] Landau J. concurred and gave additional reasons why he considered as well that Article 49 of the *Fourth Geneva Convention* was not customary international law:

Regarding paragraph 49 (6) of the [Fourth] Geneva Convention which forbids the expulsion or transfer of civilian populations of the occupying power to the occupied territory I agree with the opinion of my esteemed colleague that this is a constitutive instruction and that therefore the petitioners cannot rely on it before

¹⁰² Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (London: Stevens & Sons, 1968), 2 at 164.

this court. To the written supports which my colleague has brought in regard to this, I will add that in the commentary to this agreement, which was published under the auspices of the Red Cross with the general edition of Dr. Pictet (Geneva 1958), it is said regarding paragraph 49 (6) [Reference omitted.]:

"This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference"

If there were hesitations, then this surely was not an obvious instruction according to customary international law. ...

[Contents in brackets and emphasis added.]

[279] As already mentioned, judges Asher, Bechor and Ben-Porah agreed with their colleagues Witkon and Landau JJ.

[280] Thus, the *Ayub* case essentially confirms that, early in 1979, the HCJ considered that Article 49 of the *Fourth Geneva Convention* had not become customary international law, which, as such, forms part of the domestic law of Israel and of all other nations. Instead, the HCJ considered at the time that Article 49 of the *Fourth Geneva Convention* was conventional international law that it could not apply because it had not been incorporated by statute into the domestic law of Israel.

[281] The HCJ delivered its judgement in the *Dweikat* case in October 1979. Professor Ben-Naftali summarizes the case as follows:

In a 1979 the Israeli High Court of justice was asked to determine the issue yet again in *Dweikat v. Government of Israel*, known locally as the "Elon Moreh" case. In this instance, the Israeli Army seized private land near the West Bank City of Nablus for the establishment of an Israeli settlement. [References omitted.] The State then claimed that the land was seized for military purposes and that judicial precedent prevented the Israeli Court from hearing a petition demanding that the Court prohibit or restrict the State's Settlement policy. The Court dismissed the state's non-justiciability argument and ruled in favour of the petitioners on the grounds that the government-directed army's act of seizure had not been motivated by true military needs, but rather by ideological and political motivations. This was the first and only case in which the Israeli High Court of Justice judicially reviewed the legality of settlement establishment and construction in the Occupied Palestinian Territories. Emphasizing the controversial decision of the Court to rule on the matter of the legality of settlements, Chief Justice Landau stated:

....There is great concern that the Court will appear to have abandoned its appropriate place and will have entered the arena of the public debate, and its decision will be accepted by part of the public with applause, while it will be completely and adamantly rejected by another part. In this sense I see myself as one whose duty is to rule according to the law on every matter properly

brought before the Court, a duty that is indeed forced upon me, with full advance knowledge that the wider public will not pay attention to the legal reasoning but rather only to the final conclusion, and the Court's status as an institution is likely to be injured, beyond the divisive public debates. But this what we will do, and it is our job and our duty as judges. [Reference omitted.]

[Emphasis added.]

[282] On the face of Professor Ben-Naftali's own review, the *Dweikat* case does not support her conclusion that the Action would not be justiciable before the HCJ. Rather, it supports the conclusion that the HCJ would not refrain to adjudicate on a politically controversial matter if it were properly brought before the court.

[283] Referring to the *Ayub* case, Deputy to the President Landau confirmed in the *Dweikat* case that customary international law applies and is binding on the Military Government in the administrative areas of Judea and Samaria in the West Bank:¹⁰³

...At the time, I took Section 49(6) to the Geneva Convention out of the debate because it is part of the conventional international law, which is not binding law in an Israeli courtroom, but I did concur with my learned colleague's opinion on the judgeability of the matter in reference to the Hague Regulations, which are binding upon the Military Government in Judea and Samaria because they are customary international law....

[284] Vitkon J. distinguished as follows customary international law and conventional international law and reiterated that the latter does not form part of the law of Israel unless incorporated through appropriate legislation:¹⁰⁴

...there is a difference between customary international law and conventional international law. The first is part of Municipal Law, while the second is not, unless it has been accepted through national legislation. Customary international Law includes the Hague Regulations and therefore it is appropriate for this Court to examine the legality of the seizure in terms of Section 52 of the Hague Regulations and as was conducted by my eminent colleague the Deputy to the President....If the Geneva Conventions should be viewed as part of conventional international Law, therefore, in accordance with the international approach and the approach that is also the norm here – the individual who has suffered harm cannot appeal to the Courts in that state, when he has claims against that state's authorities and demand his rights therein. This right to claim only accrues to states signatory to such a convention and the hearings of such claims cannot be in a court in the state and must be in an international forum. Therefore, I said in the Pichat Rafiach case and I repeated in the Beit El case, that any expression of opinion on our part, concerning the legality of civilian

¹⁰³ Schedule 13 to Mr. Jarach's affidavit at 21.

¹⁰⁴ *Ibid.* at 45.

settlement in terms of the Geneva Convention is nothing more than a non-binding opinion and it would be preferable for a judge to abstain from such.

[Emphasis added.]

[285] Vitkon J.'s opinion reaffirms that according to the HCJ in the late seventies, the *Fourth Geneva Convention* was part of conventional international law, which contrary to customary international law requires enabling legislation in order to have force of law in Israel, and that only its signatories might avail themselves of the rights it created.

[286] Professor Ben-Naftali offers no review of the cases that involved Mr. Yassin or the Council and the Corporations before the HCJ. In this respect, she simply writes:

Indeed, despite several court petitions filed by Bil'in, the Court has never adjudicated or ruled upon the legality of Mattityahu East as an Israeli settlement or on the conduct of the Defendant companies in the Occupied Palestinian Territories under International Humanitarian Law. [References omitted.] Such an attempt would be futile.

[287] The Court notes that in HCJ no. 8414/05, Petitioner "Ahmed Issa Abdallah Yassin, Head of the Bil'in Village Council" argued that the construction of the disputed fence was not legal, that it constituted a breach of public international law and invoked the advisory opinion of the International Court of Justice delivered on July 9, 2004.¹⁰⁵ Deciding in favour of the Petitioner on other grounds, the HCJ stated that the Military Commander's authority is anchored principally in the Hague Regulations but also in the *Fourth Geneva Convention*.¹⁰⁶

[288] On the whole, the evidence shows that the HCJ has not applied Article 49(6) of the *Fourth Geneva Convention*, not because of its unwillingness to adjudicate on its alleged violation by reason of the political significance of the matter, but either because it was unnecessary to do so or because the HCJ considered that it was not customary international law (contrary to what professor Ben-Naftali states in her footnote) and that it had not been incorporated into the domestic law of Israel through appropriate legislation.

[289] The fact that Canada, contrary to Israel, has approved the *Fourth Geneva Convention* by statute is insufficient to conclude that the application of the law of the West Bank would lead to a result that would be manifestly inconsistent with public order as understood in international relations contrary to article 3081 *C.C.Q.*

¹⁰⁵ Schedule 4 to Mr. Jarach's affidavit at para. 14.

¹⁰⁶ *Ibid.* at para. 27.

(ii) The position of the Government of Canada

[290] The Plaintiffs urge the Court to consider the position of the Government of Canada as expressed in a letter dated December 14, 1998 by the Minister of National Revenue, which the Federal Court of Appeal mentions in a judgment it rendered in 2002 in *Canadian Magen David Adom for Israel v. Canada*.¹⁰⁷ The Defendants did not object to this irregular means of establishing a fact.

[291] The letter purports to describe Canada's public policy with respect to permanent settlements in the occupied territories. Written over ten years ago and under a different government, the letter has minimal probative weight regarding the present policy of the Government of Canada and such weight is further decreased by the fact that the letter was not produced, so that even the identity and level of authority of its signatory on behalf of the Minister remain unknown.

[292] Of course, the letter does not express the views of the Attorney General of Canada regarding the case at bar.

(iii) Resolutions of the Security Council of the United Nations and the advisory opinion of the International Court of Justice

[293] The Plaintiffs add that Israeli settlements in the occupied territories have been "condemned" over the years by various resolutions of the Security Council of the United Nations and by an advisory opinion delivered by the International Court of Justice in 2004.

[294] Israel has indeed been criticised, apparently as a High Contracting Party to the *Fourth Geneva Convention*. Neither the Security Council nor the International Court of Justice have declared, however, that Article 49(6) of the *Fourth Geneva Convention* was part of customary international law¹⁰⁸ or that a state that had not incorporated this provision into its domestic law was acting in a manner that is manifestly inconsistent with public order as understood in international relations.

(iv) Confiscatory act of a foreign state inconsistent with public order

[295] The Plaintiffs also rely on art. 3081 C.C.Q. to argue that the establishment of a Jewish settlement in Modi'in Illit constitutes an act of illegal confiscation manifestly inconsistent with public order as understood in international relations.

¹⁰⁷ *Canadian Magen David Adom for Israel v. Canada*, [2002] F.C.J. No. 1269 (F.C.A.).

¹⁰⁸ The *Rome Statute* was never mentioned.

[296] Article 3081 C.C.Q. does not purport to invalidate "acts" but to deny the application of "provisions of the law" of a foreign country, i.e. a result that would be manifestly inconsistent with public order as understood in international relations.¹⁰⁹

3081. The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations.

[297] Contrary to *Lean and Balster v. Estonian Cargo & Passenger Steamship Line*,¹¹⁰ here, the Plaintiffs are not attacking the application of the provisions of a foreign statute purporting to nationalize property despite an insufficient consideration, or, as in *Vladi v. Vladi*,¹¹¹ the application of provisions of the law of a foreign country that would have given a wife minimal support, or, as in *Kuwait Airlines Corporation v. Iraqi Airways*,¹¹² the application of the provisions of a decree by the Revolutionary Command Council of Iraq pursuant to which planes were seized during the Iraqi invasion of Kuwait.¹¹³

[298] Strictly speaking, the Plaintiffs are not contesting the application of any "provision of the law" of Israel. Rather, they prospectively oppose what they presume would be a legally unjustifiable refusal by the HCJ to apply Article 49(6) of the *Fourth Geneva Convention* on which the Action is based. This argument is further dealt with hereafter.¹¹⁴

[299] Most significantly, contrary to the precedents the Plaintiffs cite, they have offered no evidence whatsoever to this Court of their alleged ownership of the Lands.

[300] The judgements of the HCJ do not support their argument that they own property which has been "confiscated", contrary to what was indisputably the case in *Lean and Balster v. Estonian Cargo & Passenger Steamship Line* and in *Kuwait Airlines Corporation v. Iraqi Airways*.

[301] The Plaintiffs have therefore failed to show that article 3081 C.C.Q. prevents giving effect to the law that applies in the West Bank.

(v) Conclusion regarding the applicable law

[302] There is no substance to the Plaintiffs' argument that adjudication by the HCJ on the basis of the laws that apply in the West Bank would be manifestly inconsistent with public order as understood in international relations.

¹⁰⁹ H. Patrick Glenn, "Droit international privé", *La réforme du Code civil*, *supra* note 24 at 682; by analogy see: *Mutual Trust Co. v. St-Cyr*, [1996] R.D.J. 623 (C.A.).

¹¹⁰ *Lean and Balster v. Estonian Cargo & Passenger Steamship Line*, [1949] S.C.R. 6.

¹¹¹ *Vladi v. Vladi*, [1987] N.S.J. no. 204 (S.C.).

¹¹² *Kuwait Airlines Corporation v. Iraqi Airways*, [2002] All. E. R. 209 (H.L.).

¹¹³ *Ibid.* at paras. 21 and 29.

¹¹⁴ At paras. 316 and foll.

[303] Furthermore, contrary to the HCJ, the Superior Court possesses no expertise in respect to the laws that apply in the West Bank.

[304] The factor of applicable law clearly favours declining jurisdiction in favour of the HCJ.

(i) The advantages conferred upon the Plaintiffs by their choice of forum

[305] The Plaintiffs wish to take advantage of Canadian and Québec laws and thereby ensure that they will benefit from the *Fourth Geneva Convention* and the *Rome Statute* whereas the HCJ might refuse this on legal grounds.

[306] In delivering the judgment of the court in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*,¹¹⁵ Sopinka J. made the point that the advantage that a plaintiff derives by its choice of forum is but one of the several factors relevant to identifying the appropriate forum and that the weight of this factor depended on the connection to such forum:

In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum.... The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

[307] The case of *Garantie (La), compagnie d'assurances de l'Amérique du Nord v. Gordon Capital Corp.*,¹¹⁶ instructs that the domicile of a Defendant will not always suffice for a legitimate claim to the advantages of a forum.

[308] In that case, La Garantie insured Gordon. The insurer's head office was in Québec, whereas the insured's was in Ontario. A dispute arose between the parties regarding the application of the policy. Gordon was issued a writ to sue in Québec and, the following day, obtained a writ to sue in Ontario, which was never served. Gordon later instituted declaratory proceedings in Ontario. Gordon's Québec action was then served. La Garantie brought a motion in Québec to have Gordon's action dismissed on the basis of *lis pendens* and, alternatively, to stay the Québec claim pending the final outcome of the

¹¹⁵ *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

¹¹⁶ *Garantie (La), compagnie d'assurances de l'Amérique du Nord v. Gordon Capital Corp.*, [1995] R.D.J. 537 (C.A.).

proceedings in Ontario. Gordon opposed the stay on the ground that it enjoyed a legitimate juridical advantage in the forum of Québec.

[309] The Superior Court dismissed La Garantie's motion on the finding that *lis pendens* did not exist and that the Québec proceedings could not be stayed on the basis of the doctrine of *forum non conveniens*. The Court of Appeal granted the stay.

[310] Beauregard J.A. with whom Mailhot J.A. concurred, examined whether the mere fact that La Garantie's domicile was situated in Québec justified continuing the proceedings in Québec and found that it did not:

[TRANSLATION] Regarding the portion of this text that I have underlined, Gordon suggests that there exists a real and substantial connection between its claim and the Québec court and that it may therefore rely on article 2190.¹¹⁷

What is this real and substantial connection?

Gordon tells us that it is the fact that La Garantie is domiciled in Québec. It reminds us that one cannot find a better connection between a claim and a court than the Defendant's domicile. This is perfectly accurate in domestic law. It is also accurate in private international law but, where two courts of two states or two provinces both have jurisdiction over a dispute, it appears to me that one must examine the real and substantial connection between the claim and the court in a more "pragmatic and functional" manner. This out of a concern for equity and order.

In the present case, such a "pragmatic and functional" examination shows that all of the connecting factors indicate that the Ontario court is the appropriate forum and that, except for the fact that La Garantie is domiciled in Québec, none of the connecting factors suggest that the Québec court should hear the dispute.

[311] Similarly, in the present case, the Québec forum has jurisdiction over the Action solely because the Defendants are domiciled in Québec.

[312] Mr. Badt's evidence and the letter dated January 6, 2009 from the Plaintiffs' counsel to the Defendants' counsel clearly establish, however, that this lone and apparent connection is merely superficial: the Corporations have no assets in Québec, are alter egos for another corporation which itself has no assets in Québec and Defendant Laroche has no personal involvement in the Bil'in project or any actual knowledge of same.

[313] The advantage conferred to the Plaintiffs by their choice of the Québec forum should therefore be given very little weight, if any.

¹¹⁷ Article 2190 C.C.L.C.

(j) The interest of the parties

[314] It is in the interest of all the parties that a court of competent jurisdiction decides the Action impartially, promptly and efficiently on the basis of the best evidence available. In this connection, it is relevant to note that the burden of proof in the Action lies with the Plaintiffs.¹¹⁸

[315] It would clearly be more practical to try the Action in Israel rather than in Québec in light of each and every one of the connecting factors considered above, including the interest of the parties. It is also clear that the Defendants would be seriously prejudiced if this was not the case.

(k) The interest of justice

[316] The Plaintiffs strenuously argue that they seek justice in the Québec forum.

[317] However, as it is presently framed, the Action can hardly lead to a just result:

- The Plaintiffs have failed to implead any of the numerous owners or occupants of the buildings that they seek to have demolished, thereby depriving those persons of the right to be heard, a fundamental tenet of natural justice.¹¹⁹
- Despite having chosen not to implead the State of Israel, the Plaintiffs indirectly seek the essential finding that it is committing a war crime, thereby effectively bypassing Israel's absolute immunity to any judicial proceedings. In Canada¹²⁰ as in England,¹²¹ the scope of state immunity extends to gross violations of international human rights.

[318] Moreover, the *Geneva Conventions Act* and *Crimes Against Humanity and War Crimes Act* both prohibit criminal prosecution without the Attorney General's authorisation. Although the Action is civil, it is predicated on the finding that Israel is committing a war crime in violation of public international law. While seeking the benefit of the *Geneva Conventions Act* and *Crimes Against Humanity and War Crimes Act*, the Plaintiffs are proceeding without having impleaded the Attorney General and without his authorisation.

[319] The HCJ has jurisdiction over the Action insofar as the Plaintiffs allege that the Defendants are agents of the State of Israel.¹²² In the past, Mr. Yassin has

¹¹⁸ *Kaycan Ltd. v. Pella Corporation*, [2003] J.Q. no. 12757 at para. 26 (S.C.).

¹¹⁹ On this basis, a trial court may refuse to issue the injunctive orders that the Plaintiffs are seeking: *Bellavance v. Blais*, [1976] R.P. 423 (C.A.).

¹²⁰ *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (Ont. C.A.), leave to appeal refused.

¹²¹ John H. Currie, *Public International Law*, 2nd ed. (Ottawa: University of Ottawa, 2008) at 376 and foll.

¹²² According to Professor Ben-Naftali "The Israeli Supreme Court, sitting as the High Court of Justice, has legal jurisdiction in Israel over matters brought against the State, its military, and their agencies." [Reference omitted.] Mr. Jarach states that the Supreme Court of the State of Israel sitting as the

acknowledged the jurisdiction of the HCJ with respect to the Lands by bringing several motions contesting the legality of various actions undertaken by Israel.

[320] He was partially successful.

[321] He has apparently exhausted all recourses that are not based on international law. In HCJ no. 143/06 delivered on September 5, 2007, the HCJ commented as follows:

20. To summarize this matter: It is difficult not to gain the impression that after the approval of the Second Plan, the Petitioners turned over every rock and stone to find every possible planning claim, to prevent further construction and occupancy. The propitious hour has passed for some of the Petitioners' claims and other claims should not be accepted....

[322] And thus Mr. Yassin, and now his heirs, turn to Québec.

[323] The essence of their argument is that although Article 49(6) of the *Fourth Geneva Convention* legally applies in the West Bank, the HCJ would refuse to decide on the basis of this provision because of an unwillingness to adjudicate on a politically sensitive matter. A review of the evidence simply does not bear out this preconception.

[324] It is noteworthy that the Plaintiffs have not alleged and did not argue that the HCJ is not an independent tribunal or that it would not try the Action fairly and impartially or, more specifically, that it would not be prepared to reconsider, in light of fresh evidence on the current practice of states, the issue of whether Article 49(6) of the *Fourth Geneva Convention* has now become customary international law.

[325] They are implicitly satisfied that the HCJ is an impartial tribunal. Having closely examined all of the HCJ judgements filed in the record, this Court is convinced that an informed person, viewing the matter realistically and practically would not perceive the situation otherwise.¹²³

[326] By choosing the Québec forum, the Plaintiffs are avoiding the necessity of discharging their onus of proving before the HCJ that Article 49(6) of the *Fourth Geneva Convention* is indeed customary international law as they allege, thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Québec.

[327] In delivering the judgment of the Supreme Court of Canada in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, Sopinka J. expressed

HCJ hears "matters in which it deems it is necessary to grant relief for the sake of justice and which are not within the jurisdiction of another Court".

¹²³ *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369.

the court's opposition to the selection by litigants of an inappropriate forum to secure a juridical advantage at the expense of other litigants:¹²⁴

This does not mean, however, that "forum shopping" is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others....

If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping".

[Emphasis added.]

[328] Inappropriate "forum shopping" should thus be discouraged.

[329] In the United States of America, legislation expressly grants jurisdiction to American courts over civil claims brought by aliens and based on torts committed abroad.¹²⁵ No such legislation exists in Canada.¹²⁶ The Plaintiffs did not submit any precedent of a Canadian court acknowledging that a person may be found civilly liable in Canada for having participated abroad in a war crime as defined by international instruments, neither is the Court aware of any such precedent.

[330] The existence of some substantive difference between the domestic law of Israel and the domestic law of Québec does not mean, in and of itself, that the HCJ would not be "in a better position" to decide the Action than the Superior Court. In *Kuwait Airlines Corporation v. Iraqi Airways*,¹²⁷ Lord Nicholls of Birkenhead, with whose views three of his four colleagues concurred, explicitly recognized that proceedings having connections with a foreign country may be more appropriately decided by reference to the laws of such country despite differences with the laws of England:

[15] Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately

¹²⁴ *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, *supra* note 115 at 912.

¹²⁵ *Alien Torts Claims Act* (1789), codified (28 USC § 1350); see also: *Torture Victims Protection Act* 106 Stat. 73 (1992).

¹²⁶ Bill S-233, submitted for first reading on April 28, 2009, would create a civil remedy in Canada against a person who engaged in terrorist-related conduct. As of the date of this judgment, Bill S-233 has not been passed into law.

¹²⁷ *Kuwait Airlines Corporation v. Iraqi Airways*, *supra* note 112 at paras. 15-16.

decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to foreign law. If the law of all countries were uniform there would be no "conflict" of laws.

[331] In *Birdsall Inc. v. Any Event Inc.*,¹²⁸ LeBel J.A., as he then was, discussed the issue of *forum non conveniens* in the context of an action in warranty and cited authors G. Goldstein and E. Groffier regarding the relevant connecting factors:

[TRANSLATION] What exceptional circumstances must be considered? The criteria considered in the other provinces are the availability of evidence, the expense for the parties to call witnesses and other practical factors that enable an easy, swift and inexpensive trial. Public interest considerations may also come into play, such as the inconvenience of having rolls encumbered by trials that are unconnected with the venue [...]

An abusive or vexatious election of forum by the plaintiff will be decisive....[References omitted.]

[Emphasis added.]

[332] Judicial resources are unfortunately limited in all venues. It would not be in the interest of justice to restrict access to the Superior Court for those matters truly having a real and substantial connection with Québec in favour of the Action or of similar proceedings having only a superficial connection with Québec where another court would clearly be in a better position than the Superior Court to decide.

[333] The applicable law and the advantages conferred upon a plaintiff by its choice of forum are but two of the factors relevant to the determination of whether the foreign authority would be in a "better position" to decide. Of course, being in a "better position" is not synonymous with the "most advantageous forum to the plaintiff".

[334] Order and fairness therefore require that the Action be tried before the HCJ. In the words of La Forest J. "...While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice...".¹²⁹

[335] To sum up, this is one of those exceptional situations where the Superior Court is compelled to decline jurisdiction on the basis of *forum non conveniens*, as the Plaintiffs have selected a forum having little connection with the Action in order to inappropriately

¹²⁸ *Birdsall Inc. v. Any Event Inc.*, [1999] R.J.Q. 1344 at 1354 (C.A.)

¹²⁹ *Tolofson v. Jensen*, *supra* note 63 at 1058.

gain a juridical advantage over the Defendants and where the relevant connecting factors, considered as a whole, clearly point to the HCJ as the logical forum and the authority in a better position to decide.

Costs

[336] The Defendants' Exception to Dismiss is granted only against the Council, without costs, given that the Defendants are largely unsuccessful on the motion.

[337] The Declinatory Exception is granted with costs. The Defendants will be entitled collectively to one bill of costs only based on the total amount in issue.

[338] In light of the novelty of the matter, it would not be appropriate to make any further award.

FOR THESE REASONS, THE COURT:

MAINTAINS, in part, the Defendants' Exception to Dismiss Action and, *de Bene Esse*, to Recognize Judgments and **DISMISSES** the Village Council of Bil'in's Second Further Amended and Particularized Motion Introducing a Suit dated June 12, 2009.

Without costs.

MAINTAINS the Defendants' Application to decline jurisdiction – forum non conveniens and **DISMISSES** the Second Further Amended and Particularized Motion Introducing a Suit dated June 12, 2009.

With costs.

LOUIS-PAUL CULLEN, J.S.C.

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Dates of hearing: June 22, 23 and 25, 2009

