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Introduction to “Litigating Palestine: Can Courts Secure Palestinian Rights?”

By GEORGE BISHARAT*

This issue of the *Hastings International and Comparative Law Review* (HICLR) presents two articles based on presentations first offered at a conference held at UC Hastings College of the Law and sponsored by the Trans Arab Research Institute¹ on March 25 and 26, 2011. The conference was entitled “Litigating Palestine: Can Courts Secure Palestinian Rights?” The conference consisted of four panels of three speakers each, and a keynote address.² It was attended by members of the Hastings community, as well as many from outside the college, and attracted a significant online audience, as the proceedings were live streamed over the Internet.

Virtually all academic conferences have starting premises or points of departure, and this was so of the “Litigating Palestine” conference. To be useful, conference premises should bear close relationship to reality, but need not be uncontested. Here are the premises assumed by the conference:

First, and most basically, Palestinians as individuals and as a collectivity have human,³ civil,⁴ and political, that is, national rights.⁵

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1. The Trans Arab Research Institute is a 501(c)(3) organization registered in Massachusetts that “aims to provide focused research and public venues to analyze, discuss and present optional perspectives” on issues and problems in the contemporary Arab world. See generally <http://tari.org/>.

2. For a brief description of the conference, panelist biographies, conference program, see <http://www.uchastings.edu/media-and-news/event/2011/03/Litigating-Palestine.html>.

3. Universal Declaration of Human Rights, arts. 3 and 14, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948). In addition, Palestinians living under Israeli military occupation in East Jerusalem, the West Bank, and the Gaza Strip, are further protected by international humanitarian law, as codified in the Fourth Geneva Conventions of 1949 and their Additional Protocols, among other sources.

It was not possible always to say this, but today these are moral and legal assertions that are virtually unassailable.

Second, it is by now widely accepted that Israel has a lengthy history of violating the human, civil, and national rights of the Palestinians. Whether Israel is a more or less severe violator of human rights than other nations, or whether the international community has responded or failed to respond to these violations, or whether Israel is guilty in each and every instance and of each and every violation of which it is accused – these are all questions that can be reasonably debated. But there is far too lengthy and diverse a record of Israel's human rights violations for there to be any serious dispute about the "big picture." Journalists,⁶ human rights organizations based in Israel,⁷ the occupied West Bank⁸ and Gaza

See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609. *See also* Convention (IV) Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277.

4. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

5. Palestinian rights to national self-determination were first recognized in 1974 with the United Nations in General Assembly Resolution 3236. G.A. Res. 3236 (XXIX), U.N. GAOR, 29th Sess., Doc. A/RES/3236 (XXIX) (Nov. 22, 1974) Palestinian rights to national self-determination and sovereignty were recognized in 2004 by the United Nations Security Council in its resolution endorsing the Roadmap for Peace generated by "the Quartet" (United States, the United Nations, the European Union, and Russia). G.A. Res. 1515, U.N. GAOR, 58th Sess., Doc. A/RES/58/21 (Jan. 22, 2004). According to Palestinian diplomats, more than one hundred nations have recognized Palestine as a state following the Palestine Liberation Organization's decision to declare a state in 1988. *See Argentina, Uruguay recognise Palestinian state*, AFP (Dec. 7, 2010), available at <http://www.abc.net.au/news/2010-12-07/argentina-uruguay-recognise-palestinian-state/2365532>.

6. For example, credible reports that Israel had engaged in systematic torture of Palestinian detainees in the territories it had occupied in 1967 were first reported in the Sunday Times of London on June 17, 1977. *See* Article published in "The Sunday Times" (London)_on 19 June 1977: Israel tortures Arab prisoners, U.N.S.C., 32nd. Sess., Annex, U.N. Doc. A/32/132 (July 5, 1977), available at <http://unispal.un.org/UNISPAL.NSF/0/FE3D603D74F5729B85256FE0006CC519>.

7. *See, e.g.*, *The Israeli Information Center for Human Rights in the Occupied Territories*, B'TSELEM, <http://www.btselem.org>; *The Legal Center for Arab Minority Rights in Israel*, ADALAH, <http://www.adalah.org>; THE ARAB HUM. RTS. ASSOC'N, <http://www.arabhra.org>; HAMOKED: CENTER FOR DEF. OF THE INDIVIDUAL, <http://www.hamoked.org/about.aspx> (all last visited Nov. 10. 2011).

Strip⁹ and abroad,¹⁰ governments – including the United States government, in the State Department's annual reports on human rights violations by recipients of United States aid¹¹ – UN officials, or individuals working under UN auspices such as Justice Richard Goldstone,¹² and courts, including the International Court of Justice¹³ have all contributed to a rich documentary record that is replete with examples of rights violations. These violations include torture¹⁴, extrajudicial killings,¹⁵ detention without trial,¹⁶ home demolitions,¹⁷

8. See, e.g., AL-HAQ, <http://www.alhaq.org>, and ADDAMEER, <http://www.addameer.org/addameer/about.html> (all last visited Nov. 10. 2011).

9. See, e.g., THE PALESTINIAN CENTER FOR HUM. RTS., <http://www.pchrgaza.org/portal/en/>, and AL-MEZAN CENTER FOR HUM. RTS. <http://www.mezan.org/en/index.php> (all last visited Nov. 10. 2011).

10. See generally AMNESTY INTERNATIONAL, ANNUAL REPORT: ISRAEL AND THE OCCUPIED PALESTINIAN TERRITORIES (2011), available at <http://www.amnestyusa.org/research/reports/annual-report-israel-and-the-occupied-palestinian-territories-2011>; and HUMAN RIGHTS WATCH, ISRAEL: FOLLOW PRISONER EXCHANGE BY ENDING BLOCKADE (Oct. 18, 2011), <http://www.hrw.org/middle-eastn-africa/israel-and-occupied-territories>.

11. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., 2010 HUMAN RIGHTS REPORT: ISRAEL AND THE OCCUPIED TERRITORIES (Apr. 8, 2011); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., 2009 HUMAN RIGHTS REPORT: ISRAEL AND THE OCCUPIED TERRITORIES (Mar. 11, 2010); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., 2008 HUMAN RIGHTS REPORT: ISRAEL AND THE OCCUPIED TERRITORIES (Feb. 25, 2009).

12. United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009); see also Rep. of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, ¶ 32(b) at 17, U.N. Comm'n on Human Rights, U.N. Doc. A/HRC/16/72 (Jan. 10, 2011) (by Richard Falk); Rep. of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Implementation of General Assembly Resolution 60/251 of March 15 entitled "Human Rights Council"*, ¶¶ 3, 22-24, 58-62, U.N. doc. A/HRC/4/17 (Jan. 29, 2007) (by John Dugard).

13. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. No. 131, 136 (July 9), available at http://www.icj-cij.org/icjwww/-idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.htm [hereinafter *Legal Consequences Opinion*].

14. See, e.g., THE PUB. COMM. AGAINST TORTURE IN ISRAEL, <http://www.stoptorture.org>; *Torture and Abuse Under Interrogation*, B'TSELEM, <http://www.btselem.org/torture/>; THE LANDAU COMMISSION REPORT, available at http://www.cttcampaigns.info/documents/fr/landau_en/Landau1.pdf (all last visited Nov. 10, 2011).

15. See, e.g., *The Status of Human Rights in Palestine*, INDEP. COMM'N ON HUM. RTS. (Dec. 31, 2010), available at <http://www.ichr.ps/pdfs/exs2011.pdf>.

illegal settlements,¹⁸ banishments, and other grave offenses. Those who have borne the brunt of Israeli rights violations include Palestinians, who are citizens of the state of Israel,¹⁹ Palestinians who have lived under Israeli military occupation in the East Jerusalem,²⁰ the West Bank,²¹ and the Gaza Strip,²² and Palestinians who live in exile outside of the borders of former Mandate Palestine.²³

16. See, e.g., B'TSELEM, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INCARCERATION OF UNLAWFUL COMBATANTS LAW (Oct. 2009), http://www.btselem.org/publications/summaries/200910_without_trial.

17. See, e.g., HUMAN RIGHTS WATCH, *Israel: Halt Home Demolitions* (June 21, 2011), <http://www.hrw.org/news/2011/06/21/israel-halt-home-demolitions>.

18. See, e.g., *Foreign Office Minister condemns further expansion of illegal Israeli settlements*, THE PUB. RECORD (Aug. 16, 2011), <http://pubrecord.org/nation/400/un-secretary-general-says-israeli-settlements-illegal/>; *Foreign Office Minister condemns further expansion of illegal Israeli settlements*, FOREIGN & COMMONWEALTH OFF. (Aug. 16, 2011), available at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=644678882>

19. See generally ADALAH, THE INEQUALITY REPORT: THE PALESTINIAN ARAB MINORITY IN ISRAEL (Mar. 2011), available at http://www.adalah.org/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf.

20. See OFF. OF THE HIGH COMM'R FOR HUM. RTS., ISRAEL: UN RIGHTS EXPERT RAISES ALARM ON GROWING DETERIORATION OF HUMAN RIGHTS IN OCCUPIED EAST JERUSALEM (Mar. 21, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10874&LangID=E>.

21. See HUMAN RIGHTS WATCH, SEPARATE AND UNEQUAL: ISRAEL'S DISCRIMINATORY TREATMENT OF PALESTINIANS IN THE OCCUPIED PALESTINIAN TERRITORIES (Dec. 19, 2010), <http://www.hrw.org/reports/2010/12/19/separate-and-unequal-0>.

22. See PALESTINIAN CENTRE FOR HUM. RTS., *8 Persons, Including 2 Children and 3 Women, Wounded Due to Explosions of Home-Made Rockets in Populated Areas in Gaza* (Aug. 24, 2011), http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=7672:8-persons-including-2-children-and-3-women-wounded-due-to-explosions-of-home-made-rockets-in-populated-areas-in-gaza&catid=61:field-update-security-chaos-&Itemid=211.

23. There is a strong argument that Palestinian refugees who were forced from their homes or fled in fear in either 1948 or 1967 to areas outside of Palestine have an internationally recognized right to return to their homes or, if they prefer, to receive compensation and support for resettlement. See Susan Akram, *Palestinian Refugees and Their Legal Status: Rights, Politics and Implications for a Just Solution*, 31(3) J. PALESTINE STUD., 36, 51 (2002); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998). Israel has denied Palestinian refugees their rights of return and has regularly resorted to lethal force to bar their return, most recently in May 2011. See *16 dead, dozens injured as violence erupts along Israel's borders with Syria*, DAILY MAIL UK (May 16, 2011), <http://www.dailymail.co.uk/news/article-1387322/Violence-Israels-borders-Syria-Nakba-Day-16-dead-dozens-injured.html>.

Third, it is an empirical fact that Palestinians and others—including Israeli Jews, Europeans, and Americans—have made efforts to protect and advance Palestinian rights in courtrooms around the globe. They have done so in Israel and the Occupied Palestinian Territories²⁴, in the United States²⁵, in Canada,²⁶ and in the international system.²⁷ Their efforts, I think it is fair to say, have yielded profoundly mixed results. Even where favorable verdicts have been achieved, as in the International Court of Justice's ruling that Israel's separation wall violated international law²⁸ these occasional courtroom victories have seldom resulted in substantial changes in the situation on the ground. Israel's separation wall, for example, is still under construction, largely according to its originally planned route.²⁹

Our business as lawyers and legal academics, of course, is to encourage resolution of conflict through peaceful and lawful means. Therefore it makes perfect sense for us to evaluate the strategies, limitations, successes and failures of efforts to defend Palestinian rights in a variety of different court systems here and abroad and to help to identify strategies for them to be more successful. Is this not the way we, as a profession, want to see conflict resolved? So while the conference, and this issue of the *Hastings International and Comparative Law Review*, discuss Israeli violations of Palestinian rights, neither constitutes a gripe forum for Palestinians and their advocates. The point, rather, is to grapple seriously with the question

24. See *Human Rights groups launch court challenge of targeted killings*, ASSOCIATED PRESS, Jan. 21, 2002, available at <http://www.haaretz.com/news/human-rights-groups-launch-court-challenge-of-targeted-killings-1.54784>.

25. See *Court: Dichter cannot be sued over 2002 bombing in U.S.*, HAARETZ, Apr. 16, 2009, <http://www.haaretz.com/news/court-dichter-cannot-be-sued-in-u-s-over-2002-gaza-bombing-1.274208>.

26. See, e.g., AL-HAQ, FROM PALESTINIAN OLIVE GROVES TO CANADIAN COURTROOMS: RESISTING ISRAEL'S ANNEXATION POLICIES IN THE WEST BANK (2008), http://www.alhaq.org/images/stories/PDF/accoutability-files/From_Palestinian_Olive_Groves_to_Canadian_Courtrooms.pdf.

27. See Aluf Benn, *Ministry defends report on ICJ Ruling*, HAARETZ, Aug. 23, 2004, <http://www.haaretz.com/print-edition/news/ministry-defends-report-on-icj-ruling-1.132378>.

28. See generally *Legal Consequences Opinion*.

29. Several challenges to the separation wall in the Israeli High Court have resulted in minor adjustments in the wall's route. See, e.g., Joseph Berger, *High Court Tells Israelis to shift part of barrier*, N.Y. TIMES, July 1, 2004, <http://www.nytimes.com/2004/07/01/world/high-court-tells-israelis-to-shift-part-of-barrier.html?ref=josephberger>.

of how Palestinian rights can be peacefully and lawfully protected.

So here are some examples of the kinds of questions that the articles will ask, and hopefully, answer:

- Can Palestinians get a fair shake in court? Does it make sense for them and those who aspire to defend their rights to invest financial and human resources in costly litigation?
- If so, where? What venues are most welcoming to Palestinian claims?
- What kinds of legal strategies are most likely to succeed, and where?
- How can success in litigation be measured? Does an unfavorable verdict always spell failure, or are there other, equally important residual benefits?
- What are the unseen costs of litigation? In particular, if Palestinian litigants suffer an unfavorable verdict, does the fact that they have “had their day in court” then impart an appearance of illegality to the practices they were challenging?
- What happens if we are forced to conclude that litigation should be abandoned? Are there peaceful and lawful ways to enforce international law outside of courts if litigation proves fruitless?

In addition to these practical considerations, there are theoretical questions that are raised by the experiences of “litigating Palestine.” There are at least two bodies of literature in sociolegal studies that are implicated. One looks at the political role of judicial institutions, particularly as venues for protecting or advancing the rights of disempowered groups.³⁰ The other is a by now extensive literature on “cause lawyering,” which examines the lives, strategies, and conditions under which lawyers struggle to advance social and political causes.³¹

It strikes me that in the diversity of examples within the track

30. The classic in this field is GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d. ed. 2008). See also STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d. ed. 2004).

31. See generally *THE CULTURAL LIVES OF CAUSE LAWYERS* (Austin Sarat and Stuart Scheingold eds., 2008); *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (Austin Sarat and Stuart Scheingold eds., 2006); *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat and Stuart Scheingold eds. 1998).

record of "litigating Palestine," and in comparisons between this experience and those in other locations, as in South Africa³² or even here in United States,³³ we have the grist to generate new insights about the conditions under which courts cannot or cannot play in realizing justice, or where "cause lawyering" can flourish or not. I sincerely hope, therefore, that these articles contribute to broader theoretical understandings that can inform others who are considering similar challenges in completely different places.

Lastly, a word about feelings. It was clear that some within the Hastings community and others outside of it were alarmed, even pained by the conference, and may greet the appearance of these articles with no less concern.³⁴ I am sure I speak for the editors of HICLR as well as myself, as a conference organizer, in assuring our various audiences that no offense has been intended, even if some offense is sincerely felt. At the same time, the sensitivities of some cannot function to censor our expression nor limit our freedom in raising issues of clear academic merit, not to mention practical import. A discussion of these issues is too important not to be held.

32. RICHARD ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994* (1995); STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

33. MICHAEL McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

34. See, e.g., *ADL Commends UC Hastings for Resolution; Disappointed at School's Failure to Remove Name from Problematic Conference*, ANTI-DEFAMATION LEAGUE (Mar. 25, 2011), http://www.adl.org/PresRele/Is1ME_62/6009_62.htm; Bob Egelko, *Hastings Board pulls UC brand from rights conference*, SAN FRANCISCO CHRONICLE, Apr. 13, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/13/BABN1IV958.DTL>; *S.F. college backs out of Palestinian rights meeting*, ASSOCIATED PRESS, Apr. 14, 2011, available at http://www.smdailyjournal.com/article_preview.php?type=news&title=S.F.%20college%20backs%20out%20of%20Palestinian%20rights%20meeting&id=156593.

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