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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 Institute 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. 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.

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, human rights organizations based in Israel, the occupied West Bank and Gaza


Strip and abroad, governments — including the United States government, in the State Department’s annual reports on human rights violations by recipients of United States aid — UN officials, or individuals working under UN auspices such as Justice Richard Goldstone, and courts, including the International Court of Justice have all contributed to a rich documentary record that is replete with examples of rights violations. These violations include torture, extrajudicial killings, detention without trial, home demolitions,


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

\begin{enumerate}
\item See \textit{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.
\item 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 \textit{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. \textit{See 16 dead, dozens injured as violence erupts along Israel's borders with Syria}, \textit{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.
\end{enumerate}
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 Territories\(^\text{24}\), in the United States\(^\text{25}\), in Canada,\(^\text{26}\) and in the international system.\(^\text{27}\) 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 law\(^\text{28}\), 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.\(^\text{29}\)

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


\(^{28}\) See generally Legal Consequences Opinion.

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 for 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

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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 Africa\textsuperscript{32} or even here in United States,\textsuperscript{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.\textsuperscript{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.

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\item \textsuperscript{33} MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).
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