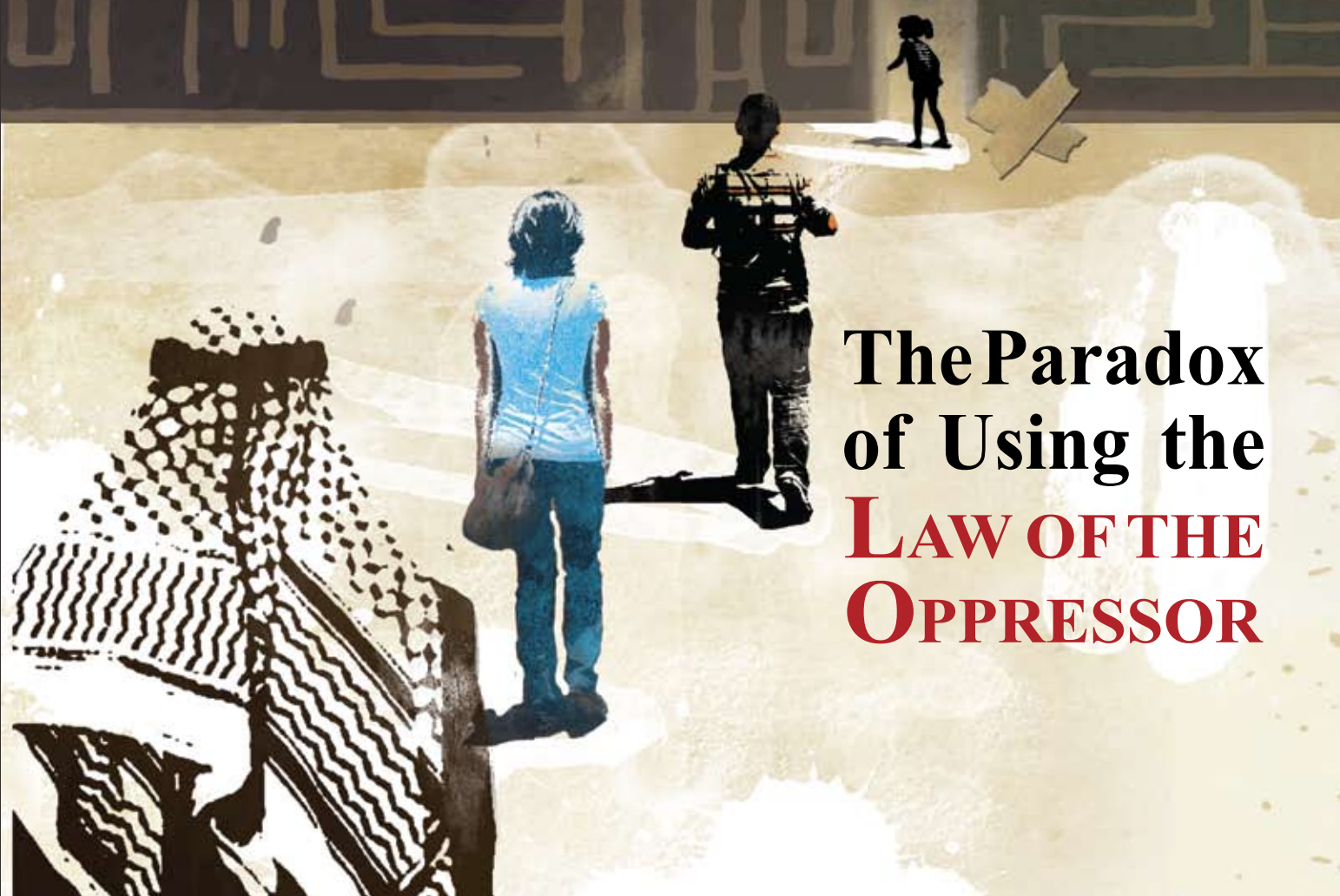


# al majdal

Issue No.55 (Winter 2013 - 2014)



quarterly magazine of  
BADIL Resource Center for Palestinian Residency and Refugee Rights



**The Paradox  
of Using the  
LAW OF THE  
OPPRESSOR**

BADIL takes a rights-based approach to the Palestinian refugee issue through research, advocacy and support of community participation in the search for durable solutions.

BADIL was established in 1998 to support the development of a popular refugee lobby for Palestinian refugee and internally displaced rights and is registered as a non-profit organization with the Palestinian Authority. BADIL is a Palestinian human rights organization. It holds consultative status with the UN ECOSOC.

Learn more about BADIL at [www.badil.org](http://www.badil.org)

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**Front cover:** BADIL thanks Suhad Khatib for her design of the cover for *al-Majdal* no.55.

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The views expressed by independent writers in this publication do not necessarily reflect the views of BADIL Resource Center.

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## Climbing out of the Rabbit Hole

Israel's implementation of protracted occupation, apartheid and colonization is hyper-legalized. This regime is sterilized through the language of law and its violence dispersed through many bureaucratic institutions and complex [legislation](#). In tandem, law is used to criminalize acts of political expression – Palestinian Sheikh Sayah Aturi from the community of al-Araqib was released from detention on 11 December 2013 after he was held for [almost a month](#) for his attempts to impede Israel's 62<sup>nd</sup> demolition of his village in the Naqab. Nearly 5,000 Palestinian political prisoners are [currently](#) held in Israeli detention.

You're on your way down the rabbit hole.

Other colonial regimes such as Apartheid South Africa also heavily relied on their judiciary to facilitate oppression. In the Palestinian case, Israel succeeds in portraying the judiciary as a progressive, independent and fair institution to Jewish-Israelis and the international community. Palestinians, however, are intimately familiar with the crimes sanctioned by the legal order. The Israeli Supreme Court approves [collective punishment](#) through house demolitions, as military tribunals [exonerate](#) Israeli soldiers' murder of [children](#), and municipal courts affirm the [exclusion](#) of Palestinian citizens from resources and budgeting. As of this writing, the Knesset appears to be proceeding with the legislation process for the [Praver Plan](#), threatening upward of 30,000 Palestinians with forcible displacement and land expropriation despite Minister Benny Begin's call for its halt on 12 December 2013.

Whether citizens of Israel, residents of the occupied Palestinian territory, or exiled – lived reality instructs Palestinians that the Israeli legal order is anything but just. Welcome to wonderland.

Currently, the only legal forums available to Palestinians for challenging abuses are the Israeli courts. The Palestine Liberation Organization's threats of turning to the International Criminal Court may materialize when the current round of Kerry-sponsored negotiations conclusively ends. Increased access to international legal mechanisms will impact domestic tactics.

However, when political factions are [imbedded](#) within the PA/PLO and the official representative body of the Palestinian people is [unable to fulfil its role](#), there is broad recognition of the need for a collectively informed Palestinian political practice to guide tactics. [Fragmentation](#) of the body politic and foreign interventions [modeled on the Oslo framework](#) contextualize the current political crisis. These conditions also point the way to the strength of our moment in time. Political "weakness" may provide the opportunity to repurpose deeply faulty endeavors such as the Palestinian Authority and to sharpen tools of resistance in ways that – through their engineering – also envision the ideals we seek to achieve.

One of these tools – the law – is multilayered and daunting. On the one hand it embodies Israel's powerful control over Palestinians and, as such, is futile as a source of justice. However, the legalized racism of Israeli law contains another pursuit. Acknowledging the unlikelihood of achieving equal rights through the courts, Palestinians have employed law-based and extra-legal tactics in useful ways – to block attempts at denying Jerusalem residency, for example.

However, participation in the legal system comes with compromises – one of the most worrying is the political and psychological legitimization of Israeli justice that using the courts imposes on Palestinians. Yet, with few alternatives, the slim chance of limited success compels many Palestinians to employ the Israeli legal system to prevent or delay attacks on their homes, livelihoods, freedom of movement, family unification, etc. This fact has very real implications by diverting resources (financial, organizational and emotional) that may be better allocated to sustaining Palestinian existence.



## A Classical Discourse

A body of literature is written on the topic of law as resistance and legitimation in Palestine.<sup>1</sup> As an initial foray into the topic,<sup>2</sup> the 55<sup>th</sup> installment of *al-Majdal* aims to contribute to this tradition while pursuing two specific goals: maintaining a holistic framework across the fragmented geography of Palestine and focusing on the non-governmental organization sector of Palestinian civil society.

Sovereign domestic law in Palestine falls into two general categories: Israeli civil law in Israel-proper and annexed East Jerusalem, and Israeli military law in the rest of the occupied Palestinian territory. Both institutions ultimately feed into the Supreme Court. In order to counteract fragmentation, we asked Palestinian non-governmental organizations from both sides of the artificial, but painfully divisive Green Line for their positions on employing Israeli law. Can tactics in and around the law usefully challenge disenfranchisement institutionalized in Israeli laws and legal culture? Published here are contributions from *Al Mezan Center for Human Rights - Gaza*, *Al-Haq*, *Addameer Prisoner Support and Human Rights Association*, *Civic Coalition for Palestinian Rights in Jerusalem*, *Defence for Children International – Palestine*, *Jerusalem Legal Aid and Human Rights Center*, *Mossawa Center: The Advocacy Center for Arabs in Israel*, *Women's Centre for Legal Aid and Counselling* and the Palestinian Authority. By including multiple perspectives responding to the paradox of utilizing Israeli law we seek to gauge the im/possibility of a holistic law-based and extra-legal strategy.

The first third of the magazine hones in on the uses of and limitations to engaging with an oppressive legal system. The second third discusses the Palestinian experience in the Israeli legal order more broadly. Additionally, we host three commentaries that focus on specific theoretical arenas of importance. The first was commissioned for a comparative insight into the use of law in the Zapatista struggle. The second commentary emphasizes the significance and prevalence of extra-legal tactics to confront Israeli law. The last commentary reviews tactics used by human rights lawyers in Israeli courts, suggesting a project to accompany future litigation.

A more challenging analysis was not dealt with here – the effects of Israeli law on Palestinians exiled outside of the homeland and the creative means to incorporate them. Can we align law-based and extra-legal tactics to a holistic strategy that crosses forcible divisions such as the *Shatat* (exile community)? Also, we leave the issue of international law to future consideration, but the same concepts of legitimization, resistance and tactic vs. strategy apply.

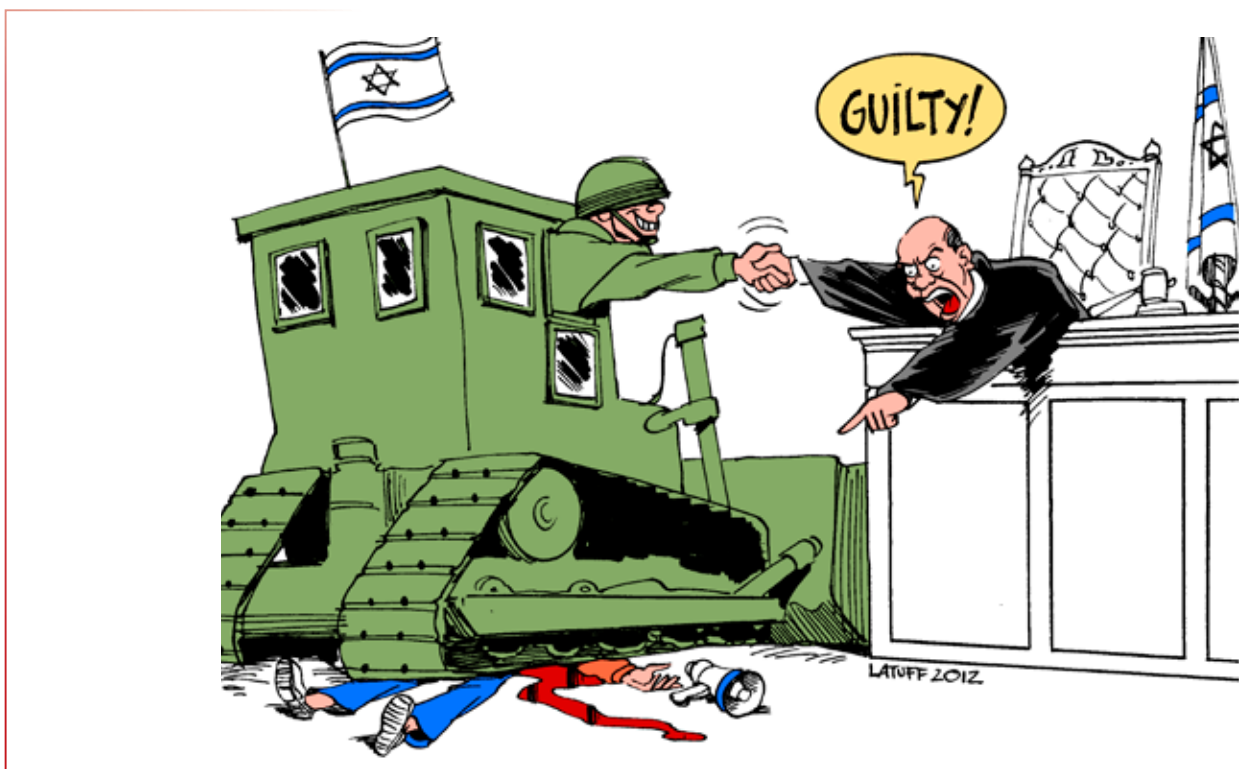
The resulting magazine is a variety of opinions and a collection of tactics for struggle. A conclusive survey of civil society responses to Israeli law is not presented here – popular movements, individual communities and many organizations are not included. Also, we do not synthesize or analyze the presented positions, but feel that the reader will observe the lack of a comprehensive approach to dis/engaging Israeli law. We find that this issue provides insight into the state of Palestinian political strategy in general.

Part of the explanation for this reality is that it is difficult to expect that law will play a leading role in the Palestinian struggle when it is a mechanism of coercion. Rather, we believe that the usefulness of Israeli law materializes when the law-based struggle is subservient to the needs of Palestinian communities, social movements and a coherent political framework. Israeli law is incapable of containing Palestinian requirements of justice, but nonetheless provides an opportunity to solidify principles and mobilize talents and public opinions. If, as [some argue](#), engagement with the Israeli judiciary is unable to serve the pursuit of Palestinian rights, then we must consider whether a collective boycott of the court system is now applicable.

In the process of countering daily oppression we are laying foundations for a new society based on equal rights and justice, on decolonization and return – what we hope can be a permanent exit from the rabbit hole.

## Israel's justice System is Useless; Why Palestinians Should Still Engage With It

by Mahmoud Abu Rahma\* for Al Mezan Center for Human Rights - Gaza



Palestinians' attempts to seek justice or redress for Israeli violations through the Israeli legal system have largely been an experience of futility. Even when Israel's Occupation Forces commit the most serious violations of international law, it is rare to see adequate investigations to establish the truth or any attempt to prosecute the perpetrators or secure redress for the victims. Considering the lack of accountability, should we invest in engaging this system?

In an address to the Human Rights Council's Committee of Experts during its assessment of Israel's self-investigations into major war crimes during [Operation Cast Lead](#),<sup>1</sup> one of the victims [concluded](#) that Israel's investigations into the incidents of Operation Cast Lead were:

[s]uperficial, not significant, and misleading to the international community. Despite our belief that the investigation was not serious we decided to appear and deliver testimony, out of a belief that we are civilians and innocent. But we also believed that in the end, we will end up with nothing. We were correct; the investigation carried out by Israel is just a game, nothing more.

Israel demonstrates a [strong tendency](#) toward favoring the military and maintaining its deterrence over basic obligations to international norms. Where there appears to be any chance of breaching the iron wall

of impunity, which courts-alone cannot overcome, the Israeli legislators rush to prevent it by means of [legislative reform](#).

So, why do some Palestinian human rights organizations continue the painstaking activities of documenting cases and taking them to Israeli courts or other arenas of the Israeli legal system? Is overwhelming and consistent evidence that this legal system is ineffective at promoting the human rights of Palestinians and is designed in such a way to render access to justice meaningless, not sufficient? Should we not focus on other venues such as United Nations mechanisms, the International Criminal Court and the potential of universal jurisdiction?

There is merit in this argument. Israel designed its legal system to enable impunity from criticisms about its treatment of Palestinians and to shield its soldiers and leaders from prosecution. We have joined other Non-Governmental Organizations in [criticisms](#) of the Israeli legal system, which denies Palestinians justice and redress<sup>2</sup>; however, the Al Mezan Center for Human Rights, following extensive deliberations and consultations, has decided to continue to file cases with Israeli courts. Below are our arguments in support of this position, which we believe does not contradict positions opposed to court intervention.

First, we must bear in mind that, as a human rights organization, the victims' rights are our top priority. As such, it is impossible to pursue the victims' right to justice or remedy if we refuse requests to utilize the legal system. Many victims, after being briefed in full on the lengthy and biased process of attempting justice through Israeli courts, decide that they want to attempt litigation anyway. It is then our duty to help them try even though the process is lengthy, expensive and taxing; not to mention discriminatory.<sup>3</sup> At the end of the process, there is a slim chance of securing justice and/or remedy - the motivation for some individuals' attempt to undergo it.

Second, by continuing to file cases and complaints with the Israeli legal system, we employ another platform for pointing out the continuous and serious violations of human rights and international law by the Israeli occupation forces. It is important to expose as well as challenge these violations. It is equally important to use such violations to test the Israeli legal system's ability to deliver justice as Israel continues to [modify its legislation](#) to further limit Palestinians' access to justice and/or redress. It is crucial to continue to engage with the system if we are to be able to explain with precision what kind of flaws and built-in impediments exist. This is important for our strategic fight to combat impunity. In fact, almost all of the information we use in reporting and [advocacy is based on actual cases](#) that were dismissed without a proper legal process in accordance with international standards.

Normally, international justice mechanisms are accepted as 'complementary'; i.e. they are effective when there is proof that the available domestic remedies have been exhausted and are ineffective. Again, it is true that the well-documented experience of Palestinians can make it easy to prove that the legal system has been tested for its limits to respecting Palestinian rights. However, a continuous engagement with the Israeli legal system provides Al Mezan with stronger evidence of Israel's inability to implement reforms. Pursuit of the avenues Israel provides for law-based challenge adds credibility to using international mechanisms that might successfully investigate or prosecute Israel in the future. Over the past few years, some of the most successful examples of applying the principle of universal jurisdiction to Israel were cases in which we were able to demonstrate to a court in a third state that Palestinians tried every possible avenue in Israel first, but that all such attempts failed to deliver justice.

Israel's main defense in response to Palestinians' pursuit of justice internationally is within the theme of 'warfare': Palestinians use the law to attack Israel unjustifiably. While this argument cannot stand even

the least serious test, it does land on many willing ears. In fact, Al Mezan would be satisfied if the Israeli legal system itself investigated violations seriously, identified perpetrators for prosecution and provided remedy for the victims of criminal acts. Under those circumstances, there would be no need to pursue justice elsewhere. By continuing to engage the Israeli justice system and showing that it is designed to prevent achieving justice, we strengthen our position and, therefore, our advocacy worldwide.

Finally, challenging the Israeli legal system by initiating cases may help deter violations. The Israeli media has frequently reported on the anxiety of Israeli military commanders and politicians following legal interventions. The Israeli military makes an effort to claim that international law is respected. While this has proved false as patterns of violations repeat, their claims of ‘legality’ based on international law creates opportunities for remarking on their cynical contradictions in an international court as demonstrated by the International Court of Justice’s finding that the Wall has little to do with ‘security’. Ultimately, we demonstrate that Palestinians would be much better protected if the rules of international law were abided by; a goal that human rights organizations seek strategically.

Legal interventions by Al Mezan and other human rights Non-Governmental Organizations have not secured accountability or redress for almost any of the Palestinian victims of Israeli violations of international law. There is merit in the argument to reconsider attempting interventions in a system ineffective at promoting Palestinian rights, thus leaving only international legal mechanisms as options. Nevertheless, engaging with the Israeli legal system produces tactical benefits that may contribute to strengthening the fight against Israeli impunity and the protection of Palestinians.

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\* *Mahmoud Abu Rahma is the director of international relations at Al Mezan Center for Human Rights – Gaza.*

\*\**Endnotes: See online version at: <http://www.BADIL.org/al-majdal>*



## Beyond Justice: al-Haq after the Ruling in *Adalah* (2009-2013)

by Dr. Susan Power\* for al-Haq



Palestinian children play on the ruins of their homes in Jabalya, Gaza, destroyed by the Israeli war in 2008-2009 © AFP

The year 2009 marked a watershed moment for al-Haq in its approach to seeking justice beyond the Israeli High Court of Justice. In *Adalah v Attorney General (2009)* al-Haq, Adalah and the Palestinian Centre for Human Rights petitioned the Israeli High Court of Justice to judicially review the decision of the judge advocate general not to launch a criminal investigation into the deaths of civilians and destruction to civilian property in the Gaza Strip during Operation Rainbow and Operation Days of Repentance during the second intifada.

The Court denied the petition on the grounds of [generality and delay](#) outlining that the petition did not identify specific incidents of war crimes for investigation. Although the petitioners presented [documentation](#) from the United Nations Relief and Works Agency, Human Rights Watch and the International Federation for Human Rights, the Court, somewhat arbitrarily, found that the claim did not have a “[factual foundation](#).” The duty to investigate war crimes under the jurisdiction of the State comprises [customary international law](#). Notwithstanding, the case marked yet another instance of the Court’s [refusal](#) to insist on criminal investigations reinforcing the Military Advocate General’s [official policy](#) of [impunity](#) for the deaths of protected Palestinian civilians during ‘active combat.’

For al-Haq, the ruling demonstrated the unwillingness of the Israeli High Court of Justice to order a criminal investigation. Israel has a duty to investigate, prosecute, punish or extradite individuals for international

crimes. Moreover, the laws of war, the Geneva Conventions, obligate parties to search for persons alleged to have committed [grave breaches](#) of the Conventions regardless of the nationality of the accused.<sup>1</sup> [Israel](#) has signed and ratified the Fourth Geneva Convention, but has not incorporated the Convention into legislation making its application, according to former Chief Justice Barak, “[bitterly disputed](#).” Less controversial, is [Article 27](#) of the Vienna Convention on the Law of Treaties, which finds that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Previously, in its [report](#) *The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Palestinian Territories* (2004), al-Haq questioned whether “the experience of Palestinians with the Israeli High Court of Justice and the policies followed by the Court so far require those working in human rights to seriously consider whether to resort to this body.” Prompted by the litigation [delays](#) in *Adalah* (the hearing was held more than two years after the petition was filed) and the arbitrary [conclusion](#) by the Court that the petitioners had failed to establish a “real suspicion” that criminal offences were committed, al-Haq once again considered its relationship with the Court and whether it might be more resource effective to pursue justice in third states.

Al-Haq found recurring limitations to the pursuit of justice before the Israeli High Court of Justice including the Court’s deference to the military commander in cases of settlement construction,<sup>2</sup> military security,<sup>3</sup> the [impartiality of the judge](#) in conducting [criminal investigations](#) into military operations, and the Court’s *ad hoc* application of proportionality and reasonability test<sup>4</sup> to dilute the substantive application of international humanitarian law. Cumulative obstacles led al-Haq to the conclusion that “human rights defenders in the OPT [Occupied Palestinian Territory] must now address the long-standing problem of the H CJ as a rubber stamp for illegal Israeli policies.”<sup>5</sup>

In this regard al-Haq’s relationship with the Court remains fractious. The organization is mindful that in petitioning the Court there are insurmountable substantive and procedural hurdles in the Israeli legal system, which systematically deny victims of Israeli violations of international humanitarian law the right to an [effective judicial remedy](#). That being said, the organization has not completely ruled out petitioning the Court in certain cases. For example, in two cases against the Wall<sup>6</sup> the Israeli High Court of Justice effectively reinforced the policy of expropriating private property for the construction of settlements and the *de facto* annexation of Palestinian territory while side stepping the overall illegality of the Wall and the failure to apply Article 49 of the Fourth Geneva Convention. Nevertheless, in *Mara’abe v. The Prime Minister of Israel* and *Ahmed Issa Abdallah Yassin v. The Government of Israel*, the Court ordered a partial rerouting of the Wall (albeit not on the Green Line), thereby enhancing the quality of life of those immediately effected.

Taking the potential for rerouting the Wall into consideration, al-Haq decided to petition the Court, once again, on behalf of the villagers of Al Nu’man. Although the village is located within the Jerusalem municipal boundaries, the Municipality of Jerusalem and the Israeli Ministry of Interior issued the residents West Bank ID’s and refused to supply basic services, such as electricity, food and water, to the village. The [village](#) is completely surrounded by the Wall and residents must pass through a military checkpoint to enter and exit the village while non-residents are denied entry. The [restrictive impact](#) on the delivery of food supplies, access to educational facilities outside the enclave, and deprivation of healthcare, which can only be accessed outside the enclave, together caused conditions that would lead to the gradual expulsion of villagers from the area. For al-Haq, the depth of the human suffering experienced in Al Nu’man, outweighed any reservations about reinforcing the illegitimate determinations on the legality of the Wall, by petitioning the Court. Notwithstanding, the Court [denied](#) the rerouting of the Wall and the issuing of new residency permits.

While al-Haq will sporadically petition the Israeli High Court of Justice, the organization's primary focus is on third party states. Accordingly, al-Haq, noted its intention in *Adalah* to have recourse to foreign courts in the absence of a domestic remedy, an avenue regarded by President D. Beinisch as "[a veiled 'threat'](#)." Adding to the discussion, Justice E. Rubinstein proposed that any exercise of universal jurisdiction was designed to delegitimize the State of Israel. However, despite vehement opposition to the pursuit of justice in foreign courts, al-Haq considered this to be the best option going forward. Somewhat ironically, the Court added, "if the petitioners leave this court with empty hands, it is only because they took the wrong path, and therefore did not reach their objective."<sup>7</sup>

In 2013, al-Haq's advocacy in the Netherlands forged a new path, resulting in the Dutch ASN Bank which specializes in socially responsible investment, of its shares, divesting from Veolia, a French company accused of complicity in Israeli war crimes. Subsequently the Stadsregio Haaglanden municipality decided not to award a lucrative transport contract to [Veolia's subsidiaries](#) in the Netherlands. Similarly, the filing of criminal charges by al-Haq in the Netherlands against the Dutch company Riwal contributed to the decision of [Royal HaskoningDHV](#), another Dutch company, to terminate its involvement in the design of a wastewater project in occupied East Jerusalem, absolving the corporation from complicity in international war crimes and potential domestic prosecution.

Ultimately, al-Haq remains hopeful that in the future cases like *Adalah* will be referred by the Office of the Prosecutor to the International Criminal Court for investigation. Despite the [recognition of Palestine](#) by the United Nations General Assembly as a non-member State, politically, it would appear that the Office of the Prosecutor is reluctant to open an investigation until [Palestine ratifies the Rome Statute](#). The ruling in *Adalah* demonstrates Israel's unwillingness to open criminal investigations, which alone should trigger admissibility to the International Criminal Court under Article 17. However, the International Criminal Court is not an absolute panacea for ending impunity. Article 25 limits the jurisdiction of the court to "natural persons" excluding cases on corporate complicity or state responsibility.<sup>8</sup>

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\* Dr. Susan Power is a Visiting Research Fellow at al-Haq.

\*\* Endnotes: See online version at: <http://www.BADIL.org/al-majdal>

## The Reality of Legal Assistance in the Occupation's Military Courts

by Randa Wahbe\* for Addameer Prisoner Support and Human Rights Association

Ofer Military Court trial of a Palestinian human rights activist on 12.3.2013.  
(Source: jbcnews.net).



Exacerbated by the Oslo negotiations beginning in 1993, Palestinian civil society organizations are constantly navigating the contradictions of providing services to the community while retaining basic political principles. The agreements signed between the Palestine Liberation Organization and the government of Israel, and continuing negotiations make it increasingly difficult for local human rights organizations to hold the Occupation accountable on a local or international sphere.

As a Palestinian human rights organization, [Addameer Prisoner Support and Human Rights Association](#) continues to call for the boycott of the Occupation's military courts on the basis that they are illegitimate and do not meet international standards of fair trial. Despite this lack of confidence in the Occupation's military court system, Addameer continues to work within it to provide immediate relief services to political prisoners who are subjected to it. The question becomes, how does a legal aid organization like Addameer overcome this paradox of working within a system that it seeks to dismantle?

The experience of Addameer shows that legal aid for prisoners and detainees developed significantly on several levels over the past two decades. Perhaps the most important and prominent of those developments is the concept of legal aid itself, which extends well beyond the provision of free legal services. Since its founding in 1992, Addameer has evolved to integrate new approaches in its work including research



and documentation of prisoner violations, and advocacy and lobbying efforts to change international opinion. Responsibilities of community awareness-raising and rights education that were once held by political factions have been largely absorbed by legal aid organizations, broadening their role and responsibility within civil society. Despite the developments, increased experience and responsibility, legal aid organizations have not made concrete changes to the rulings of military courts, especially with respect to establishing fair trials for detainees and preserving their dignity and rights.

Fundamental fair trial rights as prescribed by international law are regularly flouted by the Occupation's military courts, including the right to prompt notice of criminal charges, the right to prepare an effective defense, the right to trial without undue delay, the right to interpretation and translation and the right to presumption of innocence. Cases are rarely dismissed in the military courts and prosecutors try to ease their burden by processing cases quickly (the average tribunal hearing is three minutes), thereby facilitating the continual detention of Palestinians. Considering the 99.7 percent conviction rate and the disproportionate and harsh rulings in the courts, Palestinian defense lawyers and their clients often opt for plea bargains instead of exhausting judicial procedures. Concluding plea bargains also succeeds in criminalizing the Palestinian right to resistance since the deals require an admission of 'guilt' on behalf of the detainee. By continuing to work within the military courts, it has become the role of legal aid and other service organizations to work within the logic of occupation, ultimately exempting Israel from its accountability to international human rights law and international standards to fair trial.

In addition to these regular and systemic violations of the right to a fair trial, the primary obstacle for legal aid organizations is functioning within a system that is illegitimate according to both international law and the principles of the Palestinian liberation movement, which does not recognize the Occupation's authority. According to the Fourth Geneva Convention articles 64 and 66, the jurisdiction of the military courts should be limited to serious violations that constitute a threat to state security while other violations should continue to be tried within the Palestinian judicial system. However, in direct violation of international law, Israel tries cases of "public disturbance," "traffic violations," "trespassing" and "crime" in addition to "security offenses" in the Ofer and Salem military courts in the West Bank. Increased emphasis on violations outside of typical security offenses points to a manipulation of the jurisdiction of the military courts. In the most recently released Israeli Military Court Annual Report (2012), 44 percent of the files were for traffic violations constituting the largest proportion of files opened. The second largest proportion of files opened (19 percent) were for "trespassing" applied to those who are found outside of the West Bank, including in Jerusalem, without a permit. The report shows a 15 percent increase since 2011 in the number of cases of "trespassing." Most alarmingly, there is a 19 percent increase in cases of "public disturbance" since 2011, which includes participating or organizing a demonstration or any type of protest, confirming the criminalization of civil and political activity in the West Bank.

The exploitation of the military courts is not only evidenced in their criminalization of basic civil, political, economic, social and cultural rights of the Palestinian people, but also in the intensified economic exploitation of recent years. The Occupation's military administers a system of financial punishments on those who are sentenced, usually fining thousands of shekels for cases as small as traffic violations. In 2012 alone, NIS 13,229,170 (\$3,704,168) was paid to the military courts, a tremendous 37.7 percent increase over the past five years. These fines are absorbed by detainees' families, the Ministry of Detainees and Ex-Detainees Affairs and other service organizations. The data exemplifies the military courts' exploitation of the Palestinian population and abusive control over the everyday life of Palestinians by stifling attempts at self-determination.

It is clear from the data and experiences of legal aid organizations that justice for the Palestinian prisoners



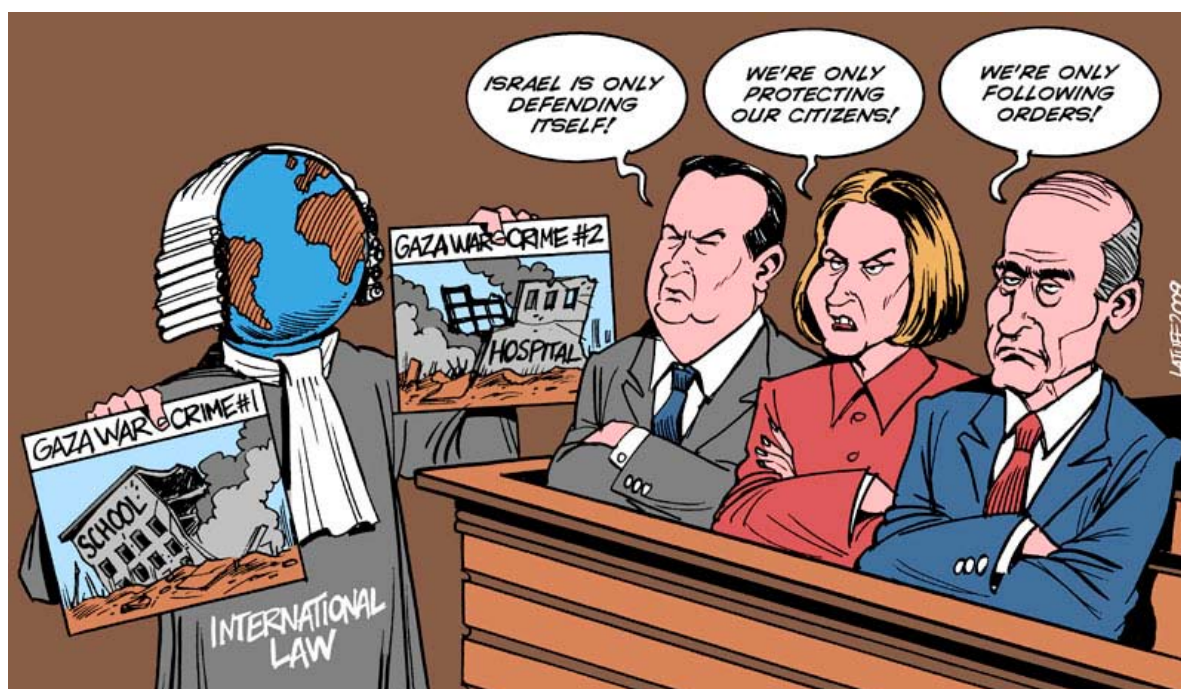
cannot come from within the military courts. Continuing to appear before military courts contributes to their legitimacy and the legitimacy of the military orders according to which they operate in the occupied Palestinian territory. For this reason, it is essential and urgent that a national strategy to defend the prisoners and detainees be formulated, and the option of collectively boycotting military tribunals be taken into serious consideration. During the second Intifada, when tens of thousands of Palestinians languished in the Occupation's prisons, a complete boycott of the court would have inevitably made the entire system fall immediately due to the sheer size of the prison population. While this strategy will require widespread popular and governmental participation, including the prisoners, detainees, their families, as well as legal aid organizations, private lawyers, the Palestine Liberation Organization and all Palestinian factions, it is the only strategy that can effectively break the chains of the military court. Refusal to recognize the legitimacy of military courts can effectively remove an important component to the colonization and occupation of Palestinian land that the Occupation depends on to systematically control the population. A unified and committed strategy can make this a possibility.

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*\*Randa Wahbe is the advocacy officer at Addameer.*

## The Israeli Supreme Court's Jurisdiction over the Occupied Palestinian Territory Severely Limits the Tactic of Litigation

by Husam Yunis\* for the Palestinian National Authority Ministry of Detainees and Ex-Detainees Affairs\*\*



Any discussion of legal issues related to the Palestinian people must address the laws and customs of international law. The occupied Palestinian territory is subject to customary and conventional international law, including specific conventions applicable to cases of occupation. The most important of these conventions are *The Hague Convention Respecting the Laws and Customs of War on Land of 1907* and *The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949*.

Since the occupation of the West Bank and the Gaza Strip in 1967, Israel never clearly recognized the applicability of the aforementioned conventions to the occupied Palestinian territory. Israel's position regarding the validity of these conventions fluctuated between two poles: either questioning the applicability of the conventions to the occupied Palestinian territory, or explicitly announcing that the Fourth Geneva Convention, in particular, does not apply to the occupied Palestinian territory.

From the official Israeli point of view, the Israeli Supreme Court plays the role of a watchdog over the practices of the military courts in the West Bank. However, in this capacity the practice of the Israeli

Supreme Court constitutes an international precedent that shakes the basic pillars of international law concerning the interaction between the occupied and the occupying state. For the first time, the court of the occupying power watches over the acts and practices of its army. This contradicts the norm according to which countries occupied by other countries have always had the right to monitor the practices of the military ruler through their own courts and judicial systems.

For instance, in 1941 the Norwegian Supreme Court deemed it had the capacity to monitor the legal acts and orders of the German military ruler. Its position was affirmed by the Norwegian District Court in the case of *Overland*. Similarly, the Greek Courts of Appeal also practiced such monitoring in 1944 arguing that every decision of the occupying Axis Powers' military courts was void because of its noncompliance with Article 43 of the Hague Convention. During the German occupation of Belgium during World War I, the Belgian court decided that it had the capacity to monitor the laws enacted by the military government and that it was authorized to implement those laws approved by international law. The same is true regarding the German Reich, which remained under occupation and control of the coalition forces for fifteen years. During this period, the existing district courts exercised judicial control over the occupying authorities making it possible to appeal the authorities' decisions in district courts as well as in the Supreme Court of non-occupied Germany.

A review of Article 43 of the Hague Convention, relating to the customs of war, leaves no room for doubt that the Palestinian courts are the only courts that can carry out the role of the watchdog, and certainly not the Israeli courts. Article 43 reads:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>1</sup>

It is possible to infer from Article 43 that the laws that must be applied are the laws that were in force at the time of occupation, meaning the Jordanian Law. This can be considered a second factor that confirms the lawlessness of the Israeli Supreme Court as a watchdog, even if it operates according to the legal standards and principles in force in Israel. How was this authority robbed from the Jordanian High Court? And how was it transferred, indirectly, to the Israeli Supreme Court?

The Israeli military government did not want to have its actions inside the occupied Palestinian territory reviewed by another body. Rather, it wanted to have absolute freedom of action in such a way that the local Jordanian courts would not disturb the programs that it prepared for the occupied territory, particularly those relating to Jewish colonization. Accordingly, it quickly invalidated the authority of local courts. Six months after the beginning of the occupation, Military Order No. 164 was issued, revoking the validity of legal monitoring by Palestinians.

It is clear that Israel sought to achieve several political goals from this move. First, it was trying to forge closer ties between the West Bank, namely East Jerusalem, and Israel, and weaken its relationship with Amman. Second, Israel sought to implement an indirect recognition of its acquisition of occupied Palestinian territory. This was, and still is, the most dangerous issue.

Moreover, extending the Supreme Court's jurisdiction plays a role in Israel's goal to improve its image internationally. Portraying itself as a country that accepts and exercises judicial control over the acts of its military government gives a legal nature to its actions. With those considerations,

clearly it is in Israel's interest that the Israeli Supreme Court conducts judicial monitoring over the acts of military rule.

The Supreme Court's monitoring of military rule does not arise from the desire to make a real legal review, but rather from a political calculation. The dangerous role that the Supreme Court began to play was noticed and opposed by the Palestinian Liberation Organization from the beginning. When the first cases against the Israeli military were presented to the Supreme Court in 1967, the Israeli Attorney General did not challenge the validity of the Supreme Court.

Another dangerous aspect of this situation lies in the Supreme Court's condoning the actions of the occupying power inside the occupied Palestinian territory. In effect, the Supreme Court favors the State in order to maintain its jurisdiction. This constitutes a clear danger that threatens not only the independence of the Supreme Court, but also makes the Supreme Court very cautious about accepting petitions on behalf of Palestinians from the occupied territory for fear that it may lead the State to a decline in its approval of the Supreme Court's authority. This has created a sort of hidden understanding according to which the authorities support the Supreme Court's jurisdiction and the Court generally accepts the authorities' policy decisions.

### Possible Palestinian Strategies

There are two feasible Palestinian strategies for engaging with the Israeli legal system. On the one hand, a short-term strategy may pursue limited legal remedies for Palestinians facing daily problems. In the long run, however, there is a need for developing an alternative to the illegitimate court system.

A short-term approach, specifically regarding administrative detention (seeking to arrange a lawyer's meeting with a detainee, for example), will have no success by appealing through the Israeli legal system. The fact is that the Israeli Supreme Court's decisions are based on imprecise intelligence information and secret evidence. A Palestinian prisoner is labeled a militant and under the premise of 'security concerns' all procedures of redress are denied. There is a need to approach the Supreme Court and to build legal precedents in it. Meanwhile, discretion should be taken to avoid cases that ought to refrain from pursuing the Supreme Court for fear of damaging the prospects of other prisoners through establishing negative legal precedents.

In the long run, there is a need to reach a unified front in order to decide on the utility of approaching the Israeli legal system from all the sectors of Palestinian society. Such a decision must factor in all the multitude and complexity of Palestinians' problems which are obscured by the Israeli Supreme Court.

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\*\*\* *Endnotes: See online version at: <http://www.BADIL.org/al-majdal>*

## Litigating from *Within* Lays the Trajectory for an International Legal Strategy

by Ingrid Jaradat Gassner\* for the Civic Coalition for Palestinian Rights in Jerusalem

Palestinian girls stand in the cave where their family is staying after Israeli forces destroyed their home in the East Jerusalem neighborhood of Silwan, 29 August 2013 (© ActiveStills.org)



International law is the reference for the work of the Civic Coalition for Palestinian Rights in Jerusalem. However, the Coalition and its [25 members](#) also work within the Israeli legal system on the basis of Israeli law, which is applied to East Jerusalem Palestinians as a result of the illegal annexation, because of the need to provide immediate and practical support to the people at risk of or affected by Israeli land confiscation, home demolitions, forced evictions, revocation of residency permits and forced separation of families.

Having provided individual legal counseling and aid in 2008 – 2009, the Coalition has since shifted the focus to group and public interest cases, which respond to a need for strategic, preventive legal and administrative challenges to discriminatory Israeli laws, law proposals and settlement expansion plans, which, if implemented, will further undermine the human rights and livelihoods of Palestinians in Jerusalem. The Coalition's small team of lawyers, often in conjunction with members such as [Adalah](#), has represented Jerusalem communities vis-à-vis Israeli local, regional and national planning committees, and in Israeli courts. According to the Coalition's assessment, this has produced mixed results, for example:

- **Objections to Israeli grand planning schemes**, such as the Jerusalem Regional (Master) Plan, which is the basis for the Jerusalem Local Outline Plan ("Jerusalem 2020 Master Plan") and the Eastern Ring Road, were rejected by the Israeli planning committees. At the same time, they have posed



hurdles to official approval so that Israeli authorities use these plans now as unofficial blueprints for smaller-scale specific plans and projects, which are approved and result in piece-by-piece and *de facto* implementation of the grand planning schemes.

- **Objections to specific settlement plans** have prolonged the ongoing process of hearings in the cases of Beit Safafa (Givat Hamatos settlement), Shu'fat (settler road) and Anata (Israeli waste disposal), contributed to controversy within the Israeli government (the Israeli “national park” in Issawiya and al Tur), and achieved a freeze of a plan for an Israeli military academy in Souwaneh. In the case of al-Bustan/Silwan, they have prevented adoption of any plan for the Israeli “historical park,” while demolition orders continue to be issued against Palestinian homes.
- In court, a **legal challenge to the ownership claims of Israeli settlers** has resulted in a temporary freeze of forced evictions of Palestinian residents in Sheikh Jarrah. Another petition has prevented destruction of the remnants of the village of Lifta until Israeli commercial developers present an alternative plan that will preserve some of the Palestinian homes and heritage of the 1948 Nakba in Jerusalem.

### Lessons Learned from Working in the Israeli Legal System

First, the Coalition’s experience shows that the following achievements can be gained through interventions in the Israeli legal system:

- Delayed execution of Israeli measures that violate human rights;
- Time for Palestinian victims to adapt, and more time for pressuring governments to adopt legal and political measures which could ensure Israeli respect for international law and Palestinian rights in Jerusalem<sup>1</sup>;
- Exposure of the failure of Israeli domestic law, courts and planning authorities to meet international law standards, which can serve Palestinian advocacy at the international level.

Second, the Coalition’s experience confirms that Israeli law bars access to justice for Palestinians and that injustice is systematic. This is true not only for Israel’s criminal law system where conviction rates for Palestinians are virtually [100 percent](#), while Israeli settlers and soldiers are [not held to account](#). The broader lesson learned is that discrimination against Palestinians is generalized and institutionalized. Based on the construction of a “Jewish nationality” (Law of Return, 1950) in addition to and distinct from citizenship and on the grant of public status and functions to Zionist “Jewish national organizations”, Israeli citizenship, immigration and land laws have been carefully crafted to dispossess the indigenous Palestinian people, prevent return of the Palestinian refugees, convey inferior status to Palestinian citizens and privilege the Jewish population. In occupied East Jerusalem, where Israeli law is applied in violation of international law due to the illegal annexation, Palestinians are denied secure legal status, respect of their property and the right to unite with spouses and children originating from elsewhere in the occupied West Bank or Gaza Strip among other basic rights.

Third, lessons learned from the treatment accorded by Israeli courts to property claims of Israeli settlers and Palestinian petitions against the application of the [Israeli Absentees’ Property Law \(1950\) in occupied East Jerusalem](#) confirm that these courts play a central role in “[legitimizing the illegitimate](#)”. This assessment is increasingly shared by legal scholars and practitioners who have concluded that, overall, Israeli courts, in particular the Supreme Court, function to deflect international criticisms and pressures while legitimizing and empowering Israel’s discriminatory regime. This regime is best characterized as a regime of apartheid over the Palestinian people and a colonizing power in the [occupied Palestinian territory](#).

### The Future Trajectory Proposed by the Coalition

The largely negative balance presented above does not necessarily mean that all Palestinian interventions in the Israeli legal system should stop. Such interventions, however, must not be the objective *per se*. Rather, use of Israeli law and courts should be one (small) step in an international legal strategy, which exposes the lack of due process and biased decisions of Israeli courts and administrative authorities and utilizes the latter for seeking remedy in domestic courts abroad as well as in the International Court of Justice and the International Criminal Court. Such a Palestinian legal strategy must be coherent, inclusive and coordinated: interventions in foreign/international legal mechanisms must be designed in a manner that serve the aim of achieving legal decisions and advisory opinions on Israeli apartheid and colonialism that will – eventually – force states and the United Nations to hold Israel accountable to its responsibilities under international law, i.e. to cease its serious violations, make reparation to the Palestinian victims, and respect the entire set of its international obligations, including respect of the right of the Palestinian people to self-determination.

The Coalition is seeking to facilitate the overdue debate about such an international legal strategy and convened an [international law conference](#) in conjunction with the Birzeit University Institute of Law for this purpose. In addition to options, priorities and obstacles ahead, this conference identified a number of steps that should and can be immediately taken: Palestinians, first of all Palestinian civil society engaged in international legal advocacy and campaigning, should restore the consensus that the right of self-determination is a right of every Palestinian irrespective of geographic location, and that the right to reparation – foremost return of the displaced and restitution of property – is the right of every Palestinian victim, including Palestinian citizens of Israel and the 1948 refugees. Second, agreement must be reached about the appropriate legal definition and analysis of Israel's regime over Palestinians since 1948 as a system of apartheid, colonialism and population transfer (ethnic cleansing). Finally, there has to be a firm commitment by Palestinian civil society, in particular leading human rights organizations, to promote this analysis at all times, locally and abroad, because only a sustained and collective effort can have the desired impact on the Palestinian political leadership, governments, diplomats and donors, who collude in fragmenting the Palestinian people and our country, trivializing Israeli violations and international crimes, and undermining access to justice.

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## Litigating in the Occupier's Court: A Reading of the Palestinian Authority's Position

by Mohammed Elias Nazzal\* for the Palestinian National Authority Wall and Colonization Portfolio\*\*



Israel's Annexation Wall, view from Aida Refugee Camp, Bethlehem.  
(© Liliolivares.com, 2010)

The applicability of international humanitarian law came into effect with the subordination of the West Bank and Gaza Strip to the Israeli occupation in 1967. Both customary law and treaties – the 1907 Hague Convention Respecting the Laws and Customs of War on Land and the 1949 Fourth Geneva Convention on the Protection of Civilian Persons in Time of War – require that an occupying power must be temporary and limit changes to the legal system that preceded it to cases of extreme necessity.

Military Order No. 2 of 1967, issued by the Israeli Military Commander, integrated the aforementioned provisions and kept in force laws that preceded Israel's control of the occupied Palestinian territory, which could have been in line with international humanitarian law. However, the occupying power's [policies and practices](#), such as the imposition of Israeli civil law on occupied East Jerusalem and amending the scope of pre-existing laws through military orders, have been completely at odds with the rules and norms of international humanitarian law. The most dangerous practices are those that target Palestinian existence on their land, including natural resources and immovable properties. Policies are implemented by Israeli laws and regulations of land, planning and building, and powers of judiciary bodies including quasi-judicial committees.

Extension of the Israeli Supreme Court's jurisdiction over the occupied Palestinian territory was rationalized as a means to provide oversight in monitoring the actions of the Israeli military. In the beginning, the Palestinian position rejected the extension of jurisdiction and refused dealing with the Supreme Court,

considering it in serious violation of the norms of international humanitarian law and requiring a boycott. Despite the legitimacy of this principled stand, rejection posed significant challenges to Palestinians confronting the enterprise of Israeli occupation. For instance, as a result of Israel's illegal annexation of Jerusalem and the subjection of it to Israeli civil laws, Jerusalemites had only two options for challenging Israeli policies aimed at expropriating their properties and destroying their homes: either to revert to using the Israeli court or to adhere to the initial boycott position and not challenge the implementation of the measures through the courts.

Early Palestinian discussions never abandoned, not even for a moment, the reference point of International Humanitarian and Human Rights Law. However, in practice international law did not protect Palestinians from Israeli violations. As a result, both the lack of international protection and imminent daily threats continue to inform the official Palestinian position. Before the Oslo process the Palestine Liberation Organization's position for a boycott was expressed through elected mayors, the National Guidance Committee and the Unified National Leadership. After Oslo, the official Palestinian position is expressed by the highly pragmatic approach of the Palestinian Authority. The Palestinian Authority, as a project, sought to find a stance between two antithetical compulsions.

Originally, the Palestinian position rejected using the legal system so as not to confer any legitimacy on Israeli judicial measures that violate obligatory rules of international law. Additionally, Israel prevented Palestinian institutions from litigating before the Israeli courts. However, this ban was not imposed on Palestinian individuals and groups. Palestinian institutions provided financial support to affected persons to subsidize court and attorney fees, land surveys and plans, the costs of aerial photographs as well as fees of experts or specialists who examined fingerprints and provided other services. This is exactly what the Palestinian Authority is doing today.

What I want to emphasize here is that neither of the two positions (one that on principle rejects participation in the Israeli judiciary trap and the other that calls for exploiting the narrowly available margins of opportunity within the legal system) legitimizes extension of Israeli judicial power to the occupied Palestinian territory. The Israeli justice system remains an illegal implement of the colonial and occupying power. Nor do these positions end at the Israeli military courts or reduce the necessity of taking up Palestinian human rights in international judicial forums, which requires exhausting all domestic judicial measures.

The central difference between the two positions is motivated by a feeling (from the majority of Palestinians) of frustration by the lack of will or inability of the international community and the Palestinian leadership to compel the Israeli occupying power to respect the binding rules of international law. The Palestinian leadership fears losing control of the actions of affected Palestinians left without practical alternatives to attempting the courts. Both the general feeling of frustration and the Palestinian leadership's lack of control have led to the overwhelming practice of the idiom: *necessity knows no law*, legitimizing dealing with the courts of the occupation.

Despite its pragmatic stance, the official Palestinian position has maintained a number of unwritten (until now) principles constraining its support for interactions with the Israeli legal system. It is worth mentioning the most important of these regulations particularly those that involve real estate, which are:

- In order to prevent Israel's claim that colonization was implemented with the consent of Palestinians, a principled prohibition against accepting compensation for damages that are ongoing and/or damages caused by the occupation;

- A land swap or exchange is prohibited, irrespective of losses or gains;
- A compromise is prohibited (Israeli court justices usually encourage parties to seek a settlement rather than a ruling) even if the price of rejecting one is a lost lawsuit;
- Suggesting alternatives, such as negotiating an alternative path for the Separation Wall, is prohibited because such alternatives are illegal as long as they are located in occupied territory;
- For the same reason, the principle of arbitration is unacceptable;
- It is prohibited to waive rights or accept interim procedures such as renting;
- It is mandatory to invoke the norms of international humanitarian law and other relevant international laws as the foundation for all legal positions, which means to prohibit conferring legitimacy on the occupation's illegal procedures while emphasizing the rights of protected persons and civilians.

The principles listed above may seem to be contrary to the due process required for pursuing justice in a law-abiding state. For example, under normal conditions compensation derived from an agreed settlement between the parties may indeed achieve just resolutions. The Palestinian Authority's rejection of compensation may seem problematic and unreasonable. The same could be said about the prohibition against suggesting an alternative path to the Wall, rejection of accepting alternatives, rejection of arbitration, etc. However, such prohibitions are essential given the context of injustice implemented, in part, through the Israeli legal system. A Palestinian approach to the law is determined by the disparity between 'normal' conditions of a legitimate authority that confiscates land for public use and the Palestinian reality: occupation forces that confiscate land for exclusive colonization purposes. As such, it is impossible to accept the 'fairness' of compensation, arbitration, or alternative routes as long as they are implemented by an illegitimate authority – the occupying power.

Finally and in my personal opinion, there are three reasons why the long held Palestinian approach to engage, albeit with limitations, with the Israeli legal system continues without serious revisions despite decades of disastrous experiences, the continuing occupation and the emergence of a new fundamental variable, which is the recognition of Palestine as a non-member state of the United Nations providing more avenues for accessing international judicial forums. They are:

- The continuous pressure and the diversity of the challenges mentioned above facing all the occupied Palestinian territory creates many instances when using Israeli courts is the best of bad options. For instance, to delay the demolition of a home requires filing a petition with the Israeli legal system. Challenging falsified ownership documents in favor of Israeli colonies and in rejection of Palestinian rights requires appealing the Israeli Magistrate's Court.
- There are several parties who benefit economically from the continuation of this reality. It may sound a bit strange, but let us imagine the number of beneficiaries who will lose sources of income if the Palestinian Authority implements a decision prohibiting Palestinians from addressing their claims in the Israeli courts?
- The need to avoid undesirable confrontation with many concerned actors. The adoption of a new approach toward the Israeli legal system is not free from political pressure or backlash, including from international actors, which is undesirable for many of the decision makers. Altering the Palestinian Authority's approach to the Israeli legal system puts into question the type of relationship the Authority keeps with the Arab states and Europe in addition to the weight of confronting Israel and its allies.

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## Israeli Military Law: A Tool to Legitimize Oppression and Injustice

by *Ayed Abu Eqtaish\** for *Defence for Children International – Palestine*

Israeli soldiers arrest a Palestinian during clashes near Huwwara checkpoint near Nablus, West Bank. (© EPA-ALAA, 25 February 2013 BADARNEH)



**T**he Israeli military law framework, made up of over 1,700 military orders applied to the occupied Palestinian territory (excluding East Jerusalem), is used to sanction and legitimize the implementation of an oppressive and violent prolonged military occupation. Israeli military law works to disconnect individual soldiers, military prosecutors, military judges and others from their choice to implement occupation and deny rights to the Palestinian population. The Israeli military commander of the West Bank attempts to escape responsibility by distancing himself from the legal code (military orders) and also to show its independence, and demonstrate the rule of law notion. Such attempts are lost on us.

Separation of powers, a fundamental democratic principle, does not exist in the Israeli military law system. Instead, an Israeli military commander has legislative, judicial and executive authority over the occupied Palestinian territory. An Israeli military commander unilaterally issues military orders, determines how they will be applied and enforces each order with the might of Israel's army and governmental authority. Palestinians have no democratic input into the military orders that control their daily lives. Israeli military orders are not laws, though they function as such and are intended to give a legal veneer to the institutionalized system of discrimination.

Israeli military law does not seek to administer justice. The Israeli military law framework is a tool for legitimizing oppressive practices and punishing the Palestinian population. Acting in accordance with or implementing unjust and discriminatory military laws does not absolve an individual from responsibility or add any value to the law itself.

The Israeli military court system is designed to protect “Israel’s security”, more specifically the security of Jewish-Israeli citizens above all else. Israel retains the right to maintain “public order” and control the occupied Palestinian territory through the criminalization and punishment of all forms of Palestinian resistance to the Israeli occupation, regardless of its gravity and violent or non-violent nature.

The Israeli military court system exists to prosecute Palestinians arrested by the Israeli army in the West Bank accused of committing ‘security’ and other offences. The military law and the emergency law applicable in the Israeli military courts includes a variety of offenses common to domestic criminal codes, but also includes more occupation-related or political offences including membership to a banned organization or participation in protests. Israeli military law denies basic and fundamental fair trial rights and fails to respect standards of international law.

The scope of Israel’s military law system is extremely wide, affecting all aspects of Palestinian daily life. All Palestinians living in the occupied Palestinian territory are ruled by military law in various ways.

### “Security”

Israeli officials and pro-Israel organizations claim that Israel is a “democratic, Jewish state” and the narrative of “security” is relied on heavily when perpetuating this idea. The “security” narrative is used to justify the disruption, intrusion and destruction of Palestinian lives preventing any sense of normalcy. The issue of “security” overlaps with various Israeli policies, political and economic, concerning Israel’s relationship with neighbouring and foreign countries. The “security” factor regularly appears in Israel’s political statements, whether at the domestic, regional or international level. With “security” as the justification, Israel has managed to pass several domestic policies that legitimize practices violating universal human rights principles and obligations.

Israel promotes the concept of “security” as a neutral notion, but in reality the rights of Jewish-Israeli citizens are protected without any consideration for the violations implemented to achieve that objective. Israel regularly claims that the environment in which Israel is located is a hostile one and, therefore, necessitates the systematic domination and subjugation of Palestinian rights. Israeli military law is used as a tool to further a prejudiced “security” of Jewish-Israeli interests over Palestinian rights.

### Incarceration and Control

The Israeli military court system was created when Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip in June 1967. The military court system is part of the Israeli military administrative system designed to govern and control the Palestinians living in the occupied Palestinian territory. It began with the occupation and will continue as long as Israel continues its occupation of Palestinian territory.

The primary form of subjugation and control of Palestinians living in the occupied Palestinian territory has been and continues to be mass arrests. Since the start of Israel’s occupation in 1967, the Israeli army arrested hundreds of thousands of Palestinians, including men, women, and children and systematically prosecuted them in Israeli military courts.

Although arrest, trial and detention are components of administering justice in legal systems all around the world, the Israeli military court system is not interested in administering justice. The Israeli occupation is about control and the military court system is used to implement that control. The rate of arrests among

the Palestinians throughout the prolonged Israeli occupation is high by all standards. During periods of political tension in the occupied Palestinian territory including the first and the second intifada, arrest rates among Palestinians were the highest in the world as a percentage of population.

Rates of detention are not always an indication of the prevalence of crime, or punishment indicating violations of the law. However, it can indicate how the law is used to control a population. Analysing the boundary between ‘legal’ and ‘illegal’ acts is important for such an understanding. Where the law criminalizes many acts and behaviours, including those that fall within universally protected human rights norms, is itself an indication that the laws are unjust. While Israeli military law considers mass arrests of Palestinians to be ‘legal’, this does not equate with justice given the fact that the law itself is discriminatory and fails to ensure basic and fundamental due process guarantees. Such laws are also designed to restrict individuals’ rights to protest peacefully.

### **Military Law and the Rights of the Child**

The Israeli military court system has undergone a few cosmetic upgrades over the last three years, which have not affected the nature of this system designed, as it is, to control and subjugate instead of administer justice. Specific changes include procedures related to children such as the establishment of a juvenile military court, which raised the age of majority from 16 to 18 years and reduced the period of appearance before the judge for the first time. These amendments have not delivered any new rights to child detainees or additional protections that would actually attempt to end the widespread and systematic practice of ill-treatment and torture of Palestinian children during arrest and interrogation.

The recent amendments to military law failed to reduce the period of imprisonment that can be imposed on children. They failed to provide bail for the release of children during legal proceedings. By default, the majority of Palestinian children taken into the Israeli military court system are held in pre-trial detention for the duration of legal proceedings against them.

The bottom line is that any legal system designed to control and subjugate is not capable of administering justice, and the military law amendments discussed do not alter the purpose or nature of the Israeli military law framework. It aims to suppress the legitimate aspirations of the Palestinian people for liberation and self-determination. The systematic discrimination in law and its enforcement is an essential feature of this system. Furthermore, a legal system that is discriminatory does not take into consideration the best interest of the child, given that Israel’s first and last concern is to maintain the “security” and public order with its vast implications – limitations on individuals’ ability to exercise their freedoms and basic rights. In short, as St. Augustine wrote: “An unjust law is no law at all.” It is in the spirit of law to confront and break unjust laws.

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## The Injustice of the Israeli Judicial System: Experiences of the Jerusalem Legal Aid and Human Rights Center

by Rami Saleh\* for the Jerusalem Legal Aid and Human Rights Center\*\*



Blue and green identity cards are manifestations of a tiered system of rights through residency to Israel proper and East Jerusalem (blue) or the West Bank (green). (Source: jfjf.com)

There is a longstanding debate among Palestinians and human rights organizations in Palestine about turning to the Israel judicial system and whether doing so confers legitimacy on the Israeli occupation and its judiciary. Some Palestinians call for a thorough boycott of the Israeli judicial system since it is biased against Palestinians and implements unlawful legislation and policies. Other Palestinians see importance in using the Israeli judicial system as a tool to obtain limited benefits for Palestinians and to obstruct the Israeli authorities' policies. Even in Jerusalem, which was unilaterally annexed to Israel against principles and provisions of international law, the discussion continues to be held despite its residents' subjection to Israeli civil law instead of military law.

For more than thirty-five years of litigation work challenging the Israeli judiciary system on behalf of Palestinian rights,<sup>1</sup> the experience of the Jerusalem Legal Aid and Human Rights Center<sup>2</sup> has demonstrated that it is possible to mitigate the damage of the occupation and even block instances of their policies by resorting to the Israeli judicial system despite the fact that its laws are unjust. The Center will continue with this strategy until it is convinced that boycotting the Israeli judicial system has greater benefits for the pursuit of Palestinian rights. It is important to note that the Center based most of its petitions in Israeli courts on international law, even when those laws were in conflict with the laws and procedures of the occupying forces. This paper outlines two main conclusions drawn from our experiences: 1. An unfair Israeli judicial system demonstrated by samples from the Center's work, and 2. Employing the unfair Israeli judicial system can minimize the damage and suffering experienced by Palestinians.

**First Conclusion** – An unfair Israeli judicial system demonstrated by samples from the Center’s work: The Center’s accumulated experience representing Palestinians in court confirms the unfairness of the Israeli judicial system. For instance, over the last few months the District Court of Jerusalem issued two discriminatory rulings in which the common variable was the identity of the petitioners: the District Court of Jerusalem ruled against Palestinians’ rights. These instances clearly demonstrate the prejudice of the Israeli judicial system. Following is a brief on the two incidents that occurred within the cases of “the waste in Kufr Aqab” and “the translation of documents related to the establishment of a National Park on At-Tur and Al-Issawiya lands.”

**The Waste in Kufr Aqab:**

In March 2012, garbage drastically accumulated in the neighborhood of Kufr Aqab in Jerusalem, as a result of the Jerusalem Municipality’s neglect of providing collections. The Municipality previously provided garbage collection services once a week (with a maximum of two times per week). A sudden disparity in that already minimal service-provision compelled the residents to file an urgent appeal through the Center to the District Court in Jerusalem.<sup>3</sup>

In June 2012, the District Court ruling instructed the Municipality to implement quality improvements to the waste collection services in the neighborhood. The Court compelled the Municipality of Jerusalem to raise the annual budget for the collection of waste from NIS 2,000,000 to NIS 3,000,000 (\$600,00 to \$900,000), and also obliged it to collect 840 tons instead of 350 tons of waste along with other improvements.<sup>4</sup> The Center opened a lawsuit against the Municipality of Jerusalem and the Mayor Nir Barkat (Barkat was named in the case) for its failure and neglect during the previous period. The Center’s legal staff was informed that fining the Mayor Barakat was an absurd position for the court to take and the judge rejected their request.<sup>5</sup>

**The Translation of Documents Related to the Establishment of a National Park on At-Tur and Al-Issawiya Lands:**

In November 2011, the District Committee of the Jerusalem Municipality announced its plan to establish a National Park on the lands of At-Tur and Al-Issawiya through confiscation of 741 dunums and stifling expansion of urban Palestinian growth. This plan was open to objection for a 60 day period. In response, the Center utilized an innovative legal strategy in order to amass a larger number of objections by focusing on the responsibility of the District Committee to translate planning documents into Arabic.<sup>6</sup> The District Committee rejected the Center’s appeal prompting the Center to petition the District Court in Jerusalem demanding that the District Committee translate the documents.

Several deliberations were carried out in front of the District Court before the decision was issued in December 2012.<sup>7</sup> In his decision, the judge rejected the Center’s demand that the District Committee translate documents. The judge ruled that the cost of the translation should be paid by the applicant and not by the District Committee. The second fundamental issue taken into consideration by the Court was that the Center was fined NIS 10,000 (\$2,900).<sup>8</sup> The legal unit of the Center interpreted the fine as an attempt to discourage appealing decisions of the High Court. The fine was depicted to represent the “Court’s costs” levied on the grounds that the Center had wasted the Court’s time during the previous months. Israeli law guarantees the free access to court documents.

**Summary:**

In the case of Kufr Aqab, even if the District Court of Jerusalem confirmed that the Municipality was responsible for providing basic services to the neighborhood and that this burden was deliberately shirked, the judge refused the Center’s lawsuit to hold the Municipality accountable for neglect. In the translation



case, the District Court imposed a fine on the Jerusalem Center for NIS 10,000 exemplifying the prejudice of the Israeli judicial system towards Palestinians and the lack of its integrity.

The conclusion of the Center's experiences in these two cases, both of which played out in the same court, is that when it comes to the claims of Palestinians their rights are refused in front of the Jerusalem District Court (and the Israeli court system in general) and the Municipality will not be held accountable. Rather, Palestinians risk being punished for pursuing fundamental rights – such as the translation of documents – through disincentivizing mechanisms like the NIS 10,000 fine incurred on the Center.

**Second Conclusion** – Employing the unfair Israeli judicial system can minimize damage and suffering: Palestinians widely conclude that the Israeli judicial system lacks integrity. Statements from Jewish-Israeli judges that Palestinian defendants are equivalent to an “enemy” (and it is impossible to be lawful with your enemy) such as testimonies made by Colonel Jonatan Levy – a military court judge, disrobes any veneer of fairness or the pursuit of justice through the Israeli courts.<sup>9</sup>

The Palestinian community is aware that the roof of justice in the Israeli judicial system is very low and does not meet the basic standards of justice. So, the question arises: Why do Palestinians head to the Israeli judiciary even if they know about the prejudice of the judicial system against them? Three main reasons explain the motivation for Palestinian use of the Israeli judicial system.

### **1. To Minimize Damage and Reduce Cost as Much as Possible**

In many cases Palestinians do not have any choice but to appear in front of the Israeli judiciary. For example, a Palestinian will be made to appear in Court in the case of an arrest. If he were to refuse appearing in Court after his arrest, the imposed conviction and fine are substantially more severe. Similarly in cases of house demolitions in Jerusalem, if the accused does not appear in Court his house will be demolished immediately and the value of the fine will be automatically increased.

### **2. Obstructing Israeli Projects**

Palestinian institutions use gaps in Israeli law to impede various Israeli projects such as the expansion of colonies, forced population transfer of Bedouin communities in West Bank Area C or the Naqab, or the confiscation of land in order to build housing projects. Israeli intentions for implementing these schemes are clear and not subject to cancellation.<sup>10</sup> However, rather than accepting the time frame set by the Occupation, Palestinian institutions seek to offer a defense against their colonial tactics by imposing obstacles to these plans and impeding the ideal time frame determined by the Occupation, hoping that meanwhile there will be changes in political or international pressures that will be capable of halting these projects.

For instance, the Center along with other legal institutions challenged the establishment of a National Park through the confiscation of 741 dunums of land belonging to the neighborhoods of At-Tur and Al-Issawiya, as described above.<sup>11</sup> The Center was able to freeze implementation of the plan for more than 16 months, until mid-April 2013, and has since facilitated 280 submissions of individuals' objections against the plans for the National Park.<sup>12</sup> These objections have yet to be considered by the Israeli bureaucracy. Additionally, in mid-October 2013, the Israeli Minister of the Environment released a decision to freeze work on this plan. The Center intends to prevent the Occupation authorities from imposing ‘facts on the ground’ for another 16 months, at least.

Another important example of small successes using the legal system is from the Jerusalem neighborhood of Sheikh Jarrah. Colonists' organizations have sought to take possession of 28 properties in the

neighborhood through forged ownership documents since the 1970s. By resorting to the judicial system, it was possible to obstruct these seizures for more than 40 years.<sup>13</sup>

### **3. Exhausting Domestic Avenues**

The tactic of exhausting all law-based procedures of local judicial institutions can be considered as a preparatory step before heading to the international arena such as the International Criminal Court or the International Court of Justice. Using the domestic court systems requires Palestinians to document and defend their cases, often includes reference to international law, and, most importantly, repeatedly confirms the point that Palestinians have exhausted local remedies for justice and accountability, and that their only remaining option is to utilize international mechanisms. Thus, Palestinians will be prepared in the case of authentic political will on the part of the Palestinian leadership to pursue prosecution of Israel for its violations of Palestinian rights through international forums.

In conclusion, the case of Jerusalem confirms that the Israeli judicial system is prejudiced against Palestinians and Israeli laws are only an external cover created to legitimize violations carried out by the occupying power against the Palestinians. Within such circumstances, the Center turns to the Israel judicial system in order to alleviate the violations borne by the Palestinians.

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\*\**Translated from the Arabic by Halimah Al Ubeidiya.*

\*\*\* *Endnotes: See online version at: <http://www.BADIL.org/al-majdal>*

## Surgical Use of the Israeli Legal System

by Mossawa Center: The Advocacy Center for Arabs in Israel



Four Palestinian residents of Israel from the unrecognized village of al-Araqib in the Naqab desert sit in a Bir'As Sabi' court before their hearing on 27 August 2013. The men were arrested as they were trying to rebuild a tent demolished by the Israeli authorities. To date, the village has been bulldozed 63 times (© Oren Ziv / ActiveStills).

The Israeli legal system pervasively discriminates against Palestinian citizens of Israel. The Mossawa Center strives to protect the individual and collective rights of Palestinian citizens of Israel from discrimination. In order to do so, our strategy is to advocate at every international and domestic opportunity. Specifically, Mossawa works to combat racism, increase women's participation in elections, develop youth programs and advocate against the State of Israel's institutionalized discriminatory practices.

The debate about the Palestinian community's political power, parliamentary participation and use of the legal system varies depending on whether they are exposed to Israeli civil or military law. Meaningful intervention to protect Palestinians with residency documents to the West Bank and Gaza Strip is clearly limited by a legal system that fails to protect Palestinian human right against the military regime used there. Possession of Israeli citizenship enables more opportunities to challenge the legal system for the upwards of 1.5 million Palestinians.

However, even with citizenship the Israeli legal system is limited by conflicting founding principles. The internal conflict between Israel's Jewish and democratic notions dooms its legal system to discrimination against its non-Jewish political minority, the largest such minority being the Palestinians. Mossawa's is a struggle to uproot the discrimination within the legislation rather than fighting a specific symptom.

## The Supreme Court and Palestinian Citizens

Palestinian citizens of Israel constitute 20 percent of the population, yet are not recognized as an official minority by the state making it more difficult to assert collective rights. Collective rights require special measures that assure appropriate protection of the identity of the minority group and its collective interests. The purpose of advocating for collective rights is to grant Palestinians appropriate legal protection on the individual and collective level. Individual rights include civil and political rights as well as social, economic and cultural rights.

Palestinian citizens of Israel encounter discrimination in the legal norms and system. Even so, the Supreme Court rarely finds a law to be discriminatory. Discriminatory laws exist alongside a number of specific laws in the Israeli legal system that forbid discrimination based on race and/or nationality, such as in matters of employment, entry to public places, as well as state allocation of funds to public institutions.

The Supreme Court makes many decisions influenced by the political environment of governing coalitions like the current one led by Likud. Because of its reception to the legislature's considerations, the Supreme Court overemploys the exception of national security to justify discriminatory practices. For example, consider the Citizenship Law that denies family unification. The Citizenship Law has been renewed based upon a state of emergency for the last 65 years. This is a systemic abuse and is discriminatory although the practice is enabled by the judiciary.

Because of the different legal framework, the path toward establishing equality for Palestinian citizens of Israel is unique from that of the residents of the occupied Palestinian territory. We must take action to fight for equality, to fight within the existing system for justice and peace. We must bring to the court cases where Israeli law is not applied evenly.

## Mossawa's Approach

Israeli courts are prejudiced against Palestinian citizens of Israel. The prejudice is shown by the duration of sentences, incarceration levels and degree of charges brought against Palestinians, for example. While changing the discriminatory laws is Mossawa's first priority, Mossawa uses the legal system as a last resort.

The major drawback to advocating for Palestinian citizens' rights through the Israeli court system is the risk of creating a precedent precluding additional litigation. For example, students instructed in Hebrew have smaller class sizes than students instructed in Arabic. Rather than take a case to the Supreme Court challenging the disparity between Jewish and Palestinian students, Mossawa brought a case on behalf of only one school, Al Rashidiyah, against the Lod Local Municipality and the Ministry of Education. By focusing on the individual school, the risk of creating a precedent precluding additional litigation is minimized. If the Al Rashidiyah litigation is not successful, other cases of discrimination are still open for further attempts.

Another approach to the legal system is exemplified by Mossawa's criticism of the State's cultural budget. After analyzing the state budget, Mossawa found that the budget for Palestinian culture was equivalent to 3 percent of the total budget. Palestinians make up about 20 percent of the citizenry. Such discrimination affects Arabic language development and Palestinian cultural development. The Arabic Language Academy, the sole Palestinian school for art, and all other cultural institutions are expected to survive

off of this budget providing little room for development. No Palestinian heritage museum exists in Israel and no Arabic films are selected for funding by the cinema foundations. Yet through co-financing and co-production with Israeli television stations, Hebrew cinema institutions are able to access funding of more than half a billion shekels.

Rather than immediately turning to the legal system, Mossawa sought a political solution by working in the Knesset. After attempting to influence the Knesset to allocate proportionate funding to the Palestinian community, Mossawa filed a petition with the Supreme Court. The response from the Knesset was to immediately end the political discussion. At the time of filing the petition, Mossawa had an information session scheduled with many of the Knesset ministers. The information session was cancelled and political channels are currently closed pending the result of litigation.

The legal system has its uses when used surgically and in certain situations. The risk of precluding any future litigation due to an unfavorable outcome is too great to justify using the legal system except when political approaches fail.

Utilizing every tool is necessary to combat discrimination. Mossawa's extensive work in the Knesset allows us to make a case by case analysis to determine when political approaches have failed, as in the case of the state's cultural budget described above. Working to create coalitions within the Knesset, providing information to the Knesset and to the media, and monitoring the implementation of legislation by government offices is key to creating a less-discriminatory legal system. Every tool at Mossawa's disposal is wielded in an effort to achieve equality for Palestinian citizens of Israel.



## Colonialism, Occupation, Patriarchy: The Impossibility of Achieving Justice for Palestinian Women

by Lucy Garbett\* and Manal Jubeh\*\* for the Women's Centre for Legal Aid and Counselling



A Palestinian protestor is detained by Israeli police during a demonstration against Israeli government plans to relocate Palestinian Bedouins in the Naqab desert, on 15 July 2013 in the southern city of Bir As Sabi. (©AFP; Davit Buimovitch)

The Palestinian people are subjected to different sets of laws depending on where they live – citizenship in Israel-proper; residency in the Gaza Strip, West Bank and Jerusalem; and wholly denied rights in the Shatat (exile community). The Israeli occupation's discriminatory tiered identification system particularly affects women. Palestinian women marrying men from a territory outside of theirs are extremely vulnerable in the case of a divorce, for example. Depending on where they are born, their children may end up with no identity at all, or they may be separated permanently from their mother in cases of contested custody.

Most of the Women's Centre for Legal Aid and Counselling's work is concentrated in the West Bank and Jerusalem, where the Centre navigates different judicial systems in order to ensure women achieve their rights. These various courts include the Israeli civil family courts, the Israeli religious courts, as well as the Jordanian Courts.

Most cases of women's rights the Centre pursues in Israeli courts occur in the religious courts. This court system in Israel was established mainly on the Palestine Order-in-council 1922-1947 enacting specific laws for some of the recognized religious communities. Religious courts are subjected to oversight by the Israeli Ministry of Religious Affairs and the Israeli Ministry of Justice. Moreover, Islamic religious court judges are appointed by the Committee for Nomination of Judges, an official committee that consists of representatives from the Israeli government. Less alienating are the Israeli Sharia courts where Arabic is used and, thus, women feel more accommodated.

The situation in Jerusalem is particularly difficult as there is a huge need for services yet Palestinian areas suffer from a lack of funding and insufficient service provision from the Israeli authorities. The Centre seeks to provide quality services to Palestinian women with a feminist vision: ensuring that they can obtain legal and social counseling as well as free representation in the courts, but only if they wish to do so after being informed of all their options. However, few cases end up being pursued in the courts for a number of reasons. Firstly, there is a general relegation of family disputes and gender-based violence issues to the private sphere. Secondly, there is hesitation about and stigmatization of approaching Israeli courts, especially in Jerusalem. Women from the most marginalized areas of Jerusalem such as Essawiyeh and Silwan face direct confrontations with the Israeli occupation, and, as such, are much more reluctant to pursue cases through the Israeli legal apparatus.

Multiple and overlapping legal systems causing legislative inconsistencies and a general lack of enforcement of court rulings limit women's rights. One example of this is alimony cases between couples that hold different identity cards (such as West Bank ID, or Jerusalem ID/Israeli citizenship). A woman with a Jerusalem identity card married to a man with a West Bank identity card may win an alimony case in the West Bank courts, however, due to the higher cost of living in Jerusalem the woman typically receives much less than she requires to sustain her family.

In divorce cases, for another example, the occupation forces women with West Bank IDs to return to their original place of residence with their families. In the meantime she must hire an attorney to pursue her case in the Jerusalem courts. She faces an additional financial burden with the requirement to obtain child custody or alimony.

Both the structures of occupation and patriarchy work against women's rights. Women with West Bank IDs married to holders of Jerusalem ID or Israeli citizenship live precariously when outside of the West Bank. Fearing arrest or deportation, undocumented women hesitate to approach the Israeli courts and to seek assistance or information from organizations if problems arise with their spouses. Due to the fact they do not hold residency status in Jerusalem, they are particularly marginalized as they are not entitled to a work permit, suffer from a lack of access to health services and experience restricted freedom of movement cutting them off from their extended families and other sources of social support. As a result, these women have few places to seek help and support when faced with abuse or other problems in the home. The Centre is the only Palestinian organization in Jerusalem that offers services to women without residency status.

Despite the impossibility of achieving justice for Palestinian women in the Israeli court system, the Centre believes that Israeli law can be used tactically in certain cases. The Centre uses whatever protection mechanisms are available, which include alternatives to the limited Israeli courts in Jerusalem. In extreme cases, for example, women may have to resort to the courts or the police in order to resolve their issue. In less extreme cases, a dispute may be resolved through family mediation facilitated by the Centre, tribal mediation, or through a signed contract between spouses facilitated by a lawyer without going to court. Out of principle, the Centre does not assist clients in legal representation in Israeli courts for inheritance or land disputes as negative ramifications may ensue regarding property rights that the Centre does not wish to take responsibility for.

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## Law as Tactic: Palestine, the Zapatistas, and the Global Exercises of Power

by Linda Quiquívix\*

Indigenous Women and Zapatismo (Source: Columbia University)



While the Palestinian struggle has its contextual specificities, the violence, dispossession, and disenfranchisement that Palestinians experience daily is not unique to them even in the present moment. Whether their condition is one conceptualized as “statelessness,” “occupation,” or “second-class citizenship,” that Palestinians must appeal to external sites and institutions for their “rights” renders their contemporary condition not unlike that of many people worldwide whose States, having undergone neoliberal restructuring in the last decades, have intensified their police functions and lost their effectiveness as sites where social inequalities could be directly addressed.<sup>1</sup> The weakening of the State’s redistributive capacity, its heightened role in the privatization of land and resources, the increased surveillance and punishment of its own citizens for the promotion of a “good business climate,”<sup>2</sup> and the crisis of representation associated with this restructuring has led many to similarly turn to non-governmental organizations (NGOs) and international legal bodies in the hopes to balance out inequities. In such a context, it has become the case for many that external appeals to “rights” have also come to form their center of protest even if they are not formally conceptualized as stateless people. This is a trend that has proven dangerous because, as Palestinians’ own troubled engagements with both international and Israeli legal venues have similarly revealed,<sup>3</sup> appealing to actors and institutions that have not historically been kind to them risks reinforcing the very forces that oppress them. In light of these realities, the question over what usefulness law and rights-based claims can have for emancipatory struggles worldwide has become all the more urgent.

Such common experiences should signal to us the existence of a [shared logic of domination functioning globally](#)<sup>4</sup> that can place Palestinians into an exchange of analyses with other subjects in struggle over what liberation strategies might be more effective for our time.<sup>5</sup> In the short space of this essay, I place some aspects of the Palestinian condition into conversation with Shannon Speed and Alvaro Reyes' analytic of how the Zapatistas in Mexico have been able to subversively deploy rights-based claims to work at the service of self-determination, as Speed and Reyes detail in their essay, "Rights, Resistance, and Radical Alternatives: The Red de Defensores Comunitarios and Zapatismo in Chiapas."<sup>6</sup> The Zapatistas,<sup>7</sup> an almost exclusively indigenous movement in the Mexican State of Chiapas that rose up in arms against the Mexican government on 1 January 1994;<sup>8</sup> took back and held onto large tracts of land; and subsequently underwent peace negotiations that would go unfulfilled by the State,<sup>9</sup> make use of "indigenous rights" not because they believe such rights will in themselves grant them autonomy, but because they serve as obstacles for the Mexican government in interfering with the Zapatistas' project to *construct* autonomy. While I am able to highlight only a few of its key arguments below, the essay is worth reading in its entirety. How Speed and Reyes highlight the Zapatistas as a concrete example of how "law" can be rejected as a force that would determine and limit what subjects in struggle are able to do, and be deployed instead as a tool that might provide them with space to construct what they themselves determine, bears significance for both analyzing and tackling the fraught relationship Palestinians and so many others have with rights-based claims and the use of legal venues in the contemporary context.

## Law and the Exercise and Circulation of Power

The Zapatistas, it is important to note at the outset, would reject notions that law is a question of innate "bad" or "good," and engage it instead as a relation of force that can be complicit and effective. In delineating how this could be so, Speed and Reyes argue that law's essence cannot be adequately mapped without analyzing "the law as a particular form and structure for the exercise and circulation of power."<sup>10</sup> "Law" under modern Western juridical thought, they point out, has meant a very specific type of exercise and circulation: one where a sovereign authority endowed with our "rights" (the ruler), is tasked with granting, recognizing, and enforcing them for us (the ruled).<sup>11</sup> This radical separation between ruler and ruled should signal for us a sharp contrast between the exercises of sovereignty and the exercises of self-determination, rather than their conflation.<sup>12</sup> For the sovereign, as Speed and Reyes write,

is an 'authority' that throughout the history of jurisprudence has been most effectively justified through the philosophical fiction of the 'contract.' The fiction posits that due to the fear of others, individuals in the state of nature give up their unlimited 'rights' to a sovereign. This sovereign, through the collection of these rights, holds absolute power within a society and is in turn charged with the task of mediating among competing individual interests with the goal of creating social unity and peace.<sup>13</sup>

So while "rights" can have multiple meanings, when they are exercised in courts and legal bodies, they are placed within a logic that renders them meaningful through the permission of such an external authority. These legal exercises assume that "politics" or the exercise of power more generally must take place through the positivist practice of attorneys, courts, and legislatures. And because these practices help promote the myth that people are not collectively capable of "doing politics" without the framework, consent, and support of an authority external to them, deferring to such an authority circulates power in ways that reinforce the very forms and logics of domination that movements for self-determination seek to struggle against.

It was in recognizing that such exercises do not do away with the relation of domination characteristic of warfare (but rather, perpetuates it through a different form and change of venue) that could lead Frantz Fanon and other revolutionary intellectuals to underscore the point: “To wage war and to engage in politics are one and the same thing.”<sup>14</sup> In turn, it is what would lead liberation movements worldwide to link military logic (i.e. strategy and tactics) to political battles to the point where they could even devise ways to deploy law back onto itself without letting it overcome them.<sup>15</sup>

### On Strategy and its Tactics

In maintaining that there is no inherent link between the application of law and the attainment of justice, critical legal analyses on Palestine are [wise to caution](#) that legal recourse should be engaged a means rather than an end.<sup>16</sup> But due to the modern legal system’s propensity to capture political activity into a circulation that reproduces social relations of domination, a sharper distinction could be made and securely maintained between the use of means (what we might refer to as “tactics”) and their relationship to the ends (the “strategy” that would guide the tactic). For if tactics are flexible and even disposable methods of achieving firm strategic objectives,<sup>17</sup> and if legal appeals are to be understood as only methods toward the greater objective of Palestinian self-determination, then law cannot function as merely a method when an extra-legal political project on the ground that Palestinians themselves actively shape and determine is missing—one that would guide the when, the where, the how—and even the *if*—of the use of law. Absent the strategy for self-determination, legal appeals can easily cease being tactics and become the strategy itself, shifting “politics” away from the people and channeling the bulk of their activity into a system with rules, conditions, and tendencies that are not of their own making.

The challenge here comes in believing that a political project can be created right now by Palestinians and other emancipatory movements that would allow self-determination to flourish irrespective of external legal approval. But indeed, mustn’t it? For, insofar as self-determination is to be the goal, self-determination by definition cannot be granted by an external body. For any emancipatory movement to ask an external authority to “grant” self-determination renders self-determination contingent on that authority’s will and recognition, thus providing that external authority the legitimacy to determine for them. Moreover, the activity of asking for self-determination to be granted is a productive act: it produces those doing the asking as subjects that believe that self-determination is a thing external to them, rather than existing in their own self-activity.<sup>18</sup> Put another way, the activity of deferring to others for our “rights” prevents us from believing it possible to exercise our rights ourselves. On the contrary, it renders us willful participants in the opposition’s strategy to keep us convinced of our own incapacity.

But how can movements begin creating the conditions for self-determination when they are confronted with violence? Here we might do well to recall that domination can take various, overlapping forms. While violent repression is one and coercion another, the most efficient forms are those fueled, not by weapons, but by the willful participation of the dominated into their own domination.<sup>19</sup> To briefly illustrate, during the First Intifada, Israel was at its most fatigued on the ground and weakest internationally because it was forced to make so central the use of force. This problem for Israel was then alleviated by Palestinians’ willful participation in the Oslo Accords, which had the effect of relieving Israel from relying so centrally on violent repression and rendering the State’s legitimacy and favorable reception stronger than it had been historically. Seen from such an angle, the term “peace process” is not at all inconsistent with the current state of affairs; [indeed, it is quite apt](#).<sup>20</sup>

This is not to say, of course, that willful participation by some Palestinians into their own domination



did not exist before Oslo, or that Israel has ceased resorting to violent repression since Oslo. The varied forms of domination (repression, coercion, willful participation) exist in overlapping and complimentary ways; each form's contextual development and degree of intensity depending on its efficacy in that given context. The argument here is that willful participation is a most efficient form and without a doubt, a most pernicious one because it obscures force. But the argument is also that the form used is not determined by Israel, but determined by the type of resistance that Israel is made to confront. In other words, it is resistance that is primary; the form that domination takes is the reaction.<sup>21</sup>

The recognition that Palestinians' willful participation in Israel's peace helps fuel their own deteriorating situation should lead us toward a further recognition: power is productive. And if power is productive, with willful participation so central in fueling and sustaining what is produced (and, conversely, with constant refusal so central in fueling and sustaining *what else* can be produced), it is possible to produce systems that continually channel power away from bodies that rule over society and toward the dispersal of power throughout society itself.<sup>22</sup> The Zapatistas, who I return to in the next section, provide a concrete example of the creation of such a system, along with an analysis of how such a system can then guide the tactical deployment of rights-based claims.

### The "Good Government" Strategy in Chiapas

With the inability of the Mexican State to comply with the constitutional recognition of indigenous rights and autonomy as negotiated under the peace accords that followed the 1994 uprising, the Zapatistas decided to unilaterally implement and defend their own rights and autonomy rather than continue waiting. They created within their territories their own system of government, one currently centered around the work of the "Good Government Councils" (*Juntas de Buen Gobierno*). The Councils are tasked with balancing out inequalities across Zapatista communities; mediating conflict; overseeing the implementation of laws decided by the communities themselves; and helping monitor the construction of projects such as subsistence cooperatives, autonomous schools, water systems, and collectivized clinics. The Councils also serve as contact points for national and international guests who wish to visit, donate, or ask permission to do research that is beneficial to the communities. Notably, the Good Government's structure and function was deliberately designed to [alter the power relationship](#) NGOs can have to the Zapatistas, for NGOs are today only allowed into Zapatista territory if they wish to [propose \(rather than impose\)](#) productive projects.<sup>23</sup>

In constructing their autonomy, it is important to emphasize, the Zapatistas do not seek independence to build another State under a new sovereign. Zapatista "autonomy" is guided by a radically distinct philosophy and practice of social organization: the principle of "rule by obeying" (*mandar obedeciendo*), a social relation wholly incompatible with and inherently antagonistic to sovereignty's relation of "command-obedience."<sup>24</sup> To replicate the latter would be fundamentally at odds with a project that understands its aim as the establishment of freedom, not a reversal of positions within domination, or a conversion of the oppressed into new oppressors.<sup>25</sup> The ideological clarity and implications here are profound, for as a strategy, it reveals the ordering of human relations over the past 500 years to be absolutely illegitimate while working toward making it wholly irrelevant.

The Zapatistas's system of self-government can be understood as a strategy to exercise self-determination if we understand that "government" is not a moral or ideological question of "bad" or "good,"<sup>26</sup> but a strategy to put the exercises of power into a specific circulation. The five Good Government Councils (so-called, the Zapatistas [say](#), "not because they are already 'good,' but in order to clearly differentiate them

from the ‘bad government,’<sup>27</sup>) are each headquartered in the zones of Zapatista territory and serve as coordination rather than centralization points for hundreds of Zapatista communities networked throughout Chiapas, each with local-decision making structures undertaken in assembly form that the Councils are held accountable to. Members of each Council are not politicians but members of the communities who rotate into positions, are immediately revocable, and are not paid. “This circular practice,” Mara Kaufman writes in an in-depth study of the Zapatistas’ theory and practice, “keeps power firmly at the base throughout the political process and makes political representatives, during their ‘turn,’ responsive and responsible to that base.”<sup>28</sup> This structure of organization also circulates power in a way that wards off the professionalization of politics and the specialization of governing, effectively doing away with the division between the ruler and the ruled. As Kaufman writes:

In this system, politics itself is not a sphere separate from all other realms of life: one does not become a politician; there *are no* politicians. Governing is rather a necessary social task in which all must participate to maintain organization and cooperation. [...] making government a common responsibility rather than a professionalized category delinks it from privilege or prestige and thus eliminates the temptations or vices of wielding power over others.<sup>29</sup>

With such a system on the ground, the Zapatistas can then deploy rights-based claims as a truly tactical maneuver. “Indigenous rights,” gained in the second half of the twentieth century by indigenous people worldwide demanding space for their customary practices to function unimpeded, are deployed by the Zapatistas as problematic obstacles for the Mexican State to interfere in their construction of autonomy.<sup>30</sup> That is, rather than believing in “indigenous rights” as an end goal that will grant them autonomy, the Zapatistas position such “rights” as impediments for the State, thus allowing the Zapatistas an ability to, Speed and Reyes emphasize, “accumulate the space necessary to further expand their internal autonomy projects.”<sup>31</sup> And as Speed and Reyes further point out, it is Zapatista community members themselves who study national and international human rights law, and are themselves trained in maneuvering the Mexican legal system and in documenting human rights abuses.<sup>32</sup> Such capacitation effectively does away with the need for intermediaries who may conceptualize “rights” differently and inadvertently reinforce the architecture of power that the Zapatistas’ project [seeks to dismantle](#) at local, national, and global levels.<sup>33</sup>

### Palestinians and the Global Exercises of Power

Legal appeals to self-determination, equality, and universal human rights can help raise awareness of and garner sympathy for some important struggles, especially among Western audiences. While this has indeed been the case for Palestine over the last two decades, it also cannot be ignored that the outcomes have been paradoxical: while awareness of and sympathy for Palestinians in the West is today at an all-time high, the situation on the ground continues to slip further into its most dire. Yet it may not be that these two phenomena are paradoxical but inter-related, as efforts to garner the ear and support of Western audiences require that protest methods be shaped into forms the West will deem legitimate. While these methods may be determined by Palestinians themselves (e.g. Boycott Divestment Sanctions, awareness campaigns, non-violent demonstrations), when their grounding strategy is legalistic they continue to assume that the right of Palestinians to self-determine and be treated equally as human beings will be ultimately granted by a small cadre of actors in the carefully controlled arenas of courts and legislatures. In the meantime, Palestinians are made to wait.

Having famously [declared](#) two decades ago that “We do not need permission in order to be free,”<sup>34</sup> the Zapatistas continue providing an example that self-determination exists in its own construction. Although

the strength and endurance of their project has made them a common referent for such autonomous philosophies and practices today, [autonomy's paths](#) take multiple forms and exist in diverse locations.<sup>35</sup> In Bolivia, for example, Raúl Zibechi highlights how the indigenous Aymara self-organize in the urban context of El Alto through general assemblies, neighborhood council meetings, and barrio community groups.<sup>36</sup> These practices have manifested into the provision and organization of municipal works; the operation and maintenance of schools, parks, and radio stations; and the creation of systems for conflict resolution and community justice. Intervening in the material conditions of their own daily existence has, in turn, strengthened their capacity to unleash powerful mobilizations that have defeated neoliberal projects, toppled presidents, and warded off co-optation into State structures. Likewise in Syria, Yasser Munif documents how the liberated town of Manbij, even while Bashar al-Assad's regime was still present on the ground, quietly constructed [local committees](#) networked in council-fashion to coordinate resistance activities between the town and its agricultural hinterland.<sup>37</sup> With the town now having forced the regime's ground forces to flee, the committees and council are shifting their emphasis toward self-governing activities that attempt to develop political and judicial mechanisms, even as they continue warding off the State and, more recently, al-Qaeda organizations seeking to co-opt their gains.

While emancipatory movements like those in Mexico, Bolivia, and Syria are being built by people who are not formally conceptualized as stateless, they nevertheless experience their States as openly hostile bodies and wholly inadequate as sites to balance out social inequalities. This has led them to construct systems themselves for resistance, survival, and ways of doing that are based on mutual care, dignity, and respect, building from that which already exists in their daily lives, and expanding, improving, and intensifying from there.<sup>38</sup> These practices are, quite notably, reminiscent of those that Palestinians themselves showed the world were possible during the First Intifada, and whose tendencies still exist today in places as diverse as the Palestinian villages inside Israel, the refugee camps, the Gaza Strip, Jerusalem, and the villages in the West Bank.

Such commonalities across the globe today should encourage us to more critically examine a shared logic of domination we are currently living under, and take seriously the [emancipatory strategies](#) that groups are themselves constructing and sharing with each other for mutual reinforcement.<sup>39</sup> This would entail, however, that our analyses radically shift away from a dependence on the legal categorizations that fragment and divide subjects in struggle worldwide, and examine instead the common experiences and potentials of the present moment. If, as Nimer Sultany can argue, legal compartmentalizations should not hide from us a common logic at work against Palestinian "citizens of Israel" and Palestinian "non-citizens" alike, irrespective of their legal status and geographic locations,<sup>40</sup> we can similarly put the Palestinian condition into conversation with others well beyond Palestine who are also resisting and organizing against discriminatory systems whose effects are also violence, dispossession, and disenfranchisement.<sup>41</sup> While legal categorizations can be helpful in pointing to the legal tools that are available to us in our specific contexts, they cease being useful when we allow them to determine who we are, what we are allowed to do, and whom we can walk with.<sup>42</sup>

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\*\*\* Endnotes: See online version at: <http://www.BADIL.org/al-majdal>

## Challenging Administrative Detention: Hunger Strikes and the Diffusion of Extra-Legal Resistance

by Julie M. Norman, PhD\*

The question of how Palestinians should engage with the Israeli legal system is complicated for prisoners and detainees whose current and future situations, both individual and collective, are inherently intertwined with that system. Some prisoners reject the system completely such as when Palestinian prisoner Marwan Barghouti notably refused to present a defense to his 2002 charges, maintaining that the trial was illegal and illegitimate, or when 70 detainees in Ofer Prison refused to attend their military hearings in 2012. However, despite the symptoms of illegitimacy in the military court system including a systematic lack of due process (and over 99.7 percent conviction rate), the majority of detainees do attend their hearings and trials, and lawyers from human rights groups like [Addameer](#) continue to seek justice in individual cases through the legal system. In addition, prisoners, former prisoners, and human rights Non-Governmental Organizations have attempted to further collective rights by appealing to Israel's Supreme Court and using international law mechanisms.

Supporters of Paestinian prisoners on hunger strike used this image on Facebook and other media spaces (© Hafez Omar).



However, from the early days of the occupation, in addition to pursuing judicial proceedings or other traditional justice mechanisms, prisoners have engaged in acts of extra-legal resistance. Like civil disobedience, this type of resistance occurs outside of given legal parameters, procedures and institutions, and aims to make the system itself unworkable. Actions have included the development of alternative

institutions (such as political, financial and educational systems within the prisons), noncooperation (such as refusing to comply with prison protocols or refusing to work), refusal of family or lawyer visits, refusal of meals and prolonged hunger strikes.

It might be assumed that prison-based resistance is quite literally confined to a particular time and place. However, such acts of resistance, including recent hunger strikes, have had a reverberating effect, diffusing beyond the temporal and spatial boundaries of the physical institutions to influence policy and inspire local, national and international activism. Indeed, prisoners' resistance has managed to preserve some sense of internal political unity despite external political fracturing, and has also maintained the support of the general population when support for political parties was lacking. Finally, the prisoners' movement has been able to maintain a spirit of resistance that challenges the perceived complacency of political leaders in recent years.

In this article, I explore the extent to which the 2011-2013 hunger strikes challenged the specific policy of administrative detention at both the individual and collective levels. After providing a contextual background, I discuss how the initial strikes of the detainees sparked broader prison strikes, popular mobilization, civil society advocacy and transnational solidarity actions, leading to some (eventual) individual releases, a verbal (if not actual) Israeli shift on detention policies, as well as international and United Nations condemnation of administrative detention. However, I point out that gains could have been even greater with a more coordinated, sustained strategy. I conclude that confronting the Israeli legal system requires a coordinated, multi-level approach that includes the leadership, agency and participation of detainees and prisoners themselves.

## Administrative Detention

The hunger strikes of 2011-2013 have brought increased attention to the issue of administrative detention, defined by [B'Tselem](#) as “detention without charge or trial that is authorized by administrative order rather than by judicial decree.” Administrative detainees thus differ from the majority of Palestinian prisoners who are prosecuted and sentenced in the military court system.

According to Israeli Military Order 1591 (passed in 2007 as an amended version of 1970s Military Order 378 and 1988s Military Order 1229) military commanders can detain individuals for a period of six months, which can then be renewed such that 79 percent of detainees have been held for more than six months. As there are [no limits](#) on the number of extensions, some have been held in detention for two or more years, while others are re-arrested within a year of their initial release.

The military order applies directly to Palestinians in the West Bank (and was used in Gaza until 2005 when it was replaced by the similar Internment of Unlawful Combatants Law) and, according to Addameer, has been applied to residents of East Jerusalem when the “alleged offense” relates to the West Bank. It is distinct from the Emergency Powers (Detention) Law that applies in Israel.

Administrative detention is legal under international law (see the [Fourth Geneva Convention](#), Article 78), but only in specific circumstances. As echoed by both the International Committee for the Red Cross and the Supreme Court of Israel itself, detention is only to be used when a person is deemed to pose an immediate security risk and only as a preventative (not punitive) measure. Instead, scores of Palestinians are held in detention at any given time (ranging from over 1,000 during the second intifada to approximately 135 presently), as Israel expanded the “security threat” concept to include Palestinians belonging to certain political parties, participating in unarmed resistance, or expressing opposition to the peace process.



## Extra-Legal Resistance to Administrative Detention: Hunger Strikes

The use of hunger strikes by Palestinian prisoners is not new; the first major hunger strike took place in Ashqelon Prison in 1970, serving as a foundation for at least 30 documented hunger strikes by Palestinian prisoners over the past four decades. The strikes have directly influenced the gradual realization of certain rights in the prisons, including improved food and better hygiene conditions, as well as access to books, writing materials and eventually radios and televisions; and were also instrumental in establishing negotiation policies between prisoners and the prison administration. The majority of these strikes were collective in nature, either across a prison or across the prison system. As experience with hunger strikes developed, prison leaders took steps to coordinate strikes with other prisons and with political parties, organizations and families on the outside, while physically and mentally preparing themselves and each other for the direct experience of the strike.

The ‘individual’ strikes of 2011 - 2013 differed in that they were undertaken by individuals rather than by the collective and these individuals were administrative detainees, rather than sentenced prisoners. The first individual strike began on 17 December 2011 by Khader Adnan who was arrested nine times since 1999. Adnan wrote in a [letter](#) to his wife:

The Israeli occupation has gone to extremes against our people, especially prisoners. I have been humiliated, beaten, and harassed by interrogators for no reason, and thus I swore to God I would fight the policy of administrative detention to which I and hundreds of my fellow prisoners fell prey (emphasis added).

Adnan’s fast continued for 66 days, until 21 February 2012, when a deal was reached for his release on 17 April 2012, four months after his arrest. Two days after the cessation of Adnan’s strike, on 23 February 2012, Hana Shalabi began a hunger strike to protest her six-month detention order. Shalabi had initially been arrested in 2009, then released in 2011 as part of the Hamas-Gilad Shalit prisoner exchange. Her hunger strike continued for 43 days, until a (controversial) deal was reached to release her to Gaza. At the same time, Bilal Diab and Thaer Halaleh began a hunger strike on 27 February 2012 in solidarity with Shalabi, with Diab ending his strike on 15 May after being given a guaranteed release date, and Halaleh ending his 77-day strike on 5 June 2012 upon his release.

Other individuals in administrative detention continued to adopt the hunger strike tactic in subsequent months, including footballer Mahmoud Sarsak (released July 2012), Samer Issawi (intermittent hunger strike between August 2012-April 2013), Jafar Ezzedine (November 2012-February 2013), Tareq Qa’adan (November 2012-February 2013), Akram Rikhawi (May-July 2012, renewed January 2013 when his date of release was not upheld), Yusef Shaaban Yassin (released February 2013), and Ayman Sharawna (deported to Gaza in March 2013).

The individual hunger strikers garnered widespread local support and international attention, and their actions contributed to the decision to launch a collective hunger strike from 17 April – 14 May 2012 with approximately 2,000 of the estimated 4,700 prisoners participating. The general strike ended with an Egypt-brokered agreement in which Israel agreed to allow prison visits from families living in Gaza, release some prisoners from isolation and limit the use of administrative detention, though these agreements have yet to be implemented. The renewed focus on prisoners also proved instrumental in the Palestine Liberation Organization’s July 2013 decision to resume peace talks, based in part on a US-brokered agreement in which Israel agreed to release 104 pre-Oslo prisoners in four phases.

## Diffusion of Activism: Local, National and International Dimensions

Historically, Palestinian prison leaders have taken steps to coordinate hunger strikes in conjunction with outside resistance, often through political party mobilization or via the efforts of prisoners' family members in their camps or villages. Actions took the forms of demonstrations, marches, protests, conferences and solidarity tents.

In the past two years, even when popular resistance was arguably lower than previous periods, the prisoners' cause, embodied by the hunger strikes, remained a salient, unifying issue. Nearly all major Palestinian cities erected solidarity tents with prisoners during the collective hunger strike of 2012 bringing together members of different political parties to organize around the prisoners' issue, and 54 percent of Palestinian university students indicated that the strikes inspired them to engage in protests or other activism.<sup>1</sup> Inter-party protests and demonstrations erupted around the prisoners' issue again in February 2013, sparked by the death of Arafat Jaradat, a prisoner in Israeli custody, combined with the deteriorating health of several individual prisoners on hunger strike.

Some of the local organizing efforts in the past two years have been more formal than in the past, coordinated by both governmental and non-governmental organizations that facilitate communication between prisoners and their families, the Palestinian public and the international community. For example, the Ministry of Prisoners' and Former Prisoners' Affairs, established under the Palestinian Authority in 1999, works at both the local and international levels. As Issa Qaraqe, the Minister of Prisoners' Affairs explained:

The ministry worked a lot with the local community here and with local organizations in mobilizing around the hunger strike[s]... The goal was to make the hunger strike and the prisoners issue the main topic of conversation in the local community. This played a major role in pressuring the Israeli side.<sup>2</sup>

Civil society organizations have also been involved in supporting prisoners, coordinating communication and engaging in advocacy, with groups like the Palestinian Political Prisoners' Club and Addameer, the Prisoners Support and Human Rights Association, working closely with the International Committee for the Red Cross and other human rights organizations to support prisoners and raise awareness, both locally and internationally. In addition to formal organizations, support for prisoners is also disseminated through informal networks and individual efforts such as the volunteer-driven Freed Prisoners Association, which

Hana Shalabi and Land Day. (© Husam Zakharia)



helps families communicate with prisoners via “video letters,” and fosters solidarity among families and community members.

On the international level, the hunger strike tactic was instrumental in leveraging attention and media coverage, especially via social media, with images and stories of Khader Adnan and other hunger strikers posted on Facebook, disseminated on Twitter and discussed on blogs. Meanwhile, the hunger strikes garnered responses from more official levels as well, with Richard Falk, United Nations Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories, reiterating his [condemnation](#) of administrative detention policies most recently in June 2013 and, perhaps most notably, multiple statements by United Nations Secretary General Ban Ki Moon speaking out against administrative detention as well as solitary confinement. For example, on 11 December 2012 in a [message](#) to the Conference on Solidarity with Arabs in Israeli Prisons, Moon commented:

Administrative detention should be applied only under clear parameters and in exceptional circumstances, for as short a period as possible and without prejudice to the rights guaranteed to prisoners. Those detained must be allowed to challenge their detention and, in the absence of formal charges, should be released without delay.

He went on to express his, “deep concern for the health and well-being of Palestinian prisoners, including those who had undertaken a hunger strike in the spring.” This top-level attention to the rights of Palestinian prisoners in general and the issue of administrative detention in particular reflects the complementary efforts of civil society advocacy and international solidarity campaigns, combined with direct actions on the ground, particularly protests at United Nations offices in the West Bank. All of these efforts were driven in part by the actions of the hunger strikers themselves, illustrating how the hunger strike tactic and the prisoners issue diffuses through various levels to bring pressure on the state through extra-legal and diverse channels.

## Limitations

Despite international attention, the issue of administrative detention continues, remaining one of Israel’s most efficient mechanisms for controlling dissent and opposition in the occupied Palestinian territory. As noted above, although the 2012 collective strike ended with the agreement that Israel would limit the use of detention, the policy continues to be employed.

At the international level, Palestinian officials like Qaraqe and human rights organizations like Addameer and Amnesty International continue to press the issue of administrative detention with the United Nations and the European Union, and have also organized meetings and conferences to better address other prison-related issues such as child prisoners, torture and abuse allegations, health conditions and prisoners’ legal status. However, broader activism regarding detainees, even those on hunger strike, has waned across horizontal solidarity networks and social media, as sustaining interest in the issue has proven difficult, especially as the initial “drama” of the tactic diminished.

Likewise, within the occupied Palestinian territory, numerous activists noted that, despite the demonstrations and solidarity tents, local support for prisoners was weaker than in the past, reflecting a broader shift in activism that has been evident in the post-Oslo period. As one former prisoner and activist explained, “After Oslo, the concept of resistance and the readiness for resistance in the Palestinian context has changed. Before that, the kind of knowledge and mobilization among prisoners and among Palestinians in general was

different from today.”<sup>23</sup> Indeed, the establishment of the Palestinian Authority following the Oslo Accords resulted in the major political factions focusing more on processes of institution-building and control of dissent, and less on national struggle and resistance, ultimately dampening popular mobilization.

From a prisoner perspective, while most prisoners supported the individual strikers the individualized nature of the strike marked a departure from the collective efforts of the past. Likewise, the demands of the individual strikers, while calling attention to the issue of administrative detention, ultimately focused on securing their own release rather than improving conditions or pushing for more collective rights, resulting in less solidarity among prisoners themselves and thus less sustained mobilization outside the prison. Even when the collective strike took place in 2012, many prisoners still lamented the lack of adequate preparation and organization that had been the norm in the past, especially in regards to coordination of mobilization inside and outside the prisons. It thus proved difficult to sustain the initial momentum around the issue, especially after the end of the collective strike. Indeed, the strike ended just before Nakba Day, a day noted for annual protests and demonstrations, which may have created more synergy between prisoners’ resistance and local mobilization if better coordinated through a broader strategy.

### Recommendations & Conclusion

There is no one way to confront the legal system in general or the issue of administrative detention in particular. As the past two years have indicated, challenges to the legal system come through various channels, from individual prisoners to local communities to international organizations exerting pressure in different ways. However, the last two years also reflect how detainees’ actions largely sparked mobilization at other levels, underscoring the importance of incorporating prisoners as leaders and participants in any broader movement.

Over the past two years, individual detainee actions have inspired other prisoners to engage in individual and collective strikes, while these strikes have further motivated solidarity actions at the local level through family and community mobilization. These local actions have complemented the efforts of Non-Governmental Organizations, the Ministry of Prisoners’ Affairs and, increasingly, international organizations by bringing more attention to the issue of administrative detention (and other prison-related grievances) and putting more pressure on the state through official channels. However, as noted above, much of the initial mobilization has waned, especially at the local level, in the absence of a broader strategy.

It is thus important to determine how the recent hunger strikes, and similar actions in the future, can be incorporated into a more comprehensive approach to confronting the legal system. It is not expected that every individual held in administrative detention can or should engage in a hunger strike. Yet, prison-based resistance, which includes a variety of tactics, is integral to the success of any broader strategy. Historically, the national movement has moved in parallel with the Palestinian prisoners’ movement, each working in tandem with the other. The past two years have indicated that prisoners’ issues, and moreover, their actions, can still create a ripple-effect of activism through various levels. Thus, developing a strategy to confront the legal system depends in part on leveraging the influence of detainees themselves and recognizing their role as agents and leaders in extra-legal resistance.

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## “When we sit to judge, we are being judged”: A Call for the Establishment of a Database of Israeli Judicial Complicity in International Law Violations

by Allegra Pacheco\*

Track marks of the heavy Israeli destruction machinery are all that is left after al-Araqib village was again demolished in 2012 (Source: BADIL's Ongoing Nabka Education Center).



When I first started litigating Palestinian human rights cases in the Israeli Supreme Court<sup>1</sup> in 1995, there were only about a dozen lawyers regularly involved in the business. Then, there were three strategies employed for cases regarding the West Bank including East Jerusalem. The first was to buy time – to prevent house demolitions, land confiscations, the denial of residency and to stop the torture. The second strategy among some of us was to litigate as a form of documentation, especially for future reparations and transitional justice tribunals. The third strategy was based on a naiveté that still existed then: that the Israeli Supreme Court could be persuaded to rule in favor of justice and equity in its policy toward Palestinians in the occupied territory. The theory for this last strategy was based on the fact that the Court decided to take on the legal responsibility for the actions of the occupation forces beginning in the early 1970s.<sup>2</sup>

Looking back almost twenty years later, one could argue that the first and second strategies – to delay violations against individual Palestinian victims and to build a record of violations – are still relevant, albeit the first in limited circumstances. However, the third strategy of relying on the Court to adopt moral and legal principles that promote justice and equity needs to be reexamined today.

Instead of providing protection and relief for Palestinians, over the years the Court has played an active



role in undermining Palestinian human rights. The Court created legal precedents that caused individual and collective hardship and suffering. Specifically, the Court issued and refrained from issuing, decisions that sanctioned almost the entire list of documented human rights violations in the West Bank: settlements, mass confiscations and misappropriation of public and private property, torture, collective punishment, unjustified destruction of civilian property, mass transfers and deportations, annexation of occupied territory, and refusal of the rights of prisoners and administrative detainees. Some of these human rights violations amount to grave breaches of international humanitarian law, i.e. war crimes.

After decades of litigation, we can no longer be naive about the Israeli Supreme Court: We are dealing with judges mainly drawn from former government and/or Israeli institutional positions with no legal (and at times moral) incentive to challenge the word of the Israeli security services and military. The Court's record demonstrates a prejudice toward Israeli state interests over the interests of Palestinian civilians living under Israel's occupation whose protection is the Court's responsibility.

If one collected the cases of all West Bank Palestinian petitioners in the Israeli Supreme Court over the years, one would find hundreds if not thousands of decisions and examples of judicial complicity in major human rights violations. Just from my modest caseload, I could point to instances where Israeli justices legalized unlawful house demolitions and prolonged administrative detentions; or sanctioned war crimes by refusing to intervene in torture cases, to stop the forced mass transfer of the Jahalin Bedouin to the Jerusalem garbage dump, and to prevent collective punishment in the cases of the destruction of homes of spouses and children of suicide bombers. If we included the Israeli military courts, the District and other lower courts, administrative tribunals and the judges of interrogation sessions, the number of cases of judicial complicity in human rights violations would easily be in the thousands.

Palestinians and lawyers may be able to create incentives to compel justices to rule more closely with international legal principles by compiling a database of judicial complicity in human rights violations. By drawing from two cases I litigated, the following two sections shed light on the ethical factors in the decision-making of Israeli Supreme Court justices and how we might influence them.

### Image Counts: The 1999 Torture Case

In September 1999 and after five years of litigation, Justice Aharon Barak and eight other justices unanimously decided to outlaw certain methods of torture and cruel treatment used against Palestinians by Israeli interrogators. The decision came after dozens of petitions were filed to stop the torture of Palestinians in which the Supreme Court refrained to intervene.

Though the prohibition on torture is absolute and carries no legal justification under international law, the Court's decision to ban *certain* torture methods was considered historic and made the headlines of the *New York Times*. Although the decision was bold within the Israeli context, the Court did not completely outlaw all torture and cruel and unusual punishment: It maintained the pretext of the 'ticking bomb' scenario (a situation in which the detainee allegedly has information that could prevent an imminent attack) and refrained from setting the legal standard according to the Convention on Torture. Furthermore, the Court suggested that the government pass legislation to explicitly legalize some methods and provide a legal defense for Israeli interrogators to preempt prosecution for practicing torture. Less than two years later, the Second Intifada broke out and almost all Palestinian detainees were treated according to the *exceptional* 'ticking bomb' scenario. Methods such as painful positioning and tight shackling were reinstated by the Israeli security services.

More than empathy for the pain and suffering of thousands of Palestinian detainees or receiving weekly appeals from human rights organizations describing torture cases, it was public international exposure of Court-sanctioned torture that played one of the most important roles in compelling the Court to make its ‘historic’ 1999 ruling. A few months before the ruling (after sitting on the Court’s docket for five years), students protested Justice Barak’s sanctioning torture of Palestinian detainees at his honorary degree ceremony at the University of Michigan. How much longer could the President of the Israeli Court, Justice Barak who is an annual guest lecturer at Yale University Law School, keep his dark secret away from his fellow Yale scholars? The cat was out of the bag and Israeli justices did not want their names associated with a decision approving torture. Their status and legitimacy depended heavily on the approval of their colleagues abroad. In short, naming and shaming began to have an effect. Barak admitted this in his 1999 decision:

Our apprehension that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our brethren require us to act according to the law. This is equally the standard that we set ourselves. When we sit to judge, we are being judged.

In this case, Barak and the Court appear to have been persuaded by the threat to their image beyond the legal and moral implications. As such, the ruling did not outlaw all forms of torture, but rather limited the crime just enough to elicit positive reactions within Jewish-Israeli society and in the West.

### A Rare Conscience? The Punitive House Demolition Case

For comparison, it is interesting to look at the language used in a rare instance of an Israeli Supreme Court justice who refused to be complicit in violating basic principles of justice and causing unjustifiable suffering to Palestinian civilians. It occurred in a dissenting opinion.

In 1997, the Israeli military wanted to demolish the house of the widow of a suicide bomber from Tzurif village near Hebron. The widow, Maysun Mohammed Ghanimat, was 24 years old and had four young children. Her husband had not intended to commit suicide, but the bomb detonated prematurely in a Tel Aviv café and he was killed along with three Israeli women. Following the bombing, the Israeli military arrested her family members. The widow suffered a nervous breakdown and was hospitalized leaving the traumatized children without their mother. The Israeli military claimed that the intended demolition was not punitive (in order to avoid being accused of collective punishment), but was meant to deter future bombers. As it had done for decades and in hundreds of cases, the Israeli Supreme Court of Justice led by the Court’s president Justice Aharon Barak accepted this argument while knowing that the military’s theory of deterrence was questionable. The Court threw out the petition and the house was destroyed. In a feeble justification, Barak wrote:

We are aware that the demolition will leave petitioner 1 and her children without the roof over their heads, but this is not the aim of the demolition. It is not a punitive measure. It aims, rather, to deter. Its outcome does pose difficulties for the family, but the respondent believes that this measure is essential in order to prevent further attacks on innocent people. He maintains that family pressure does discourage terrorists.

There is no absolute assurance that this measure will be effective. But considering the very few measures left to the state to defend itself against these “human bombs,” we should not despise this one. For these reasons I would reject the petition.<sup>3</sup>

Justice Michel Cheshin, the third judge on the panel refused to be complicit in this act of collective

punishment. He dissented and called the bluff of the Court's president and the military that this was not just an act of deterrence. He forcefully wrote:

On many occasions I have pointed out the difficulties inherent in exercising the powers granted by Regulation 119 of the Defense Regulations. ... In all these judgments I rooted myself in a basic legal principle, and from it I will not be swayed. This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. ... Petitioner 1 is the wife of the suicide murderer, and she is the mother of four small children. The woman and her children reside in that same apartment where the murderer lived, but nobody claims that they were accomplices in his plot to murder innocent souls. Likewise nobody claims that they knew about the intended attack. If we demolish the bomber's apartment we will simultaneously destroy the home of this woman and her children. We will thereby punish this woman and her children even though they have done no wrong. We do not do such things here. ... [W]hat I say now I have never said before. I deliberated long and hard until I reached this conclusion. This is the Torah that I learned from my teachers, and this is the doctrine of law that I have in my hands. I can rule no other way.<sup>4</sup>

Justice Cheshin unveiled the security argument and exposed the inherent illegality and human consequences arising from the demolition. Had other Israeli Court Justices stayed true to principles of justice and adopted Cheshin's conduct, the history of the Court on Palestinian human rights could have shifted profoundly. Unfortunately, Cheshin's dissent remained just that – a lone dissent without precedential value.

### Holding Israeli Justices Accountable

Though there is a growing movement for holding Israeli government officials who commit violations against Palestinians accountable, little focus is devoted to the role of the justices of the Israeli Supreme Court despite the fact that their role has been critical to legalizing Israeli violations.

It was clear to me as a human rights lawyer that if the Supreme Court objected to the planned action of the Israeli military, security services or civil administration (be it demolition, arrest, torture, etc.), the Israeli forces would mostly likely refrain from implementing the specific violation. In a sense, we human rights lawyers helped to advance the role and power of these justices when we petitioned them to decide on these violations. Our petitions gave them legitimacy to be the ultimate decision makers over Palestinian human rights under an illegal occupation.

Ultimately, justices hold the greatest responsibility for violations facilitated by the Supreme Court. The onus is unavoidable in light of the fact that human rights lawyers repeatedly alerted the Court to Israel's obligations to human rights and international humanitarian law. For decades, the justices did not take these rules and norms seriously and instead were characterized by an unabashed impunity. Most justices disregarded the role of international humanitarian and human rights law concerning military occupations. At a conference in 2009, Aharon Barak, the former president of the Israeli Supreme Court, justified his disregard for human rights law in his decision due to his lack of understanding of international law. He said:

The question before me was what was the scope of the power of the military authorities [in the territories]. To the extent that human rights were able to restrict their power, this was an outcome, a derivative, from the concentration of the power of the state...In my new, better understanding of

the role of international law of human rights and humanitarian international law, slowly, slowly, the vantage point started to shift from talking about the power of the military authorities and more and more to the question of the human and civil rights of the people living there.<sup>5</sup>

In the same forum, Barak recognized that the human rights situation in the West Bank was grave and referred to the West Bank as “occupied territories” rather than “Judea and Samaria” – the political euphemism he consistently used during the years of his court decisions to avoid acknowledging the applicability of the laws of occupation. The Israeli *Haartzet* newspaper reacted swiftly:

[W]e...wonder why Barak only made his statements now. As someone who led Israel’s Supreme Court for 11 years, he had countless opportunities to sound a warning and act to improve human rights and democracy in Israel and the occupied territories. The court under Barak did not do enough in this area. Barak’s judicial activism stopped a number of times when the matter at issue was preserving human rights in the territories, and for a number of years the court declined to take a stance on such important issues.

Barak’s disingenuous assertion that he just didn’t know enough about international law and his exceptional shift in language is inadequate. There is still a long way to go to hold Israeli Supreme Court justices responsible for violations of Palestinian human rights.

Take for example, one of the last opinions of the former President of the Supreme Court, Dorit Beinisch, in a 2009 case challenging the legality of licensing Israeli quarries in Area C from where 90 percent of quarried materials are exported to Israel. In this case, Beinisch reinterpreted International Humanitarian Law restrictions of an occupying power’s ability to exploit the natural resources of the occupied territory and developed a novel approach to accommodate and help legalize Israeli quarrying. Beinisch ruled that in prolonged occupations the privileges and the “governmental role” of the occupying power may expand to include exploitation of the natural resources of the occupied territory for its own economic interests. This interpretation of International Humanitarian Law deviated so heavily from the internationally accepted understandings of occupation law that it provoked seven prominent Israeli legal academics to issue a damning critique calling the decision “irreconcilable with the accepted interpretation of the temporal dimension of the laws of occupation” and “inconsistent with the principle of the trusteeship of the occupier toward the protected population.”<sup>6</sup>

Accountability is not as elusive as it may seem. As a consequence of universal jurisdiction applied to Israeli government officials, the complicity of the Israeli Court has also begun to interest third states. Israeli justices are forced to be more mindful of facilitating transgressions of international law.

### Next Steps for Palestinian Human Rights Lawyers

One response to the disparity between Israeli rule and international legal norms is to completely suspend litigation in the Israeli courts. This kind of action would address questions such as: Should a court prioritizing Israeli state interests be deciding on the legality of actions by its own military against a foreign population that it controls? Should human rights lawyers and Palestinian petitioners legitimize the authority of the Israeli Supreme Court to decide on major issues affecting Palestinian self-determination i.e. annexation of East Jerusalem, refugee property, mass confiscation of Palestinian private and public land, settlement expansion and construction of the Wall in the West Bank?

Lawyers and Palestinians must adopt a clear tactical vision of alternative legal actions in order to conclude

upon a boycott of the Israeli courts. As lawyers, we are obligated to find relief and remedy for our clients wherever we can and, perhaps in a few individual cases, litigation in Israeli courts may still actually achieve that. In those cases where Palestinians decide to continue to litigate in the Israeli courts, human rights lawyers must add to their tasks holding Israel’s judiciary to account for its complicity. **Naming and shaming must be part and parcel of every Palestinian human rights lawyer’s terms of reference.** However, in both cases – boycott or continuation of litigation – judicial accountability (in the past and present) for serious human rights violations must be included in the strategy. One way to begin such a process is to set up a database to document the role of various courts’ decision-making in human rights violations.

### Conceptualizing the Israeli Judicial Accountability Database

Justices’ participation in human rights violations concern individual Palestinians’ rights, but in some case the courts are complicit in serious international crimes (i.e. persecution based on national, religious and/or ethnic grounds; forcible transfer and state-sponsored discrimination). An example of this would be the Supreme Court’s role in the settlement project: the Court’s intentional and consistent evasion of ruling directly on the legality of the settlements (knowing this would effectively allow the settlements enterprise to continue) together with its prolonged history of legalizing almost every aspect of the enterprise (confiscations, planning, demolitions). Nahum Barnea who is one of Israel’s most prominent news commentators in Israel’s main newspaper vividly described this role last year:

The original sin was that of the [Supreme] Court. In the second decade following the Six-Day War, when the settlements went from being a marginal whim to the State of Israel’s major policy in the territories, the [Supreme] Court was asked to decide its position on a series of petitions. The



After al-Araqib tents and other structures were demolished in 2012, some families slept in their vans. (Source: BADIL's Ongoing Nabka Education Center)



judges throughout the years decided to ignore international law, which forbids settling occupied territories, and instead focus on the matter of ownership... This choice was convenient for all parties: it presented our court to the world as a champion of human rights. Its doors are open even to the occupied Palestinians. It allowed the Israeli Left to win now and then in its struggle against the settlements. And most importantly, it allowed the Israeli governments to settle the territories like there is no tomorrow...<sup>7</sup>

A database for judicial accountability could analyze Supreme Court justices' roles in court decisions affecting Palestinian human rights. The individual and collective collusion of justices could be systematically weighed against standards of international law. This information could support future accountability litigation, especially on the international level like an International Court of Justice petition on settlements and apartheid, and universal jurisdiction cases against the justices. A database could also be used as an advocacy tool for human rights.

Publicizing the database locally and internationally – to other states' Supreme Court judges and national bar associations or academic and international law institutions that regularly invite Israeli justices to lectures, conferences or author publications – would increase the impact. Israeli Supreme Court justices may begin to rethink their past precedents and begin ruling in line with international humanitarian and human rights law knowing that they are being monitored and tracked for their role in potential international law violations against Palestinians. 'Naming and shaming' could also serve as a basis to demand these judges' exclusion from international forums that provide their needed legitimacy.

The database should not be limited to human rights cases in the occupied territories – the West Bank and the Gaza Strip. That would only tell part of the story. In parallel, the database should include cases affecting Palestinian citizens of Israel and refugees impacted by Israeli law bringing in other Israeli institutions and potential violators of human rights: the State Attorneys, Ministries and Ministers, the Israeli Military and Civil Administration officials. Such a resource would become very useful in future transitional justice processes such as in reparations schemes, truth and reconciliation commissions and in planning for the return of Palestinian refugees.

In the discussion whether to continue using the Israeli Supreme Court to advance Palestinian rights we must add another level of scrutiny: holding judges accountable for their past and present decisions. A database is a way to start this process. The information it produces can go a long way toward encouraging Israeli justices to implement international law and put an end to sanctioning and legalizing violations of Palestinian rights. It will also be useful for future transitional justice processes.

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*\*Allegra Pacheco is an international lawyer residing in the West Bank. She holds a Juris Doctor from Columbia University School of Law, and is admitted to both the New York and Israeli bars. She has litigated many cases in front of the Israeli Supreme Court on behalf of Palestinian human rights..*

*\*\* Endnotes: See online version at: <http://www.BADIL.org/al-majdal>*



## General Assembly

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### Human Rights Council Twenty-fourth session

Agenda item 7

### Human rights situation in Palestine and other occupied Arab territories

22 August 2013

**Joint written statement\* submitted by BADIL Resource Center for Palestinian Residency and Refugee Rights, Al-Haq, Law in the Service of Man and Al-Mezan Center for Human Rights non-governmental organizations in special consultative status\***

### Denial of the right of return

Denying the return of Palestinian refugees is central to Israel's systematic oppression of Palestinians. By denying Palestinian refugees the right of return, Israel clearly forces them to remain displaced, preferably outside of Israel.<sup>2</sup> Israel's ongoing forced population transfer of Palestinians—characterized in part by the denial of return—is a continuing violation of Palestinian individual and collective rights. In fact, the erga omnes obligation to implement the collective right to self-determination first requires enabling refugees and other displaced persons to return to their homes and repossess their properties.<sup>3</sup> Consequently, it would be accurate to say that the Palestinian right to self-determination is meaningless without ensuring the Palestinian refugees' right to voluntary repatriation. Without the right of return, Palestinians remain marginalized and vulnerable to secondary and even multiple displacements. This issue grows more important as instability increases in states hosting Palestinian refugees—namely Syria, but potentially Egypt as well—and Palestinians face dangers in their host state, rendering them unable to remain in their present place of refuge or return to their places of origin long since dispossessed by Israel.

### Israel's consistent and continuous denial of the right of return

While the Israeli 1950 Law of Return and its amendments grant Jews around the world the right to move to Israel and acquire Israeli citizenship, Israel has denied the return of Palestinian refugees through legal and political mechanisms. The 1952 Citizenship Law restricts citizenship only to people present in "Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [in May 1948] to the day of the coming into force of this Law [in April 1952]," thus denying the right of absentees and refugees to return to their homes and claim citizenship. Additionally, the 1954 Prevention of Infiltration Law deems the, inter alia, following persons "infiltrators": national and

citizens of nearby Arab countries; residents or visitors of those countries or the parts of Palestine outside Israel; and Palestinians without nationality or citizenship—or doubtful status—who moved out of what is now Israel in favor of a place outside Israel.<sup>4</sup>

Following the displacement of over 500,000 Palestinians after 1967, the Israeli military carried out a census of remaining Palestinians. Any unregistered Palestinian following this census was denied residency status and their right of return home. The Citizenship Law and census made it very easy for Israeli officials to continually displace Palestinians by merely denying their right to enter. Instead, in the best case scenario, a Palestinian refugee could only enter his/her homeland with a temporary, visitor's visa—the same kind given to foreign tourists. The 2001 Entrenchment of Negation of the Right to Return Law states that “refugees”—defined as persons who “left the borders of the State of Israel at a time of war and [are not] citizen[s] of the State of Israel, including, persons displaced in 1967 and refugees from 1948 or a family member”—“will not be returned to the territory of the State of Israel save with the approval of the majority of the Knesset Members.”<sup>5</sup>

### **Armed conflict perpetuates forced population transfer and results in multiple displacement**

As of August 2013, approximately 50% of all registered Palestinian refugees in Syria have been displaced in Syria or to a neighboring country. Syria is particularly dangerous for Palestinian refugees due to their proximity to conflict zones. Violence has affected Yarmouk refugee camp in Damascus, which houses the largest Palestinian population in Syria. Today, less than 30% of its 150,000 residents remain as many facilities—including health centers—have shutdown. To date, of the Palestinians displaced by the armed conflict in Syria, at least 235,000 are displaced in Syria; 92,000 in Lebanon; and 8,430 (or 2,075 families) in Jordan before its borders closed. Palestinians have also fled to Egypt and Turkey.<sup>6</sup> Since Palestinians have been denied their right of return to their homes in present-day Israel, they are multiply displaced: first by Israel, now from Syria.

Jordan publicly announced its policy of rejecting Palestinian refugees from Syria in the fall of 2012. On the other hand, Jordan welcomes Syrians, of whom at least 350,000 have entered. Families in which one spouse is Syrian and the other Palestinian are unable to enter together because the Palestinian spouse will be rejected. If the father is Palestinian, the children may be refused entry as well.<sup>7</sup>

Consequently, many Palestinian refugees fled to Lebanon until earlier this month. Before August 6, Lebanon allowed Palestinians from Syria to enter, but charged them \$17USD for a weeklong visa<sup>8</sup> while Syrian refugees are still granted a six-month extendable visa at no charge.<sup>9</sup> All Palestinian refugees in Lebanon are excluded from various jobs, schools, healthcare, and other services, while Syrian refugees can work without permits.<sup>10</sup> This illustrates the difference in treatment between Syrian refugees who have a home state and Palestinian refugees, who are considered to be stateless.

Another 10,000 Palestinian refugees have left Syria for Egypt; again, unlike their Syrian counterparts, they are not recognized as refugees and do not receive the same access to healthcare and other services. Palestinian refugees from Syria arriving in Egypt receive extendable weeklong visas, but concerns about being denied extensions have prevented many from seeking renewals. Meanwhile, Syrians typically receive three or six-month visas and can register with UNHCR, which Palestinians are precluded from accessing due to the existence of and lack of coordination with UNRWA.<sup>11</sup>

Egypt and other countries' discriminatory policies towards Palestinians may emerge from the desire to ensure that the UN—not host states—takes responsibility for Palestinians and also to protect Palestinian's

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claims to statehood.<sup>12</sup> If Palestinians were able to return to their rightful homes, such policies would be unnecessary as granting the right of return also provides a measure of self-determination on the individual and collective level. In turn, Palestinian refugees are extremely likely to return to their place of origin instead of suffering under harsh conditions in states like Lebanon and Egypt. The right of return would end the cycle of forced population transfer endured by Palestinians for 65 years.

### **Denial of the right of return violates international law**

The right of return is explicitly grounded in Art. 12(4) of the ICCPR and Art. 13(2) of the UDHR.<sup>13</sup> The right of return and return itself are preconditions for the fundamental right to self-determination. The Human Rights Committee's General Comment No. 27 states that the right of return can be applied collectively to large groups as well.

The right of return exists in the law of nationality, customary law, international humanitarian law, international human rights law, and refugee law.<sup>14</sup> In fact, the obligation to respect the right of return of refugees has been a customary, legally binding, norm of international law since before 1948. Later, in December 1948, the UN General Assembly called upon Israel to respect the Palestinian refugees' right of return in Resolution 194 (III). This resolution explicitly states that Palestinians have the right of return to their homes of origin. Because Israel is the only state from which Palestinian refugees originated, it is the only state of origin and thus is obligated under international law to receive these refugees.<sup>15</sup> Moreover, since 1948, various UN bodies have regularly reaffirmed the Palestinian right of return.

Armed conflict, instability, and discriminatory policies result in multiple displacements of Palestinian refugees, which would not occur if Israel respected Palestinians internationally recognized right of return. While Palestinian refugees from such places like Syria face great risks, Jordan, Lebanon, and Egypt have rejected asylum-seekers. This violates the principle of non-refoulement, which is an accepted norm under customary international law that is codified in various human rights treaties. The denial of the right of return coupled with unfriendly policies have left Palestinians in limbo, sometimes unable to find even the temporary sanctuary that they must be afforded in cases of "massive refugee exodus," seen now in Syria.<sup>16</sup>

### **Recommendations**

The undersigned organizations urge the Human Rights Council to:

1. Prioritize the fulfillment of the right of return in light of growing instability in refugee host countries, which has continued to forcibly displace Palestinians—sometimes multiple times;
2. Call upon all States to adopt practical measure to ensure that Israel respects the fundamental right of Palestinian refugees and IDPs to return to their homes, properties, and lands as well as their right to compensation for losses and damages over the years;
3. Coordinate efforts among different agencies, namely UNRWA and UNHCR as well as activate UNCCP in order to provide protection and relief to Palestinian refugees, particularly those displaced again by recent armed conflicts;
4. Call upon all States—especially Lebanon, Jordan, and Egypt—to open their doors to refugees fleeing Syria without discrimination and also increase their financial and humanitarian support for all refugees.

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*Addameer Prisoners' Support and Human Rights Association; Ramallah Centre for Human Rights Studies NGO(s) without consultative status, also share the views expressed in this statement.*

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## Ongoing Displacement of Palestinians

### Oral statement submitted by BADIL Resource Center for Palestinian Residency and Refugee Rights<sup>1</sup> to the Human Rights Council, Session 24, Item no. 7 (09 Sep - 27 Sep 2013)

Dear Mister President and dear members of the Council,

Israel does not simply seek domination over the Palestinian people, but rather their forcible displacement. In this light, any discussion on the situation in Palestine has to consider that the essential question is the rights of existing Palestinian refugees, as well as the prevention of future forcible displacement.

This is why it is hugely important to seek solutions rooted in a strict rights-based approach. Only approaches based on international law rather than political negotiations will achieve a long lasting and just solution. In this light, it should be unacceptable to refer to Israeli settlements in the occupied Palestinian territory as anything but a violation of numerous international standards and principles representing Israel's ongoing impunity. Therefore, the implementation of international law and standards should be the driving principle of political negotiations and not the other way around. Rights are nonnegotiable.

Enabling Israel's repeated noncompliance with international law for the sake of political negotiations contradicts international legal principles.

In fact, the ongoing absence of international accountability undermines the legitimacy of international law, in particular human rights, humanitarian law and international criminal law. This Council is presented with an opportunity to ensure that international law is more than utopian rhetoric, but instead a robust legal system which effectively protects rights, establishes obligations and most importantly, creates realities that mirror its core values.

As the United Nations body responsible for protecting and promoting universal human rights and addressing systematic violations of international law, we urge this Council to:

- Categorize the prolonged Israeli occupation, which includes illegal and discriminatory policies and practices that are leading to permanent control over the occupied territory, as a form of colonization;
- Suggest practical steps to ensure that all Member States respect their erga omnes obligations and refrain from providing any support to Israeli policies that deny the Palestinian people the right to self-determination.

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<sup>1</sup> Contact: Amjad Alqasis, legal advocacy programme coordinator at BADIL Resource Centre for Palestinian Residency and Refugee Rights, at [amjad@badil.org](mailto:amjad@badil.org).



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## ABOUT THE MEANING OF AL-MAJDAL

al-Majdal is an Aramaic word meaning fortress. The town was known as Majdal Jad during the Canaanite period for the god of luck. Located in the south of Palestine, al-Majdal was a thriving Palestinian city with some 11,496 residents on the eve of the 1948 Nakba. Majdalawis produced a wide variety of crops including oranges, grapes, olives and vegetables. Palestinian residents of the town owned 43,680 dunums of land. The town itself was built on 1,346 dunums.

The town of al-Majdal suffered heavy air and sea attacks during the latter half of the 1948 war in Palestine. Israeli military operations (Operation Yoav, also known as “10 Plagues”) aimed to secure control over the south of Palestine and force out the predominant Palestinian population. By November 1948, more than three-quarters of the city's residents had fled to the Gaza Strip. Israel subsequently approved the resettlement of 3,000 Jews in Palestinian refugee homes in the town. In late 1949 Israel began to drive out the remaining Palestinian population using a combination of military force and administrative measures. The process was completed by 1951. Israel continues to employ similar measures in the 1967 occupied West Bank, including eastern Jerusalem, and the Gaza Strip.

Palestinian refugees from al-Majdal now number over 71,000 persons, and Israel has Hebraized the name of their town as “Ashkelon.” Like millions of other Palestinian refugees, Majdalawis are not allowed to return to their homes of origin. Israel opposes the return of the refugees due to their ethnic, national and religious origins. al-Majdal, BADIL's quarterly magazine, reports about and promotes initiatives aimed at achieving durable solutions for Palestinian refugees and displaced persons based on international law and relevant resolutions of the United Nations.



# GREAT PEOPLE DON'T DIE

A tribute to Nelson Mandela from BADIL's General Assembly, Board of Directors and Staff

To the great Nelson Mandela we say: great people don't die!

To the beloved of Palestine, who said at the moment of victory over Apartheid: "We know too well that our freedom is incomplete without the freedom of the Palestinians."

To the loss of the nations, the wretched and the tortured of the land; to the man who said: "Freedom cannot be given in doses; one is either free or not free - not half free."

To the comrade of the displaced and the refugees in the world, we say: we will return, because return is the beginning of what will follow, or as you put it: "There is nothing like returning to the place ... where history, memory and identity are rooted, and where the future will open spaces of hopes."

To the whole world we say: The great Mandela has passed away, but injustice has not. Our only comfort is that we know that great people don't die...