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in the Arab-Israeli Conflict

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NGO “Lawfare”

*Exploitation of Courts
in the Arab-Israeli Conflict*

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Executive Summary

T

he use of courts to prosecute violations of human rights has grown exponentially since the 1990s. This growth has coincided with the vast accumulation of power by non-governmental organizations (NGOs) and the expansion of the concept of “universal jurisdiction.” NGOs claiming to promote human rights (many funded

by European governments, the EU, and prominent foundations such as the Ford Foundation, the New Israel Fund, and George Soros’ Open Society Institute) are engaged in international lobbying, as well as filing civil lawsuits or initiating criminal complaints in Belgium, England, Spain, Switzerland, the United States, and elsewhere against Israeli officials for alleged “war crimes” or “crimes against humanity.”

These legal actions, ostensibly to provide “justice” to “victims,” are a form of “lawfare”ⁱ – a “strategy of using or misusing law as a substitute for traditional military means to achieve military objectives” – intended to punish Israel for anti-terror operations, as well as to block future actions. They are also a means for actors that are not accountable to any form of democratic check to subvert a country’s foreign policy and interfere with diplomatic relations. While Israel is not the only country that has been subject to NGO lawfare (several prominent NGOs have filed similar suits against US officials in France and Germany), it is a primary target of these efforts. Though claiming to promote universal human rights, these same NGOs have not pursued cases against Palestinian, Hezbollah, Syrian, or Iranian officials involved in terror.

The strategy to delegitimize Israel using legal frameworks was adopted at the NGO Forum of the 2001 UN World Conference Against Racism held in Durban, South Africa (“WCAR” or “Durban Conference”). The NGO Forum crystallized a plan in which Israel would be singled out as a “racist” and “apartheid” state; isolated internationally through a campaign of boycotts, divestment, and

sanctions; and explicitly adopted lawfare to advance the political war against Israel.ⁱⁱ The NGO Forum Declaration called for the “adoption of all measures to ensure [the] enforcement” of international humanitarian law, including “the establishment of a war crimes tribunal to investigate and bring to justice those who may be guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid . . . perpetrated in Israel and the Occupied Palestinian Territories.”

This movement is led by Palestinian NGOs such as Al Haq, the Palestinian Center for Human Rights (PCHR), Al Mezan, and Badil, and aided by international NGOs including Human Rights Watch, Amnesty International, International Federation of Human Rights (France), and the Center for Constitutional Rights (New York). Israeli NGOs Adalah, Public Committee Against Torture in Israel (PCATI), Yesh Din, and others also figure prominently. These organizations are largely supported by European governments and receive funding from the abovementioned foundations.

This monograph presents a number of case studies analyzing the central role that NGOs have played in the strategy of lawfare, using it to further their political campaigns against Israel. The study begins with a discussion of NGO involvement in the movement to promote and expand the concept of universal jurisdiction and the creation of the International Criminal Court (ICC). Without these legal developments, this NGO strategy would not be possible.

Second, the paper will detail anti-Israel lawfare at the international level, examining the development of the tactic at the NGO Forum of the 2001 Durban Conference; alternative strategies adopted by the NGO network in lieu of criminal prosecutions of Israelis at the ICC, such as European government- and EU-funded conferences on prosecuting Israeli “war criminals,” and lobbying campaigns; the International Court of Justice case against

ⁱ Jeremy Rabkin, “Lawfare: The International Court of Justice Rules in Favor of Terrorism,” *The Wall Street Journal*, September 17, 2004, available at <http://www.opinionjournal.com/forms/printThis.html?id=110005366>.

ⁱⁱ For more information on the Durban Conference, see Gerald M. Steinberg, “The Centrality of NGOs in the Durban Strategy,” *Yale Israel Journal*, Summer 2006, available at <http://www.ngo-monitor.org/article.php?viewall=yes&id=1958>.

Israel's security barrier; and international "fact-finding" missions on the 2009 Gaza war. As in other politicized NGO campaigns, these activities consistently draw an immoral equivalence between anti-terror operations and mass scale atrocities, minimize or omit the context of terror, exploit international legal terminology and rhetoric, level condemnations without providing proper bases or reliable evidence, and use incomplete, distorted, or inconsistent legal definitions.

Third, the monograph discusses NGO-led litigation against Israel in the national courts of Europe and the United States. Because Israel has not ratified its participation in the International Criminal Court (ICC) due to serious political and legal concerns, NGO lawfare has generally been pursued in national courts where "war crimes" statutes or other universal jurisdiction laws have been enacted. The lawsuits detailed in this study include the case against Ariel Sharon in Belgium for his alleged responsibility for the Sabra and Shatila massacres; the arrest warrant issued against Doron Almog in the United Kingdom for alleged "grave breaches" of the Geneva Convention; the private criminal suit filed in Spain against seven Israeli officials for their alleged role in the targeted killing of the founder of Hamas' military wing, Salah Shehade; attempts in the UK to arrest Ehud Barak and Tzipi Livni for alleged "war crimes" committed in the Gaza war; the filing of a criminal complaint in the Netherlands against Ami Ayalon for "torture"; civil cases in the US against Avi Dichter for his alleged role in the Shehade operation and against Moshe Ya'alon for his alleged participation in the 1996 IDF operation in Qana, Lebanon; and, finally, cases initiated in the US and the UK intended to block corporate trade with Israel.

As a US Court of Appeals observed, these cases seek to engage courts "in the micro-management of military targeting decisions" and are not cases such as those

against "an Idi Amin or a Mao Zedong."ⁱⁱⁱ Plaintiffs point to no cases where "similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute torture or extrajudicial killing under international law."^{iv} While these cases were all dismissed in the preliminary stages, the media coverage was highly damaging, fulfilling one of the NGOs' central goals.

As a result of these cases, several countries, notably Belgium and Spain, have amended their laws to prevent future abuse. Such amendments have included denying NGOs the ability to apply to a judge directly for an arrest warrant without consulting any government officials. Yet, these lawsuits continue to have serious political and diplomatic repercussions, including severely limiting the ability of Israeli officials to travel abroad. And the media impact remains an important element in the demonization of Israel.

This report also highlights the lack of transparency and accountability of NGOs, and their contribution to diplomatic and political tension, and even greater conflict. Analysts have noted that the "single-issue" focus of many NGOs that claim to promote human rights makes them "less concerned with the balancing of interests required of policy leaders."^v NGO officials use lawsuits to promote their personal ideologies and foreign policy goals, and are not accountable to a democratic polity. Instead of engaging in debate and making the difficult choices of nation-states, such as how to weigh sovereignty and security concerns with human rights, these NGOs advance their political agendas regardless of the wider impact of their actions. This self-interested view in the midst of a complex geopolitical environment, such as the Arab-Israeli conflict, entrenches conflict, and paradoxically, leads to a dilution of the universality of human rights.

ⁱⁱⁱ*Belhas v. Ya'alon*, Opinion of the DC Circuit Court of Appeal, February 15, 2008, at 2, 7, available at <http://www.ccrjustice.org/files/Decision%20in%20Belhas%20v%20Ya'alon%202.15.08.pdf>.

^{iv}*Id.*

^vDavid Davenport, "The New Diplomacy Threatens American Sovereignty and Values," in *"A Country I Do Not Recognize": The Legal Assault on American Values* 113, 119 (Robert Bork ed., 2005), available at http://media.hoover.org/documents/0817946020_113.pdf.

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S

Introduction

ince the late 1990s, the use of courts to prosecute alleged violations of human rights and the laws of war has grown exponentially.¹ The intensification of this form of legal advocacy has coincided with the accumulation of power by non-governmental organizations (NGOs). The convergence of these elements, as Henry Kissinger notes, has led to an “unprecedented movement . . . to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systematic debate, partly because of the intimidating passion of its advocates . . . [t]he danger,” he warns, “lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.”² Today, this “dictatorship of the virtuous,” largely led by NGO superpowers, in cooperation with Palestinian and Israeli groups, has turned its sights on Israel in an effort to attack Israeli self-defensive measures against terror by exploiting both international and national legal systems.

This strategy to delegitimize Israel using legal frameworks was adopted at the NGO Forum of the 2001 UN World Conference Against Racism held in Durban, South Africa (“WCAR” or “Durban Conference”). The NGO Forum crystallized a plan in which Israel would be singled out as a “racist” and “apartheid” state, and isolated internationally through a campaign of boycotts, divestment, and sanctions.³ The NGO Forum Declaration and Programme of Action called for the use of legal processes – or “lawfare” – as coined by US attorney Major Michael Newton – to advance the political war against Israel.⁴

Lawfare is understood as a “strategy of using or misusing law as a substitute for traditional military means to achieve military objectives” and involves two key components (both of which are present in the NGO Forum Declaration): (1) as a “decapitation strategy . . . where

¹ For example, the jurisprudential expansion of the U.S. *Alien Tort Claims Act* (28 U.S.C. § 1350) from acts of piracy to the most extreme violations of human rights, and the adoption of the Rome Statute establishing the International Criminal Court.

² Henry Kissinger, “The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny,” *Foreign Affairs*, June/July 2001.

³ For more information on the Durban Conference, see Gerald M. Steinberg, “The Centrality of NGOs in the Durban Strategy,” *Yale Israel Journal*, Summer 2006, available at <http://www.ngo-monitor.org/article.php?viewall=yes&id=1958>.

⁴ Jeremy Rabkin, “Lawfare: The International Court of Justice Rules in Favor of Terrorism,” *The Wall Street Journal*, September 17, 2004, available at <http://www.opinionjournal.com/forms/printThis.html?id=110005366>.

international groups encourage [“victims”] to file human rights suits with few grounds against military figures” – many of whom are still active members of the military or government; and (2) as a means “to goad” military forces “into violations of the Law of Armed Combat, which are then used against [those forces] in the court of world opinion.”⁵ Employing the second method can have dramatic military consequences and may prolong conflict as military and government officials become “reticent to attack targets” and have “[t]oo much concern over the legality of each and every decision.”⁶ Another component of the strategy involves initiating suits against corporations that sell equipment later used in military operations to armed forces. The aim of such suits is to cut off supply in order to hamper military efforts.⁷ Often, these methods are pursued in countries with no direct connection to the conflict at issue and little understanding of the details, by exploiting the controversial principle of universal jurisdiction. In most cases, as seen in this report, these efforts focus on one party in the conflict, reflecting the biases of the initiators of the legal process.

NGOs claiming human rights and humanitarian missions are the primary sources of lawfare in the Arab-Israeli conflict, and NGO involvement begins well before the filing of any lawsuit. These organizations issue numerous press releases and lengthy “research reports” condemning Israeli anti-terror operations. Political NGOs also regularly submit written statements to UN committees and other international bodies, in which the authors call for the end of “impunity” or the bringing of Israelis to “justice” for so-called “war crimes” or “crimes against humanity.” These statements often quote other NGO publications, repeating and entrenching unsubstantiated, and in some cases, entirely false claims. UN Special Rapporteurs and UN- or EU-commissioned studies also rely heavily on this NGO “evidence.” Their reports are then adopted by the decision-making bodies of the UN such as the General

Assembly, and underpin further condemnations and actions taken against Israel.

Through this process, NGO statements become part of the official dossiers of cases at international legal institutions such as the International Court of Justice or the International Criminal Court, or part of the court record in domestic suits. NGO-initiated proceedings also generate enormous amounts of publicity for the organization and its campaigns, regardless of the case outcome. Any developments in such a lawsuit are exploited to issue further reports and press releases promoting the NGO’s version of events, and overwhelming any interest in the actual merits of a case.⁸

The prominent role of NGOs in this process is a result of their resources and largely unchecked power. James McGann and Mary Johnstone describe this phenomenon:

*World politics has undergone a radical and often-overlooked transformation in the last fifteen years, resulting neither from the collapse of the Soviet Union nor the rising tide of fundamentalism, but from the unprecedented growth of non-governmental organizations around the globe. NGOs or Civil Society Organizations (CSOs) have moved from backstage to center stage in world politics, and are exerting their power and influence in every aspect of international relations and policymaking... [few] have felt the need to take a critical look at the effectiveness and accountability of these organizations.*⁹

The problems associated with the emergence of NGO power, particularly in light of the expansion of universal jurisdiction and the creation of international legal institutions such as the International Criminal Court, have taken on new significance in the context of legal

⁵ Council of Foreign Relations, “Lawfare, the Latest in Asymmetries,” March 18, 2003, available at <http://www.cfr.org/publication.html?id=5772>.

⁶ *Id.*

⁷ This monograph will focus on NGO involvement in initiating legal proceedings against Israel. An in-depth discussion of the impact of lawfare on Israeli military decisions is outside the scope of this publication.

⁸ The series of lawsuits brought against Israel by the Center for Constitutional Rights is a typical example: each case development saw the issuance of press releases and even the dismissal of the suit prompted additional statements denouncing Israel. See *infra* at 54.

⁹ James McGann & Mary Johnstone, “The Power Shift and the NGO Credibility Crisis,” *International Journal of Not-for-Profit Law*, January 2006, available at <http://www.globalpolicy.org/ngos/credib/2006/01shift.htm>.

proceedings. As McGann and Johnstone note, “NGOs are hardly neutral on issues of policy formation.” NGOs play the “dual role of providing information and acting as an agent of political pressure on the government, leading to potential conflicts of interest.”¹⁰ Professor David Davenport remarks that the NGO “style is generally more one of debate and confrontation than compromise. This makes them excellent advocates but not balanced leaders of an international legal process.”¹¹ And Professor Kenneth Anderson describes how groups like Human Rights Watch “focus to near exclusion on what the attackers do, especially in asymmetrical conflicts where the attackers are Western armies” and tend “to present to the public and press what are essentially lawyers’ briefs that shape the facts and law toward conclusions that [they] favor... without really presenting the full range of factual and legal objections to [their] position.”¹² In describing this NGO activity in the context of the Arab–Israeli conflict, Alan Dershowitz puts it more bluntly: NGO conclusions “are not based on sound legal arguments. They’re certainly not based on compelling moral arguments. They’re simply anti-Israel arguments.”¹³

This monograph presents several case studies analyzing NGO employment of lawfare to delegitimize Israel. The study begins by addressing NGO involvement in the movement to promote and expand the concept of universal jurisdiction, and the creation of the International Criminal Court (ICC); without these legal developments, lawfare would not be possible. Second, the paper will detail anti-Israel lawfare at the international level, examining the crystallization of the tactic at the NGO Forum of the 2001 Durban Conference; alternative strategies adopted by the NGO network in lieu of criminal prosecutions of Israelis at the ICC; and the International Court of Justice case against Israel’s security barrier. Third, the monograph discusses NGO-led litigation against Israel in the national courts of Europe and the United States, including the case against

Ariel Sharon in Belgium for his alleged responsibility for the Sabra and Shatila massacres; the arrest warrant issued against Doron Almog in the United Kingdom for alleged “grave breaches” of the Geneva Convention; the private criminal suit filed in Spain against seven Israeli officials for their alleged role in the targeted killing of the founder of Hamas’ military wing, Salah Shehade; attempts in the UK to arrest Ehud Barak and Tzipi Livni for alleged “war crimes” committed in the Gaza war; the filing of a criminal complaint in the Netherlands against Ami Ayalon for “torture”; civil cases in the US against Avi Dichter for his alleged role in the Shehade operation and against Moshe Ya’alon for his alleged participation in the 1996 IDF operation in Qana, Lebanon; and, finally, cases initiated in the US and the UK intended to block corporate trade with Israel.

¹⁰ *Id.*

¹¹ David Davenport, “The New Diplomacy Threatens American Sovereignty and Values,” in *“A Country I Do Not Recognize”*: *The Legal Assault on American Values* 113, 119 (Robert Bork ed., 2005), available at http://media.hoover.org/documents/0817946020_113.pdf.

¹² Kenneth Anderson, “Questions re: Human Rights Watch’s Credibility in Lebanon Reporting,” *Kenneth Anderson Laws of War Blog*, August 23, 2006, available at <http://kennethandersonlawofwar.blogspot.com/2006/08/questions-re-human-rights-watches.html>.

¹³ Alan Dershowitz, “Amnesty International’s Biased Definition of War Crimes: Whatever Israel Does to Defend Its Citizens,” *Huffington Post*, August 29, 2006, available at http://www.huffingtonpost.com/alan-dershowitz/amnesty-internationals-b_b_28257.html.

ORIGINS OF ANTI-ISRAEL LAWFARE

N

GOs have spearheaded the effort to expand the boundaries of international law and to create legal institutions allowing for the prosecution, both criminal and civil, of alleged violations of human rights and international humanitarian law. Some of these institutions are international, such as the International Criminal Court (ICC), and some are nationally-based frameworks, such as the US *Alien Tort Claims Act*¹⁴ and the universal jurisdiction statutes adopted by certain European governments. The human rights NGO “superpowers” – Fédération Internationale des Ligues des Droits de l’Homme (FIDH) (France), Amnesty International (Amnesty), and Human Rights Watch (HRW) have been at the forefront of these efforts.

Historical Background: Expansion of Universal Jurisdiction

While efforts to codify the laws of war and other international crimes began in earnest in the late 19th and early 20th century, the 1945–49 International Military Tribunal at Nuremberg was the first “pure example in the modern legal world” of an international criminal tribunal established to enforce these laws via their direct application.¹⁵ The creation of another such tribunal to prosecute international crimes did not take place again until 1993, when the UN Security Council, pursuant to Chapter VII, Article 39 of the UN Charter, established the International Criminal Tribunal for the Former Yugoslavia

(ICTY) and, in November 1994, the International Criminal Tribunal for Rwanda (ICTR).¹⁶

The limitations of these ad hoc tribunals¹⁷ and the “the failure of national jurisdictions acting alone to effectively suppress international crimes” galvanized human rights activists and, according to Professor Robert Cryer, led to two significant legal developments: “the creation of treaties by which States agree[d] to exercise jurisdiction on an expanded basis and the rise of universal jurisdiction legislation and jurisprudence.”¹⁸ NGOs, as will be discussed, have played a significant role in both developments.

Typically, jurisdiction to adjudicate a case exists only if there is a territorial or national nexus between the court, the parties, and/or the events at issue. In international law, three bases for jurisdiction are widely accepted: the *Territorial Principle*, the *Nationality Principle*, and the *Effects Principle*.

The *Territorial Principle* is the oldest and most fundamental basis for jurisdiction and is rooted in the concept of state sovereignty.¹⁹ Under this principle, a state has the right to attach “legal consequences to conduct that occurs” or to “a thing,” “status or other interest localized within [a state’s] territory irrespective of the effects such conduct may have outside that territory.”²⁰ Pursuant to the *Nationality Principle*, courts may exercise jurisdiction over “the activities, interests, status, or relations” of its citizens, be they individuals or corporations regardless of

¹⁴ 28 U.S.C. § 1350 (2003).

¹⁵ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press (2005) at 39.

¹⁶ See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 955, U.N. SCOR, 3543 mtg., U.N. Doc. S/RES/955 (1994).

¹⁷ Such tribunals have jurisdiction only over a chronologically and territorially limited series of events, and require widespread political will and agreement to establish.

¹⁸ Cryer, *supra* note 15, at 79.

¹⁹ Mark W. Janis, *An Introduction to International Law*, (2d ed. 1993) at 322–23.

²⁰ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 17 (1987).

where such conduct occurs.²¹ This concept is the “most fundamental principle of extraterritorial jurisdiction.”²² Under the *Effects Principle*, a state has jurisdiction “over extraterritorial conduct when that conduct has an effect within its territory.”²³

The concept of universal jurisdiction is highly controversial, yet has been widely promoted by the NGO network.

A fourth basis – the concept of universal jurisdiction – is far more controversial, yet has been widely promoted by the NGO network. Universal jurisdiction contemplates the adjudication of “conduct that is totally foreign – conduct by and against foreigners outside [a state’s] territory and extensions, and not justified by the need to protect a narrow state interest.”²⁴ The theory behind universal jurisdiction is that certain crimes are of “such exceptional gravity that they affect the fundamental interests of the international community as a whole.”²⁵ National courts, therefore, are empowered, if not required, to prosecute the offenders. ICC jurisdiction, as well as national court cases against dictators such as Augusto Pinochet, Hissène Habré (former

President of Chad), and the architects and perpetrators of the Rwandan genocide, is generally premised upon the principle of universal jurisdiction. Similar suits have also been initiated against Israeli nationals for engaging in anti-terror operations.²⁶

The exercise of universal jurisdiction is highly controversial because of its implications for state sovereignty and because the jurisprudence “is disparate, disjointed, and poorly understood.”²⁷ As a result, use of universal jurisdiction is “potentially beset by incoherence, confusion, and, at times, uneven justice.”²⁸

Despite these problems and the vigorous academic debate surrounding it,²⁹ many NGOs have lobbied for the adoption of a very expansive definition of universal jurisdiction without fully addressing the legal concerns.³⁰ Amnesty International, as documented by Cryer, has been one of the major proponents of a wide-ranging universal jurisdiction. Indeed, the “views of Amnesty...on universal jurisdiction are more assertive than many international lawyers.”³¹ For example, Amnesty calls on

²¹ Janis, *supra* note 19, at 324-25 (citing *Restatement (Third)* at § 402(2)).

²² *Id.* at 324.

²³ *Id.* at 326–27. Two other bases for jurisdiction can be considered offshoots of the *Effects Principle*. These are the *protective principle* (jurisdiction over extraterritorial conduct directed against crucial state interests) and the *passive personality principle* (jurisdiction over foreigners when their conduct affects subjects of the state). Many NGO proponents of universal jurisdiction, such as HRW’s Reed Brody, attempt to shame Israel into accepting the exercise of international jurisdiction over its nationals by claiming its prosecution of Adolf Eichmann was based upon universal jurisdiction. Jurisdiction in the Eichmann trial, however, is more firmly rooted under the *passive personality principle*. NGOs frequently draw an immoral equivalence between trials against Nazi war criminals and lawsuits aimed at punishing Israel for its anti-terror operations. See Reed Brody, “An Unfinished Assignment for Israelis,” *International Herald Tribune*, February 21, 2003, available at <http://hrw.org/english/docs/2003/02/21/israb12975.htm>.

²⁴ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford University Press (2004) at 5.

²⁵ Program in Law and Public Affairs, Princeton University, *The Princeton Principles on Universal Jurisdiction* (2001), at 23, available at http://www.princeton.edu/~lapa/unive_jur.pdf (“The Princeton Principles”).

²⁶ Aside from the Rome Statute, which established the International Criminal Court, three other human rights conventions potentially address the concept of universal jurisdiction: the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Part I, Articles 4–7); the Apartheid Convention (Article V); and the Convention on the Prevention and Punishment of the Crime of Genocide (Article VI). See Cryer, *supra* note 15, at 83–84.

²⁷ The Princeton Principles, *supra* note 25, at 24.

²⁸ *Id.*

²⁹ *Id.* at 39–40.

³⁰ In addition to the NGOs addressed in this section, other proponents of an expansive universal jurisdiction include FIDH, Public Committee Against Torture in Israel (PCATI), Human Rights First, Center for Constitutional Rights, and REDRESS.

³¹ Cryer, *supra* note 15, at 96.

all governments to empower their national courts to take on this important role by enacting and using legislation providing for universal jurisdiction. Such legislation should enable national authorities to investigate and prosecute any person suspected of the crimes, regardless of where the crime was committed or the nationality of the accused and the victim and to award reparations to victims and their families.

Amnesty wishes “all countries to enact universal jurisdiction legislation” over the crimes of “genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.” Under this campaign, Amnesty issues “briefs” on universal jurisdiction, tracks case developments, issues statements, and lobbies internationally.³²

Human Rights Watch has also lobbied aggressively for the expansion of universal jurisdiction. In a June 2006 press release that accompanied HRW’s 101-page survey of universal jurisdiction statutes in Europe, the NGO states that “[p]rosecutors in Europe are using the concept of universal jurisdiction to pursue foreign war criminals in national courts, a strategy that is gaining momentum across the continent and should be expanded.”³³ The officials that determine HRW’s agenda dismiss important and fundamental concerns over the exercise of universal jurisdiction, characterizing these discussions as “shrill debates.”³⁴ HRW’s Executive Director, Kenneth Roth, published a response in *Foreign Affairs* to Henry Kissinger’s critique of universal jurisdiction, claiming that “nation[s] committed to human rights and the rule of law...should be embracing an international system of justice.”³⁵ The organization’s Special Counsel for

Prosecutions, Reed Brody, characterized US efforts to limit universal jurisdiction as part of an “ideological ‘jihad’... to undermine the legitimacy of...international justice.”³⁶

Other NGOs, such as New York-based Human Rights First, actively promote the concept of universal jurisdiction and its implementation, but acknowledge that “NGOs must turn their minds to the issues and concerns raised by... universal jurisdiction...in order to maximize momentum towards the effective national implementation [of universal jurisdiction] ... and to minimize any ‘chilling effect.’”³⁷

NGO advocacy and campaigning for the adoption of a broad-based view of universal jurisdiction are problematic on several levels – not least because these problems have all plagued cases brought against alleged perpetrators of war crimes or other human rights violations. First, there is a direct tension between the exercise of such jurisdiction and the notion of state sovereignty. As legal scholar Louis Henkin has noted, states have a right of non-intervention on matters relating to their territory or nationals.³⁸ This right is violated when there is “an excessive claim of extraterritorial jurisdiction.”³⁹ Moreover, as David Davenport emphasizes, “NGOs do not have the sort of accountability that would be expected of leaders developing international law. NGOs work from their own local base directly into the international arena, skipping over the national level with its give and take or checks and balances system of democratic accountability.”⁴⁰ And Gerald Steinberg has written that

Officials from NGOs, while often preaching transparency and accountability to others, rarely practice it themselves. There is little information

³² See, e.g., Amnesty International, “Universal Jurisdiction: The Duty Of States To Enact And Implement Legislation,” AI Index: IOR 53/002-018/2001, Chapter 4, Parts A and B (2001).

³³ Human Rights Watch, “Europe: Shrinking Safe Haven for War Criminals ‘Universal Jurisdiction’ Prosecutions Bring Justice for Victims,” (June 28, 2006) available at http://hrw.org/english/docs/2006/06/28/eca13622_txt.htm.

³⁴ *Id.*

³⁵ Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs*, September/October 2001, available at <http://www.globalpolicy.org/intljustice/general/2001/roth08.htm>.

³⁶ Reed Brody, “Belgium Curtails Anti-Atrocity Law Under US Pressure,” *ACLU Int’l Civil Liberties Report* 2003, at 3.

³⁷ See Human Rights First, “Universal Jurisdiction: Meeting the Challenge through NGO Cooperation,” April 2002, at 8, available at http://www.humanrightsfirst.org/international_justice/w_context/meeting_challenge310502.pdf.

³⁸ Cryer, *supra* note 15, at 82.

³⁹ *Id.*

⁴⁰ Davenport, *supra* note 11, at 120.

There is serious concern that universal jurisdiction will be used for political motivations and could harm international peace.

*on the decision-making processes that are used by these groups to determine their agendas, or why some areas of the world (particularly the Israeli-Palestinian region) receive far more attention from NGOs than conflicts in other parts of the region or the world. Similarly, the accuracy of the reports and analysis issued by officials of the major international NGOs ...is rarely questioned.*⁴¹

Second, customary international law is created as a result of state practice – not via non-accountable actors such as NGOs; NGO interference weakens the underpinnings of international law. Historically, universal jurisdiction has been employed in cases of piracy because such acts were committed on the high seas rather than within a national boundary,⁴² and its use in cases of violations of *jus cogens* (preemptory) norms such as the prohibitions against genocide and crimes against humanity⁴³ is generally accepted. Other norms, even those that are codified in a multilateral treaty, such as the ICC Rome Statute, do not necessarily rise to the level of *jus cogens* or even of customary international law, and may lack the historic justification for use of a controversial legal principle. The application of universal jurisdiction over such transgressions may therefore be inappropriate.⁴⁴ Many NGOs, however, seek to extend universal jurisdiction to cover any “international” crime regardless of its international legal status and regardless of whether there is state consensus.

Third, there is serious concern that universal jurisdiction will be used for political motivations and could harm

international peace. Law Lord Nicolas Browne-Wilkinson, rejecting widespread application of universal jurisdiction without state consent, comments:

*If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable.*⁴⁵

Rather than protect universal human rights and mete out justice for the worst international crimes, the interference of states controlled by unscrupulous regimes, and of non-democratic and unaccountable NGOs, in these matters could actually lead to greater conflict. As law professor, Eugene Kontorovich has commented, “Actors who have far removed interests from the seat of the conflict can create a stake and hamper deals with those with close interests.”⁴⁶

Creation of the International Criminal Court

The creation of a global court to prosecute international crimes (an International Criminal Court - ICC) in 1998 was a major triumph for the universal jurisdiction movement and evidenced extensive NGO influence.⁴⁷

⁴¹ Gerald M. Steinberg, “Soft Powers Play Hardball: NGOs Wage War Against Israel,” *Israel Affairs*, 12:4 October 2006, at 753.

⁴² Cryer, *supra* note 15, at 85.

⁴³ *Id.* at 87. Note though that the legal definition of “crimes against humanity” included in the Rome Statute of the International Criminal Court differs from the traditional definition due to the political activity of the Arab and Islamic states. See *infra* 15-16.

⁴⁴ *Id.* at 178.

⁴⁵ The Princeton Principles, *supra* note 25, at 49 n.20. See also Eugene Kontorovich, “The Inefficiency of Universal Jurisdiction,” *University of St. Gallen Law School Law & Economics Research Paper Series*, Working Paper No. 2007-13, July 2007, at 4 (arguing that “universal jurisdiction may actually cause serious harm”); Kissinger, *supra* note 2.

⁴⁶ Kontorovich, *supra* note 45, at 15.

⁴⁷ According to Marlies Glasius, “the Court would not have emerged in the way it did without the active participation of groups and individuals from the realm of global civil society.” Marlies Glasius, “How Activists Shaped the Court,” *The International Criminal Court: An End to Impunity? Crimes of War Project: the Magazine*, December 2003, available at http://www.crimesofwar.org/icc_magazine/icc-glasius.html#top.

Calls for the creation of an ICC were first made in the late 1980s by Caribbean and Latin American countries seeking international support in trying narcotics traffickers, in light of the inadequacy of their own justice systems.⁴⁸ But the extensive media coverage of the atrocities in the former Yugoslavia and in Rwanda, and the perceived success of the ICTY⁴⁹ and ICTR, accelerated NGO interest in the project. In Cryer's view, "What started out in 1993 as mostly a public relations ploy namely to create an ad hoc tribunal to appear to be doing something about human rights violations in Bosnia without major risk, by 1998 had become an important global movement for international criminal justice."⁵⁰

The powerful Paris-based NGO Fédération Internationale des Ligues des Droits de l'Homme (FIDH) had been at the forefront of the movement for the adoption of an ICC since the 1950s.⁵¹ HRW and Amnesty joined the effort in the 1990s. Together, these three NGO superpowers, along with twenty-two other NGOs, formed the Coalition for the International Criminal Court (CICC) in 1995.⁵² This coalition played an integral part in establishing the ICC, as well as securing extensive NGO power within the ICC framework.

According to Marlies Glasius, far from "just propagandising the Court to a passive audience," the CICC (along with other NGOs) produced "a great deal of specialist documentation" in order to influence the direction of the court. These documents took

two main forms: journal articles in especially legal journals by individuals and reports by NGOs. Both had the primary aim of informing and influencing a specialist public of NGOs, academics, and state

*representatives on specific sub-themes, promoting certain alternatives over others with reference to precedent, legal argument, or political realities. Civil society groups also organized countless conferences and meetings around the world – contributing substantially to a global specialist debate on the court and international justice. Civil society proposals were frequently more daring than those emerging from national governments, and many left a lasting imprint on the court ...*⁵³

NGOs also played a crucial role at the June/July 1998 UN Preparatory Conference for the establishment of the ICC held in Rome ("Prepcon" or "Rome Conference"). HRW's, Amnesty's, and FIDH's UN consultative status enabled these organizations to participate in and make official statements at the conference.⁵⁴ During the drafting of the ICC statute (the Rome Treaty), participants developed and agreed on mechanisms for triggering the court's jurisdiction. These mechanisms included consent by a State party, as well as a referral from the UN Security Council (which can be made without a State's consent). NGOs were deeply involved in creating a third triggering mechanism whereby the ICC Prosecutor could initiate his own proceedings. The implementation of this prosecutorial power "was the single biggest issue on the agenda of the [NGO] Coalition and many of its constituent organisations."⁵⁵ An expansion of this power would afford NGOs the opportunity to play a major role in the operations of the ICC, particularly through lobbying campaigns directed at the Prosecutor.

A 2004 paper by Human Rights Watch details the extensive involvement of NGOs at the ICC. NGO powers include informing the Prosecutor "about crimes committed, a

⁴⁸ Cryer, *supra* note 15, at 57.

⁴⁹ See, e.g., Anne L. Quintal, "Rule 61: The Voice of the Victims Screams Out for Justice," 36 *Colum. J. Transnat'l L.* 723 (1998), for more on the "success" of the ICTY.

⁵⁰ Cryer, *supra* note 15, at 59.

⁵¹ FIDH, "Israel: National Round table on the International Criminal Court: Raising accountability of international criminals," January 2007, at 10, available at <http://www.fidh.org/IMG/pdf/IsraelICC468-2007a.pdf> ("FIDH National Roundtable Report").

⁵² www.iccnw.org.

⁵³ Glasius, *supra* note 47. See also Davenport, *supra* note 11, at 119, 122–23 (discussing how the CICC in Rome "wanted a much broader authority for the court on a faster timetable" and pushed through the ICC treaty by "supplant[ing] the normal consensus-based processes of international law with a no-reservations, take-it-or-leave-it treaty").

⁵⁴ See "Address by Pierre Sané, Secretary General, Amnesty International," available at <http://www.un.org/icc/index.htm>; "Intervention Lue par Patrick Baudouin, Président De La FIDH," available at <http://www.un.org/icc/index.htm>; "Intervention of Kenneth Roth, Executive Director of Human Rights Watch," available at <http://www.un.org/icc/index.htm>.

⁵⁵ Glasius, *supra* note 47. Members of the CICC, including HRW, also "played a vital role in the formulation of the relevant articles" regarding the position of witnesses and victims at the ICC. *Id.*

specific case, [or] the historical and political context of human rights abuses”; “accompanying victims and witnesses throughout the process of providing evidence”; proposing lawyers to the Court; submitting *amicus curiae* briefs to the ICC legal chambers; “directly address[ing] the Court in order to represent victims”; and sending “case information to a government that is party to the Rome treaty, or even to the U.N. Security Council, and asking them to refer a case to the Court.”⁵⁶

Since the beginning of Court operations in July 2002, NGOs have utilized the considerable authority granted to them in the ICC Statute. They have issued regular case updates and numerous reports promoting the ICC; they submit annual reports to the Assembly of State Parties, providing analysis and recommendations for the court’s operation;⁵⁷ and they submit reports and case files to the Prosecutor. Between 2002 and 2006, more than ninety-nine percent of court referrals came from NGOs.⁵⁸

NGOs were also instrumental prior to and during the First Review Conference of the Rome Statute held in Kampala, Uganda from May 31-June, 11, 2010. The conference was promoted as “a unique opportunity for States and other stakeholders, such as international organizations

and NGOs, to assess and reflect on the progress of the Rome Statute...and reaffirm their commitment to combat impunity for the most serious crimes.”⁵⁹ Areas of discussion at the conference⁶⁰ included “stock issues” such as “complementarity” and “peace and justice,” and adopting a definition for the highly complex and controversial “crime of aggression.”⁶¹

NGOs injected themselves early and intensively into the process, lobbying for suggested amendment language, issuing briefing papers, moderating panels,⁶² and serving as the largest delegation at the conference.⁶³ In some instances, NGOs acted on par with State representatives in meetings, including stocktaking exercises and invitation-only intersessional meetings.⁶⁴ ICC officials viewed “participation by civil society [as a] key to successful outreach for the Court and the Review Conference,”⁶⁵ and according to the NGO Coalition for the ICC’s William Pace, “[t]he level of cooperation among Governments, the United Nations, international organizations and non-governmental organizations with regard to the Statute was ‘almost unprecedented.’”⁶⁶ Many sessions recommended increasing direct NGO participation in the Court’s operations⁶⁷ – further blurring the important distinction between NGOs and government institutions.

⁵⁶ Human Rights Watch, “The International Criminal Court: How Nongovernmental Organizations Can Contribute To the Prosecution of War Criminals,” September 2004, at 13–15, 21. See also Human Rights First, “The Role of Human Rights NGOs in Relation to ICC Investigations,” September 2004, at 4 (describing NGO roles at the ICC).

⁵⁷ See HRW’s ICC Page for a compilation of the organizations’ publications on the Court, available at http://hrw.org/doc/?t=justice_icc_pubs.

⁵⁸ FIDH National Roundtable Report, *supra* note 51, at 31.

⁵⁹ Official Website of the Review Conference for the Rome Statute available at <http://www.kampala.icc-cpi.info/>.

⁶⁰ CICC, “Review Conference of the Rome Statute,” available at <http://www.coalitionfortheicc.org/?mod=review>.

⁶¹ See CICC, “The Crime of Aggression,” available at <http://www.iccnw.org/?mod=aggression>. Defining the crime of aggression was the most highly charged issue at the Conference, as well as in ICC jurisprudence; the NGO community has been fiercely divided over whether the court should adopt the crime as part of its jurisdiction.

⁶² HRW’s Ken Roth, for instance, moderated the “peace and justice stocktaking exercise.” See http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-1-Rev.1-ENG.pdf.

⁶³ Assembly of State Parties, *Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June, 2009*, ICC-ASP/8/INF.2 (2009), available at <http://www.iccnw.org/?mod=pressroom#2>.

⁶⁴ See *id.*

⁶⁵ Resolution ICC-ASP/7/Res.2, November 21, 2008, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP7-Res-02-ENG.pdf.

⁶⁶ UN Department of Public Information, “Press Conference on Upcoming Review of International Criminal Court’s Rome Statute,” April 30, 2010, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MUMA-85248H?OpenDocument>

⁶⁷ See, e.g., Review Conference of the Rome Statute, *Stocktaking of international criminal justice: Impact of the Rome Statute system on victims and affected communities, draft informal summary by the focal points*, RC/ST/V/1 (2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-1-ENG.pdf.

One commentator has noted that the role of civil society in the Conference “may ultimately have a more significant impact than the formal amendments.”⁶⁸

Given the NGOs’ lack of accountability and credibility deficit,⁶⁹ the significant clout granted to them at the ICC raises a number of issues. First, how are cases selected by NGOs for referral to the ICC Prosecutor? Such referrals may simply mirror an NGO’s political agenda, rather than representing the very worst examples of international criminal behavior. Second, NGOs interpret historical and political contexts based on this political agenda; how does the court deal with these potential distortions? Third, many of the cases brought to the ICC occur in the context of warfare, where the rapid and chaotic sequences of events often make accurate, objective evaluation impossible. Finally, the impact of the “halo effect” may prevent critical examination by the ICC Prosecutor of such NGO materials.

For example, during the Second Lebanon War between Israel and Hezbollah in 2006 and the Gaza War in 2008-2009, many international NGOs issued lengthy reports, allegedly based upon in-depth investigation and analysis, proclaiming the occurrence of “war crimes.” In reality, these NGOs usually lacked the requisite military expertise and the ability to access the primary evidence. Their “investigations” were therefore based on often unreliable “eyewitness” testimony, or the reports of local NGOs with equally low credibility. That such tenuous information could form the basis of an international criminal tribunal prosecution with the potential for wide-ranging political consequences is disturbing.

While Human Rights First is an active supporter of the ICC, it highlighted additional concerns of NGO involvement and how NGO “actions could actually harm an ICC

investigation.”⁷⁰ For example, the group noted that “[m]ost NGOs do not employ trained criminal investigators” when carrying out on-site inquiries of alleged human rights violations. Moreover, NGOs “may create difficulties” for witnesses by “gathering multiple statements,” and NGOs’ “untrained collection of physical or forensic evidence could limit its value before the Court.” Most importantly, “[t]here may be differences in the mandates and policies of NGOs and the ICC.” Human Rights First’s blunt discussion of these problems is exceptional in the human rights/humanitarian NGO community, and contrasts sharply with the lack of critical analysis in publications by other powerful NGOs such as HRW.⁷¹

Israel and the ICC

The Rome Statute conferred jurisdiction upon the ICC over the “core international crimes” of genocide, crimes against humanity, and war crimes.⁷² The statutory definition of “crimes against humanity” controversially included “the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies.” This language was inserted by Arab and Islamic states as part of their political agenda, specifically to encompass Israeli settlement activity. Israel objected to the inclusion of this language as it represented the invention of a new crime that was “neither a grave breach of the Fourth Geneva Convention, nor [a reflection of] customary international law.”⁷³

Several other facets of the ICC also caused Israel concern, such as the Rome Statute’s failure to proclaim terrorism a crime.⁷⁴ By omitting terror attacks from its jurisdiction, the ICC could find itself in the morally indefensible position of trying individuals for “war crimes” as a result of self-defensive measures against terror, while unable to prosecute terrorists.⁷⁵ Other concerns related

⁶⁸ Darryl Robinson, *ICC Review Conference Opens in Kampala; Features Intriguing Hybrid Character*, EJIL: Talk blog, May 31, 2010, available at <http://www.ejiltalk.org/icc-review-conference-opens-in-kampala-features-intriguing-hybrid-character/>.

⁶⁹ For more information on the NGO credibility deficit, see www.ngo-monitor.org; Steinberg, *supra* note 41.

⁷⁰ Human Rights First, “The Role of Human Rights NGOs in Relation to ICC Investigations,” September 2004, at 1, 5–6, 14.

⁷¹ HRW’s publication, issued at the same time as the Human Rights First paper, is void of critical analysis of NGO involvement at the ICC.

⁷² A fourth “core” crime – the crime of aggression – has not yet been codified in the Statute; the process of codifying aggression has been a source of extreme controversy. See also, *supra* note 61.

⁷³ Office of the Legal Adviser to the Ministry of Foreign Affairs “Israel and the International Criminal Court, Israel Ministry of Foreign Affairs Website, June 2002, available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court.

⁷⁴ *Id.*

⁷⁵ In fact, given its international scope, terrorism would seem to be a natural fit for the exercise of ICC jurisdiction.

to discrimination in the appointment of the ICC's judges and to the broad-ranging powers of the Prosecutor. As a result, despite Israel's active support of the ICC's goals and its signature of the Rome Statute on December 31, 2000,⁷⁶ the government decided against ratification.⁷⁷

Although Israel is not a party to the ICC, since operations began in 2002, NGOs have lobbied intensively for a Security Council referral of Israel⁷⁸ to the Court, and have submitted numerous reports to the ICC Prosecutor regarding alleged Israeli crimes. NGOs have also used official meetings of the ICC's Assembly of State Parties to lobby against Israel. In Kampala, for instance, several NGOs active in the cases described in this monograph, including FIDH, the Palestinian Center for Human Rights (PCHR), and the Center for Constitutional Rights (CCR), used the ICC Review conference as a platform for their anti-Israel campaigning. A joint statement issued by these NGOs at the opening of the event claimed that there is "prolonged impunity granted to Israel by the international community, despite Israel's documented, persistent disregard for international and humanitarian law."⁷⁹ The organizations demanded that the ICC Prosecutor "make an urgent determination regarding the opening of an

investigation into the situation in the OPT"; that "[t]he UN Security Council: [] refer the situation to the ICC"; and that [a]ll States Parties to the ICC [] take all appropriate measure[s], at the diplomatic and legal levels, to uphold the rule of law in the OPT"

In furtherance of the their anti-Israel campaigning, NGO interactions with the court greatly intensified in the aftermath of the Gaza War. On January 21, 2009, the Palestinian Authority wrote to ICC Prosecutor, Luis Moreno-Ocampo, ostensibly accepting the court's jurisdiction pursuant to Article 12(3) of the Rome Statute.⁸⁰ "Palestine" is not a recognized state, however, and consequently, is unable to become a party to the ICC.⁸¹ Nevertheless, Ocampo agreed to take the PA's declaration under advisement. Once it was clear Ocampo would not immediately reject the PA's attempt to join the Rome Statute, NGOs began an intensive campaign to pressure the Prosecutor to rule in favor of the PA. Amnesty International, Human Rights Watch, and others transmitted communications to the Prosecutor ostensibly documenting what they claimed to be Israeli "crimes" in Gaza.⁸²

⁷⁶ Available at <http://www.iccnw.org/?mod=country&iduct=82>.

⁷⁷ The US refused to sign the Rome Statute for fear that its nationals would be subject to politically motivated prosecutions. The US also signed bilateral "Article 98" agreements with many countries, including Israel, whereby the parties agreed not to surrender their nationals to the ICC.

⁷⁸ Under Article 13(b) of the ICC's Rome Statute, "The Court may exercise its jurisdiction" where "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." To date, the situation in Darfur has been the only case initiated by a Security Council referral.

⁷⁹ "NGOs gathered in Kampala Call for End to Impunity Crisis Following Israeli Attack on Aid Convoy," June 1, 2010 available at [http://www.fidh.org/NGOs-gathered-in-Kampala-Call-for-End-to-Impunity?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed:+fidhglobal+\(Human+Rights+for+All+:+www.fidh.org\)](http://www.fidh.org/NGOs-gathered-in-Kampala-Call-for-End-to-Impunity?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed:+fidhglobal+(Human+Rights+for+All+:+www.fidh.org))

⁸⁰ Article 12: Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

⁸¹ See, e.g. David Davenport, et al., "Palestinian Declaration and ICC Jurisdiction," November 19, 2009, available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281873/Paldeclandiccjurisd.pdf>.

⁸² Importantly, as noted by the Committee appointed by the ICTY Prosecutor to review alleged wrongdoing by NATO forces during the 1999 Kosovo campaign, "much of the material submitted to the Office of the Prosecutor consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed." Similarly, HRW's and Amnesty's reports relating to Gaza simply highlight a few extremely emotive incidents from which these organizations draw overly broad and unfounded conclusions regarding Israel's compliance with international law. International Criminal Tribunal for the former Yugoslavia, "Final report to the Prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia," available at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.

Other NGOs (again, those involved in many of the cases discussed below) directly lobbied Ocampo to accept the PA declaration. On October 14, 2009, representatives of FIDH and PCHR met with Ocampo to discuss “ICC jurisdiction over the situation [in Palestine],” “the gravity of the crimes committed,” and “the willingness and capacity of national tribunals to conduct domestic proceedings for crimes under ICC jurisdiction.” FIDH and PCHR, joined by Al Haq and NIF-funded Israeli NGOs Adalah and PCATI, participated in a second series of meetings with ICC officials on November 2-3, 2009, to “explor[e] different avenues to bring justice to the victims of serious violations of international human rights and humanitarian law . . . including those committed by Israel and Palestinian armed groups during Israel’s military offensive on the Gaza Strip ‘Operation Cast Lead.’”⁸³

Al Haq (a UN ECOSOC-accredited NGO based in Ramallah that receives funding from the Sweden, Norway, the Netherlands, and several other European governments, large NGOs, and prominent foundations)⁸⁴ went as far as submitting a 22-page brief to Ocampo arguing that he was obligated to accept the PA’s request on the basis that the PA could be considered a “State” solely for purposes of ICC jurisdiction.⁸⁵ On May 3, 2010, the ICC released

all submissions made to the Court on the issue, with the surprising exception of the PA’s statement.⁸⁶ In September 2010, PCHR and FIDH presented their own submission to the court aimed at disparaging the independence and due process of the Israeli justice system. Promoting this theme is an explicit strategy adopted by PCHR to advance its political agenda.⁸⁷ At time of publication, Ocampo had yet to issue an official decision as to whether he would proceed with the case.⁸⁸

As will be discussed in the next section, in the absence of jurisdiction over Israelis at the ICC, NGOs have developed complementary strategies that exploit legal processes to further their campaigns singling out Israel.

⁸³ FIDH, “Palestinian and Israeli Human Rights Organizations in the Hague,” November 5, 2009 *available at* <http://www.fidh.org/Palestinian-and-Israeli-human-rights>.

⁸⁴ Al Haq has consultative status with UN’s Economic and Social Council. Such status confers tremendous power on Al Haq, allowing it to place items on the provisional agendas, observe official meetings, submit written and oral statements to UN bodies and offers free publicity in and access to UN publications. See, e.g., Eye on the UN, “UN NGO Accreditation,” 2005, *available at* <http://www.eyeontheun.org/report-un-ngo.asp?p=3>. Al Haq’s governmental funders include Sweden, Norway, Netherlands, Switzerland, Ireland, Canada, and Spain. It also receives funding from the following foundations and church groups: the Ford Foundation, the Open Society Institute, Christian Aid, Diakonia, the Rosa Luxemburg Foundation, EED, ICCO and Kirkenactie, and the Arab Human Rights Fund. See Al Haq, “2009 Financial Statements and Independent Auditor’s Report,” *available at* <http://www.alhaq.org/pdfs/31-dec2009-final.pdf>. The NGO is also “West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).” See <http://www.alhaq.org/etemplate.php?id=3>. For more information on these organizations, see www.ngomonitor.org.

⁸⁵ Al Haq failed to note the irony, however, that many of the legal arguments advanced in its brief directly negated its claims about “occupation” and Israel’s supposed legal responsibilities to Palestinians.

⁸⁶ International Criminal Court, “Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements,” May 3, 2010, *available at* <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets>.

⁸⁷ PCHR, FIDH Press Release, “Human Rights Council Defer Justice: PCHR & FIDH submit case files to International Criminal Court,” September 29, 2010, *available at* http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=7021:human-rights-councildefer-justice-pchr-a-fidh-submit-case-files-to-international-criminal-court-&catid=36:pchrpressreleases&Itemid=194; See also Palestinian Center Human Rights, “Genuinely Unwilling: An update,” (Aug. 2010), *available at* <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>.

⁸⁸ Even if Ocampo decides to accept the PA Declaration and opens an investigation against Israelis, his decision will have to be approved by the ICC’s Court of First Instance before any judicial proceedings would take place. Given the extensive legal overreaching involved and the significant damage to the ICC’s credibility that would result should Al Haq’s approach be adopted, it is highly questionable as to whether the court would agree to move forward.

ALTERNATIVES TO INTERNATIONAL CRIMINAL PROSECUTIONS

The NGO movement promoting broad universal jurisdiction dovetailed with the intensification of the Israeli-Palestinian conflict in 2000, and led to the adoption of an explicit strategy of lawfare at the NGO Forum of the 2001 Durban Conference. NGOs sought to delegitimize Israel's existence and punish it for its anti-terror operations, yet were unable to pursue cases at the ICC. Instead, many organizations sought alternative methods within other international frameworks. These efforts have received substantial assistance from NGO superpowers and local Israeli and Palestinian NGOs, largely funded by European governments⁸⁹ and private philanthropies. In contrast, these activities are rarely directed towards the leaders and perpetrators of Palestinian terror. As with other NGO-led anti-Israel campaigns, these efforts minimize or even omit the context of terrorism, draw an immoral equivalence between anti-terror operations and mass scale atrocities, utilize international legal rhetoric, issue conclusory statements without proper evidentiary foundations, and are based on incomplete, distorted, and inconsistent legal definitions.

The NGO Forum Declaration of the 2001 Durban Conference

The strategy of initiating lawsuits to condemn, and ultimately to hamper, Israeli self-defensive measures was crystallized at the NGO Forum of the 2001 Durban Conference. At the forum, more than 1,500 participating NGOs, including NGO superpowers Human Rights Watch and Amnesty International, drafted the NGO Forum Declaration and Programme of Action ("Declaration") which singled out Israel for condemnation.⁹⁰ Attempting to give "weight" to the resolution, many provisions invoked international legal terminology and premised

their accusations on the ICC Rome Statute. Paragraphs 160, 162–63, for example, state:

160. *Appalled by the on-going colonial military Israeli occupation of the Occupied Palestinian Territories (the West Bank including Jerusalem, and the Gaza Strip), we declare and call for an immediate end to the Israeli systematic perpetration of racist crimes including war crimes, acts of genocide and ethnic cleansing (as defined in the Statute of the International Criminal Court)...*

162. *We declare Israel as a racist, apartheid state in which Israel's [sic] brand of apartheid as a crime against humanity...*

163. *Appalled by the inhumane acts perpetrated in the maintenance of this new form of apartheid regime through the Israeli state war on civilians including military attacks, torture, arbitrary arrests and detention...and systematic collective punishment...*

After listing its "charges" against Israel, the Declaration calls on the international community, with the assistance of NGOs, to engage in lawfare:

164. *...Recognize the right of return of refugees and internally displaced people to their homes of origin, **restitution** of properties, and **compensation** for damages, losses and other crimes committed against them, **as guaranteed in international law.***

113. *Call for the **immediate enforcement** of international humanitarian law, specifically the Fourth Geneva Convention 1949, in the Occupied Palestinian Territories through the **adoption of all measures to ensure its enforcement** ... Call for*

⁸⁹ Gerald M. Steinberg, *Europe's Hidden Hand: EU Funding for Political NGOs in the Arab-Israeli Conflict*, NGO Monitor Monograph Series, 2008

⁹⁰ See, e.g., Steinberg, *supra* note 41.

*the immediate convening of the High Contracting Parties to implement this process in fulfillment of their obligation to ensure respect for the Convention in all circumstances.*⁹¹

115. Call for the establishment of a war crimes tribunal to investigate and bring to justice those who may be guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid which amount to crimes against humanity that have been or continue to be perpetrated in Israel and the Occupied Palestinian Territories.⁹²

Many NGOs have incorporated these provisions into their mandates and campaigns. Al Haq, as mentioned, one of the primary NGOs lobbying for ICC jurisdiction over Israelis, is a clear example, explicitly adopting the goals of the NGO Declaration and acting upon them. In its 2007 “Programme Planning Framework – Plan of Action,” the organization lists as one of three main goals “hold[ing] accountable perpetrators of international human rights and humanitarian law in the OPT.”⁹³ Al Haq published a 16-point plan that includes

building ready-to-be-used case files that meet evidentiary demands of civil and criminal trials, ready to be activated in the courts of a number of third-party states when the opportunity presents itself to prosecute Israeli war criminals and accomplices in selected countries across the world; and on holding

*Israel accountable before the UN for its violations and crimes committed in the OPT.*⁹⁴

Although Al Haq claims to “document ... [human rights] violations of Palestinians in the OPT, irrespective of the identity of the perpetrator,” its activity is directed towards Israel, and the context of terrorism and intra-Palestinian violence is erased.

Al Haq’s Plan of Action is just one instance where an NGO has adopted lawfare and the NGO Forum Declaration as part of its official strategy. Detailed examples of how Al Haq and other NGOs have put lawfare into operation follow below.

Post-Durban NGO Conferences & Lobbying

As noted above, Israel has not ratified the Rome Statute, based on legal and political concerns, and as result, Israeli nationals cannot be brought to trial at the ICC.⁹⁵ In the effort to remove this barrier, the NGO community has adopted several alternative tactics, supported by funding from European governments, the EU, and foundations like Ford, Open Society Institute, and the New Israel Fund.

One such tactic is continued lobbying via roundtables, events, and public statements to press Israel to ratify the ICC’s Rome Statute. For instance, FIDH, with funding from the European Commission,⁹⁶ held an event in 2006

⁹¹ Article 146 of the Fourth Geneva Convention provides that

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Many international legal scholars interpret this provision as the basis for prosecuting violators for “war crimes.”

⁹² Emphasis added. Israel was the only country singled out in the declaration by the NGO community to be the object of an international criminal tribunal.

⁹³ Available at <http://www.alhaq.org/pdfs/Al-Haq%202007%20Action%20Plan.pdf>.

⁹⁴ *Id.*

⁹⁵ As mentioned above, the ICC Prosecutor is weighing whether to accept “Palestine” as a state for purposes of acceding to the Rome statute. If such a decision is accepted by the Court, it will be possible for Israeli nationals to be tried for alleged “crimes” committed in “Palestine.”

⁹⁶ For more information on EU support of NGOs promoting an anti-Israel political agenda, see .Steinberg, 2008, *supra* note 89.

entitled “Israel: National Roundtable on the International Criminal Court: Raising accountability of international criminals.”⁹⁷ The event was organized in collaboration with several EU-, European government-, and NIF-funded NGOs: Adalah, the Association for Civil Rights in Israel (ACRI), B’Tselem, and the Public Committee Against Torture in Israel (PCATI). Representatives from these groups featured prominently in the event, as did attorney Michael Sfard (legal advisor for Yesh Din and Breaking the Silence, and involved in several international “Israeli war crimes” cases).

FIDH’s stated goals in hosting the roundtable were to launch an “awareness campaign at the national level” to lobby Israel to accede to the Rome Statute, and promote “a Security Council referral to the ICC” with the support of “Israeli civil society hand in hand with international NGOs.”⁹⁸ One of the conference’s agenda items (implementing the Durban NGO Forum Declaration) included a “Discussion on Strategic Options ... strategies for bringing a case to the ICC.”⁹⁹ In its 2007 report summarizing the event, FIDH claimed that Israel refused to ratify the Rome Statute because it was afraid of “the possibility that the truth on what has been happening to the Palestinians may surface in such an international forum.”¹⁰⁰ This allegation restated language from PCHR, claiming that “[t]he Arab States are certainly not the most conspicuous parts of the region to have stepped away from the ICC. Of greater significance is the situation regarding

Israel and the Occupied Palestinian Territories, which should be considered *the issue*.”¹⁰¹

Another approach adopted by NGOs involves hosting legal strategy conferences on bringing Israelis to trial in national courts and other methods to hold Israel “accountable.”

PCHR: EU Funding for Planning Universal Jurisdiction Cases

The Gaza-based Palestinian Center for Human Rights (PCHR), the central actor in bringing cases against Israelis abroad, has organized and participated in dozens of conferences to promote its lawfare strategy. These efforts are funded primarily by the EU, European governments (Sweden, Denmark, Norway, Netherlands, Switzerland, Ireland, Spain), and large foundations (Open Society Institute, Christian Aid, DanChurchAid).¹⁰² PCHR is also active in UN frameworks. While this NGO does, at times, criticize rights abuses by Hamas and the Palestinian Authority, the main focus of its work is anti-Israel campaigning. The organization frequently labels attacks on Israeli civilians as “resistance,” and generally only condemns Palestinian bombings or rocket attacks if they fail to reach their intended civilian targets in Israel, and instead injure Palestinians.¹⁰³ In PCHR’s terms, “resistance groups” should not engage in the “misuse of weapons” [i.e. inflict intentional or negligent harm on Palestinians rather than restricting attacks to Israelis].¹⁰⁴

⁹⁷ FIDH National Roundtable Report, *supra* note 51.

⁹⁸ *Id.* at 11. See www.ngo-monitor.org for detailed information on these organizations.

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 34.

¹⁰¹ PCHR claims,

Israel appears concerned that cases, inevitably brought against it, will lead to investigations into Israel’s affairs and actions. Such investigations would allow for the possibility that the truth of what has been happening to the Palestinians, particularly in the Occupied Territories, at the hands of the Israeli authorities, may surface in such an international forum. This forum would be much more significant than the countless others in which Israel’s human rights violations have been exposed. . . The question that the Israelis are facing is whether Israel could withstand such honesty and, more significantly, its effects.

PCHR, “Globalization of Justice,” available at <http://www.pchrgaza.org/special/icc.htm>. The similarity between PCHR’s and FIDH’s positions is unsurprising given that the Director of PCHR Raji Sourani is also the Vice President of FIDH.

¹⁰² See PCHR, “Funding,” available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=3030&Itemid=178.

¹⁰³ See, e.g., PCHR, “6 Palestinians, Including 4 Children, Injured in Gaza Due to Misuse of Weapons,” December 23, 2008, available at <http://www.pchrgaza.org/files/weapon/english/2008/report44.html>.

¹⁰⁴ See, e.g., PCHR, “Explosion Kills One Man, Injures Five in Gaza,” February 4, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=5978:explosion-kills-one-man-and-injures-five-in-gaza-&catid=61:field-update-security-chaos-&Itemid=211; “4 Civilians Wounded in Incidents of Misuse of Weapons in the Gaza Strip,” March 4, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6215:4-civilians-wounded-in-incidents-of-misuse-of-weapons-in-the-gaza-strip-&catid=61:field-update-security-chaos-&Itemid=211.

PCHR rejects Israel's right to exist as a Jewish state¹⁰⁵ and is against normalization with the country.¹⁰⁶

The EU's process for awarding a grant to PCHR and Oxfam Novib was largely hidden from public scrutiny.

In 2005, PCHR and Oxfam Novib¹⁰⁷ received a 36-month, €298,339.08 grant from the European Union to “[c]ontribute to the abolition of the death penalty in the Occupied Palestinian Territory, applied by the Palestinian National Authority via judicial death sentences and via extrajudicial executions” by the Israeli military.¹⁰⁸ The funding was provided by the EU's European Instrument for Democracy and Human Rights (EIDHR) under the auspices of its program entitled the “Abolition of the Death Penalty Project.” With this funding, PCHR and Oxfam Novib campaigned against anti-terrorist “targeted killings” carried out by the Israeli military and hosted several conferences promoting the use of universal jurisdiction statutes against Israelis.¹⁰⁹ Ultimately, these activities were used as strategy sessions to bolster “war crimes” cases against Israeli officials throughout the world.¹¹⁰

The EU's process for awarding this grant was largely hidden from public scrutiny. EIDHR's grant database made no mention of PCHR as a recipient, nor that European taxpayer funding was to be used to facilitate universal jurisdiction lawsuits against Israeli officials. The grant application and details regarding the EIDHR selection process were unavailable to the public, and the EU refused to provide this information, despite numerous requests from NGO Monitor.¹¹¹

In 2006, the EU contracted with an independent consortium to audit the 28 programs funded under EIDHR's Abolition of the Death Penalty Project.¹¹² The evaluators found that there was little substantive oversight for these programs once grantees received funding. For instance, they determined that “information gathered from files and interviews with EC staff show weak monitoring by EC staff and poor knowledge of what projects are actually about, particularly at the Brussels level.”¹¹³ One funding recipient noted, “Despite invitations annually to visit us (...) [we] have not received a single visit or response during the decade we have received EC funding.”¹¹⁴ Other grantees “complained to the evaluators that they had received no feedback on the substance of their projects other than correspondence on purely administrative matters.”¹¹⁵

¹⁰⁵ See, e.g., PCHR, “Symposium entitled “60 Years of the Nakba: Palestinian People's Rights...to where?” February 28, 2008, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1356:symposium-entitled-60-years-of-the-nakba-palestinian-peoples-rightsto-where&catid=134:pchr-news-from-other-years.

¹⁰⁶ PCHR is a signatory to the Palestinian NGO Code of Conduct which rejects “any normalization activities with the occupier, neither at the political-security nor the cultural or developmental levels. No endeavor would be carried out if it undermines the inalienable Palestinian rights of establishing statehood and the return of the refugees to their original homes.” See NGO Monitor, “A Clouded EU Presidency: Swedish Funding for NGO Rejectionism,” June 29, 2009, available at http://www.ngo-monitor.org/article/a_clouded_eu_presidency_swedish_funding_for_radical_ngos.

¹⁰⁷ This NGO receives almost €130 million (approximately 70% of its budget) in funding from the Dutch government annually.

¹⁰⁸ EU funding constituted 80% of the total project budget.

¹⁰⁹ It is unclear whether the EU funding was also used to pay attorneys and filing fees for the many lawsuits described in this monograph initiated by PCHR relating to the targeted killing of Hamas leader, Salah Shehade. The EU has refused to publicly disclose any evaluation of this program and outside consultants hired to audit this program were unable to obtain or review any substantive information related to this program. See *infra* at 21.

¹¹⁰ No other funding under this EU program appears to address targeted killings or deaths occurring during military conflicts. No funding appears to have been provided for campaigns directed at NATO for its military operations – even though the use of targeted killings is broader in both scope and scale and the civilian combatant ratio in NATO attacks is much higher than in the Israeli case.

¹¹¹ NGO Monitor President Gerald Steinberg made repeated requests to EU officials for this information under the EU's Freedom of Information Law (1049/2001). After these requests were denied, the EU informed Steinberg that if he wanted to pursue the case further he would have to file a lawsuit at the European Court of Justice under Article 8(3) of the law. See NGO Monitor, “NGO Monitor sues EU over lack of NGO funding transparency,” January 26, 2010, available at http://www.ngo-monitor.org/article/ngo_monitor_sues_eu_over_lack_of_ngo_funding_transparency.

¹¹² European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects, April 4, 2007, available at http://ec.europa.eu/europeaid/what/human-rights/documents/eidhr_evaluation_death_penalty_final_report_4april07_en.pdf (*hereinafter* ADP Evaluation).

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 33.

¹¹⁵ *Id.*

These assessments are particularly relevant to the PCHR/Oxfam Novib grant. In one section of the evaluation, PCHR's project is described as "West Bank: one project targeted the Palestinian authority, essentially focusing on training for legal professionals."¹¹⁶ PCHR, however, works primarily in Gaza, and a significant percentage of its EU funding appears to have been spent on international conferences used to develop the organization's "war crimes" cases against Israelis. Significantly, the auditors also noted that the PCHR/Oxfam Novib

*file is not held in Brussels and there are few substantive documents held there on file. The only two documents we have are not very helpful . . . It is impossible to make any useful comment on this project without more information.*¹¹⁷

Given the large amounts of taxpayer funds at issue and the political repercussions of PCHR's legal campaigns, the lack of oversight regarding this program is highly troubling. PCHR and Oxfam Novib received a second three-year grant in 2010 for €964,680, entitled "Improving Awareness and Respect for Human Rights in OPT" under the EIDHR framework. On its website, PCHR claims the grant will be used for "data and reports on human rights violations"; "Increased local awareness on human rights for 950 professionals and activists and 6000 community members in the Gaza Strip"; "Access to and provision of legal aid for 9000 victims of human rights violations"; and "International pressure urging the reinforcement of Human Rights and implementation of rule of law by PNA governments." As of publication, this grant is not listed in the EU's EIDHR database, nor has the EU released any information related to this funding. It is unknown, therefore, if funds were allocated for PCHR to continue its politically motivated lawsuits.

The following section highlights some of the anti-Israel lawfare conferences held by PCHR using funds from the EU grant:

In April 2006, PCHR organized a conference in Malaga, Spain in conjunction with the Al-Quds Malaga Association, entitled "Bringing Cases Against War Criminals: Universal Jurisdiction."¹¹⁸ The aim of the conference was "to establish and develop contacts which could be used to enhance and strengthen future universal jurisdiction activities." PCHR noted that Spain was chosen as the conference venue due to its "central role in the modern practice of universal jurisdiction."¹¹⁹ The event was held ostensibly "in camera and without publicity, in order to ensure the best possible professional experience, and to facilitate debate on pertinent legal issues." According to PCHR, the secret "discussions were not academic, but practical, focusing on laws, procedures, cases and technical issues surrounding the exercise of universal jurisdiction." To that end, the conference examined how to expand the scope of anti-Israel prosecutions and conferred on whether "public funding" was available to bring these lawsuits.¹²⁰ Indeed, in June 2008, PCHR filed suit in Spain against seven Israeli officials for alleged "war crimes" (*infra* pp. 49-52).

With its EU funding, on November 5, 2008, PCHR held a follow-up conference in Cairo, "Impunity and the Prosecution of Israeli War Criminals," broadcast on Al Jazeera television.¹²¹ The event was organized in conjunction with the Arab Organization for Human Rights and the Arab Center for the Independence of the Judiciary and the Legal Profession. Speakers included British lawfare attorney Daniel Machover and Spanish attorney Gonzalez Boye (see *supra* at p. 32). Photos from the conference show a large sign behind presenters with the title "Impunity and the Prosecution of Israeli War Criminals."¹²² Underneath

¹¹⁶ *Id.* at 16.

¹¹⁷ *Id.* at 84. The EU has refused to disclose any other evaluation of this program.

¹¹⁸ PCHR, "The Principle and Practice of Universal Jurisdiction: PCHR's Work in the occupied Palestinian territory," (2010) at 133, available at http://pchrghaza.org/files/Reports/English/pdf_spec/PCHR-UJ-BOOK.pdf. (*hereinafter* "Principle and Practice").

¹¹⁹ Spain was a pioneer in advancing universal jurisdiction and has been the locus of several high profile cases – including the Pinochet case in 1998. Ironically, a Spanish judge was criminally indicted for opening an investigation into the crimes of the Franco era, one of the most brutal and repressive regimes in the 20th century and involving events with an actual connection to Spain. See Raphael Minder, "Spanish Judge Indicted for Inquiry Into Franco-Era Abuses," *The New York Times*, April 7, 2010, available at <http://www.nytimes.com/2010/04/08/world/europe/08iht-spain.html>.

¹²⁰ PCHR, Principle and Practice, *supra* note 118 at 135.

¹²¹ *Id.* at 136.

¹²² *Id.* at 175.

this phrase, an acknowledgment to the European Union and Oxfam Novib for funding the conference appears in large type, as do the EU and Oxfam logos.¹²³

PCHR held another conference from January 29 to February 1, 2009 in Madrid, focused on “establishing cooperation and coordination among universal jurisdiction practitioners, and reacting to the Israeli offensive on the Gaza Strip.”¹²⁴ PCHR used the conference to increase publicity for the case it had filed in Spain against Israeli officials.

The first day of the conference was used to discuss “current and future cases, coordination, cooperation, and progressing the practice of universal jurisdiction.”¹²⁵ Key figures in the anti-Israel lawfare movement, including Machover, Boye, an official from FIDH, and Maria LaHood of the Center for Constitutional Rights, addressed participants on the second day.¹²⁶ Hassan and Rina Jabareen from EU- and NIF-funded Israeli NGO Adalah were also invited “in anticipation of Israel’s retaliation to the 29 January decision of the Spanish Court, particularly as this related to the exhaustion of national jurisdiction vis-à-vis Israel’s military investigation.”¹²⁷ At the conference, the Jabareens “agreed to prepare an expert opinion on territorial jurisdiction to be submitted to the Spanish Audencia Nacional.”¹²⁸ The conference also discussed the attempts to have Israelis prosecuted at the ICC.

PCHR, together with FIDH, held a fourth conference on March 18, 2009 in London¹²⁹ as “an opportunity to counter

[a] 26 November 2008 conference hosted by the Jerusalem Center for Public Affairs.”¹³⁰ The aims of PCHR’s event were “to clearly explain the practice of universal jurisdiction and its motivations” and to “increase coordination and cooperation among lawyers, particularly in the aftermath of the Gaza offensive.”¹³¹ Prior to the conference, PCHR met with a group of lawyers to discuss “preparation of new cases in light of the Israeli offensive on the Gaza Strip.”¹³² Representatives from several NGOs were in attendance, including HRW, REDRESS, Amnesty International, the International Commission of Jurists, the International Center for Transitional Justice, PCHR, and Adalah.¹³³

Diakonia: Lawfare’s Swedish partner

Diakonia, Sweden’s largest humanitarian NGO, funded almost entirely by the Swedish government, is also a primary funder and supporter of lawfare.¹³⁴ In 2008, it sponsored a conference in Brussels in conjunction with Al Haq and Avocats Sans Frontiers entitled, “Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe.”¹³⁵ The event was funded by the Swedish government and included the participation of several Israeli NGO officials – many of whose organizations also receive Swedish funding, including Jessica Montell of B’Tselem, Hassan Jabareen of Adalah, Hadas Ziv of Physicians for Human Rights-Israel (PHR-I), and representatives from ICAHD, PCATI, and Badil that also receive substantial funding from the EU and/or European governments. Several key figures of the lawfare movement also presented, including Raji Sourani of PCHR, Charles

¹²³ *Id.*

¹²⁴ *Id.* at 137-8.

¹²⁵ *Id.*

¹²⁶ *Id.* at 138.

¹²⁷ *Id.*

¹²⁸ Adalah filed a submission on PCHR’s behalf during the appellate process. *See* pp. 50-52, *infra*.

¹²⁹ Adalah, International Advocacy in 2009, *available at* <http://www.adalah.org/eng/intladvocacy2009.php>.

¹³⁰ PCHR, Principle and Practice, *supra* n. 118 at 138. The JCPA conference was also held in London.

¹³¹ PCHR conducted the conference according to “Chatham House rule” where “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” It is unclear why PCHR wanted to keep this information secret. *See* PCHR, Principle and Practice, *supra* note 118 at note 495.

¹³² *Id.* at 139.

¹³³ *Id.*

¹³⁴ Diakonia funds more than 400 partner organizations. The organization was founded in 1966 by five Swedish Lutheran churches. Almost 95% of its budget is provided by the Swedish (91%) and Norwegian (1.5%) governments, and the EU (2.5%). *See* Anne Herzberg, “Diakonia: An Analysis of Activities in the Arab-Israeli Conflict,” August 25, 2009, *available at* http://www.ngo-monitor.org/article/diakonia_an_analysis_of_activities_in_the_arab_israeli_conflict.

¹³⁵ *See* Diakonia, “Conference Report: Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe,” September 2008. Report available on file with the author.

Shamas, Maria LaHood of CCR, representatives from Al Haq, FIDH, Avocats Sans Frontiers, and Yesh Gvul, a representative from the law office of Michael Sford, Spanish attorney Gonzalo Boye, and UK attorneys Daniel Machover and Phil Shiner.

The conference program claimed to examine the “need to bring perpetrators from Israel/Palestine, as well as their accomplices in Europe, to justice in European courts.”¹³⁶ In practice, the focus of the conference was on alleged Israeli violations and strategies targeting Israelis, while Palestinian abuses were ignored.

Speakers accused Israel of “war crimes,” and called for boycotts and legal initiatives against Israel. Raji Sourani of PCHR noted that the purpose of the meeting was to “look at the potential for launching more cases of universal jurisdiction” against Israel.¹³⁷ Montell declared that “most violations of human rights and international humanitarian law are the result of government policy, not the actions of a particular individual, so holding the army and state accountable on a broader level is crucial.”¹³⁸ Yishai Menuchin of the EU-, European- and NIF-funded PCATI, remarked that “universal jurisdiction shouldn’t be ruled out as a means to enforce the law against agents of the state” and that “human rights organizations could do more in terms of bringing complaints forward.”¹³⁹

Many participants discussed finding “ways to get more out of the ICJ’s Advisory Opinion,” including targeting “charities in the UK” and “financial institutions and banks.”¹⁴⁰ Diakonia’s representative, Grietje Baars noted that “Diakonia is currently researching third state responsibility.” Despite the lack of any standing

or justiciability barriers at Israel’s Supreme Court and the thousands of petitions that have been brought on behalf of Palestinians, Jabareen of Adalah claimed that the court “is not amenable to hearing [] cases that deal with acts amounting to potential war crimes,” noting that activists should try to portray Israel as an “inherent undemocratic state” and to “use that as part of campaigning internationally.”¹⁴¹

Diakonia held a forum at Al Quds University in March 2009, on “Accountability for IHL Violations” committed by Israel. The event was in conjunction with AIDA – the Association of International Development Agencies.¹⁴² Representatives from HRW, Avocats Sans Frontiers, and Al Haq presented strategies for holding Israel “accountable” for the Gaza War. Al Haq representatives also highlighted several of its universal jurisdiction cases, as well as the legal tactics used in bringing these suits.¹⁴³ Similarly, a July 2008 workshop entitled “Enforcing International Humanitarian Law in Foreign Courts” included a PowerPoint presentation entitled “Palestine: a war crime a minute” that ended with the slide, “See you in Court!”

On December 17, 2009, Diakonia, Al Haq, and Avocats Sans Frontiers again joined forces to hold an EU-sponsored workshop in Brussels, “Making Monitoring Work: Strategic Action.”¹⁴⁴ The event was intended as a follow-up to the September 2008 conference,¹⁴⁵ and materials prominently displaying the EU logo were distributed. The meeting centered around strategies for anti-Israel campaigning, including “access to legal remedies and strategic advocacy” and “consolidating networks and concrete action plans.” The event also promoted the Marxist “Russell Tribunal” (*infra* at p. 26).

¹³⁶ *Id.* at 2.

¹³⁷ The Belgian government played a role in facilitating the conference including attempts to arrange an agreement to shepherd several of the conference attendees to the Jordanian border in Belgian diplomatic cars. *Id.*

¹³⁸ *Id.* at 5. Montell was also given special thanks from the conference organizers as a member of an “inspiring team working out the deal of what the conference would look like.” *Id.* at 2.

¹³⁹ *Id.* at 6.

¹⁴⁰ *Id.* at 33.

¹⁴¹ *Id.* at 10.

¹⁴² AIDA is a “co-ordination facility for international development agencies operating in the West Bank and Gaza” including Oxfam, Trócaire, Christian Aid, and the Mennonite Central Committee. The organization collaborates on events and press releases, including many that condemn Israeli policy while stripping the context of asymmetrical war.

¹⁴³ Notes from the conference available on file with the author.

¹⁴⁴ Avocats Sans Frontiers, Workshop Agenda, available at http://www.asf.be/publications/G&J_workshop_UE-DGCD.pdf.

¹⁴⁵ Avocats Sans Frontiers, Conference invitation, available at <http://www.asf.be/images/uploads/File/Invitation.pdf>; Registration form available at http://www.asf.be/images/uploads/File/Registration_Form.pdf.

NGO PR Campaigns Advocating “War Crimes” Prosecutions

In addition to strategy conferences, many political advocacy NGOs routinely insert calls for an “end to impunity,” for “accountability,” or for “bringing perpetrators to justice” in their statements on the Arab-Israeli conflict and in their official submissions to UN bodies. These statements often equate the acts of “Palestinian armed groups” with those of the Israeli army or government, characterizing Israel as a pariah state that will not bring its own “war criminals” to justice, hence the need for international prosecution. The reports highlighted below are a sampling of the hundreds of NGO statements reflecting this activity.

Badil, one of the leaders of the anti-Israel boycott movement that rejects the existence of Israel as a Jewish state within any borders,¹⁴⁶ is a Palestinian NGO with UN special consultative status that lobbies for the so-called “right of return” and receives significant funding from several European governments.¹⁴⁷ On January 23, 2008, Badil submitted a statement to the UN Human Rights Council¹⁴⁸ calling on “states to undertake sanctions against Israel and to prosecute Israeli officials responsible for crimes against humanity and war crimes in the OPT.”

In order to strengthen its condemnation of alleged Israeli impunity, Badil not only attacks Israeli officials, but also claims that the Israeli Supreme Court, sitting as the High Court of Justice, is “guilty [of persecution] and ha[s] abetted serious war crimes.”¹⁴⁹ Badil demands that “the Palestinian people need ... to see those guilty of war crimes and crimes against humanity prosecuted and punished.”

In 2007, Badil launched “A Call to Action” to mark 60 years of “Nakba.” The campaign called upon “global civil society” to take part in “BDS, legal actions, media work, and public education and publicity campaigns.” One program sought to enlist journalists “to organize a targeted campaign to expose the lies of AIPAC and the Anti-Defamation League and to expose the Jewish and Zionist community’s double standards regarding Nakba & Occupation.” Several larger, European government funded NGOs, including Trócaire, DanChurchAid, and Oxfam Solidarity, co-sponsored these activities.¹⁵⁰

HRW also frequently engages in such campaigns. Since 2000, HRW has issued dozens of statements impugning the Israeli justice system and calling for international investigations of alleged Israeli abuses.¹⁵¹ In 2005, for example, HRW issued a 126-page report entitled “Promoting Impunity: The Israeli Military’s Failure to

Since 2000, HRW has issued dozens of statements impugning the Israeli justice system and calling for international investigations of alleged Israeli abuses.

¹⁴⁶ “Palestinian Civil Society Calls for Boycott, Divestment and Sanctions against Israel Until it Complies with International Law and Universal Principles of Human Rights,” July 9, 2005, *available at* <http://bdsmovement.net/?q=node/52>.

¹⁴⁷ Badil’s funders include Oxfam, CIDA (via Mennonite Central Committee), Switzerland, the Norwegian Refugee Council, Mussassat, DanChurchAid, Trócaire (a major recipient of Irish government funding), and Norwegian Peoples Aid. *See* Badil’s 2006 Annual Report, *available at* <http://www.badil.org/BADIL/Annual-Reports/2006/Report2006.pdf>.

¹⁴⁸ Badil, “Written statement submitted by Badil Resource Center for Palestinian Residency and Refugee Rights,” January 23, 2008, *available at* <http://www.badil.org/Publications/statements/BADIL%20Statement%20to%206th%20HRC%20special%20session.pdf>.

¹⁴⁹ This theme is often advanced by NGOs (particularly by Badil, Adalah, Al Haq, and HRW) even though the Israeli Supreme Court has no standing barriers, rarely invokes nonjusticiability doctrines, and has heard thousands of petitions regarding every conceivable issue related to Palestinian human rights and counter-terror operations. The Court has even adjudicated human rights issues while military operations are in progress. *See e.g. Almadani v. IDF Commander in Judea and Samaria*, H.C. *Available at* 3451/02, http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf.

¹⁵⁰ Badil’s website also displayed blatantly antisemitic imagery until NGO Monitor alerted one of its funders who intervened to have the image removed. A 2010 monetary award winner of its “Nakba Commemoration” poster contest involved classic antisemitic tropes, showing a grotesque caricature of a Jewish man, garbed in traditional Hasidic attire, with a crooked nose and side locks. He stands on a platform dated “1948” that is crushing an Arab woman and a dead child, surrounded by skulls and holding a pitchfork dripping with blood. Image available at http://www.ngo-monitor.org/article/badil_s_antisemitic_cartoon_questions_for_danchurchaid_trocaire_and_funders.

¹⁵¹ In contrast, HRW has issued only a handful of statements regarding the rule of law and justice systems in Iran, North Korea, Burma, and Zimbabwe. List of statements available on file with the author.

Investigate Wrongdoing.”¹⁵² The report claims that the “Israeli military has fostered a climate of impunity” and demands that Israel “improve the accountability of their armed forces for [alleged] arbitrary killings and other serious human rights abuses.” The report omits the context of terror and fails to discuss the deliberate policy of employing human shields by Palestinian terror groups. In the aftermath of the Gaza War, HRW has intensified its campaigning on this theme (*infra* p. 34).¹⁵³

Pax Christi International, in a statement submitted to the UN Commission on Human Rights in 2003, during the height of the Palestinian terror campaign, claimed that “the Palestinian population [but not the Israeli population] is in dire need of international protection. Many cases of acts of violence done by the IDF or by armed Palestinian groups cannot be investigated, in the absence of an international monitoring body, creating an atmosphere of impunity.”¹⁵⁴ The NGO called for the establishment of an international monitoring body, which would have “clear directives to end impunity and be ... empowered to press for prosecution of violators of international humanitarian law.”

Amnesty International’s statement on Israel’s Winograd Commission is another example of NGO accusations of Israeli “impunity.”¹⁵⁵ The statement alleges that Israel committed “war crimes,” “indiscriminate killings,” and

“deliberate and wanton destruction” in the Second Lebanon War, and then demands that the Israeli government “[e]stablish an independent and impartial investigation into evidence indicating that its forces committed serious violations of international human rights and humanitarian law during the conflict, including war crimes, and ensure that those responsible are brought to justice.”¹⁵⁶ Amnesty’s statement presupposes Israeli guilt for war crimes based on the organization’s one-sided assessment of the war, and calls for punishment even though such crimes have yet to be proven.¹⁵⁷

Additional radical NGOs, such as the **Alternative Information Center** funded by Ireland (via Christian Aid) and Canada (via Alternatives), issue highly inflammatory statements and promote mock war crimes trials with the cooperation of HRW and Amnesty. A December 2007 statement published on the Alternative Information Center website proclaims that “Avi Dichter ... is a courageous man, at least when he was dealing with the interrogation of handcuffed Palestinian detainees . . . he is much less courageous when confronted with the possibility of being arrested by the British police.” The article goes on to issue a call urging “the French solidarity movement to follow the example of the British and Belgian solidarity movements, to open the necessary procedures enabling [the] arrest [of Moshe Ya’alon] ... and to put him on trial ...”¹⁵⁸

¹⁵² Human Rights Watch, “Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing,” available at <http://hrw.org/reports/2005/iopt0605/>.

¹⁵³ See, e.g. NGO Monitor, List of NGO Statements in Support of Goldstone, available at http://www.ngo-monitor.org/article/goldstone_and_ngos#goldstone.

¹⁵⁴ “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Written statement submitted by Pax Christi International,” Comm. H.R. 59th Sess., E/CN.4/2003/NGO/128 (March 12, 2003).

¹⁵⁵ Amnesty International, “Israel: Winograd Commission disregards Israeli war crimes,” January 31, 2008, available at <http://www.amnesty.org/en/for-media/press-releases/israel-winograd-commission-disregards-israeli-war-crimes-20080131>. See also “Israel and Hizbullah Must Spare Civilians: Obligations under international humanitarian law of the parties to the conflict in Israel and Lebanon,” July 26, 2006, where Amnesty calls upon Israel and Lebanon to submit to an “International Humanitarian Fact-Finding Commission (IHFFC),” pursuant to Article 90 of Protocol I of the Geneva Conventions. The IHFFC could ask the Security Council to refer the case to the ICC Prosecutor, available at <http://www.amnesty.org/en/library/asset/MDE15/070/2006/en/dom-MDE150702006en.pdf>. Amnesty has engaged in a similar campaign regarding the Gaza War and the Goldstone process. See *infra* at 33-38.

¹⁵⁶ *Id.*

¹⁵⁷ As Amnesty has already rendered judgment on Israel, it is clear that the NGO would not accept the results of any “independent and impartial investigation” that differed from its opinion. In addition, this statement is particularly absurd given Amnesty’s widely discredited “research” on the Lebanon war, which relied on eyewitnesses whose testimonies were found to be false. See “Amnesty and HRW Claims Discredited in Detailed Report,” NGO Monitor, December 28, 2006, available at http://www.ngo-monitor.org/article/amnesty_and_hr_w_claims_discredited_in_detailed_report.

¹⁵⁸ Michael Warschawski, “No Holidays in Europe for Israeli War Criminals,” *Alternative Information Center*, December 12, 2006.

In February 2008, the **International Jury of Conscience for Lebanon** held a mock war crimes trial in Brussels where it considered “only the actions of the Israeli army” in the Second Lebanon War, and to which representatives of HRW and Amnesty gave presentations. The tribunal was broadcast throughout the Arab world and Latin America, and its “verdict” declared Israel guilty of “war crimes,” “crimes against humanity,” and genocide.¹⁵⁹ Kenneth Roth, Executive Director of HRW, also participated as “Prosecutor” in a mock war crimes trial on the BBC.¹⁶⁰ Roth wrongly stated that the roles of aggressor and defender in international law are irrelevant, alleged that Israel bombed civilians “indiscriminately,” and repeated claims that there was no Hezbollah presence in the areas investigated by HRW, despite the myriad of evidence to the contrary.¹⁶¹

In March 2010, a group of anti-Israel activists and NGO officials organized the “**Third Russell Tribunal**,” supported by a €56,000 grant from the Barcelona municipality.¹⁶² The Tribunal, with roots in Marxist and anti-Western ideology, was a mock court, putting Israel and its allies “on trial.” The framework, in keeping with the “Durban strategy,” calls for “existing legal actions [“lawfare”] and campaigns in the context of BDS to be stepped up and widened within the EU and globally” against Israel.¹⁶³

The Tribunal’s “Support Committee” includes anti-Israel ideologues Jean Ziegler, John Dugard, and Richard Falk;

representatives from PCHR and ICAHD; and Goldstone Mission member Hila Jilani.¹⁶⁴ Held from March 1-3, 2010, the Tribunal “witnesses” included Goldstone Mission member Desmond Travers; Phil Shiner, attorney for Al Haq in its lawfare cases against the UK government; and Michael Sfar.¹⁶⁵ The Tribunal concluded by calling for the “use of universal jurisdiction over individual criminal suspects, domestic civil proceedings against individual governments and/or their departments or agencies and private companies.” It also encouraged others “to commission research into which countries and jurisdictions these matters can most effectively be pursued.”¹⁶⁶ Its session in London in late 2010 will “focus on corporations profiting from the occupation but also on labour rights in Palestine-Israel and the role third party States play in letting those violations take place.”¹⁶⁷

International Law Portals

Another critical component of lawfare is NGO efforts to shape and control the discourse on international law. The adoption of legal rhetoric is almost universal in NGO publications on the Arab-Israeli conflict: by couching political attacks in legal terms, NGOs seek to create a veneer of credibility and expertise, thereby increasing international pressure against Israel and further delegitimizing counter-terror measures. In addition to bolstering legal strategies, this approach also supports the BDS (boycotts, divestment, and sanctions) movement

¹⁵⁹ International Associations Center, “International Jury of Conscience for Lebanon,” February 22–24, 2008, available at http://www.iacenter.org/palestine/leb_jury-sched0208/; “Final Verdict of the International Citizens’ Tribunal on Lebanon, February 24, 2008, available at <http://www.iacenter.org/palestine/lebon-tribun-verdict030708/>.

International Action Center, “Peoples court condemns Israel for war crimes in Lebanon,” February 28, 2008, <http://www.iacenter.org/palestine/leb-tribunal-condemn030108/>.

¹⁶⁰ http://www.hrw.org/campaigns/israel_lebanon/#nolink.

¹⁶¹ See “Amnesty and HRW Claims Discredited in Detailed Report,” NGO Monitor, December 28, 2006, available at http://www.ngo-monitor.org/article/amnesty_and_hrw_claims_discredited_in_detailed_report.

¹⁶² See Euro-Mediterranean Human Rights Network, “Minutes of the EMHRN Working Group on Israel/Palestine,” October 16-18, 2009, available at http://www.ngo-monitor.org/article/spain_government_funding_for_political_ngos_promoting_the_palestinian_narrative.

¹⁶³ Russell Tribunal on Palestine, “Russell Tribunal on Palestine work has started,” December 12, 2009, available at <http://russelltribunalonpalestine.over-blog.org/article-the-russell-tribunal-on-palestine-work-has-started-41625604.html>.

¹⁶⁴ Russell Tribunal on Palestine, “The Support Committee,” available at <http://www.russelltribunalonpalestine.org/pages/Parrains-1041547.html>.

¹⁶⁵ Russell Tribunal on Palestine, “Expert and Witness Presentations,” March 1-3, 2010, available at <http://www.scribd.com/doc/28196870/Presentations-Russell-Tribunal-on-Palestine-Barcelona-English>.

¹⁶⁶ Russell Tribunal on Palestine, “Conclusions of the Russell Tribunal on Palestine First Session in Barcelona,” March 1-3, 2010, available at <http://www.scribd.com/doc/27775868/Russell-Tribunal-on-Palestine-findings>.

¹⁶⁷ Russell Tribunal on Palestine, “What’s Next?,” March 14, 2010, available at <http://russelltribunalonpalestine.over-blog.org/article-russell-tribunal-on-palestine-what-s-next-46669477.html>.

and similar tactics. And NGOs engaging in this strategy openly admit this objective. In a position paper issued by Al Haq and Adalah, for instance, they acknowledge that focusing on international law

*provides a basis for the next strategic step for advocates ...by actively seeking to ensure support from the international community and in particular, courts, both national and international, for the assertion that Israel is in violation of these prohibitions, a new step in international advocacy and Palestinian strategy will be taken.*¹⁶⁸

In furtherance of this goal, several NGOs have created websites purporting to restate international law as it pertains to the conflict. The international humanitarian law web portals developed by Diakonia and Harvard University, via funding provided by the Swedish and Swiss governments, are primary examples.

Diakonia, runs the “International Humanitarian Law Programme.”¹⁶⁹ The program was developed in consultation with SIDA, Sweden’s international development agency, and the Swedish Red Cross.¹⁷⁰ From 2006 to 2009, this program received the majority of the organization’s funding for the Middle East region, and it has been widely promoted. The project’s ostensible mission “aims at increasing respect for and further implement[ation of] international humanitarian law in Israel/Palestine, as a means to improve the humanitarian situation, and create a possibility for peace in the region.” The program is comprised of several components, including the IHL “Easy Guide” Website, seminars, and events (see *supra* at pp. 22-23); sponsoring other IHL webportals, such as the Harvard site; and “monitoring breaches” of IHL. To carry out this project, Diakonia partners with several organizations – many of which are

active in the lawfare movement, including Al Haq¹⁷¹ and Al Mezan.¹⁷² The IHL program is unique in Diakonia’s framework. No similar program exists directed towards other conflict regions; in this, as in other NGO political campaigns, Arab-Israeli issues are treated uniquely.

The main component of Diakonia’s IHL program is the “Easy Guide to International Humanitarian Law in the Occupied Palestinian Territory” website. It is intended to “target” Swedish and English speakers “who are interested in the Palestinian-Israeli conflict, generally familiar with the facts on the ground but are seeking to familiarize themselves with the legal tool in their advocacy messages and analysis.” The website aims to present a summary of existing international law on various topics. Much of the content on the IHL website, however, utilizes ideological rhetoric and is aimed at delegitimizing any means of self-defense employed by Israel. It includes statements on “a selection of Israeli policies that severely affects the daily life of Palestinian civilians” such as “the Wall,” “House Demolition Policy,” “Movement Restrictions,” and “Israeli Settlements.” The website also promotes a so-called “right to resist” on behalf of the Palestinians – a euphemism for justifying Palestinian terror attacks on Israeli civilians. To support the specious claim of a “right to resist,” Diakonia writes, “[t]he use of force as part of resisting occupation in the Palestinian case is therefore derived from the **international legitimacy to recourse to armed struggle** in order to obtain the right to self-determination”¹⁷³ (emphasis added). Funding under this program is also to be used by its partners to incorporate these legal arguments into their work.¹⁷⁴

Although Diakonia includes a few scattered links to Israeli government sources, “the website primarily engages with the obligation of the State of Israel, as the occupying power, towards the Palestinian population.” The biased

¹⁶⁸ Michael Kearney, “Locating the Report in an Emergent Environment of ‘Lawfare,’” August 16, 2009, available at <http://www.alhaq.org/pdfs/MichaelKearney.pdf>.

¹⁶⁹ Anne Herzberg, “Diakonia: An analysis of activities in the Arab-Israeli Conflict,” August 25, 2009, available at http://www.ngo-monitor.org/article/diakonia_an_analysis_of_activities_in_the_arab_israeli_conflict.

¹⁷⁰ STHLM Policy Group, “Draft Evaluation of the Diakonia IHL program Occupied Palestinian territory (oPt) and Israel,” April 22, 2009 at 14, available at http://www.diakonia.se/documents/public/results_and_highlights/evaluation_ihl_programme_2009.pdf (hereinafter STHLM Evaluation).

¹⁷¹ Diakonia funding represents 15% of Al Haq’s budget. STHLM Evaluation, *supra* note 170, at 28.

¹⁷² Diakonia, “Our Partners,” last updated on November 2, 2009, available at <http://www.diakonia.se/sa/node.asp?node=928>

¹⁷³ This is a gross and immoral distortion of the law.

¹⁷⁴ STHLM Evaluation, *supra* note 170, *passim*.

information presented on the website and the frequent misrepresentations of international law reflect this one-sided approach. Little, if any, content addresses the legal rights of Israelis or Jewish self-determination. As noted, the IHL program and website are unique in Diakonia's activities. A review conducted by the author in 2009 could not find a similar type of program in terms of content or resources involving any other conflict region in the world. Moreover, as noted by the program's external evaluators:

*The core of the conflict is political and root causes can only be addressed through political dialogue. While increased respect for basic human rights and IHL standards can create space for such dialogue, it cannot in itself bring the conflict to an end.*¹⁷⁵

Program on Humanitarian Policy and Conflict Research (HPCR) in conjunction with Harvard University School of Public Health

With support from the Swedish and Swiss governments, Harvard University's School of Public Health also operates a webportal called "IHL in Israel and the Occupied Palestinian Territory."¹⁷⁶ The site was developed "in consultation" with the UN, and aims "to improve access to balanced information on international law and to promote the integration of legal and humanitarian analysis in the context of the Israeli-Palestinian conflict and the Roadmap framework."¹⁷⁷ The portal contains "policy briefs" that claim to "analyze" IHL on aspects of the Arab-Israeli conflict, yet invariably conclude that

Israel is violating international law. The forum has been a major proponent and disseminator of a PLO "legal opinion" that Gaza remains "occupied" following Israel's 2005 withdrawal.¹⁷⁸ The Program on Humanitarian Policy and Conflict Research operates several websites addressing more general topics in international law,¹⁷⁹ but like Diakonia, despite far more deadly conflicts and serious rights abuses,¹⁸⁰ the Arab-Israeli conflict is the only specific region with its own devoted website in this framework.

The ICJ Advisory Case Against the "Wall"

Although there has yet to be an ICC prosecution against Israeli nationals, in 2004, the International Court of Justice (ICJ) issued an Advisory Opinion against Israel regarding the construction of its security barrier. This civil case was largely precipitated, aided, and promoted by the NGO network.

Founded in 1945 and based in the Hague, the ICJ is the "principal judicial organ of the UN."¹⁸¹ The court's purpose is to "settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies."¹⁸²

In June 2002, Israel announced its decision to erect a barrier in order to prevent terrorists from entering Israel. The decision was made in the wake of a virulent campaign of suicide bombings¹⁸³ targeting restaurants, cafes, buses, and shopping malls, and killing hundreds of Israelis,

¹⁷⁵ *Id.* at 40.

¹⁷⁶ Available at <http://opt.ihlresearch.org/>.

¹⁷⁷ Available at <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewpage&pageid=729>.

¹⁷⁸ HPCR, "Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law (IHL)," available at <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=774>.

¹⁷⁹ The other sites are the Humanitarian Law and Policy Forum, IHL in Air and Missile Warfare, the Advanced Training Program on Humanitarian Action, and the International Humanitarian Law Research Initiative. See <http://www.hpcrresearch.org/research>.

¹⁸⁰ For instance, the conflict in Congo has resulted in more than 5 million deaths since 1998 (more than 45,000 per month). See Chris McGreal, "Congo conflict causes 45,000 deaths a month: study," *The Guardian*, January 22, 2008, available at <http://www.guardian.co.uk/world/2008/jan/22/congo.chrismcgreal>. Since 2003, 300,000 have been killed in Darfur. See "Q&A Sudan's Darfur Conflict," *BBC*, February 8, 2010, available at <http://news.bbc.co.uk/2/hi/africa/3496731.stm>. In contrast, since the beginning of the Arab-Israeli conflict in the late 1880s, approximately 65,000 have been killed. See "Mid-Range Wars and Atrocities of the Twentieth Century," available at <http://users.erols.com/mwhite28/warstat4.htm#Israel>.

¹⁸¹ International Court of Justice, "The Court," available at <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=9c2d0922995fd94fd78b094a67961d51>.

¹⁸² *Id.*

¹⁸³ Israel Ministry of Foreign Affairs, "Palestinian Violence and Terrorism," available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Palestinian+violence+and+terrorism+since+September.htm>.

including scores of children, and wounding thousands.¹⁸⁴ Shortly after construction began on the barrier, Palestinian officials followed by NGOs issued statements calling for the barrier's dismantling, accusing Israel of international crimes and human rights violations. These statements decried the alleged infringement on the Palestinian "right to movement" and the "right to work," while rarely acknowledging the Palestinian terror campaign explicitly directed against Israeli civilians, Israel's legitimate security concerns, or Israelis' "right to life."

NGO campaigns were accompanied by graphic photo essays and emotive anecdotes purportedly documenting the impact of the barrier on Palestinian human rights. Undermining the legal cornerstones of democratic societies – judicial review and the availability of due process for Palestinians – these campaigns also ignored or denigrated decisions of the Israeli High Court of Justice to re-route sections of the barrier that the court deemed to cause disproportionate harm.

Israeli NGO B'Tselem (funded by the British, Swiss, and Irish governments, Christian Aid, the Ford Foundation, the New Israel Fund, DanChurchAid, Diakonia, Trócaire, and others¹⁸⁵) was the first NGO to launch a campaign against the barrier. It issued two lengthy position papers, which became accepted as the definitive analyses of "the Wall" and were widely adopted.¹⁸⁶ In its September 2002 paper, "The Separation Barrier," B'Tselem theorized on the "potential dangers" and alleged infringement of Palestinian rights of the barrier, even though construction had not yet begun.¹⁸⁷ B'Tselem argued that the barrier was erected

for political, rather than purely security, concerns and that such "considerations may not form a proper basis for infringing human rights in general, and for infringing the human rights of residents of the Occupied Territories in particular." B'Tselem ignored the fact that in international law, few human rights are absolute and are often balanced with political considerations.¹⁸⁸

B'Tselem's second report, the 42-page "Behind the Barrier" issued in March 2003, purported to document the barrier's infringement of "a range of human rights of hundreds of thousands of Palestinians, from the right to property to the right to receive medical treatment."¹⁸⁹ The report concludes with B'Tselem urging the Israeli government to "immediately stop all work on the barrier" and "[r]eopen discussions on ways to cope with Palestinian attacks within Israel," examining "alternatives to erecting the separation barrier."¹⁹⁰ B'Tselem does not suggest alternatives, nor does the organization account for the hundreds of lives potentially at risk while these "discussions" take place. Indeed, their emphasis on negotiations with the Arafat-led Palestinian Authority reflected B'Tselem's primary, political objective.

Other NGOs joined the campaign initiated by B'Tselem and issued their own statements condemning the barrier. These organizations included the PENGON NGO network's "Stop the Wall: The Grassroots Palestinian Anti-Apartheid Wall Campaign,"¹⁹¹ HRW, and Amnesty. In one notable example, HRW issued a press release and letter to US President George Bush on September 30, 2003 statements condemning the barrier and urging

¹⁸⁴ Israel Ministry of Foreign Affairs, "Victims of Palestinian Violence and Terrorism," available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm>.

¹⁸⁵ B'Tselem, "List of Donors to B'Tselem," available at http://www.btselem.org/english/About_BTselem/Donors.asp.

¹⁸⁶ These reports were referenced by many NGOs, and were referred to in three UN-commissioned reports included by the UN General Assembly into the court's official case dossier; in the official statement of "Palestine" to the ICJ; and in the ICJ's advisory opinion.

¹⁸⁷ B'Tselem, "The Separation Barrier," September 2002, available at <http://www.btselem.org/english/publications/Index.asp?YF=2002&image.x=15&image.y=16>.

¹⁸⁸ For example, almost all of the human rights conventions and the Geneva Conventions include derogation and limitation clauses for times of "public emergency which threatens the life of the nation"; "to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others"; and for "security."

¹⁸⁹ B'Tselem, "Behind the Barrier," March 2003 at 12, available at http://www.btselem.org/Download/200304_Behind_The_Barrier_Eng.pdf; These publications followed on the heels of B'Tselem's May 2002 report, *Land Grab: Israel's Settlement Policy in the West Bank*.

¹⁹⁰ *Id.* at 36.

¹⁹¹ See www.stophthewall.org.

him to “exercise U.S. influence” and to “deduct the costs of the West Bank separation barrier from [Israel] loan guarantees.”¹⁹²

Concurrently with the NGO campaign, the UN commissioned three reports addressing the security barrier, all of which heavily relied on “evidence” from the NGOs B’Tselem, PCATI, Defence of Children International - Palestine Section, LAW, Al Haq, the Alternative Information Center, and ICAHD.¹⁹³ These studies adopted biased NGO terminology, characterized the security barrier as “the Wall” even though less than three percent of the barrier constitutes a wall,¹⁹⁴ and omitted the context of terror from their analyses.

With the “anti-Wall” NGO campaign firmly underway, and reinforced and legitimized by the UN-commissioned studies, the UN General Assembly voted on December 8, 2003 to refer a request to the ICJ for an Advisory Opinion on the Barrier.¹⁹⁵ The request, pursuant to Article 65 of the ICJ Statute, called on the court to issue an opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the

occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

As the language of the request makes clear, the outcome of the case was pre-determined. Moreover, the official dossier transmitted by the General Assembly to the ICJ reflected the one-sided nature of the request, by including the UN-commissioned reports that relied on NGO “evidence.” In advance of the court’s hearing, several countries submitted written statements to the ICJ. The “Palestine” submission¹⁹⁶ included two B’Tselem reports, and the League of Arab States submission referred to a report by Amnesty.¹⁹⁷ The final ICJ opinion incorporated the UN reports and the myriad of NGO “evidence.”¹⁹⁸

In conjunction with the case, many NGOs issued strategically timed statements and pseudo-legal “briefs” to further publicize the case and influence public opinion. Amnesty International, for example, published a press release and report on February 19, 2004 – the day before

¹⁹² Human Rights Watch, “Letter to President Bush on Israel Loan Guarantees and Separation Barrier,” September 30, 2003 available at <http://www.hrw.org/press/2003/09/israel093003-ltr.htm>; “Israel: West Bank Barrier Endangers Basic Rights: U.S. Should Deduct Costs From Loan Guarantees,” October 1, 2003, available at <http://hrw.org/english/docs/2003/10/01/isrlpa6417.htm>.

¹⁹³ See “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A,” U.N. Comm. H.R., 60th Sess., E/CN.4/2004/6, September 8, 2003; “The right to food, Report by the Special Rapporteur, Jean Ziegler” and “Addendum, Mission to the Occupied Palestinian Territories,” Comm. H.R., 60th Sess., E/CN.4/2004/10/Add.2, 31 October 2003, available at <http://domino.un.org/UNISPAL.nsf/fd807e46661e3689852570d00069e918/bcffff2cc84ae9bc85256e2b00685371!OpenDocument>; “The Impact of Israel’s Separation Barrier on Affected West Bank Communities,” Report of the Mission to the Humanitarian and Emergency Policy Group (HPEG) of the Local Aid Coordination Committee (LACC), May 4, 2003 (“LACC Study”) available at [http://domino.un.org/UNISPAL.nsf/a39191b210be1d6085256da90053dee5/084e7278b1a3491385256d1d0065bc42/\\$FILE/Wallreport.pdf](http://domino.un.org/UNISPAL.nsf/a39191b210be1d6085256da90053dee5/084e7278b1a3491385256d1d0065bc42/$FILE/Wallreport.pdf). See www.unwatch.org for more information on the background of UN Special Rapporteurs John Dugard and Jean Ziegler, authors of two of the UN-commissioned studies.

¹⁹⁴ Israeli Ministry of Foreign Affairs, “Saving Lives: Israel’s anti-terrorist fence,” January 1, 2004, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Saving+Lives-+Israel-s+anti-terrorist+fence+-+Answ.htm#3>.

¹⁹⁵ U.N. GAOR, A/RES/ES-10/14 (A/ES-10/L.16) adopted on December 8, 2003.

¹⁹⁶ Although “Palestine” is not an officially recognized country within the UN system, it was allowed to submit a written and oral statement to the court. This breach of protocol was unprecedented.

¹⁹⁷ The Palestine Submission to the ICJ annexed several B’Tselem reports: <http://www.icj-cij.org/docket/files/131/1555.pdf>; The League of Arab States submission references an Amnesty report (p. 53 n. 54) <http://www.icj-cij.org/docket/files/131/1545.pdf>. NGO Monitor contacted B’Tselem without response (as of October 31, 2010) to determine if the organization was aware that its reports had been included with the Palestine submission or if it had cooperated in preparation of the submission.

¹⁹⁸ Request for an Advisory Opinion, 2004 ICJ 136 (July 9, 2004) at 190–91, available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

the opening hearing at the ICJ. The statement, drafted like a legal brief, discounted Israel's objections to the hearing as political and, as did the General Assembly Resolution, *a priori* determined the outcome of the case claiming that the construction of the "fence/wall . . . violates international law." HRW issued its own "briefing paper" on February 23, 2004.¹⁹⁹ The International Commission of Jurists and FIDH also issued a joint "Position Paper" to coincide with the ICJ hearing.²⁰⁰ The statement presented a "legal" analysis of the barrier and described how it "seriously hinders the enjoyment of the most fundamental human rights by the Palestinian population and is in violation of international law."²⁰¹

On July 9, 2004 the ICJ issued its advisory opinion supporting the Palestinian position, as well as a stinging minority statement criticizing the biases in the majority opinion.²⁰² The NGO network immediately sprung into action, issuing numerous statements and reports declaring "the Wall" "illegal" and calling on the international community, including the UN Security Council, to "take the necessary steps in order to put an end to the illegal situation created by the construction of the wall."²⁰³ NGOs erased the non-binding nature of the court's opinion, and the inherent biases in this political body. HRW's Director of Middle East and North Africa Division Sarah Leah Whitson published an article in Lebanon's *Daily Star* on the day of the ICJ ruling, using the opportunity to also criticize the Israeli High Court of Justice for a decision that parts of the barrier caused disproportionate harm and

needed re-routing (Whitson wanted the court to declare the entire barrier illegal). Her article further found Israeli settlement policy to be "illegal" and called the barrier an "outright land grab."²⁰⁴

Several years after the court's opinion, NGOs continue to publicize the case (often misleadingly portraying it as a binding "ruling," as opposed to an advisory opinion without legal obligation) and to press for international action against Israel. In 2006, Al Haq issued a "brief" focusing on "implementation" of the opinion (even though no such implementation is legally required).²⁰⁵ The report claims that the "Wall" has "the purpose of illegally annexing Palestinian land" and falsely declares that "[e]ach state is legally obliged, under [the Geneva Conventions] to ensure the removal of the Wall . . . it may use all means allowed under international law."²⁰⁶ War on Want, a British NGO funded by the EU and the British government and a leader in the boycott, divestment, and sanctions movement, promotes the "Palestine Campaign: The Wall Must Fall" on its website, calling for the end of the EU-Israel Association Agreement.²⁰⁷

Since the 2004 opinion, NGOs have also continued to exploit the ICJ as a forum for further advancing their political goals by lobbying for advisory opinions on the legality of the Gaza War, the Free Gaza/ISM flotilla, and whether "the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism."²⁰⁸

¹⁹⁹ Human Rights Watch, "Israel's 'separation barrier' in the occupied West Bank: Human Rights and International Humanitarian Law consequences: A Human Rights Watch Briefing Paper," February 23, 2004, available at <http://hrw.org/english/docs/2004/02/20/isrlpa7581.htm>.

²⁰⁰ FIDH, ICJ, "Position paper: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," available at <http://www.fidh.org/IMG/pdf/il2302a.pdf>.

²⁰¹ *Id.* at 2.

²⁰² For detailed analyses of this process, see the special issue of the *Israel Law Review*, (38:1-2, 2005), *Domestic and International Judicial Review of the Construction of the Separation Barrier*, particularly the articles by Michla Pomerance, Gerald Steinberg, and Karin Calvo-Goller.

²⁰³ "Historical statement of the ICJ: The construction of the wall is illegal: Israel obliged to dismantle!" FIDH, July 9, 2004, available at <http://www.fidh.org/spip.php?article1569>.

²⁰⁴ Sarah Leah Whitson, "Getting an opinion on the wall," *The Daily Star*, July 9, 2004, available at <http://hrw.org/english/docs/2004/07/09/isrlpa9050.htm>.

²⁰⁵ Al Haq, "The Wall in the West Bank," 2006, available at <http://www.alhaq.org/pdfs/Al-Haq%20brief%20on%20the%20state%20of%20implementation%20of%20the%20Advisory%20Opinion%20on%20the%20Wall%20in%20the%20West%20Bank.pdf>.

²⁰⁶ *Id.*

²⁰⁷ See <http://www.waronwant.org/Palestine+Campaign+10004.twl>.

²⁰⁸ "Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law," May 2009, available at <http://electronicintifada.net/downloads/pdf/090608-hsrc.pdf>.

International “Fact Finding” Missions on the Gaza War

Another means by which NGOs advance lawfare and promote the Durban strategy is by campaigning for international “fact finding” missions. NGOs actively lobby the UN, the EU, and other bodies to establish “independent” investigations into Israeli counter-terror operations. This activity was particularly pronounced in the context of the December 27, 2008-January 18, 2009 Gaza War. During the war, NGO Monitor documented more than 500 NGO statements, mostly accusing Israel of “war crimes,” “crimes against humanity,” and other violations.²⁰⁹ These organizations - including Amnesty and HRW - launched intensive campaigns calling for international investigations, war crimes trials, arms embargoes, and boycotts against Israel. None substantively acknowledged Israel’s right to defend its citizens against deliberate missile attacks.²¹⁰

Once these missions were established, NGOs played a significant role in their functioning. Two such examples are the Arab League’s “Independent Fact Finding Committee on Gaza” and the UN Human Rights Council’s “Fact Finding Mission on the Gaza Conflict” headed by Richard Goldstone.²¹¹

Arab League “Independent Fact Finding Committee on Gaza”

The Arab League organized a “Fact Finding” Mission to Gaza in February 2009. Members of the team included John Dugard, former UN Rapporteur and anti-Israel activist;²¹² Gonzalo Boye, Spanish attorney representing PCHR in its case against Israeli officials (discussed at p. 49, *infra*), who served a 10-year prison term for ties to the Basque terror group, ETA, and for his involvement in the kidnapping of a Spanish businessman;²¹³ and Paul de Waart, a Dutch academic and frequent advocate for punitive legal measures against Israel.²¹⁴

The mission’s one-sided objective was to “investigate Israeli crimes and human rights violations” and to hold “Israel legally accountable for war crimes committed by Israeli Occupation Forces in Gaza.” PCHR was highly involved with the mission, providing “logistical support”: it “prepared the agenda for the mission and coordinated its meetings and field visits. It also provided technical assistance.” During the visit in Gaza, meetings were held with several NGOs, including PNGO, the NGO Development Center, Al Mezan, and Al Dameer.²¹⁵

²⁰⁹ In contrast, these same NGOs issued fewer than six statements during the same period on atrocities occurring in Congo including mass rapes, mutilations, and summary executions resulting in thousands of deaths. See NGO Monitor, *NGO Front in the Gaza War*, *NGO Monitor Monograph Series*, February 2009, available at http://www.ngo-monitor.org/data/images/File/NGO_Front_Gaza.pdf.

²¹⁰ A similar process has taken place in the wake of the May 30, 2010 IHH-ISM led Mavi Marmara flotilla attack.

²¹¹ NGOs also played a significant role in the UN Secretary General’s Board of Inquiry (BOI) established to investigate alleged damage to UN facilities during the War. The board was headed by the former head of Amnesty International, and many of the claims in the report echo unsubstantiated accusations made by Human Rights Watch regarding Israel’s alleged use of white phosphorous and Amnesty’s charges of deliberate attacks on UN compounds. Because the UN did not release the full report or supporting materials, the precise contributions of NGOs to the BOI remains unknown. Secretary General Ban Ki-moon did not give the report an enthusiastic reception. He reluctantly transmitted the report to the Security Council, remarking that the BOI “is not a judicial body or a court of law; it does not make legal findings and does not consider questions of legal liability.” He further noted that much of the evidence obtained by the board was unbalanced and unreliable. A summary of the BOI report is available on file with the author.

²¹² In addition to the Russell Tribunal, Dugard is the initiator of a report entitled, “Occupation, Colonialism, Apartheid?: A Re-assessment of Israel’s Practices in the Occupied Palestinian Territories under International Law.” He is also a frequent speaker at UN conferences advocating criminal trials of Israeli political and military leaders. See, e.g., NGO Monitor, “HRW plays prominent role at UN mini-Durban Conference,” July 30, 2009, available at http://www.ngo-monitor.org/article/hrw_plays_prominent_role_at_un_mini_durban_conference.

²¹³ Soeren Kern, “Spain, Israel and War Crimes,” *Pajamas Media*, March 31, 2009, available at <http://pajamasmedia.com/blog/spain-israel-and-war-crimes/>; Kern, “Anti-Israel Lawfare in Europe,” *Hudson New York*, June 30, 2010, available at http://www.gees.org/articulos/anti_israel_lawfare_in_europe_7968.

²¹⁴ Al Zaytouna, “Israel and the International Law Conference,” August 25, 2009 available at <http://www.alzaytouna.net/arabic/?c=1515&a=97455>; Janet McMahon, “Hague Conference Considers Ways to Implement ICJ Ruling on Israel’s Wall,” Washington Report on Middle East Affairs, January/February 2005, available at <http://www.wrmea.com/component/content/article/271-2005-january-february/8644-special-report-hague-conference-considers-ways-to-implement-icj-ruling-on-israels-wall.html>; FIDH, “Gaza Accountability – Impunity,” September 15, 2009 available at <http://www.fidh.org/GAZA-Accountability-Impunity>. De Waart also participated in the Russell Tribunal - <http://www.facebook.com/group.php?gid=55119034131>.

²¹⁵ “Report of the Independent Fact Finding Committee On Gaza: No Safe Place,” April 30, 2009, at para. 198; pp. 219-23, available at http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf.

The committee issued its report, “No Safe Place,” on April 30, 2009, accusing Israel of “genocide,” “crimes against humanity,” and “war crimes.”²¹⁶ Hamas attacks on Israeli civilians were labeled “resistance activities.”²¹⁷ Recommendations called for “the formation of a team of lawyers and legal experts to consider various options to prosecute Israelis accused of committing war crimes against the Palestinian people.”²¹⁸ It advocated several legal channels, many of which are documented in this report, including proceedings before the ICJ under Article 9 of the Genocide Convention and the Fourth Geneva Convention, an advisory opinion by the ICJ, proceedings in US federal courts under the *Alien Tort Claims Act*, and Security Council referral of Israel to the ICC.²¹⁹ The report also advocated further NGO lawfare, “supporting legal steps and efforts made by NGOs in the field and calling upon those NGOs to coordinate their efforts with the League of Arab States.”²²⁰

In reaching its findings, the report repeated many unsubstantiated claims advanced by NGOs regarding the war, including suspect casualty figures issued by PCHR,²²¹ accusations regarding the use of white phosphorous,²²² and conclusory allegations of indiscriminate and disproportionate use of force by the IDF.²²³ Reports by

B’Tselem, PHR-I, HRW, and Al Mezan, among others, were frequently cited.

Following the Arab League report, PCHR claimed it had more than 900 cases ready to file on the Gaza war. Similarly, Palestinian NGOs Al Haq and Al Mezan attempted to secure an arrest warrant against Israeli Defense Minister Ehud Barak in the UK in September 2009 (discussed at p. 48, *infra*), and in December 2009, British activists, aided by Hamas,²²⁴ also tried to arrest former Israeli Foreign Minister and opposition leader Tzipi Livni.²²⁵ The Palestinian National Authority controlled by Hamas in Gaza created its own NGO, the Central Commission for Documentation and Pursuit of Israeli War Criminals (TAWTHEQ), to “establish[] a coordinating authority supportive of the legal and judicial efforts dedicated locally, and internationally,” and to “pursu[e] war criminals and the follow-up of filing lawsuits against them through the national and the international courts.”²²⁶

UN Human Rights Council Goldstone Mission

From the very outset of the war, the highly politicized UN Human Rights Council,²²⁷ in conjunction with the

²¹⁶ *Id.* at *passim*.

²¹⁷ *Id.* at paras. 212, 213.

²¹⁸ *Id.*

²¹⁹ *Id.* at 148-150.

²²⁰ *Id.* Given the mass abuses of human rights and atrocities committed by Arab League members (Algeria, Bahrain, Comoros, Djibouti, Egypt Iraq Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the UAE, and Yemen), including many of the most repressive governments in the world, as well as the League’s continual sheltering of ICC indicted war criminal, Sudanese President Omar al-Bashir, this report was nothing more than a political stunt and a propaganda exercise. Collaboration by NGOs with the League, therefore, indicates severe moral failings.

²²¹ PCHR’s Gaza casualty figures, widely repeated without question by international news outlets, have been shown to be grossly inaccurate. In one case, PCHR lists Nizar Rayan as a civilian, even though he was a Hamas military leader and was storing a cache of weapons in his home at the time of his death. See, e.g., AP, “Israeli War Planes Smash Home Of Top Hamas Leader,” January 1, 2009, available at <http://cbs5.com/national/hamas.israel.airstrikes.2.898239.html>; Anne Herzberg, “Nizar Rayan and NGOs: Highlighting the Lack of NGO Credibility,” NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited#nizar.

²²² See Asher Fredman, *Precision-Guided or Indiscriminate? NGO Reporting on Compliance with the Laws of Armed Conflict*, NGO Monitor Monograph Series, June 2010, available at http://www.ngo-monitor.org/data/images/File/LOAC_web.pdf.

²²³ See Anne Herzberg, “NGOs Take Law of Proportionality out of Proportion,” NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited#proportionality.

²²⁴ Con Coughlin, “Hamas helping British lawyers target Israel,” *The Daily Telegraph*, December 21, 2009, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/6850900/Hamas-helping-British-lawyers-target-Israel.html>

²²⁵ PCHR, Al Mezan, and Al Haq have not publicly disclosed whether they were involved with this case.

²²⁶ <http://www.tawtheeq.ps/en/home.php?page=viewThread&id=70>. Hamas Justice Minister, Faraj Alghoul, established the organization.

²²⁷ Close to two-thirds of the HRC membership are representatives from the Organization of the Islamic Conference and the non-aligned Movement. See <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm>; www.unwatch.org.

Arab League and Organization of the Islamic Conference (OIC), was the primary venue for NGOs to engage in anti-Israel lobbying. On the evening of January 6, 2009,²²⁸ UN representatives from Egypt, Pakistan, and Cuba on behalf of the Arab Group, the African Group, the OIC, and the Non-Aligned Movement called for a special session at the HRC on “[t]he Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression on the occupied Gaza Strip.”²²⁹ Russia, working with the representative from “Palestine,” also joined as a co-sponsor. The request was accepted by the HRC, and a special session was held from January 9-12, 2009. That same night, the HRC circulated a *note verbale* inviting NGOs with consultative status to attend a special briefing session with the HRC President on January 7, as well as to participate in the session itself.²³⁰

As in other UN frameworks, and in particular at the HRC, NGOs played a significant role at the Ninth Special Session.²³¹ On January 9, oral statements were made by Al Haq, Adalah, Badil, and FIDH (on behalf of PCHR). The joint statement of Al Haq, Badil, and Adalah accused Israel’s “political and military leaders” of being “criminally responsible for the commission of war crimes” and “crimes against humanity,” and demanded the UN General Assembly impose “collective measures on Israel.”²³² These organizations issued no statement for

“accountability” or “collective measures” to be “imposed” on Hamas. At the January 12 session, Amnesty called for a “thorough independent and impartial investigation” and “full accountability for war crimes and crimes against humanity.”²³³ HRW accused Israel of “aggression,” and “indiscriminate” and “disproportionate” attacks. It also demanded the Security Council establish a “commission of inquiry.”²³⁴ The specific incidents raised by HRW in its statement solely related to alleged Israeli strikes.²³⁵ The International Commission of Jurists also called for the establishment of a “Commission of Inquiry” by the HRC.²³⁶

On January 12, the HRC passed a one-sided resolution to:

dispatch an urgent independent international fact-finding mission . . . to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip. (emphasis added)

NGO lobbying efforts supporting this resolution continued following its passage, despite the explicitly biased mandate and funding for the investigation provided by the Arab League.²³⁷ These lobbying campaigns further

²²⁸ The request was filed at 6:20 pm.

²²⁹ http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special_session/Letter_request_fromPM_Egypt_06.01.09.pdf. Countries joining this request were Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bosnia, Burkina Faso, Cameroon, Chile, Djibouti, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Nicaragua, Nigeria, Philippines, Qatar, Saudi Arabia, Senegal, South Africa, Zambia.

²³⁰ http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special_session/NV_9th_SS_request_06.01.09.pdf

²³¹ As of publication, there have been thirteen special sessions since the establishment of the HRC in June 2006. Six of them have solely focused on purported violations by Israel (12th Session, October 2009), (9th Session, January 2009), (6th Session, January 2008), (3d Session, November 2006), (2d Session, August 2006), (1st Session, July 2006). The other seven sessions address Haiti (13th Session, January 2010), Sri Lanka (11th Session, May 2009), the global economic crisis (10th Session, February 2009), Congo (8th Session, November 2008), food (7th Session, May 2008), Myanmar (5th Session, October 2007), and Darfur (4th Session, December 2006). Israel is also the only country with a permanent agenda item at the Human Rights Council’s regular sessions. (Agenda item 7).

²³² Oral Intervention to the Human Rights Council by Al Haq, Badil, Cairo Institute for Human Rights Studies, and Adalah, January 9, 2009.

²³³ Amnesty International, Oral Intervention to the Human Rights Council, January 12, 2009.

²³⁴ Human Rights Watch, Oral Statement: “The grave violations of human rights in the Occupied Palestinian Territory including the recent aggression in the Gaza Strip,” January 12, 2009.

²³⁵ As evidence of HRW’s influence at the UN, the UN Secretary General’s Board of Inquiry (discussed at *supra* note 111) was established to investigate the same events mentioned by HRW.

²³⁶ International Commission of Jurists, “ICJ Intervention on Serious Violations of Human Rights Law and Grave Breaches of Humanitarian Law during the Israeli Military Operations in Gaza,” January 12, 2009.

²³⁷ ICC Prosecutor Moreno-Ocampo noted in a December 4, 2009 press conference that the Arab League had financed the work of the Goldstone mission, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/MUMA-7YF4EF?OpenDocument>.

intensified once Richard Goldstone agreed to chair the HRC's mission.²³⁸ For instance, Amnesty International ignored the one-sided nature of the mission and called "on the Israeli authorities to reconsider their refusal to cooperate with the fact-finding mission set up by the UN Human Rights Council and headed by Judge Richard Goldstone, who has made clear its intention to investigate violations of international law by all parties to the conflict in Gaza and southern Israel."²³⁹ HRW issued statements demanding that UN Secretary General Ban Ki-Moon and the US government pressure Israel into cooperation with the biased investigation.²⁴⁰

A driving factor behind the significant NGO support of Goldstone and the HRC mission was the close ties between Goldstone and the other mission members to these same organizations. These connections were not disclosed, even though they raised serious questions regarding the ability of panel members and staff to objectively evaluate information submitted by these groups. For example, at the time of his appointment, Goldstone was an HRW board member and a good friend of HRW's Executive Director Kenneth Roth. Only after NGO Monitor pointed out this potential conflict of interest, did Goldstone step down from the board.

Each of the mission members also had significant ties to Amnesty International. Three members – Goldstone,

Hina Jilani, and Desmond Travers – signed a widely publicized March 2009 letter initiated by Amnesty, stating that "events in Gaza have shocked us to the core." The fourth member, Christine Chinkin, who declared Israel's actions to be a "war crime" and denied Israel's right to self-defense while the fighting in Gaza was still underway,²⁴¹ was previously a consultant to Amnesty International.

A central element of the Goldstone committee's activities consisted of inviting and receiving submissions and testimony, including oral statements from NGO representatives. In May 2009, Goldstone convened a "townhall meeting" for NGOs in Geneva, facilitating personal connections between officials from these organizations and mission members. NGOs were able to provide "evidence" and ask questions regarding the mission's activities. Attendees included HRW, Amnesty, Adalah, PHR-I, PCATI, and the ICJ. During the meeting, Amnesty circulated a detailed outline to the mission members to guide Goldstone's investigation.²⁴² These recommendations corresponded closely to the structure of the public hearings and the final report (see below), including addressing "Israeli use of human shields," the "shooting of unarmed civilians," "damage to infrastructure," "environmental impact (water and sewage)," and "psychological impact." Amnesty also provided the mission with a list of "36 incidents" to

²³⁸ For a list of statements and examples of NGO campaigning, see NGO Monitor, "The Goldstone 'Fact Finding' Mission and the Role of Political NGOs," September 7, 2009, available at http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines; NGO Monitor, "HRW: Selling Goldstone's Indictment," October 15, 2009 available at http://www.ngo-monitor.org/article/human_rights_watch_selling_goldstone_s_indictment0; NGO Monitor, "Amnesty International's Goldstone Campaign," October 22, 2009, available at http://www.ngo-monitor.org/article/amnesty_international_goldstone_s_cheat_sheet.

²³⁹ Amnesty International, "Israeli Army Probe Lacks Credibility and is No Substitute for Independent Investigation," April 23, 2009, available at <http://www.amnesty.org/en/for-media/press-releases/israeloccupied-palestinian-territories-israeli-army-probe-lacks-credibil>. Ultimately, the mission did little to no serious investigation of crimes committed by Hamas in Gaza and Israel during the war. Only a few pages out of the 450-page report address such incidents. See Trevor Norwitz, "Letter to Richard Goldstone," October 19, 2009, for a critique of this aspect of the report, available at <http://www.goldstonereport.org/pro-and-con/critics/316-trevor-norwitz-open-letter-to-judge-goldstone-191009>. Norwitz is an attorney at the premier New York firm, Wachtell Lipton Rosen & Katz.

²⁴⁰ See HRW, "US: Ask Israel to Cooperate with Goldstone Inquiry," May 17, 2009, available at <http://www.hrw.org/en/news/2009/05/17/us-ask-israel-cooperate-goldstone-inquiry>; "UN: Support Goldstone Investigation into Gaza War Violations," May 6, 2009, available at <http://www.hrw.org/en/news/2009/05/06/un-support-goldstone-investigation-gaza-war-violations>.

²⁴¹ UN Watch, "Request to Disqualify Prof. Christine Chinkin From UN Fact Finding Mission on the Gaza Conflict," August 20, 2009, available at http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza_20_August_2009.pdf.

²⁴² A recording of the hearing is on file with the author.

investigate, all relating to alleged Israeli violations, which became the primary focus of Goldstone's report.²⁴³

Other NGOs assisting in the mission included B'Tselem, which had been campaigning for an "independent and credible investigation" of the Gaza War since January 2009. This NGO urged Israel to cooperate with the Goldstone Mission,²⁴⁴ and also "provided assistance to the investigative staff of the Goldstone mission from the beginning to the end of its research."²⁴⁵

The mission held public hearings in Gaza on June 28 and 29, 2009, and in Geneva on July 6 and 7.²⁴⁶ The witnesses were selected via a secret process, and their testimonies were pre-screened. Additionally, NGO Monitor is aware that the Commission held secret hearings in Geneva, and possibly in Gaza. The full extent of NGO participation, therefore, remains hidden, as do other aspects of this highly non-transparent process.

For the hearings, the mission chose representatives from some of the most politicized and radical NGOs operating in Israel, Gaza, and the Palestinian Authority. Several are active in lawfare, including Al Haq, PCHR, the Alternative Information Center, and PCATI.²⁴⁷

In addition to the hearings, the Mission also issued a Call for Submissions from "interested persons and organizations

to submit relevant information and documentation that will assist in the implementation of the Mission's mandate." Although the mission never posted these submissions on its website, several organizations made their statements public, including a joint submission by seven Israel-based NGOs (Adalah, ACRI, Gisha, HaMoked, PHR-I, PCATI, and Yesh Din), Diakonia, and the ICJ. Each of these statements accused Israel of deliberately targeting civilians and orchestrating a campaign to "punish" Palestinians. Diakonia, for instance, claimed that Israel did not act in self-defense. The ICJ submission repeated the standard claims that the IDF used "disproportionate" force and that "[s]uch destruction is a grave breach of IHL that cannot be justified by military necessity."

Al-Bader Flour Mill

Many of the claims made by NGOs were adopted by Goldstone and incorporated into his report. One example indicative of this process was an alleged Israeli airstrike on the al-Bader flour mill. In Amnesty's July 2009 publication on the fighting, "22 Days of Death and Destruction," the NGO claimed that Israel had engaged in "wanton destruction" and had deliberately "targeted" the mill on January 10, 2009.²⁴⁸ It further claimed that the mill's "owners are adamant that the site was neither a launch pad for rockets nor a weapons cache, and the Israeli army has provided no evidence to the contrary."²⁴⁹

²⁴³ The Goldstone Report apparently documents in detail 36 incidents that occurred during the Gaza War. In an interview with Bill Moyers on PBS, Goldstone explained his rationale behind the selection:

We chose those 36 [incidents] because they seemed to be, to represent the most serious, the highest death toll, the highest injury toll. And they appear to represent situations where there was little or no military justification for what happened.

A list of these 36 incidents is not published in the report, nor is one available on the Mission's website. Neither Goldstone, nor the Mission responded to NGO Monitor requests for this information. Anne Herzberg, "List of 36 Incidents in the Goldstone Report," NGO Monitor, December 11, 2009, available at http://www.ngo-monitor.org/article/list_of_incidents_in_the_goldstone_report0.

²⁴⁴ A frequent theme promoted by NGOs was that Israel should cooperate with the mission. Based on the HRC framework, the biased mandate, and the compromised mission and staff members, these demands had little merit. Moreover, where facts in the public domain exonerating the IDF existed – whether from the UN, the Israeli Foreign Ministry or independent sources – Goldstone ignored or twisted such evidence, choosing instead to credit Hamas sources.

²⁴⁵ B'Tselem, "Israel must investigate army's conduct in Operation Cast Lead," October 19, 2009, available at http://www.btselem.org/English/Gaza_Strip/20091019_BTselem_position_on_the_Goldstone_commission_report.asp.

²⁴⁶ Testimony available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

²⁴⁷ For excerpts from this testimony, see NGO Monitor, "The Goldstone 'Fact Finding' Mission and the Role of Political NGOs," September 7, 2009, available at http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines_.

²⁴⁸ Amnesty International, "22 Days of Death and Destruction," July 2009, at 71.

²⁴⁹ *Id.*

At the mission's public hearings, this alleged incident was prominently featured. The mill's owner, Rashad Hamada, after being pre-vetted by the mission,²⁵⁰ claimed that he "received a call from the guard telling us that the factory was targeted by air with a missile."²⁵¹ In the final report, Goldstone further exaggerated the original claims made by Amnesty, alleging the mill had been "hit by a series of air strikes on 9 January 2009," that "its destruction had no military justification," and that the attack was "carried out to deny sustenance to the civilian population" of Gaza.²⁵²

In February 2010, HRW added to Goldstone's highly tendentious claims by posting a video allegedly taken by the mill's owner in February 2009, and purporting to show the "remains of an Israeli MK-82 500-pound aerial bomb."²⁵³ It also issued an accompanying press release repeating Goldstone's allegations and claiming that "Israel has failed to demonstrate that it will conduct thorough and impartial investigations into alleged laws-of-war violations by its forces."²⁵⁴

Notably, however, this incident was not contemporaneously reported by the Palestinian NGOs in Gaza, nor in the Arabic media. Neither Al Mezan nor PCHR, which were issuing comprehensive daily summaries of the fighting, referenced the flour mill or even any air strike on the date and location claimed by Goldstone, Amnesty, and HRW.²⁵⁵ Documentary evidence, including photographs of the mill released by both the UN (UNITAR)²⁵⁶ and the IDF, refuted Amnesty's, HRW's, and Goldstone's version of events. These materials

clearly show that the mill was damaged by artillery during a firefight with Hamas combatants more than a week later, and not by an F-16 airstrike as claimed. Of seven airstrikes conducted by the IDF within that area, all were more than 300 meters from the mill. Indeed, during the Goldstone hearings, the mill's owner never testified to seeing the remains of a 500-pound bomb or damage caused by an air strike. Rather, he stated that "[w]hat I did see are the empty bullets in the factory, on the factory roof, that's what I saw."

NGOs Lobby for the Goldstone Report

NGO lobbying efforts in favor of the Goldstone process intensified once the report was released, including issuance of dozens of press releases, statements, reports on the status of State investigations, calls for arms embargos, petitions, and ultimately, efforts to prosecute Israelis. Given that the credibility of these NGOs hinged upon the acceptance of the Goldstone report, due to their intense involvement in the process and the hundreds of references to their work contained in the report, these statements simply amounted to self-promotion.

For instance, HRW issued more than 20 statements and Amnesty released more than a dozen lobbying for the report's acceptance and disparaging the Israeli investigative process. In one instance, HRW joined a group of NGOs from Algeria, Morocco, Jordan, Egypt, Syria, Tunisia, Bahrain, Yemen, and Saudi Arabia, praising Goldstone for merely adopting HRW's own conclusions on the war

²⁵⁰ It appears that Mr. Hamada had ulterior motives for testifying to the mission that greatly call his credibility into question. In his testimony, Mr. Hamada claimed that he was owed \$6500 from UNWRA dating back to 2006 and that he asked "Mr. Ban Ki-moon to ask Mr. John Ging to help give this money back to me for some reason or another, Mr. John Ging refused to pay this amount for reasons that I believe are unjustifiable." It appears then, that he may have provided certain testimony on the belief that it would help him recover these funds.

²⁵¹ Mission member Desmond Travers, asked Hamada the following question after his statement apparently in order to elicit testimony bolstering NGO claims that Israel intentionally targeted Gaza's means of food production: "You mentioned that the strike by the F-16 was very precise or very deliberate. Can you tell us why, in your opinion, that this was so?" This question was asked even though Hamada had made no reference to an F-16.

²⁵² Goldstone report at para. 50.

²⁵³ Available at <http://www.hrw.org/en/video/2010/02/05>.

²⁵⁴ HRW, "Israeli Military Investigations Fail Gaza War Victims," February 7, 2010, available at <http://www.hrw.org/en/news/2010/02/06/israel-military-investigations-fail-gaza-war-victims>.

²⁵⁵ It is inconceivable that these organizations would have failed to report on the supposed destruction of the only remaining flour mill in Gaza, if such a strike had occurred.

²⁵⁶ UNITAR, Satellite Image Analysis in Support to the United Nations Fact Finding Mission to the Gaza Conflict, July 31, 2009, at 33, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNITAR_UNOSAT_FFMGC_31July2009.pdf. The UNITAR report notes that most of the damage it found to the mill appears to have occurred between January 16-18, 2009 (not January 9 and 10 as claimed by the NGOs) and was a result of "ground fire."

that “Israeli forces unlawfully used white phosphorous munitions and heavy artillery in densely populated areas, fired upon civilians holding white flags, and deprived the civilian population of basic needs through a protracted blockade, a form of collective punishment.”²⁵⁷ Amnesty called on the “the UN Secretary-General [October 2, 2009] to refer the report to the U.N. Security Council without delay,” and on the “U.S. government to press Israel and Hamas to conduct impartial investigations that would meet international standards.”²⁵⁸

In September 2009, a coalition of international NGOs including Oxfam, Amnesty International - Europe, Diakonia, Trócaire and Euro-Mediterranean Human Rights Network (EMHRN) chastised the EU for refraining from “supporting or endorsing the ongoing United Nations inquiries.” The organizations issued nine demands, including the adoption of an arms embargo against Israel, and ordered that “all those accountable for violations of IHL and IHRL to be brought to justice.”²⁵⁹

In an open letter to members, FIDH urged the UN Security Council to fully endorse the Goldstone report, and threatened to “fil[e] complaints based on the principle of universal jurisdiction and [] contribute[] to the International Criminal Court Office of the Prosecutor’s preliminary analyses and investigations.”²⁶⁰

Israeli NGOs were also active in promoting the Goldstone report, including NIF- and European-funded ACRI, Adalah, Bimkom, Gisha, HaMoked, PHR-I, PCATI, Yesh Din, and B’Tselem. These groups issued a joint statement

calling on Israel to “take the report seriously” and “cooperate with an international monitoring mechanism that would guarantee both the independence of that investigation and the implementation of its conclusions.”²⁶¹

Adalah, Addameer, Al-Dameer, Al Haq, Al Mezan, the Arab Association for Human Rights (HRA), Defence for Children International-Palestine Section, and PCHR joined forces to issue a statement repeating Goldstone’s highly inflammatory conclusion that “[w]hile the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.” These groups demanded “accountability, whether it be through the Security Council, acting under Chapter VII of the UN Charter, referring the situation to the International Criminal Court or that by States fulfilling their obligations to bring perpetrators to account under universal jurisdiction.” Finally, they called on states to “re-evaluate their relationship with Israel” because “normal relations [could] not be conducted” with it.²⁶²

Al Mezan issued a statement demanding the “PNA, Arab States, Islamic States and all States which support human rights to ensure the Goldstone report is submitted to the UN Security Council, the UN General Assembly and the Public Prosecutor of the International Criminal Court to investigate war crimes and crimes against humanity perpetrated by the Israeli Occupation Forces (IOF).”²⁶³

²⁵⁷ HRW, “UN Endorse Goldstone Report,” November 3, 2009, *available at* <http://www.hrw.org/en/news/2009/11/03/un-endorse-goldstone-report>. It is noteworthy that HRW would join with these Middle East NGOs to condemn Israel, rather than on issues related to the far more serious abuses in both breadth and scale taking place in those countries.

²⁵⁸ “Amnesty International Calls for UN Secretary General to Refer Goldstone Report on Gaza to UN Security Council for Action,” October 2, 2009, *available at* <http://www.amnestyusa.org/document.php?id=ENGUSA20091005002&lang=e>.

²⁵⁹ “EU’s Position on the Middle East Peace Process: Key Inconsistencies,” September 23, 2009, *available at* http://www.diakonia.se/documents/public/how_we_work/letters_decisionmakers/0909_key_inconsistencies_eu_me_peace_process.pdf.

²⁶⁰ FIDH, “Open Letter to Members of the United Nations Security Council,” September 28, 2009, <http://www.fidh.org/IMG/pdf/iltpopenletter2809a.pdf>.

²⁶¹ ACRI, “Israeli Rights Groups Respond to Goldstone Report,” September 15, 2009, *available at* <http://www.acri.org.il/eng/story.aspx?id=687>.

²⁶² Adalah, et al., “Palestinian Human Rights Organizations Support Work and Recommendations of UN Fact Finding Mission: Demand Effective Judicial Redress and the Protection of Victims’ Rights,” September 16, 2009, *available at* http://www.adalah.org/eng/pressreleases/pr.php?file=09_09_16.

²⁶³ Al Mezan, “Al Mezan Commends HRC Endorsement of Goldstone Report Recommendations; Calls for Ensuring the Rule of Law and Accountability,” October 17, 2009, *available at* http://www.mezan.org/en/details.php?id=9124&ddname=Crimes&id2=9&id_dept=9&p=center.

Violations of Ethical Guidelines and International Fact-Finding Standards

Both the Goldstone and Arab League missions were compromised by serious methodological defects and a failure to comply with fact-finding standards. Similarly, NGO publications, upon which these reports were largely based, also were plagued by these same problems. For instance, the Arab League, Goldstone, and the NGO “investigations” operated in clear violation of fundamental ethical standards adopted in the London-Lund Guidelines on International Human Rights Fact Finding Visits by the Human Rights Institute of the International Bar Association. The guidelines specify norms for the composition of such inquiries and appropriate methodologies, including “accuracy, objectivity, transparency and credibility.”

In particular, the London-Lund guidelines state:

- Reports must be **clearly objective and properly sourced**, and the conclusions in them reached in a transparent manner. ... In making their findings the delegation should try to **verify alleged facts with an independent third party** or otherwise. Where this is not possible, it should be noted.
- **The terms of reference must not reflect any predetermined conclusions** about the situation under investigation.
- The mission’s delegation must comprise **individuals who are and are seen to be unbiased**. The NGO should be confident that the delegation members have the **competence, experience and expertise** relevant to the matters pertaining to the terms of reference. (emphasis added)

Systematic, widespread condemnation and criticism of the Goldstone process have come from across the political

spectrum. University of Essex Professor Françoise Hampson has noted that the key problems with Goldstone were the “biased HRC mandate,” “the nature and confused conclusions reached,” and Goldstone’s faulty assumption that violations of IHL can be based solely upon result.²⁶⁴ Hebrew University Professor Yuval Shany, who is often critical of the Israeli military, has remarked that the Goldstone report “sets a standard that no one applies and no one can meet.”²⁶⁵ Laurie Blank, Director of Emory University Law International Humanitarian Law Clinic, found that “the Goldstone Report’s application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies.”²⁶⁶ Judge Fausto Pocar, former President of the International Criminal Tribunal for the Former Yugoslavia, criticized²⁶⁷ the Goldstone report for its one-sided and discriminatory call for universal jurisdiction solely against Israel.²⁶⁸

British think tank Chatham House also issued a report regarding irregularities in the Goldstone process and concluded that among other aspects, “the Mission had given insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas,” that there was a perception of bias regarding mission members, that “the criteria employed [for selection of incidents to be investigated] should have been indicated,” and that criticisms of Hamas were “tentative.”²⁶⁹

These reports stand in stark contrast to the methodologies employed by the EU fact-finding mission on the 2008 Georgia Conflict, led by Swiss Ambassador Heidi Tagliavini. For instance, this mission cautioned at the outset of its report:

[I]t was necessary to base much of the fact-finding on investigations which had been carried out soon

²⁶⁴ Remarks made at Hebrew University, “Securing Compliance with IHL” Conference, November 22-24, 2009.

²⁶⁵ *Id.*

²⁶⁶ Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary,” 12 Yearbook of Int’l Humanitarian L. (2009) at 2.

²⁶⁷ Remarks made at Hebrew University, “Securing Compliance with IHL” Conference, November 22-24, 2009.

²⁶⁸ See Goldstone Report at paras. 127, 1856-57. For other critiques of the Goldstone process, see Moshe Halbertal, “The Goldstone Illusion,” *The New Republic*, November 6, 2009, available at <http://www.tnr.com/article/world/the-goldstone-illusion>.

²⁶⁹ Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House, (Nov. 27, 2009), available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf.

*after the conflict by international and regional organisations such as the ODIHR (OSCE), the Council of Europe and the UNHCR as well as by well-known and respected international non-governmental organisations such as Amnesty International, Human Rights Watch, International Crisis Group and others.*²⁷⁰

As a result, the Tagliavini mission added the caveat that

*[T]he factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others.*²⁷¹

²⁷⁰ Independent International Fact Finding Mission on the Conflict in Georgia, “Report: Vol. 1,” September 2009, *available at* http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf, p. 9.

²⁷¹ *Id.*

RESORT TO NATIONAL COURTS: CRIMINAL PROSECUTIONS

In light of the limited venues²⁷² and political challenges²⁷³ of bringing Israelis to trial for alleged war crimes, crimes against humanity, or other human rights claims in international fora, many NGOs have focused their efforts on exploiting universal jurisdiction statutes to pursue litigation in European or North American national courts.²⁷⁴ These cases claim to be part of the fight for “human rights” and “against impunity,” and are ostensibly brought on behalf of civilians allegedly killed or injured in IDF military operations. But the evidence, including the bias displayed by the single-minded focus on Israelis, shows that the core motivation for this activity is to promote lawfare, a non-military means of warfare to advance the Palestinian cause, and to deter future acts of Israeli self-defense against terrorism. These pseudo-legal actions have been recognized as part of a “deliberate, and potentially expanding, agenda ...to import political conflicts into foreign courts or to use lawsuits as a means for advancing certain political or propaganda objectives.”²⁷⁵

Many cases target Israeli military officials and corporations doing business with the IDF, and are brought under both civil and criminal statutes. Initiated by NGOs local to the court, and often conducted with the assistance of Palestinian and Israeli counterparts, these legal suits regularly ignore Palestinian responsibility and culpability under international law, and seek judicial declarations that Israel’s defensive policies are illegal and amount to “war crimes.” Reflecting the general aspects of NGO political campaigning, these suits present a one-sided view of the Arab-Israeli conflict, attempt to minimize or erase the context of terror and terrorists’ use of human shields, base

themselves primarily on unreliable eyewitness testimony, and seek to impose distorted interpretations of the laws of armed conflict, in particular, “proportionality” and “distinction.” The cases are accompanied by large public relations efforts whereby each case development prompts a new press release or report. The political agenda is clear: NGO Monitor was unable to find a single suit initiated by the self-proclaimed “human rights” NGOs discussed in this monograph against Hamas, Hezbollah, and Al-Qaeda; against their leaders such as Yassir Arafat, Khaled Mashal, and Hassan Nasrallah; or against their government sponsors such as the Palestinian Authority, Iran, and Syria.

Many of the cases brought against Israelis and their trade partners epitomize the concept of “forum shopping,” according to which NGOs initiate suits over the same set of events in several different jurisdictions, harassing the defendants and exhausting their resources, until (it is hoped) the desired results of a favorable judgment will be achieved. When a case is lost, it is characterized as the “lack of a remedy,” the “absence of the rule of law,” or the “continuation of impunity,” even when grievances have been fully litigated at multiple court levels.²⁷⁶

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²⁷² The ICC is at present the only international body for initiating criminal suits outside of ad hoc UN tribunals.

²⁷³ The creation of an ad hoc international criminal tribunal aimed at Israel, as called for in the WCAR NGO Forum Declaration, would require Security Council approval.

²⁷⁴ It should be noted that NGOs routinely bring tens of such cases annually to the Israeli High Court of Justice. Discussion of these suits is outside of the scope of this monograph, but will be the subject of a future NGO Monitor report.

²⁷⁵ Ambassador of Israel, Daniel Ayalon, “Letter to Nicholas Burns, Under-Secretary for Political Affairs, US Department of State,” February 6, 2006, available at <http://ccrjustice.org/files/Israeli%20ambassador's%20letter.pdf>.

²⁷⁶ For example, see statements put out by the Center for Constitutional Rights, PCHR, and Amnesty following unfavorable developments in the Sharon, Almog, and Ya’alon cases.

These cases also highlight another serious problem: the ability of NGOs and other private interest groups to use universal jurisdiction statutes to initiate criminal investigations, and even directly apply for arrest warrants, without the consent or even knowledge of local officials. By engaging the judiciary, non-accountable, non-democratic actors seek to circumvent the foreign policy of a State's executive branch insofar as it conflicts with the NGOs' partisan agenda, and thus attempt to impose policy that could not otherwise be obtained through regular democratic channels. As Dapo Akande, co-director of the Oxford Institute for Ethics, Law and Armed Conflict,

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notes regarding lawfare in the UK, “[t]he problem with these cases is that you get arrest warrants in cases where prosecutions are most unlikely. So these are attempts merely to embarrass the foreign officials which also end up embarrassing the UK government.”²⁷⁷

To date, the criminal indictments discussed below have all been cancelled, although their impact continues to be felt. The threat of future cases severely restricts the international travel of Israeli government and military officials,²⁷⁸ and strains diplomatic relations between

Israel and countries willing to tolerate such suits. Many countries have begun to reevaluate their laws and the ability of private groups to initiate these lawsuits, in order to prevent future abuse, but the damage and accompanying political campaigns continue.

Belgium: Ariel Sharon and the Limits of Universal Jurisdiction

On June 18, 2001, a group of twenty-three “survivors” and five “eyewitnesses” to the 1982 Sabra and Shatila massacres filed a complaint with the Belgian Public Prosecutor's Office. The complaint named as defendants Ariel Sharon, who was Israel's Defense Minister in 1982; Amos Yaron, a retired Brigadier General who in 1982 was in charge of Israeli troops in Beirut; Rafael Eitan, who was then Chief of Staff of the Israel Defense Forces; and Amir Drori, formerly the head of the Israeli army's Northern Command. They were accused of grave violations of international humanitarian law, including genocide, crimes against humanity, and war crimes.²⁷⁹

The lawsuit was brought pursuant to the Belgian *Act concerning Punishment for Grave Breaches of International Humanitarian Law*²⁸⁰ (“*Grave Breaches Act*”) which allows for universal jurisdiction over genocide, war crimes, and crimes against humanity, as well as the *Code of Criminal Procedure* which allows victims “to initiate a criminal investigation on the basis of universal jurisdiction.”²⁸¹ Under Belgian law, had the case proceeded to the trial stage, Sharon and the other defendants could have been tried *in absentia*, a violation of due process rights and Article 14 of the International Covenant on Civil and Political Rights.

²⁷⁷ Dapo Akande, “UK to Restrict Universal Jurisdiction Laws (but only slightly),” EJIL: Talk! Blog, July 31, 2010, available at <http://www.ejiltalk.org/uk-to-restrict-universal-jurisdiction-laws-but-only-slightly/>.

²⁷⁸ See, e.g., Andrew Friedman, “Lawsuits PR opportunity for Israel,” *Ynet News*, February 27, 2006, available at <http://www.ynetnews.com/articles/0,7340,L-3221542,00.html>; see JTA, “Dichter cancels Spain visit over arrest fears,” October 26, 2010, available at <http://jta.org/news/article/2010/10/26/2741446/dichter-cancels-spain-visit-over-arrest-fears>.

²⁷⁹ “The Complaint Against Ariel Sharon: Lodged in Belgium on 18 June 2001,” June 18, 2001, available at www.indictsharon.net/cmptENft.pdf. See also Irit Kohn, “The Suit Against Sharon in Belgium: A Case Analysis,” *European-Israeli Relations: Between Confusion & Change* (Manfred Gerstenfeld ed., 2007) for the perspective of the former head of the International Department of the Israeli Ministry of Justice on the case.

²⁸⁰ September 16, 1993. The law was amended in 1999 to include universal jurisdiction for genocide, crimes against humanity, and war crimes.

²⁸¹ HRW, *Universal Jurisdiction in Europe: The State of the Art: VI. Belgium*, June 28, 2006 (hereinafter “*State of the Art*,” available at http://hrw.org/reports/2006/ij0606/6.htm#_Toc137876508).

While the suit was brought in the name of “survivors” and “eyewitnesses,” local NGOs with the support of international NGO superpowers were largely responsible for initiating the case. The Sabra and Shatila Committee (SSC) - formed by a Belgian NGO, the Arab-European League - was the main catalyst in the indictment, paying attorneys’ fees, preparing legal documentation, and submitting the complaint. The SSC also applied pressure to Belgian decision makers and influenced public opinion in support of the case.²⁸²

The SSC’s Bethlehem branch, the Palestine Committee for Justice for the Victims of Sabra and Shatila, was headed by Ingrid Jaradat of Badil.²⁸³ Badil’s “Indict Sharon Now” campaign called on supporters to sign a UN petition setting up an “International Investigation Committee” for Sharon’s “crimes against humanity” and to “[o]rganize, facilitate and participate in fact finding missions aimed at examining possible war crimes committed by the Israeli army.”²⁸⁴ From the initiation of the suit against Sharon until the time of its dismissal, Badil issued almost monthly press releases on developments in the case.²⁸⁵ As previously noted, Badil’s funders have included the NGO Development Center (NDC - Sweden, Denmark, Switzerland, and the Netherlands), Canada (via Mennonite Central Committee), Switzerland, the Norwegian Refugee Council, Denmark (via Mu’assasat and DanChurchAid), Trócaire (a major recipient of Irish government funding), and Norwegian Peoples Aid. A number of countries provide funding via multiple frameworks.

Several other NGOs assisted SSC with the case by providing fundraising and translating services. These NGOs included the Belgian NGO CODIP (Centre for Development, Documentation and Information Palestinians)²⁸⁶ and the Jerusalem-based Palestinian Society for the Protection of Human Rights and the Environment (LAW), the latter of which received funding from the Ford Foundation and was a major participant at the Durban Conference.²⁸⁷

In July 2001, a Belgian *juge d’instruction* (investigating magistrate) began a criminal investigation into the allegations of the complaint. An attorney intervening on Israel’s behalf raised several legal concerns regarding the investigation: that as a sitting Prime Minister Sharon was immune from prosecution, that prosecution pursuant to the 1993 law would violate the concept of retroactivity given that the events alleged in the complaint occurred in 1982,²⁸⁸ and that there were no links between Sharon and Belgium. The acting Attorney General of Brussels referred these issues to the *Chambre des Mises en Accusation* (the Indictment Chamber) of the Belgian *Cour d’Appel de Bruxelles* (Court of Appeals of Brussels).

NGO superpowers Human Rights Watch and Amnesty International played a critical role in publicizing the case at every stage. On September 7, 2001, the investigating magistrate suspended his work pending court review of the investigation’s legality. HRW and Amnesty used this development to demand that the court reinstate the criminal investigation against Sharon. In HRW’s

²⁸² Arab-European League, “Against the Gray: An Arab Lobby in the Heart of Europe? Yes, and it’s Working,” available at www.arabeuropean.org/article.php?ID=24.

²⁸³ International Campaign for Justice for the Victims of Sabra & Shatila, “Solidarity Committees,” available at <http://www.indictsharon.net/donate-committees.shtml>.

²⁸⁴ Badil, “Proposals for Action Towards A Global Campaign Against Israel’s Brand of Apartheid,” April 10, 2002, available at <http://www.badil.org/Publications/Press/2002/press242-02.htm>; “Public Invitation Issued by: the Popular Steering Committee for the Right of Return, Bethlehem, Palestine,” September 18, 2003, available at <http://www.badil.org/Publications/Press/2003/press310-03.htm>.

²⁸⁵ Badil’s press releases are available on its website chronologically at http://www.badil.org/Publications/Press/2002/press_2002.htm.

²⁸⁶ International Campaign for Justice for the Victims of Sabra & Shatila, “Contributions,” available at www.mallat.com/create.htm.

²⁸⁷ “The Complaint Against Ariel Sharon for his Involvement in the Massacres at Sabra and Shatila,” (Official Translation from the French), available at <http://www.mallat.com/articles/complaintenglish.htm>. After auditors found financial misappropriations and other fraudulent activity at the NGO, international funding for LAW ceased. For more information on LAW see www.ngo-monitor.org.

²⁸⁸ The prohibition against retroactive application of the law is overwhelmingly accepted as a standard of international law. Article 15.1 of the ICCPR for example states that “[n]o one shall be held guilty of any criminal offence . . . which did not constitute a criminal offence, under national international law, at the time it was committed.” Notably, the ICC only has jurisdiction over crimes occurring after the date of its seating – July 1, 2002.

press release, Executive Director for the Middle East and North Africa Division Hanny Megally claimed that “there is abundant evidence that war crimes and crimes against humanity were committed on a wide scale,” detailing Sharon’s alleged role and essentially placing full responsibility on Israel and the IDF rather than on the actual Lebanese perpetrators.²⁸⁹ Additional HRW statements carried forth this theme. Amnesty issued its statement on the day the court was scheduled to hear arguments, pressing for Sharon’s investigation and further lobbying for widespread institution of universal jurisdiction laws. (During this same time period, these NGOs also unsuccessfully lobbied for a Danish criminal investigation against the former head of Israel’s Security Service, Carmi Gillon, when he was appointed Ambassador to Denmark.)²⁹⁰

While the case was under deliberation in the Belgian court, the ICJ ruled in the “Arrest Warrant Case” on a related legal issue. The February 14, 2002 decision held that sitting high ranking government officials are immune from prosecution in foreign countries.²⁹¹ Following this decision, the Belgian Attorney General and the complainants asked the Belgian court to consider the impact of the ICJ decision on the Sharon case. Prior to oral argument over this issue, Amnesty released a pseudo-legal brief calling the ICJ decision “flawed” and urging the Belgian court to find it inapplicable.²⁹²

On June 26, 2002 the Belgian court held that the complaints against Sharon were “inadmissible” because

“no investigation can be opened in Belgium for war crimes, crimes against humanity, or genocide unless the suspect is found in the country.” In a press release issued the same day, Amnesty expressed its “dismay” at the ruling, claiming that “the restrictive interpretation of Belgian national law is inconsistent with international law,” and further declared that if the decision was upheld on appeal, it would “seek an amendment of the Belgian law.”²⁹³ Amnesty issued yet another press release on September 26, 2002, on the eve of appellate court arguments, urging the court to reopen the case and repeating statements about changing Belgian law.²⁹⁴ Another pseudo-brief was released by Amnesty in February 2003, again on the same day as oral arguments were heard.²⁹⁵ HRW issued a document on February 1, 2003 (revised in June 2003), “Belgium: Questions and Answers on the ‘Anti-Atrocity’ Law,” calling the law “an essential part of the emerging system of international justice” that helps “to break down the wall of immunity with which tyrants and torturers protect themselves in their own countries.”²⁹⁶

On February 13, 2003, the court ruled that the investigation could continue but excluded the case against Sharon because “international custom bars acting heads of state and government . . . from becoming the object of proceedings before criminal tribunals in foreign states,” and that consequently, “the contested ruling is not legally supported.”²⁹⁷ HRW issued a press release on the day of the ruling calling it a “landmark step for international law This decision is a huge victory not only for the victims of the Sabra and Shatila massacres but for all atrocity victims

²⁸⁹ Human Rights Watch, “Israel: Sharon Investigation Urged,” June 23, 2001, *available at* <http://hrw.org/english/docs/2001/06/23/isrlpa97.htm>.

²⁹⁰ Amnesty, “Amnesty International Urges Investigation of Ariel Sharon,” October 3, 2001, *available at* <http://web.amnesty.org/library/index/engmde150892001>. *See also* Human Rights Watch, “Denmark: Letter to Danish Minister of Foreign Affairs Mogens Lykketoft,” July 18, 2001; Amnesty International, “Israel/Denmark: Amnesty International calls on Denmark to fulfill its obligations under the UN Convention against Torture,” August 14, 2001.

²⁹¹ “Press Release: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).” International Court of Justice. February 14, 2002, *available at* <http://www.icj-cij.org/presscom/index.php?pr=552&pt=1&p1=6&p2=1>.

²⁹² *Id.*

²⁹³ Amnesty, “Belgium/Israel: Dismay at Sharon Case Decision,” June 26, 2002, *available at* <http://web.amnesty.org/library/index/ENGMDE151012002?open&of=ENG-BEL>; Anthony Dworkin, “Belgian Court Rules that Sharon Cannot be Tried in Absentia,” Crimes of War Project, July 1, 2002, *available at* <http://www.crimesofwar.org/onnews/news-sharon.html>.

²⁹⁴ Amnesty, “Israel: International Justice for Sabra and Shatila victims,” September 26, 2002, *available at* <http://www.amnesty.org/en/library/asset/MDE15/144/2002/en/dom-MDE151442002en.html>.

²⁹⁵ Amnesty, “Universal Jurisdiction, Belgian Prosecutors Can Investigate Crimes Under International Law Committed Abroad,” February 12, 2003, *available at* <http://www.amnesty.org/en/library/asset/IOR53/001/2003/en/dom-IOR530012003en.html>.

²⁹⁶ HRW, *available at* <http://hrw.org/campaigns/icc/belgium-qna.pdf>.

²⁹⁷ Belgian Court of Cassation, “Ruling,” February 12, 2003, at 6, *available at* <http://www.indictsharon.net/12feb2003dectrans.pdf>.

who have put their hopes in the Belgian justice system.”²⁹⁸ A week later, HRW’s Reed Brody wrote an op-ed in the *International Herald Tribune* saying that Israel was “fuming” because the Belgian court was just “enforcing the most basic norms of humanity,” and comparing the case against Sharon to that against Adolf Eichmann.²⁹⁹

Following the Sharon case, as well as cases initiated against President George H.W. Bush, Dick Cheney, Norman Schwarzkopf, and Colin Powell over the 1991 Gulf War; a case against US General Tommy Franks over the 2003 invasion of Iraq; and a suit against Chinese President Jiang Zemin over alleged persecution of Falungong practitioners, the Belgian government and parliament began to question the efficacy of the law and sought its amendment. In response to this initiative, several international human rights groups including HRW, Amnesty, and FIDH formed a coalition to lobby the Belgian parliament to “defend the law.”³⁰⁰

In April 2003, the *Grave Breaches Act* was amended, “removing the right of victims to initiate a universal jurisdiction prosecution, and introducing immunity provisions ‘in accordance with international law.’”³⁰¹ Continuing its campaign, HRW issued a statement criticizing the amendments.³⁰² An article authored by HRW’s Brody, a strong proponent of the old law, claimed that the amendments “went far beyond what the NGOs had

agreed to.”³⁰³ Brody does not say on what basis the NGO coalition had the power to bind the Belgian legislature to the coalition’s demands. On June 10, 2003, the Brussels Appeals Court affirmed the February decision,³⁰⁴ but three days later the Belgian Ministry of Justice initiated the transfer of the case to Israel.³⁰⁵ The law incorporating international crimes into the Belgian Criminal Code was repealed in August 2003, effectively putting an end to the case against Sharon.³⁰⁶

United Kingdom: Doron Almog

On August 26, 2005, Daniel Machover, an expatriate Israeli, co-founder of Lawyers for Palestinian Human Rights and head of the civil litigation department at the London firm of Hickman & Rose Solicitors (H&R), submitted “evidence files” to the Anti-Terrorist and War Crimes Unit of the London Metropolitan police regarding former IDF Southern Command Chief (December 8, 2000 to July 7, 2003) Major General (res.) Doron Almog.³⁰⁷

Machover acted in concert with attorneys from the Palestinian Center for Human Rights (PCHR),³⁰⁸ the main Palestinian NGO involved in lawsuits against Israeli military officials. In addition to the Almog case discussed here, PCHR was involved in civil suits filed in the US in conjunction with the Center for Constitutional Rights (detailed below); an action criminally to indict

²⁹⁸ Human Rights Watch, “Belgian Ruling Key Precedent for Human Rights,” February 12, 2003, available at <http://hrw.org/english/docs/2003/02/13/belgiu5309.htm>.

²⁹⁹ Reed Brody, “An Unfinished Assignment for Israelis,” *International Herald Tribune*, February 21, 2003, available at <http://hrw.org/english/docs/2003/02/21/israb12975.htm>.

³⁰⁰ Brody, *supra* note 36.

³⁰¹ Human Rights Watch, “State of the Art,” *supra* note 281.

³⁰² Human Rights Watch, “Belgium: Anti-Atrocity Law Limited,” April 5, 2003, available at <http://hrw.org/english/docs/2003/04/05/belgiu5488.htm>.

³⁰³ Brody, *supra* note 36.

³⁰⁴ International Campaign for Justice for the Victims of Sabra and Shatila, “Sabra and Shatila Plaintiffs Welcome Today’s Ruling by the Brussels Appeals Court Opening the Way for a Full Investigation and Trial of Amos Yaron and Others,” June 10, 2003, available at <http://www.indictsharon.net/>.

³⁰⁵ International Campaign for Justice for the Victims of Sabra and Shatila, “Statement of the lawyers for the survivors of Sabra and Shatila in reaction to the Belgian Justice Ministry’s decision to start the procedure of transferring the case to Israel,” June 15, 2003, available at <http://www.indictsharon.net/case-diary17.shtml>. Under the amended *Grave Breaches Act*, the Belgian government could decide to transfer a case to the accused’s home country so long as that country upheld standards of a fair trial and criminalized human rights violations; the court could then dismiss the case regardless of whether the home court decided to prosecute the case. See Reed Brody, “Belgium Curtails Anti-Atrocity Law Under US Pressure,” *ACLU Int’l Civil Liberties Report* 2003, at 2.

³⁰⁶ “State of the Art” *supra* note 281.

³⁰⁷ Daniel Machover and Kate Maynard, “Prosecuting Alleged Israeli War Criminals in England and Wales,” *Denning Law Journal*, 2006, at 1–2 (“Machover Article”).

³⁰⁸ PCHR, “Israeli war crimes suspect evades British justice after UK court issues warrant,” September 11, 2005, available at <http://www.pchrgaza.org/files/PressR/English/2005/101-2005.htm>.

former Chief of Staff Moshe Ya'alon in New Zealand;³⁰⁹ the submission of two complaints to Switzerland's Military Attorney General against former Israeli Minister of Defense, Benjamin Ben-Eliezer; former Chief of Staff of the Israeli military, Shaul Mofaz; former head of Israel's General Security Services, Avi Dichter; and Almog for alleged "grave breaches of international humanitarian law";³¹⁰ and a June 24, 2008 suit in the National Court of Spain, the highest Spanish judicial council, against seven former senior Israeli military officials former senior Israeli military officials (see *infra* at p. 49).³¹¹ PCHR is funded by the European Commission, Denmark, Norway, Ireland, Holland, the Ford Foundation, the Open Society Institute, and Christian Aid.³¹²

In the Almog case as well as in similar cases against former Chiefs of Staff Ya'alon and Halutz, Machover also appears to have worked with Yesh Gvul ("There is a limit"), an Israeli NGO established during the 1982 Lebanon War to encourage Israeli soldiers to refuse to serve beyond the Green Line.³¹³ Yesh Gvul's Yoav Hess claimed that his NGO's objective in helping to bring such cases to court is to create a situation where "every soldier who receives an order will think twice . . . if it can result in his being placed on trial on the charge of committing war crimes."³¹⁴ According to media reports, prior to approaching H&R, Yesh Gvul attempted to file suit against Almog at the ICJ, but was unaware that Israel has not ratified the court's charter.³¹⁵ Another member of Yesh Gvul, Yishai Menuchin, is currently the head of PCATI, and has lobbied for universal jurisdiction cases, as well as ICC prosecution of Israeli officials.³¹⁶

The files submitted by H&R accused Almog of the "wanton destruction" of 59 houses in the Rafah refugee camp on January 10, 2002; the killing of a woman during a "punitive house demolition"; the killing of a Palestinian man on December 30, 2001; and the dropping of a bomb on a Gaza City neighborhood in an anti-terror operation against the leader of Hamas' military wing, Salah Shehade (see *infra* at 49).³¹⁷ According to H&R, these "crimes" constituted "grave breaches" of the Fourth Geneva Convention 1949, including torture.³¹⁸

England has enacted several universal jurisdiction statutes, including the *Geneva Conventions Bill* of 1957 (allowing for jurisdiction over "grave breaches of the 1949 Geneva Conventions) and the *International Criminal Court Act* of 2001. These were invoked in the 1998 landmark universal jurisdiction case against former Chilean Dictator, Augusto Pinochet. In July 2005, pursuant to these laws, an Afghan militia leader was sentenced to twenty years' imprisonment for torture and hostage-taking. These statutes allow for third parties, such as NGOs, to file criminal complaints. If the police refuse to investigate, these parties can then "initiate a private investigation and prosecution," including the right to apply for an arrest warrant if the presence of the alleged perpetrator can be "established or anticipated." Such application can take place "even without the consent of the [Crown Prosecution Service] or the attorney general."³¹⁹

The police declined to act upon the files submitted by H&R/PCHR in August 2005. As a result, H&R applied for an arrest warrant directly to the Bow Street Magistrates'

³⁰⁹ PCHR, "New Zealand Attorney General stays prosecution of Israeli war crimes suspect, enabling him to evade international justice," November 30, 2006, available at <http://www.pchrgaza.org/files/PressR/English/2006/127-2006.htm>.

³¹⁰ PCHR, "Palestinian Victims Submit Legal Complaints against Israeli authorities in Switzerland," September 6, 2003, available at <http://www.pchrgaza.org/files/PressR/English/2003/95-2003.htm>.

³¹¹ PCHR, "PCHR Submits Lawsuit Against Israeli Officials via Spanish National Court," June 25, 2008, available at <http://www.pchrgaza.org/files/PressR/English/2008/60-2008.html>.

³¹² PCHR, "Funding," available at <http://www.pchrgaza.org/about/funding.html>.

³¹³ "UK lawyer targets Israeli embassy." *Ynet News*. September 13, 2005, available at <http://www.ynetnews.com/articles/0,7340,L-3141430,00.html>.

³¹⁴ "Israelis Against Israel," *Omedia*, July 1, 2006, available at http://www.omeida.org/Show_Article.asp?DynamicContentID=1766&MenuID=610&ThreadID=1014011.

³¹⁵ *Id.*

³¹⁶ See *supra* 15-16.

³¹⁷ Machover Article, *supra* note 307, at 3.

³¹⁸ *Id.* at 8-11, 18-20.

³¹⁹ Machover Article, *supra* note 307, at 3; HRW, *State of the Art: XIII. B. United Kingdom (England and Wales)*, *supra* note 281.

Court.³²⁰ On September 10, 2005, following a hearing held the previous day, Senior District Judge Timothy Workman issued a warrant, subject to stringent bail conditions, for Doron Almog's arrest on suspicion that he had committed grave breaches of Article 147 of the Fourth Geneva Convention by allegedly destroying the Rafah homes.³²¹ The court declined to issue a warrant for the remaining charges.

The court's warrant required the Anti-Terrorist and War Crimes Unit of the Metropolitan Police to arrest Almog. When he landed at Heathrow Airport on September 11, 2005 in order to appear as the guest speaker at a charity event that evening, PCHR tipped off the London police.³²² (Such direct NGO involvement in providing information to the authorities is common practice.³²³) Almog, however, was informed that the police were waiting for him, and he remained on the El Al plane and returned to Israel immediately.³²⁴

On September 12, 2005, Amnesty International issued a press release "deplor[ing]" the failure to arrest Almog. Amnesty claimed that "[t]he refusal to arrest a person suspected of war crimes is a clear violation both of the UK's unconditional obligations under the Fourth Geneva Convention and under national law." Amnesty further called on "the UK authorities to urge Interpol to circulate the arrest warrant and on other states party to the Geneva Conventions to cooperate with the UK in carrying out the arrest and handing over General Almog to the UK's court."³²⁵

PCHR issued several press releases regarding the case noting that it was part of PCHR's "long term strategy designed to combat the culture of impunity which is endemic inside the Israeli military, judicial and political system." Following Almog's return to Israel, PCHR demanded a "full investigation . . . to establish why the police did not board the plane," "to apply pressure . . . to ensure that Doron Almog and any of his associates who were responsible for perverting the course of justice are prosecuted in the UK," and to "recall to Israel the Israeli Ambassador and/or relevant Military Attache and/or any other relevant officials."³²⁶ Paris-based FIDH, whose Vice President is also the Director of PCHR, issued similar demands in a September 15, 2005 letter to Lord Goldsmith, the UK Attorney General.³²⁷

On September 14, 2005, Senior District Judge Workman cancelled the warrant due to the fact that Almog had departed from the UK and was therefore "no longer under the court's jurisdiction."³²⁸ The British government also decided to reevaluate the law to prevent the future issuance of arrest warrants at the request of NGOs or other complainants, though as of publication, changes have yet to be implemented.³²⁹

United Kingdom: Ehud Barak

In September 2009, Al Haq and Al Mezan adopted PCHR's tactics and attempted to have Israel's Defense Minister Ehud Barak arrested in the UK for "war crimes" allegedly

³²⁰ *Id.*

³²¹ A court refused to issue a warrant against Shaul Mofaz in February 2004 under these same statutes on the basis he was a sitting minister in the Israeli government. See HRW, "State of the Art: XIII. United Kingdom," available at http://hrw.org/reports/2006/ij0606/13.htm#_Toc137876550. Machover Article, *supra* note 307, at 3. The provision invoked in the arrest warrant, Geneva Convention Article 147, is the same raised by plaintiffs in *Corrie v. Caterpillar* (*infra* at 61). In that case, however, the US district court judge found this provision "d[id] not set a clear, specific norm" upon which a claim could be stated.

³²² Roe Nahamias, "U.K. court cancels warrant against Almog," *Ynet News*, September 16, 2005, available at <http://www.ynetnews.com/articles/0,7340,L-3143122,00.html>.

³²³ See HRW, "State of the Art" ("Police and courts have generally been notified of the presence or anticipated presence of alleged perpetrators of international crimes by the media, victims' lawyers or NGOs.").

³²⁴ *Id.*

³²⁵ Amnesty International, "United Kingdom/Israel-OT: Amnesty International deplores failure to arrest Israeli war crimes suspect," September 12, 2005, available at <http://web.amnesty.org/library/Index/ENGEUR450362005>.

³²⁶ PCHR, "Anyone Responsible for Perverting the Court of Justice Must also Face Prosecution," September 12, 2005, available at <http://www.pchrgaza.org/files/PressR/English/2005/104-2005.htm>; see also, PCHR, "British police feared a 'real threat of an armed confrontation' with armed Israelis at Heathrow Airport," February 19, 2008, available at <http://www.pchrgaza.org/files/PressR/English/2008/19-02-2008.html>.

³²⁷ FIDH Letter, available at <http://www.pchrgaza.org/files/campaigns/english/almog/lettfidh.pdf>.

³²⁸ Nahamias, *supra* note 322.

³²⁹ Machover Article, *supra* note 307, at 5.

committed as a result of the Gaza War.³³⁰ The NGOs were represented by London law firms Irvine, Thanvi, Natas and Imran Khan & Partners. On September 29, just prior to Barak's official state visit to the UK, the NGOs filed a petition for an arrest warrant in the magistrate's court of the City of Westminster under the *Geneva Conventions Bill*, claiming Barak "committed and/or ordered, grave breaches of the Geneva Conventions." The court declined to issue the arrest warrant on the grounds of immunity.

Although the court rejected the NGO petition, the case highlighted the lack of safeguards in Britain's universal jurisdiction laws, allowing for private individuals to seek politically motivated arrests on an *ex parte* basis and without the knowledge of the UK's executive branch.

The British universal jurisdiction laws were further placed in disrepute in December 2009, when there was an attempt to arrest Tzipi Livni, Israel's former foreign minister and current opposition leader. A magistrate's court actually issued an arrest warrant against Livni, but it was revoked shortly thereafter when it became known that Livni was not present in the UK.³³¹ Within weeks of the warrant's cancellation, it emerged that the Hamas GONGO, the Central Commission for Documentation and Pursuit of Israeli War Criminals (TAWTHEQ),³³² was involved in filing the complaint.³³³ It is unclear if Hamas also assisted Al Haq and Al Mezan in filing their suit against Barak, or if these NGOs or PCHR aided TAWTHEQ in the Livni case.

Widespread protest following the attempted arrest of Livni led to demands for a change in the universal jurisdiction law to prevent further abuse by private litigants. In January 2010, Britain's Attorney General, the Baroness of

Scotland, delivered an address at Hebrew University in Jerusalem, noting that legal procedure in the UK was being abused for "political and other unjust purposes" and that "energetic efforts [were] being made to find a resolution to the problem."³³⁴ Several other government officials expressed the need to remedy the law immediately. After his election in May 2010, Britain's Prime Minister David Cameron also pledged to amend the law.³³⁵

In response, NGOs, many of whom are staunch proponents of lawfare, launched a campaign to block the change. Often, they misrepresented the scope of the changes even though "the proposed rules [did] not restrict the scope of universal jurisdiction in the UK," but only affected "the possibility of private persons obtaining an arrest warrant in relation to universal jurisdiction crimes."³³⁶ Instead of explaining why these politically motivated private organizations should have the right to secure *ex parte* arrest warrants in order to circumvent the UK's foreign policy decisions, these organizations issued hysterical condemnations. These statements also served as yet another springboard for NGOs to launch anti-Israel publicity campaigns.

Al Haq issued a position paper "welcom[ing]" the issuance of the Livni warrant, claiming she bore "special responsibility for the war crimes and possible crimes against humanity that characterized Israel's actions during the assault on Gaza." Al Haq also criticized those who wished to amend the law to require authorization by the British Attorney General before such cases are filed, claiming that "it is unclear why such considerations would have to be taken into account as early as the arrest stage."

British NGO War on Want (a leader in anti-Israel boycott campaigns) joined with Amnesty International, Palestinian

³³⁰ Associated Press, "Palestinians seek UK arrest of Ehud Barak," Khaleej Times Online, September 29, 2009, available at http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/middleeast/2009/September/middleeast_September706.xml§ion=middleeast.

³³¹ "Israel condemns 'absurd' UK arrest warrant for Livni," CNN, December 15, 2009, available at <http://edition.cnn.com/2009/WORLD/meast/12/15/uk.israel.livni/index.html>.

³³² Despite its provenance as a propaganda vehicle for Hamas, the Goldstone report cited TAWTHEQ as a credible source more than 12 times.

³³³ Mail Foreign Service, "Hamas helped British lawyers secure arrest warrant for Israel's ex-foreign minister Tzipi Livni," December 21, 2009, available at <http://www.dailymail.co.uk/news/worldnews/article-1237535/Hamas-helped-British-lawyers-secure-arrest-warrant-Israelis-ex-foreign-minister-Tzipi-Livni.html>.

³³⁴ Notes on file with the author.

³³⁵ *Jerusalem Post*, "UK to Change Arrest Warrant Law," July 22, 2010 available at <http://www.jpost.com/International/Article.aspx?id=182239>.

³³⁶ See Akande, *supra* note 277.

activists, several British MPs, Daniel Machover, and others calling the proposed amendments an “attempt to undermine the judiciary’s independence and integrity.”³³⁷

NIF-funded Coalition of Women for Peace, which is also active in the BDS movement, issued a letter on December 19, 2009, entitled “Join Urgent Appeal to Maintain Universal Jurisdiction and Enable the Prosecution of War Criminals.” The letter stated that “we believe that all Israeli officials who made operational decisions during Operation Cast Lead, including Tzipi Livni, should face charges for their involvement in war crimes.”

PCHR and its UK counsel Hickman & Rose issued a press release following a July 22, 2010 decision by the British Justice Secretary to “give the Director of Public Prosecutions (DPP) the power to veto the issue of arrest warrants for universal jurisdiction offences.”³³⁸ They alleged that the “proposed change is a purely political move designed to block the arrest of war criminals, from ‘friendly countries’ in the UK.” They also claimed that under the current law, the threshold to issue a warrant is “very high,” even though British officials and others have shown the opposite.

As of publication of this monograph, legislation proposing these changes has yet to be introduced.

Spain: Benjamin Ben Eliezer, et al.

On June 24, 2008, PCHR initiated yet another suit against Israeli officials over the Shehade targeted killing, even though its earlier attempts to litigate in the UK, New Zealand, and the US (discussed below) were all rejected by the courts in those countries. The case, filed in the Spanish Audiencia Nacional (National Court) before

Judge Andreu, was brought on behalf of six “survivors and relatives” allegedly injured during the July 22nd, 2002 airstrike targeting Sheik Salah Shehade, the founder of Hamas’ military wing and one of the Israel’s most wanted terrorists. Shehade was killed in the strike along with fifteen bystanders; more than 100 were injured.³³⁹

As head of Hamas’ military wing, Shehade masterminded hundreds of terror attacks, including a Jerusalem bus bombing in June 2002 that killed 26 Israeli civilians.³⁴⁰ One day prior to the airstrike, Shehade took responsibility for a June 16 attack in Tel Aviv in which eight Israelis were killed in an ambush by Palestinian gunmen dressed as Israeli soldiers.³⁴¹ This context was missing from PCHR’s filings.

Seven Israeli officials (former Defense Minister Benjamin Ben-Eliezer, former military advisor Michael Herzog, former IDF Chief of Staff Moshe Yaalon, former Shin Bet Director Avi Dichter, former Israel Air Force Commander Dan Halutz, Giora Eiland, former Southern Command Chief Doron Almog, and former Prime Minister Ariel Sharon) were named as defendants and accused of “war crimes” under article 26 of Organic Law 6/1985 and articles 23.4(a) and (g) under the amended Organic Law 11/1999.³⁴² PCHR also claimed that the strike was part of a “widespread and systematic attack” that “may classify as a crime against humanity.”³⁴³ The suit asked the court to open an official criminal investigation, as well as to issue arrest warrants against the defendants.

As part of its PR campaign, PCHR issued a press release announcing the filing of the suit. The group also noted that the case was “the result of more than two year’s [sic] collaborative work between Palestinian human rights organizations (including the Arab Cause Solidarity

³³⁷ John Austin, et. al., “We must not renege on war crime laws,” *The Guardian*, January 16, 2010, available at <http://www.guardian.co.uk/world/2010/jan/16/war-crimes-universal-jurisdiction-israel>.

³³⁸ PCHR, “PCHR and Hickman & Rose Oppose Proposed Changes to Universal Jurisdiction in the UK; Politic Considerations Must Not Be Allowed to Triumph over the Rule of Law,” August 1, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6867:pchr-and-hickman-arose-oppose-proposed-changes-to-universal-jurisdiction-in-the-uk-politic-considerations-must-not-be-allowed-to-triumph-over-the-rule-of-law-&catid=36:pchrpressreleases&Itemid=194.

³³⁹ “Hamas Chief Sheikh Salah Shehade Killed by Israel,” *Palestine Facts*, available at http://www.palestinefacts.org/pf_current_hamas_shehada_killed.php.

³⁴⁰ *Id.*

³⁴¹ “Fatal Terrorist Attacks in Israel Since the Declaration of Principles,” *Jewish Virtual Library*, available at <http://www.jewishvirtuallibrary.org/jsourc/Terrorism/victims.html>.

³⁴² PCHR, Principle and Practice, *supra* note 118.

³⁴³ PCHR, Principle and Practice, *supra* note 118, at 130.

Committee³⁴⁴ and the Al-Quds Association for Solidarity with People in Arab Countries) and Spanish civil society organizations that focus on justice for Palestinians.” Much of this collaboration took place during the EU-funded conferences described at pp. 19-22, *supra*.

After the suit was filed, Judge Andreu made a request for Judicial Assistance to the Israeli government to clarify the issues in the case. The Israeli Ministry of Justice responded, providing much of the context omitted in PCHR’s filings.³⁴⁵ For instance, the government stressed that it was critical for the Spanish court to take into account the modus operandi of terror organizations that “direct their attacks against Israel’s civilian population, from within densely populated areas without distinction from the civilian population.” The response provided several details regarding the operation, including evidence that an in-depth review of the proportionality and the military necessity of the strike was conducted beforehand, and that the targeted killing was approved only after it became clear that an arrest of Shehade was impossible.³⁴⁶ In addition, the casualties resulting from the strike were a result of erroneous real time intelligence and had not been anticipated in advance.³⁴⁷

A key component of PCHR’s legal strategy was to attack the legitimacy of the Israeli justice system. PCHR alleged that in the aftermath of the strike, the “Israeli judiciary was used as a legal cover for the perpetration of war crimes, and as a tool to deliberately hinder international jurisdiction under the pretext of a ‘fair’ national judicial system operating

in Israel.”³⁴⁸ Contrary to this inflammatory rhetoric, the Israeli Supreme Court had actually adjudicated claims arising out of the Shehade killing in two high profile cases: *Public Committee Against Torture in Israel v. State of Israel* (HCJ 769/02) and *Yoav Hess v. Chief Military Prosecutor* (HCJ 8794/03). In the *PCATI* case, the court reviewed the legality of Israel’s targeted killing policy. The *Hess* case addressed the Shehade operation specifically. In addition to these cases, the Israeli government formed an independent commission to investigate the operation, and the Supreme Court granted the right to the *Hess* plaintiffs to petition the court for review of the committee’s work should they be dissatisfied with the results.

Some of the same plaintiffs in the Spanish suit (as well as in the other cases abroad such as the US) had also previously filed civil cases in Israel over the strike. Plaintiffs in *Matar v. State of Israel* (7606/03) filed in Kfar Saba Magistrate’s court seeking monetary compensation. In 2004, the Supreme Court informed those who had been injured in the operation that they could file individual petitions against the government in Israeli court, but they chose not to. Additional claimants filed suit in August 2004 in the Hadera courts, but the plaintiffs’ own attorney asked for dismissal after he was unable to contact the plaintiffs’ attorney in Gaza for more information. The court agreed to dismiss the case without prejudice.

On May 4, 2009, Judge Andreu issued an opinion that the Spanish courts were competent “to judge the subject matter of the suit.”³⁴⁹ Spanish prosecutors immediately

³⁴⁴ The Arab Cause Solidarity Committee is part of the global BDS movement that rejects a State of Israel even within the 1948 armistice lines. It accuses both Israel and the US of “state terrorism” and “colonial domination” and seeks the end “of both the US occupation of Iraq and the Zionist occupation of Palestine.” See e.g. http://www.nodo50.org/csca/agenda2004/iraq/nota-retirada_19-04-04_eng.html.

³⁴⁵ State of Israel, Ministry of Justice, “Request of Judicial Assistance,” January 29, 2009.

³⁴⁶ Although Israel weighed the viability of arresting Shehade, it was not required to do so under the laws of armed conflict as Shehade was a combatant and therefore, a lawful military target.

³⁴⁷ Immediately prior to the strike, the IDF was informed that the only people in Shehade’s house were himself, his wife and another Hamas activist. PCHR alleges that the IDF believed there were 10 civilians in the home, yet it offered no proof for this claim except for a self-serving reference to its own complaint filed in the US *Matar v. Dichter* case. This US complaint also offers no source for this charge. Regardless, under standards employed by NATO in its 1999 Kosovo campaign, and approved by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, even if the IDF had believed 10 civilians were to be killed, the operation would not be considered disproportionate under international law. Indeed, contrary to PCHR’s assertions, no court has ever found in a case similar to that of Shehade that such a strike would be disproportionate under international law.

³⁴⁸ PCHR, “PCHR Submits Lawsuit against Israeli Officials via Spanish National Court,” June 25, 2008, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=3062:-pchr-submits-lawsuit-against-israeli-officials-via-spanish-national-court&catid=58:universal-jurisdiction&Itemid=214.

³⁴⁹ Central Magistrates Court no. Four, “Ruling,” May 4, 2009, available at <http://www.pchrgaza.org/files/PressR/English/2008/04-05-2009-2.html>.

appealed the ruling,³⁵⁰ and on June 30, 2009, the Spanish Appeals Court reversed Andreu's decision and voted 14-4 in favor of dismissing the case. In a written decision, dated July 9, 2009, the appellate court highlighted that "the extensive and exhaustive documents submitted [by Israel] reveal the commencement of a series of criminal and civil proceedings well in advance of the presentation of the complaint in Spain." As a result, the court found "it can be deduced that there has been genuine action, first on the part of the government and then on the part of the courts, to determine whether a crime may have been committed."

The judges rejected PCHR's claims that Israel's investigations of the strike were not credible and that the plaintiffs were denied due process in Israel. Instead, the court found that PCHR's allegations "do[] not tally with the court decisions that have been handed down in the proceedings in which the parties have intervened, among them many of the parties to the complaint brought in Spain, who have made use of the rights of allegation, proof and challenge provided for by law." Finally the court noted that there was no "evidence of any malicious or unjustified procedural delay" by Israel and that PCHR's "disputing the impartiality and organic and functional separation" between the Israeli Military Advocate General, Israel's Attorney General, the government-appointed Investigation Commission "involves ignoring [Israel's] existence [as] a social and democratic state with rule of law."

Hours after the appellate ruling, PCHR issued a press release noting its intention to appeal the decision, and ironically stating that "[j]ustice must remain distinct from politics."³⁵¹ PCHR also threatened that its "legal team will redouble its efforts" and that "the case [would] be expanded to include four new cases, Bus 300, the

destruction of Gaza airport, and two cases resulting from the recent Israeli offensive on the Gaza Strip, Al Dayah and a flechette case."³⁵²

In support of the appeal, Adalah filed an "expert opinion" with the court that was conceived during PCHR's EU-funded conference in Cairo in October 2008. The opinion was signed by Hassan Jabareen, general director of the organization. In the document, Adalah claimed that the Israeli Supreme Court had engaged in "misuse of the judicial process" in reviewing the Shehade operation. It also alleged that following Israel's 2005 disengagement from Gaza, there is a "lack of impartiality of the Israeli legal system towards Palestinians and the lack of an effective remedy before Israeli courts for Palestinians in Gaza."³⁵³ Adalah also claimed that the Israeli "Supreme Court ha[s] defined all Palestinians as enemies who present an inherent threat to all citizens of Israel."³⁵⁴ The statements closely echoed the strategy laid out by Jabareen during Diakonia and Al Haq's 2008 Swedish-government funded conference (discussed at p. 22, *supra*): "Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe," where he posited that activists "should try to portray Israel as an inherent undemocratic state" and to "use that as part of campaigning internationally."

It is important to highlight the baseless foundation upon which Adalah's strategy rests: the Israeli Supreme Court has judged thousands of petitions (many of which were brought by NGOs) relating to Palestinian rights: examining the authority of the military commander according to the standards of proportionality; restrictions on place of residence; checkpoint positioning; harm to Palestinian property due to army operations; the safeguarding of freedom of worship and the right to access to holy places; the demolition of houses; the laying of siege; the powers of the army during combat pursuant to international

³⁵⁰ "Spain court suspends investigation into 2002 Israel bombing of Gaza Strip," *Jurist*, June 30, 2009, available at <http://jurist.law.pitt.edu/paperchase/2009/06/spain-court-suspends-investigation-into.php>.

³⁵¹ "PCHR will Appeal to Supreme Court against Spanish Appeals Court's Decision," June 30, 2009, available at <http://www.pchrgaza.org/files/PressR/English/2008/84-2009.html>.

³⁵² *Id.*

³⁵³ Ironically, Adalah criticized Israel's Shehade Examination Committee on the basis that "a committee appointed by a person who has a conflict of interest, or whose members have conflicts of interest, cannot conduct an independent, objective investigation." Yet, Adalah had no problems with the Goldstone inquiry even though each of its members were marred by serious conflicts of interest. And Adalah continues to be one of the primary organizations lobbying for the Goldstone report.

³⁵⁴ Adalah's report also advances several legal fallacies related to concepts of "mens rea," "collective punishment," "occupation," "siege," and humanitarian obligations. An examination of these legal distortions are outside the scope of this publication but will be examined in future editions of the author's series: "NGOs, International Law, and Human Rights."

humanitarian law; the rights of Palestinians to food, medicine, and similar needs during combat operations; the rights of Palestinians during the arrest of terrorists; and detention and interrogation procedures. In more than one hundred petitions, the Israeli Supreme Court “has examined the rights of [Palestinians] according to international humanitarian law as a result of the erection of the separation fence.” Adalah files dozens of cases in the Israeli courts each year, and many have been successful. In fact, Jabareen’s own CV annexed to his opinion described several cases where Adalah had secured relief for Palestinian litigants in Israeli courts.

While the appeal was pending and amid heavy criticism regarding the exploitation of Spanish courts for political aims, the Spanish Legislature voted to amend its universal jurisdiction law to prevent further abuse. In addition to Israel, officials from several countries had been targeted by NGO activists, including the US and China.³⁵⁵ The Chief Justice of the Supreme Court was quoted as saying, “[w]e cannot become the world’s judicial gendarme . . . who are we to pass judgment in foreign countries when we have so much to deal with at home?”³⁵⁶ On October 15, 2009, the Spanish Parliament approved (319-5) an amendment to Spain’s universal jurisdiction law, limiting such cases to those involving Spanish nationals or where the alleged perpetrators are located in Spain. The new law will prevent NGOs from initiating criminal investigations against officials from foreign governments regarding events having no connection to Spain and without the knowledge or approval of Spanish officials.

On April 13, 2010, the Spanish Supreme Court rejected PCHR’s appeal confirming dismissal of the case, finding the appellate decision to be a “well grounded and reasoned response.” The court also emphasized that Israel’s investigation into the Shehade operation was “substantive

and genuine,” wholly rejecting PCHR’s and Adalah’s attack on the credibility of the Israeli justice system.³⁵⁷

Despite the rejection of its allegations, PCHR continued to publicize the case and issued a press release noting it would appeal the decision to the Spanish Constitutional Court. It also continued to repeat the false claims that “Israel is genuinely unwilling to investigate this crime; rather, the State’s actions have shown a desire to protect alleged war criminals from justice.” PCHR ended its release with platitudes about the “rule of law” and “If the law is to be respected it must be enforced.” However, the organization’s many factual and legal distortions, as well as its continued litigation of the Shehade case around the world, exemplify its own disregard for the rule of law.³⁵⁸

Netherlands: Ami Ayalon

In addition to the filing of the Shehade cases, PCHR and Daniel Machover expanded their efforts and reach by seeking an arrest warrant in the Netherlands against Ami Ayalon, former head of Israel’s General Security Service (GSS), for alleged “torture.” Ayalon was scheduled to visit the Netherlands from May 14 -18, 2008, and on May 16, a complaint was filed with the Dutch police on behalf of Khaled Joma’a Mohammed al-Shami, who was allegedly tortured by the GSS in January 2000. PCHR alleged that the Netherlands was obligated under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment to prosecute alleged violators regardless of their connection to the Netherlands.

Prior to determining whether to open an investigation, the Dutch Prosecutor requested an opinion from the College of the Attorney-General as to whether Ayalon was entitled to diplomatic immunity. The College decided on May 21 that Ayalon was not entitled to immunity. However,

³⁵⁵ Some commentators have noted that it was actually Chinese pressure that led to the change in the universal jurisdiction laws.

³⁵⁶ Helene Zuber, “Spain’s ‘World Court’ May be Restricted,” *Der Spiegel*, February 6, 2009, available at <http://www.spiegel.de/international/world/0,1518,628112,00.html>.

³⁵⁷ As part of its campaign, in February 2010, PCHR issued a 36-page report entitled, “Genuinely Unwilling,” claiming that “Israel is unwilling to and that the Israeli system is incapable of conducting independent, credible investigations in conformity with international standards.”

³⁵⁸ PCHR, “PCHR take Al Daraj case to Constitutional Court; Challenge Restrictions on Universal Jurisdiction Law in Spain,” April 16, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6441:pchr-take-al-daraj-case-to-constitutional-court-challenge-restrictions-on-universal-jurisdiction-law-in-spain-&catid=58:universal-jurisdiction&Itemid=214.

because he was no longer present in the jurisdiction, the Prosecutor did not go forward with an investigation. Al-Shami appealed the decision to the Court of Appeal on October 6, 2008 seeking an order “requiring the Prosecutor to start a criminal investigation,” “to issue an extradition order or an international arrest warrant” against Ayalon, and to seek “an Order for an anticipatory investigation, so that a criminal investigation file may be opened.”³⁵⁹ PCHR claimed the failure to prosecute in May evidenced “interference with the rule of law,” and the group threatened “serious implications for the Netherlands should a lack of due process be identified.”³⁶⁰

The appeal was rejected on October 26, 2009.³⁶¹ In the decision, the court noted that “the complaint filed by Al-Shami was too general and did not specify the circumstances of the alleged acts of torture” and “that no prima facie evidence had been presented to substantiate credible suspicions against Ayalon and, consequently, he could not be considered a suspect.”³⁶² The court also rejected the wide-ranging application of universal jurisdiction, finding that it “should not be applied in the territory of the Netherlands in the absence of the suspect, since this could lead to a conflict of jurisdictions and other legal problems.” It opined that “the application of universal jurisdiction should be restricted to instances in which the accused is in the Netherlands.”

³⁵⁹ PCHR Principle and Practice *supra* note 118. See also Associated Press, “Dutch Lawyers Seek Arrest of Minister Ayalon for War Crimes,” *Ha’aretz*, October 7, 2008, available at <http://www.haaretz.com/news/dutch-lawyers-seek-arrest-of-minister-ayalon-for-war-crimes-1.255137>.

³⁶⁰ PCHR Principle and Practice *supra* note 118 at 128.

³⁶¹ PCHR, “Justice Denied: Dutch Court Denies Appeal Petition in Ayalon Torture Case,” October 30, 2009, available at <http://www.pchrgaza.org/files/PressR/English/2009/111-2009.html> but note that PCHR’s report “Principle and Practice,” claims the date of the dismissal was August 19, 2009.

³⁶² Ido Rosenzweig and Yuval Shany, “Universal Jurisdiction: Dutch Court Dismisses Appeal Petition on Torture Allegations against Ami Ayalon,” Israel Democracy Institute, available at http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/11th%20Newsletter/5/5.aspx.

RESORT TO NATIONAL COURTS: CIVIL ACTIONS

United States: CCR vs. Israel

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CHR has not only been active in pursuing criminal litigation against Israeli military officers in the United Kingdom, New Zealand, Switzerland, the Netherlands, and Spain, but it has

also enlisted the assistance of the New York-based Center for Constitutional Rights (CCR) - funded by George Soros' Open Society Institute and the Ford Foundation to initiate civil lawsuits in United States federal courts.³⁶³ CCR is recognized in the Palestinian solidarity movement for its "legal expertise" which can help "educate" the public about the Palestinian narrative.³⁶⁴

CCR is the primary organization involved in litigation against Israel in the US.³⁶⁵ These cases are part of CCR's International Human Rights program, a central component of the organization's mandate. CCR claims to have "pioneered the field of civil human rights litigation."³⁶⁶ Through this work, CCR attempts to create new causes of action out of international norms such as "proportionality" that, "however well accepted," are "subjective, open-ended, and susceptible to considerable controversy in [their] application."³⁶⁷ Its international human rights docket targets Israel, using allegations of "crimes against humanity" and "intentional targeting of civilians."³⁶⁸ These cases consistently omit the context of terrorism and deny Israel's legitimate right to self-defense.

Two out of five cases listed in the "International Law and Accountability" section of the group's 2007 Annual Report are directed against Israel (two target the US and one targets Haiti). CCR has not filed lawsuits against officials of terror groups such as the PLO, Hamas, and Hezbollah, or against the governments that support and arm them, such as Syria and Iran. Analysis of CCR's other cases suggests that the organization draws a false, immoral equivalence between self-defensive military operations by Western governments and the brutal repressive tactics of dictators, such as Augusto Pinochet, who have ordered the commission of mass atrocities. A review conducted by NGO Monitor in July 2007 of CCR's publications, statements, and lawsuits found no publications on the conflicts and massive human rights abuses taking place in Darfur, Sri Lanka, the Democratic Republic of Congo, Sierra Leone, Uganda, Iran, Chechnya, Saudi Arabia, or North Korea.³⁶⁹

Michael Ratner, CCR's President, often promotes the Israeli apartheid canard,³⁷⁰ and is one of the organizers of a September/October 2010 flotilla from the US to Gaza intended to confront the Israeli Navy and to run Israel's blockade.³⁷¹ In a blog item entitled, "From Hebron to Yad Vashem: Jewish Sorrow Justifying the Sorrow of Others," Ratner describes a January 2010 trip to Israel's Holocaust museum. In the post, he claims that the "the museum was trying to make me accept, or at least justify, what was unacceptable: the apartheid state that is today's Israel. In

³⁶³ CCR has also partnered with FIDH to bring war crimes cases in France.

³⁶⁴ UN Workshop on Palestine Work in the Global Peace Movement, "Report of Workshop on Palestine Work in the Global Peace Movement," available at <http://www.un.org/Depts/dpa/dpr/Workshop%20Global%20Peace%20Movement.pdf>.

³⁶⁵ In addition to suits against Israelis, CCR has initiated criminal investigations for war crimes against Donald Rumsfeld in Germany and France.

³⁶⁶ CCR, "Mission & History," available at <http://ccrjustice.org/missionhistory>.

³⁶⁷ "Statement of Interest of the United States of America," November 7, 2006, at 3, available at <http://www.ccrjustice.org/files/Statement%20of%20Interest%20Dichter%2011.17.06.pdf> (hereinafter "US Statement of Interest").

³⁶⁸ See, e.g., CCR case description "Belhas v. Ya'alon," available at <http://ccrjustice.org/ourcases/current-cases/belhas-v.-ya%E2%80%99alon>; "Matar et al v. Dichter," available at <http://ccrjustice.org/ourcases/current-cases/matar-v.-dichter>.

³⁶⁹ See NGO Monitor, "Center for Constitutional Rights: Serial Abuse of International Law," July 17, 2007, available at http://www.ngo-monitor.org/article/center_for_constitutional_rights_serial_abuse_of_international_law.

³⁷⁰ Michael Ratner, "Ratner on Israeli Apartheid," February 15, 2010, available at <http://www.youtube.com/watch?v=6fzolEE-7Do>.

³⁷¹ US Boat to Gaza, "US to Gaza announces plan to join the next Freedom Flotilla," July 14, 2010, available at <http://palsolidarity.org/2010/07/13030/>.

this narrative, the Holocaust is used to ask us to wash away the sins of the occupier.”³⁷²

Matar v. Dichter

On December 8, 2005, CCR and PCHR filed a class action lawsuit in US District Court for the Southern District of New York against Avi Dichter, the former Director of Israel’s General Security Service.³⁷³ Attorney Jamil Dakwar also served as a consultant on the suit.³⁷⁴ During 2005, Dakwar was listed as an employee of HRW’s Middle East and North Africa division,³⁷⁵ but it is unclear whether he assisted on the case as part of his employment with HRW. Prior to joining HRW, Dakwar was a senior attorney for Adalah.³⁷⁶

The suit was filed by several of the same plaintiffs and covered the same events that were the basis for PCHR’s 2008 criminal suit filed in Spain. The complaint accused Dichter of “war crimes and other gross human rights violations” for his alleged involvement in the planning of the July 22, 2002 strike targeting the home of Sheik Salah Shehade, a founder of Hamas’ military wing.³⁷⁷

Jurisdiction in the case was premised upon the *Alien Tort Claims Act (ACTA)* and the *Torture Victim Protection Act (TVPA)*.³⁷⁸ These statutes allow for the limited exercise of universal jurisdiction over certain human rights violations. The ten-count complaint alleged that Dichter “authorized, planned and directed the al-Daraj bombing” and charged

him with, among other causes of action, “war crimes,” “crimes against humanity,” “cruel, inhumane or degrading treatment or punishment,” and “extrajudicial killing.” The complaint claimed that Dichter engaged in conduct that “transcends all possible bounds of decency and is utterly intolerable in a civilized society.”³⁷⁹

CCR neglected several other crucial facts in its highly politicized lawsuit, ignoring the legal and moral implications of Shehade planning operations in a densely populated civilian neighborhood.

Notably absent from the complaint was the context of terrorism. As mentioned, as head of Hamas’ military wing, Shehade masterminded hundreds of terror attacks, including a Jerusalem bus bombing in June 2002 that killed 26 Israeli civilians.³⁸⁰ The complaint also pointedly omitted that one day prior to the airstrike, Shehade took responsibility for a June 16 attack in Tel Aviv in which eight Israelis were killed in an ambush by Palestinian gunmen dressed as Israeli soldiers.³⁸¹

CCR neglected several other crucial facts in its highly politicized lawsuit. While admitting that Al-Daraj was a densely populated civilian neighborhood, CCR ignored the legal and moral implications of Shehade planning operations there, including the possible violation of the international prohibition against making use of human shields.³⁸² The plaintiffs also alleged that no “adequate

³⁷² Michael Ratner, “From Hebron to Yad Vashem: Jewish Sorrow Justifying the Sorrow of Others,” Just Left blog, January 14, 2010 available at <http://michaelratner.com/blog/?m=201001>.

³⁷³ *Matar v. Dichter*, Civil Action No. 05 CV 10270 (WHP) (“*Matar*”). Pleadings are available on the CCR website at <http://ccrjustice.org/ourcases/current-cases/matar-v.-dichter>.

³⁷⁴ “US Lawsuits Brought Against Israeli Officials,” January 11, 2006 <http://www.adc.org/index.php?id=2702>.

³⁷⁵ HRW 2005 Annual Report at 61.

³⁷⁶ ACLU, “Biography of Jamil Dakwar,” July 18, 2007, available at <http://www.aclu.org/human-rights/biography-jamil-dakwar>.

³⁷⁷ See Palestine Facts, *supra* note 339.

³⁷⁸ *Matar* Complaint at para. 14, available at http://ccrjustice.org/files/Matar%20v.%20Dichter_Decision.pdf.

³⁷⁹ *Id.* at paras. 47–128.

³⁸⁰ See Palestine Facts, *supra* note 339.

³⁸¹ “Fatal Terrorist Attacks in Israel Since the Declaration of Principles,” *Jewish Virtual Library*, available at <http://www.jewishvirtuallibrary.org/jsource/Terrorism/victims.html>.

³⁸² See e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 3, reprinted in 16 ILM 1391 (1977) at Article 51.

remedy is available in the State of Israel,” yet they omitted from the complaint that Matar had already initiated a suit in Israel over the same series of events.³⁸³ Moreover, Dichter’s actual involvement in the incident was not clear. Matar’s suit in Israel did not name Dichter as a defendant. It appears rather that Dichter was selected by CCR simply because he happened to be in New York briefly for a speaking engagement, thus allowing the court to obtain jurisdiction over him.³⁸⁴

The case called on the US District Court to adjudicate issues which were wholly out of the purview of the court and could compromise US foreign policy, Israeli foreign policy, and Israeli military secrets. These issues included:

a. Whether Defendant aided and abetted or conspired with other forces;

*b. whether Defendant knew or should have known that forces under his command were: deliberately and wantonly dropping a 1000 kilogram (over one ton) bomb... undertaking an indiscriminate military attack; targeting civilians... disproportionately using lethal weapons... and undertaking acts of violence the primary purpose of which was to spread terror among the civilian population.*³⁸⁵

Adjudication of these points would allow the plaintiffs to “explore the discussions in the inner councils of Israeli government”; to obtain access to information regarding Israeli military assets, targeting information, and troop

assessments; and to inquire about Israeli intelligence and its methods.³⁸⁶

In conjunction with the suit, CCR and PCHR issued numerous statements to help publicize the case. In a press release issued to coincide with the filing of the lawsuit, PCHR Director and FIDH Vice President, Raji Sourani, declared that “[j]ustice must finally be delivered.... These families are representatives of scores of other Palestinians who have suffered and continue to suffer as a result of Dichter’s actions.”³⁸⁷ This statement was further disseminated by Badil.³⁸⁸ PCHR and CCR issued another statement just prior to oral argument in the case, and PCHR highlighted the case in the organization’s 2005 Annual Report.³⁸⁹ CCR Senior Attorney, Maria LaHood, authored an article discussing the case published in Badil’s quarterly magazine, *Al Majdal*.³⁹⁰ The article, entitled “The Role of Universal Jurisdiction in the Fight Against Impunity,” outlined the action’s legal arguments and claimed that Dichter and the US government were engaging in “transparent attempts to stem the international trend toward UJ, respect for human rights, and the fight against impunity.” LaHood went on to characterize Israel’s defense against politically motivated lawsuits as an “assault on UJ . . . being wielded by those in power to protect themselves from being subject to the rule of law.” Crucial details regarding Shehade’s terrorist background were again omitted. CCR’s complete failure to pursue litigation against perpetrators of anti-Israeli terror belies LaHood’s contention that the organization is engaged in “respect for human rights” or the “fight against impunity.”

³⁸³ Matar, “Reply Memorandum of Points and Authorities in Support of Avraham Dichter’s Motion to Dismiss the Complaint,” February 22, 2005, at 4 n.5, available at http://www.ccrjustice.org/files/Dichter_reply%20memo%20to%20dismiss%20complaint.pdf; See also Amos N. Guiora, “Legislative and Policy Responses to Terrorism, A Global Perspective,” 7 *San Diego Int’l L. J.* 125, 146 (2005) (discussing the Matar case in Israel).

³⁸⁴ Matar, “Memorandum of Points and Authorities in Support of Avraham Dichter’s Motion to Dismiss the Complaint,” February 22, 2005, at 4 (“Defendant’s Memorandum of Law”), available at <http://www.ccrjustice.org/files/Memo%20of%20law%20in%20support%20of%20Dichter.pdf>.

³⁸⁵ Matar Complaint, *supra* note 378, at para. 12.

³⁸⁶ Reply Memorandum, *supra* note 383, at 12.

³⁸⁷ Noura Erakat, “Landmark Lawsuits Filed in U.S. Courts Against Israeli Officials,” *Washington Report on Middle East Affairs*, March 2006, at 21, 36 available at http://www.wrmea.com/archives/March_2006/0603021.html.

³⁸⁸ Badil email, December 10, 2005, available at <http://lists.mcgill.ca/scripts/wa.exe?A2=ind0512b&L=fogonet&P=612>.

³⁸⁹ See “CCR challenges Israeli military’s extrajudicial killing in U.S. court tomorrow,” May 30, 2006, available at <http://www.pchrgaza.org/files/PressR/English/2006/53-2006.htm>; PCHR’s Annual Report 2005 at 11, available at http://www.pchrgaza.org/files/Reports/English/pdf_annual/summary2005.pdf.

³⁹⁰ Maria LaHood, The Role of Universal Jurisdiction in the Fight Against Impunity,” *Al Majdal*, Spring 2007, available at <http://www.badil.org/al-majdal/2007/spring/article11.htm>.

Dichter moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), the *Foreign Sovereign Immunities Act (FSIA)*, the political question doctrine, and the act of state doctrine,³⁹¹ on the basis that plaintiffs were “improperly involv[ing] ‘the US courts in evaluating Israeli policies and operations in the context of an [sic] continuing armed conflict against terrorist operatives’” and that a US court was not the “proper forum to adjudicate political claims, to prosecute some ideological struggle, or to conduct foreign relations.”³⁹² In addition, the US government filed a Statement of Interest seeking dismissal of the case because plaintiffs sought use of the courts “to recognize a private cause of action for the disproportionate use of military force in armed conflict . . . [a] course [that] would lead to bad law and bad policy.”³⁹³

In response to Dichter’s motion, the plaintiffs dismissed the state sovereignty concerns and attempted to circumvent the applicable legal doctrines by invoking the Nuremberg Tribunal, claiming that Dichter was attempting to “insulat[e] the Nuremberg defendants from scrutiny.”³⁹⁴ This analogy compared Dichter to Nazi war criminals and Israel to Nazi Germany – a practice often used by NGOs.³⁹⁵

As part of his defense, Dichter also sought to introduce evidence of Shehade’s terrorist activities and the background to the operation. But in a further effort to obscure the necessary context, CCR moved to block this evidence from being introduced into the court record on the basis that it was “rhetorically charged” and

“constitute[d] evidence inadmissible” to the legal issues in the case.³⁹⁶

On May 2, 2007, Judge William Pauley dismissed CCR’s case. At the outset, the Court found that pursuant to the *FSIA*, Dichter was entitled to immunity from suit.³⁹⁷ The Court next dismissed the case on the basis that it presented a non-justiciable political question.³⁹⁸ Importantly, Judge Pauley found that the plaintiffs had brought this action “against a foreign official for implementing the anti-terrorist policy of a strategic US ally in a region where diplomacy is vital despite requests for abstention by the State Department and the ally’s government.” The plaintiffs “did not limit their claims to the Defendant or to the al-Duraj bombing” but rather sought to implicate Israel’s “targeted killings” policy and to criticize a policy that “involves the response to terrorism in a uniquely volatile region.” Such a case, therefore, was “at its core. . . peculiarly volatile” and “undeniably political.” Judicial intrusion “against this unique backdrop would impede the Executive’s diplomatic efforts” and would cause “intragovernmental dissonance and embarrassment.”³⁹⁹

Upon dismissal of the case, CCR and LaHood used the opportunity to accuse Dichter further and advance the NGO’s political agenda. Spinning the decision, LaHood stated that “[t]he court found a government official immune for war crimes because the Israeli government approved of his acts, and because the U.S. executive might be embarrassed if the case proceeded.” She also claimed that the dismissal failed “to enforce the law” (even though

³⁹¹ The *Foreign Sovereign Immunities Act (FSIA)*, 28 U.S.C. §§ 1602–1611 (1976), bars suit against a nation or its agents acting in an official capacity unless the case involves a commercial matter, expropriation, terrorism, torture, or other torts. Pursuant to the political question doctrine, US federal courts will decline to adjudicate a case where the Constitution has designated powers to another branch of government; applicable standards are inadequate; or where court interference would be imprudent. Under the act of state doctrine, domestic actions taken by one nation, may not be questioned in the courts of another. The policy is intended to prevent interference by US Courts in the foreign policy powers of the executive branch.

³⁹² Defendant’s Memorandum of Law, *supra* note 384, at 1, 2.

³⁹³ US Statement of Interest, *supra* note 367, at 2.

³⁹⁴ Defendant’s Reply Memorandum of Law, *supra* note 383, at 6.

³⁹⁵ See, e.g., Joint NGO Submission to UN Committee on the Elimination of Racial Discrimination (including pseudo-academic article comparing Israel to Nazi Germany), available at <http://www2.ohchr.org/english/bodies/cerd/cerds69-ngos.htm>; NGO allegations of Israeli “collective punishment” in Gaza, available at www.ngo-monitor.org.

³⁹⁶ Matar, “Objections to Defendant’s Evidence as Improper under Rule 12(b)(6), Not Competent, Irrelevant, and Likely to Confuse the Issues,” April 26, 2006 at 3, available at http://ccrjustice.org/files/Matar_Objections%20to%20Defendants%20Evidence.pdf.

³⁹⁷ Matar, “Memorandum & Order,” May 2, 2007, at 13, available at http://www.ccrjustice.org/files/Matar%20v.%20Dichter_Decision.pdf.

³⁹⁸ *Id.* at 16–17.

³⁹⁹ *Id.* at 3–4.

no such law existed), and thus “permit[ted] some of the worst abuses to go unpunished.”⁴⁰⁰ LaHood again gave no acknowledgement of the hundreds of Israeli civilians killed and wounded in attacks planned by Shehade.

CCR appealed the dismissal to the US Court of Appeals for the Second Circuit on June 14, 2007. Oral arguments took place on January 16, 2009. Prior to the deliberations, CCR sent out a communiqué, “NO IMMUNITY FOR GAZA WAR CRIMES! PACK THE COURTS,” urging its supporters to rally before the courthouse.⁴⁰¹

On April 16, 2009, the Second Circuit issued its opinion, affirming the dismissal of CCR and PCHR’s case.⁴⁰² Even though the courts rejected the lawsuit, CCR and PCHR have continued to exploit it to promote their ideological agendas and to generate significant publicity. CCR’s “Fact Sheet” on the lawsuit urged individuals to write letters and op-eds “demanding accountability for war crimes.” PCHR accused the highly respected Second Circuit of the US Appeals Court of setting “a questionable legal precedent... in conflict with customary international law.”⁴⁰³

Belhas v. Ya’alon

On November 4, 2005, CCR filed a class action lawsuit in the U.S. District Court for the District of Columbia against Lieutenant General (res.) Moshe Ya’alon, former Head of the Intelligence Branch and former Chief of Staff of the Israel Defense Forces (IDF).⁴⁰⁴ The complaint was filed on behalf of plaintiff Saadallah Ali Belhas and others, whose relatives were allegedly killed or injured during a battle between Hezbollah and the IDF on April 18, 1996.⁴⁰⁵ The fighting took place around the Hezbollah stronghold of Qana, Lebanon, from where Katyusha rockets were

frequently launched into northern Israel. IDF fire accidentally hit a UN compound in which civilians had taken refuge, some 300 yards from the Hezbollah position. CCR accused Ya’alon, then in the US as a visiting scholar, of “war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading treatment or punishment.”⁴⁰⁶ As in *Matar v. Dichter*, this case was brought under the *Alien Tort Claims Act* and the *Torture Victim Protection Act*.⁴⁰⁷

While the complaint in *Matar v. Dichter* centered on the legal issue of “proportionality,” *Belhas v. Ya’alon* was premised on the principle of “distinction.” CCR repeatedly alleged that the IDF deliberately targeted the UN compound in order to inflict harm on civilians. CCR claimed that forces under Ya’alon’s command “deliberately and wantonly attack[ed] and kill[ed]” civilians in the accidental hit on the UN compound, and that they had failed to warn the United Nations Interim Force in Lebanon (UNIFIL) of impending attacks in the area.⁴⁰⁸ CCR went so far as to claim that Ya’alon was “responsible for the **murder** and injuries of Plaintiffs” and that “these **murders were knowingly committed** as part of a widespread or systematic attack against a civilian population” (emphasis added).⁴⁰⁹ Moreover, CCR alleged that Ya’alon conceived of a “pattern and practice of systematic human rights violations” which he “designed, ordered, implemented and directed.” According to CCR, this plan was carried out by the Israeli military “acting with [Ya’alon’s] direction, encouragement or acquiescence.”⁴¹⁰

As is common practice for the NGOs discussed herein, the complaint deliberately omitted the context of terrorism in which the IDF operation was carried out. Hezbollah is simply referred to as a “guerilla force[] ... oppos[ing] the

⁴⁰⁰ CCR, “US Judge Dismisses War Crime Case Against Avi Dichter,” *Jerusalemmites*, available at <http://www.jerusalemmites.org/reports/86.htm>.

⁴⁰¹ CCR, January 16, 2009, available at <http://ccrjustice.org/get-involved/calendar/no-immunity-gaza-war-crimes!-new-york,-ny>.

⁴⁰² For the appellate pleadings, see <http://www.ccrjustice.org/ourcases/current-cases/matar-v.-dichter>.

⁴⁰³ PCHR, Principle and Practice, *supra* note 118 at 124.

⁴⁰⁴ *Belhas v. Ya’alon*, Case Number 1 :05CV12067 (hereinafter *Belhas*), “Complaint,” November 4, 2005, available at http://ccrjustice.org/files/Belhas_ComplaintQana_11_05.pdf.

⁴⁰⁵ *Id.* at para. 15.

⁴⁰⁶ *Id.* at paras. 92–111.

⁴⁰⁷ *Id.* at para. 14.

⁴⁰⁸ *Id.* at para. 18.

⁴⁰⁹ *Id.* at para. 103.

⁴¹⁰ *Id.* at para. 91.

Israeli occupation.”⁴¹¹ In the five weeks prior to the April battle, seven Israelis were killed by Hezbollah attacks, and the IDF response was intended to prevent Hezbollah from launching Katyusha rockets into northern Israel. At the time of the events alleged in the complaint, Hezbollah was launching attacks from “artillery batteries located close” to the UN compound.⁴¹² Yet CCR declared that “this case is not about the military conflict between Hezbollah and Israel.”⁴¹³ CCR absolved Hezbollah of legal culpability by ignoring the organization’s routine practice of embedding itself within the civilian population of southern Lebanon and conducting operations under the cover of human shields. Even HRW, which issued a critical report against Israel over the incident, acknowledged that “the only thing you [the public] can accuse us of being weak is on the issue of Hezbollah shielding.”⁴¹⁴

CCR omitted other critical facts from its filings, including that the combined number of countries which voted against and abstained from voting on a UN General Assembly Resolution condemning the bombing was greater than that of the countries that voted in favor. CCR ignored Israel’s statement that the accident was a result of “incorrect targeting based on erroneous data,” as well as the determination of US President Bill Clinton that the incident was a “tragic misfiring in Israel’s legitimate exercise of its right to self defense” against “the deliberate tactics of Hezbollah in their positioning and firing.”⁴¹⁵ A statement from the US Congress that Israel was justified in “counterterrorist operations as a response of a legitimate government defending its citizens” was similarly omitted.⁴¹⁶

On February 21, 2006, Ya’alon, like Dichter, moved to dismiss the case on the basis of the *FSIA*, the political

question doctrine, and the act of state doctrine. His briefing also filled in many of the contextual holes created by CCR. It noted that “between 1994 and mid-April, 1996, Hezbollah terrorists launched hundreds of katyusha rocket attacks from Lebanon, causing some 20,000 to 30,000 Israeli civilians to flee their homes.” It also cited the *Syria Accountability and Lebanese Restoration Act*, confirming that the “Israeli–Lebanese border and much of southern Lebanon is under the control of Hezbollah, which continues to attack Israeli positions, allows Iranian Revolutionary Guards and other militant groups to operate freely in the area, and maintains thousands of rockets along Israel’s northern border, destabilizing the entire region.”⁴¹⁷

CCR opposed Ya’alon’s motion to dismiss, characterizing the background on Hezbollah as “irrelevant” and claiming yet again that the accidental shelling of the UN compound amounted to “intentional murder.”⁴¹⁸ Moreover, CCR sought to discredit Ya’alon’s defenses by arguing they were “wrapped in rhetorical flourishes and references to events unrelated to the issue before the Court.”⁴¹⁹ CCR raised nearly the same legal arguments as it did in the *Dichter* case, including drawing parallels with Nazi war criminals.⁴²⁰ And as in that case, CCR objected to Ya’alon’s evidence as “irrelevant and incompetent” in an attempt to obscure necessary facts and context. CCR was essentially urging the Court to “determine whether this action interferes with U.S. foreign policy,” while at the same time trying to block “the policy statements of the U.S. or Israel” from the record.⁴²¹

CCR’s publicity attending the case belied its intentions simply to get “justice” for the alleged victims. Instead, the group utilized the case as an opportunity publicly to

⁴¹¹ Belhas, “Memorandum of Points and Authorities in Support of Moshe Ya’alon’s Motion to Dismiss the Complaint,” February 21, 2006, at 11 (hereinafter “Defendants Memorandum of Points and Authorities”), available at http://ccrjustice.org/files/Belhas_DismissPointsAuthorities_02_06.pdf.

⁴¹² *Id.* at 8.

⁴¹³ Belhas, “Memorandum of Points and Authorities in Support of Plaintiffs’ Opposition to Defendant’s Motion to Dismiss the Complaint,” May 15, 2006, at 16 (hereinafter “Plaintiffs’ Memorandum of Points and Authorities”), available at http://ccrjustice.org/files/Belhas_PlaintiffsOppositiontoMotiontoDismiss_05_06.pdf.

⁴¹⁴ Ellen Yan, “Rights Group Chides Israel, Hezbollah,” *Newsday*, May 23, 1996.

⁴¹⁵ Defendants Memorandum of Points and Authorities, *supra* note 411, at 2.

⁴¹⁶ *Id.* at 13.

⁴¹⁷ *Id.* at 4–5.

⁴¹⁸ Plaintiff’s Memorandum of Points and Authorities, *supra* note 413, at 2.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 26.

⁴²¹ Reply Memorandum at 1–2.

The DC Circuit Court of Appeals flatly rejected CCR's arguments because plaintiffs were asking the court to "engag[e] in the micro-management of military targeting decisions" and were not making allegations against "an Idi Amin or a Mao Zedong."

indict and demonize Israel, and posted a "fact sheet" on its website entitled "The Qana Massacre." This document continued the organization's practice of omitting the context of Hezbollah's policy of using human shields and its rocket attacks on Israeli civilians, deeming the incident a "deliberate attack." The statement ends with a reference to the 2006 Israel-Hezbollah war, implying again that Israel was deliberately targeting Qana civilians.

On December 14, 2006, District Judge Paul L. Friedman dismissed the case. He found that Ya'alon acted in his official capacity with "respect to the events underlying this lawsuit" and was therefore immune from suit under the *FSIA*. The court further found that plaintiffs had failed to cite a single case in support of their argument that the *TVPA* abrogated *FSIA* immunity, nor did they cite an applicable exception to the *FSIA* that applied to the crimes alleged.⁴²² Moreover, the court declined to create a new exception to the *FSIA* as advocated by plaintiffs.⁴²³

PCHR issued its own statement following the court's dismissal. Raji Sourani stated that "we will continue to do our best to bring the Israeli perpetrators of crimes against our people to justice – with all our professionalism and the support of a global network of lawyers. If international law is to serve, then it needs to be implemented."⁴²⁴

Following the case's dismissal, CCR filed a Notice of Appeal to the D.C. Circuit Court of Appeals on January 12, 2007. Oral argument was heard on December 10, 2007, and on February 15, 2008, the D.C. Circuit affirmed

dismissal of the case. In a strongly worded opinion, the court acknowledged that the case centered on "a battle between Israel and the terrorist organization Hezbollah along the Lebanese border," noted that the accident occurred "in the conduct of hostile operations," and found the lower court's decision in Ya'alon's favor to be "entirely correct."⁴²⁵ Furthermore, the Circuit Court found that plaintiffs "offered no factual allegation as to how [Ya'alon] ... fit[s] in the chain of command of the operational units conducting the shelling."⁴²⁶ In fact, the court noted that

*Instead of suing the foreign state of Israel,⁴²⁷ something prohibited by the FSIA in the absence of allegation of any of the statutory exceptions, Plaintiffs sued a retired Israeli general with at most a **tangential relationship** to the events at issue who made a **convenient visit** to the District of Columbia.⁴²⁸*

The court flatly rejected additional arguments improperly raised by CCR on appeal, and expressed that such rejection was all the more necessary in a case such as the one at bar in which the plaintiffs were asking the court to "engag[e] in the micro-management of military targeting decisions" and were not making allegations against "an Idi Amin or a Mao Zedong."⁴²⁹ In addition, a concurring judge found the plaintiffs pointed to "no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute torture or extrajudicial killing under international law."⁴³⁰ Not surprisingly, CCR offered no commentary on its website regarding the Circuit Court opinion. Instead, the NGO

⁴²² *Belhas*, "Order of Dismissal," December 14, 2006, at 3–7, 9 ("Belhas Order").

⁴²³ *Id.* at 10.

⁴²⁴ PCHR and the Anti-Apartheid Wall Campaign, "Stop support for Israel's war crimes! Moshe Ya'alon in New Zealand," *The Joint Advocacy Initiative*, November 30, 2006, available at <http://www.jai-pal.org/content.php?page=439>.

⁴²⁵ *Belhas*, "Opinion," February 15, 2008, at 2, 7, available at <http://www.ccrjustice.org/files/Decision%20in%20Belhas%20v%20Ya'alon%202.15.08.pdf>.

⁴²⁶ *Id.* at 3.

⁴²⁷ A similar issue arose in the *Al Haq/Bil'in* case in Canada (discussed at 68-72, *infra*). In that case, the plaintiffs filed against Canadian companies in order to circumvent sovereign immunity laws which prohibited suit against Israel directly. As in *Belhas*, the Canadian court admonished the plaintiffs for this practice.

⁴²⁸ *Id.* at 5, emphasis added.

⁴²⁹ *Id.* at 11, 14.

⁴³⁰ *Id.* at 6 (concurring opinion of Senior Circuit Judge Williams).

issued an “anniversary” press release on April 18, 2008, providing emotive anecdotes.⁴³¹ Maria LaHood is quoted as saying that the “Qana survivors have been denied justice everywhere they have turned, including the U.S. courts,” but that CCR “will continue to call on Israel to be accountable for its crimes.”

Blocking Corporate Trade With Israel

Another tactic in NGO lawfare against Israel can be considered a prong of the boycott, divestment, and sanctions (BDS) movement. It involves litigating against third-party state officials and corporations that sell weapons or other material to the Israeli government or military. It is thought that such suits may stand an easier chance of surviving jurisdictional bases for dismissal, as they indirectly attack foreign sovereigns. CCR, PCHR, and Al Haq are primary actors in this litigation.

Corrie v. Caterpillar

CCR and PCHR also joined forces in 2005 on a case against Caterpillar, Inc. As with CCR’s other cases, the suit was designed to indict Israel for its anti-terror operations. It was filed on March 15, 2005 against Caterpillar, Inc. in the US District Court for the Western District of Washington (State), on behalf⁴³² of the parents of International Solidarity Movement (ISM) activist Rachel Corrie for “providing specially designed bulldozers to Israeli Defense Forces (IDF) that it knew would be used to demolish homes and endanger civilians.” The complaint alleged seven causes of action including “war crimes,” “complicity in extrajudicial killing and cruel, inhuman, or degrading treatment or punishment,” and violation of the *Racketeer Influenced and Corrupt Organizations Act*

(RICO). Federal Court jurisdiction was predicated on the ATCA, the TVPA, and RICO.

The plaintiffs alleged three rationales for Israeli “home demolitions”: (1) to “expel Palestinians simply for existing near Israeli military bases or the settlements and bypass roads or the ‘separation barrier’ that are themselves illegal under international humanitarian law”; (2) “for the purposes of collective punishment”; and (3) “for the purposes of demographic engineering, *i.e.*, to limit and discourage Palestinian population growth.”⁴³³ They cited NGOs such as B’Tselem, Amnesty, and HRW, in addition to UN Rapporteur Jean Ziegler (*see* Section III, *supra*), as the sources for their inflammatory claims.⁴³⁴

The complaint distorted many facts in the case. For instance, it described Corrie as a “peacemaker” engaged in “non-violent” efforts who was killed while trying to protect a Palestinian home from “unlawful” demolition.⁴³⁵ These allegations erase Corrie’s membership in the ISM, a leading organization in the Palestinian solidarity movement; the nature of this NGO’s activities, which include engaging in deliberate confrontation with the Israeli army, interfering in military operations, and maintaining connections with wanted terrorists;⁴³⁶ and the fact that her “peaceful” protest took place in a closed military zone during an IDF anti-terror operation to clear shrubbery and other objects that served as cover for weapons smuggling tunnels and rocket launch sites. The complaint also alleged that the bulldozer driver “intentionally ran over” Corrie, even though the facts surrounding the incident are heavily disputed.⁴³⁷ Another “home demolition” alleged in the complaint occurred during “Operation Defensive Shield,” which was intended to eradicate terror operations in the West Bank after a wave of vicious suicide bombings in March 2002,

⁴³¹ CCR, “On 12th anniversary of IDF shelling UN Compound CCR Calls on Israel to Compensate Qana Survivors,” April 18, 2008, available at <http://www.ccrjustice.org/newsroom/press-releases/12th-anniversary-idf-shelling-u.n.-compound-ccr-calls-israel-compensate-qana>.

⁴³² The case was subsequently amended to include four Palestinian families as additional plaintiffs.

⁴³³ Complaint at para. 10.

⁴³⁴ *Id.* at paras. 25, 26, 29, 50, 51, 53, 66.

⁴³⁵ *Id.* at paras. 65–67, 70–71.

⁴³⁶ These confrontations include initiating violent protests at Israel’s separation barrier in Bi’ilin and organizing flotillas to Gaza. “Radical Help is on the Way,” *NGO Monitor Blog*, June 21, 2007, available at <http://blog.ngo-monitor.org/other-ngos/international-solidarity-movement/radical-help-is-on-the-way/>. In addition, in March 2003, Israeli troops captured a senior member of Islamic Jihad hiding in an ISM’s offices in Jenin. *See, e.g.*, “Too Close for Comfort: Protesters who Cosy up to Terrorists Make Mideast Peace Less Likely,” *The Ottawa Citizen*, May 09, 2003, available at http://www.ngo-monitor.org/article/_too_close_for_comfort_protesters_who_cosy_up_to_terrorists_make_mideast_peace_less_likely_.

⁴³⁷ *See, e.g.*, Rachel Corrie Facts website, available at <http://rachelcorriefacts.org/default.aspx>.

including the bombing of a Passover Seder that killed 29; this context is missing. And CCR tried to block the court from soliciting the State Department's views of the case, in an attempt to keep the context out of the court record.⁴³⁸

Corrie v. Caterpillar is an integral part of the international NGO campaign to isolate and boycott Caterpillar for its vehicle sales to Israel, on the basis of allegations that its equipment is used for "grave abuses of human rights and humanitarian law by the Israeli army."⁴³⁹ This campaign includes prominent NGO members such as Amnesty, HRW, War on Want, and ICAHD.⁴⁴⁰ Within a month of filing the lawsuit, this coalition organized a press conference and a protest to take place during Caterpillar's annual shareholders meeting in Chicago. Speakers included representatives of Jewish Voice for Peace, HRW, and Amnesty. Literature advertising the event directly referenced the CCR lawsuit.⁴⁴¹

As part of its own public relations campaign for the *Corrie* lawsuit, CCR issued a document entitled "Fact Sheet: Home Demolitions and Caterpillar," in which it repeated the charges of the complaint.⁴⁴² It also wrote an open letter to President George Bush and Secretary of State Condoleezza Rice, excoriating the United States for selling weapons to Israel and making the specious claim that "Israel's conduct cannot be equated in any way with that of its enemies but is vastly superior in its catastrophic consequences."

Caterpillar moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6), to plaintiffs' failure to state a claim, to the political question doctrine, and to the

act of state doctrine. Caterpillar argued that the lawsuit was "not an appropriate means to pursue [plaintiffs'] political goal" of forcing Caterpillar "to stop doing business with the Israeli government" and "in essence, to boycott the Israeli government."⁴⁴³ Moreover, it stated that "the IDF's destruction of property . . . alleged in the Complaint, does not state a claim under any universally recognized norm of international law."⁴⁴⁴

On November 22, 2005, Judge Franklin Burgess dismissed the action on the basis that plaintiffs failed to allege that "Caterpillar participated in or directed any of the IDF's challenged conduct"; that the "prohibition" on the destruction of personal property set forth in Article 53 of the Fourth Geneva Convention "does not set a clear, specific norm"; that private claims for relief under the Geneva Convention may not be made; that Israeli law provided adequate remedies for tortious conduct; that plaintiffs failed to allege a *RICO* enterprise or conduct; and that the case "interferes with the foreign policy of the United States of America."⁴⁴⁵

The plaintiffs appealed to the Ninth Circuit Court of Appeals on March 20, 2006. The Court affirmed the case's dismissal in an opinion dated September 17, 2007 on the basis that it would "require the federal judiciary to ask and answer questions that are committed by the Constitution to the political branches of our government."⁴⁴⁶ A primary consideration for the Circuit Court was that Israel purchased Caterpillar's bulldozers via the US's Foreign Military Financing Program.⁴⁴⁷ The sale of this equipment was therefore considered to be US military aid to Israel. Consequently, "whether to grant military or other aid to a

⁴³⁸ "Plaintiffs' Opposition to Defendant's Motion Requesting that the Court Solicit the State Department's Views," October 17, 2005.

⁴³⁹ Catdestroyshomes.org, "Declaration Regarding Caterpillar Violations of Human Rights," available at <http://www.catdestroyshomes.org/article.php?id=242>.

⁴⁴⁰ Catdestroyshomes.org, "Declaration Regarding Caterpillar Violations of Human Rights: List of Endorsers," available at <http://www.catdestroyshomes.org/endorse.php>.

⁴⁴¹ See NGO Monitor, "HRW and Amnesty Promote Caterpillar Boycott," April 13, 2005, available at <http://www.ngo-monitor.org/article.php?id=527>.

⁴⁴² CCR, "Fact Sheet: Home Demolitions and Caterpillar," available at <http://www.ccrjustice.org/learn-more/faqs/factsheet%3A-home-demolitions-and-caterpillar>.

⁴⁴³ Defendant's Memorandum of Law at 4.

⁴⁴⁴ *Id.* at 5, 14–15, 36.

⁴⁴⁵ Order at 3, 5–6, 10, 15

⁴⁴⁶ Opinion at 12490.

⁴⁴⁷ *Id.* at 12492.

foreign nation is a political decision inherently entangled with the conduct of foreign relations.⁴⁴⁸ Moreover, the court found that “[i]t is not the role of the courts to indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide.”⁴⁴⁹

CCR issued a press release on the day of the Ninth Circuit opinion. Repeating the charges against Caterpillar, Maria LaHood stated: “[t]he Court has a constitutional duty to uphold the law, and the law prohibits aiding and abetting war crimes – regardless of who’s footing the bill.”⁴⁵⁰

Since the case’s dismissal, NGOs continue to use publicity stunts to generate media attention and to reopen this lawsuit. In May and June 2010, for instance, the ISM organized several flotillas to Gaza aimed at provoking a confrontation with the Israeli Navy over the blockade of material support for Hamas. One of the boats was named the “Rachel Corrie.”⁴⁵¹ CCR actively promoted the flotillas through publicity efforts. After nine activists were killed during a violent attack on Israeli naval commandos, CCR filed several *Freedom of Information Act* requests in the US seeking “answers” to the “U.S. role and knowledge of the attack and its position vis-à-vis the continued blockade, and an end to the illegal policies and practices resulting in the ‘collective punishment’ of the people of Gaza . . .” CCR also lobbied for the report of the UN Human Rights

Council’s “fact finding” report on the flotilla, claiming the US supports a “culture of impunity” and “lacks the legitimacy necessary to serve as a broker of peace.”⁴⁵²

Al Haq Goes Abroad

United Kingdom: *Saleh Hasan v. Secretary of State and Industry*

Saleh Hasan v. Secretary of State and Industry is part of Palestinian NGO Al Haq’s strategy of “building ready-to-be-used case files . . . to be activated in the courts of a number of third-party states.” The organization enlisted the Public Interest Lawyers (PIL)⁴⁵³ law firm located in Birmingham, England to file suit in the UK in order to “secure the implementation of the July 2004 [ICJ] Advisory Opinion on Israel’s wall.”⁴⁵⁴ The action was filed by PIL against the British government on November 15, 2006 in the High Court of London based on documentation provided by Al Haq “regarding the impact of the Wall.”⁴⁵⁵ The lawsuit was ostensibly brought on behalf of an individual living near Bethlehem whose land was purportedly appropriated by the Israeli government.⁴⁵⁶

In the case, PIL and Al Haq proffered a novel theory, arguing that the granting of export licenses by the British government for the sale of weapons to Israel “breache[d] both its own Consolidated Criteria, as well as principles of

⁴⁴⁸ *Id.* at 12500.

⁴⁴⁹ *Id.* at 12501.

⁴⁵⁰ CCR, “Court of Appeals Dismisses CCR Case Against Caterpillar for Deaths And Injuries in Palestinian Home Demolitions,” September 17, 2007, available at <http://www.ccrjustice.org/newsroom/press-releases/court-appeals-dismisses-ccr-case-against-caterpillar-deaths-and-injuries-pal>.

⁴⁵¹ Adam Gabbatt, “Freedom flotilla ship MV Rachel Corrie continues to head for Gaza,” *The Guardian*, June 4, 2010, available at <http://www.guardian.co.uk/world/2010/jun/04/gaza-flotilla-mv-rachel-corrie>. See also, Rachel Corrie Foundation, “UN Human Rights Council Calls On U.S. to Enforce ‘Leahy Amendment,’” November 10, 2010 (describing CCR/FIDH side event at the UN Human Rights Council revisiting the *Corrie* lawsuit), available at <http://rachelcorriefoundation.org/blog/2010/11/10/un-human-rights-council-calls-on-u-s-to-enforce-leahy-amendment>.

⁴⁵² CCR, “Gaza Freedom Flotilla: Synopsis,” available at <http://ccrjustice.org/ourcases/current-cases/gaza-freedom-flotilla>. CCR claims that “if no information is forthcoming [to the FOIA requests], it will pursue responses to its requests through litigation.” *Id.* See also CCR, “Rights Groups Welcome Human Rights Council Report on the Israeli Attack on Flotilla to Gaza,” September 28, 2010, available at http://canadaboatgaza.org/cms/en/news/View/10-09-28/Rights_Groups_Welcome_Human_Rights_Council_Report_on_the_Israeli_Attack_on_Flotilla_to_Gaza.aspx.

⁴⁵³ This law firm is a “contracted Legal Aid service provider,” and in some instances can obtain public funding for its cases. It does not say whether it obtained such funding to bring Al Haq’s action. The firm appears to bring many cases under color of international law, such as several cases against the British government for its activity in Iraq. See www.publicinterestlawyers.co.uk.

⁴⁵⁴ Al Haq, “Legal Challenge to British Government Support of Israel,” November 15, 2006, available at <http://www.palsolidarity.org/main/2006/11/16/alhaq-high-court/>.

⁴⁵⁵ *Id.*

⁴⁵⁶ Judgment, *R (Hasan) v. Secretary of State for Trade & Industry*, Case No: CO/9605/2006 (Collins, J.), November 19, 2007, at para. 1, available at <http://www.alhaq.org/pdfs/Hasan%20v%20Sec%20of%20State%20-%20High%20Court%202007.pdf>.

international law reflected in the ICJ Advisory Opinion.” They sought to force the government to “review the legality and rationality of its arms trade with Israel,” because these arms were allegedly “implicated in violations of international humanitarian law carried out by Israeli forces.” Al Haq claimed that the UK had failed “to meet its obligations as a third-party state” and believed the lawsuit would be a means to make other countries “more mindful of their own international legal obligations with regard to violations carried out in the OPT.” This case was a clear attempt to seek judicially imposed sanctions against Israel and to interfere with Israel/UK diplomatic relations. The action was also an effort to circumvent the ICJ’s rules of consent (Israel had not consented to ICJ jurisdiction) and to transform the ICJ Advisory Opinion into a legally binding decision, which it is not.

In response to the claim, the British government annexed to its Summary Grounds of Defense information showing how the 56 export licenses at issue in the suit were in compliance with British and international law.⁴⁵⁷ As a result, PIL filed an amended claim on February 2, 2007, seeking explanations as to compliance with UK government criteria for all export licenses to Israel, and dropping its former demand for a judicial declaration that the government had acted unlawfully in granting the licenses.⁴⁵⁸

Hearings were held October 10 and 11, 2007, and the High Court of Justice dismissed the case on November 19, 2007. The opinion by Justice Collins noted that “judicial review” of legislative or executive decisions “is a remedy of last resort and is only needed if appropriate redress cannot

be obtained by another route.”⁴⁵⁹ He further noted that “Parliament has set out the means whereby the lawfulness of licensing decisions . . . should be monitored.”⁴⁶⁰ Therefore, he concluded that the claim must fail because “the necessary transparency” already existed in UK law, and that if the defendant “fails to comply” with these existing regulations, “the ultimate judge will be Parliament.”⁴⁶¹

PIL requested a chance to appeal, which was granted on February 11, 2008.⁴⁶² On November 25, 2008, the UK High Court of Appeal affirmed the dismissal of the case. The court noted that Al Haq’s case was “attenuated,”⁴⁶³ and sought a duty of “uncontained width and imprecision” that “would be a massive and unwarranted leap for the court to make.”⁴⁶⁴ Moreover, the court also found that Al Haq had “at most only an indirect interest in the subject matter and outcome of the appeal.” According to the court, the NGO was not “an individual whose personal human rights are likely to be affected by a decision to grant a licence to export military equipment to any one of 20 countries.”⁴⁶⁵ Finally, the Court remarked that Al Haq’s counsel failed to provide “a sufficiently confined and principled common law duty, which was not simply a cocktail of the particular facts relied upon.”⁴⁶⁶

In its press release regarding the appellate court’s decision, Al Haq claimed it was “deeply concerned” that “political considerations have triumphed over principled issues of law, and have undermined the importance of the common law obligation to disclose information in the public interest.”⁴⁶⁷ Yet, Al Haq failed to mention (and as the court reiterated) that the UK law already contained provisions for “giving reasons” for denying license applications, and that

⁴⁵⁷ *Id.* at para. 3.

⁴⁵⁸ *Id.* at para. 4.

⁴⁵⁹ *Id.* at 22.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² Al Haq, “Appeal granted in the case of UK arms-related licenses agreements to Israel,” February 21, 2008, available at <http://www.alhaq.org/etemplate.php?id=348>.

⁴⁶³ Approved Judgment, *R (Hasan) v. Secretary of State for Trade & Industry*, Case No: C1/2008/0030 (Wilson, J and Rimer, J.), November 25, 2008, at para. 4, available at <http://www.alhaq.org/pdfs/Hasan%20v%20Sec%20of%20State%20-%20Court%20of%20Appeal%202008.pdf> (hereinafter “Approved Judgement”).

⁴⁶⁴ *Id.* at para. 6.

⁴⁶⁵ *Id.* at para. 8.

⁴⁶⁶ *Id.* at para. 21(5).

⁴⁶⁷ Al Haq, “Political Considerations Triumph Legal Obligations as Court of Appeal Dismisses Challenge to UK’s Arms Related Agreements with Israel,” November 26, 2008 available at <http://www.alhaq.org/etemplate.php?id=400>.

the law also required “an annual report to Parliament and a power for proportionate disclosure of information.”⁴⁶⁸ Moreover, in its decision, the Court of Appeal highlighted “additional voluntary publication of quarterly reports and assiduous scrutiny by the Select Committee,” as well as the existence of the UK *Freedom of Information Act* which “argues against the parallel existence of a common law duty,” in contrast to what Al Haq had claimed.⁴⁶⁹

United Kingdom: *Al Haq v. Secretary of State for Foreign and Commonwealth Affairs, the Secretary of State for Defence, the Secretary of State for Business, Enterprise and Regulatory Reform*

On February 24, 2009, Al-Haq filed another case in the UK, this time against Secretaries of State David Miliband, John Hutton, and Peter Mandelson for “the United Kingdom’s ongoing failure to meet its obligations under customary international law in respect of Israel’s actions since the launch of Operation Cast Lead in Gaza on 27 December 2008.” The claim included allegations of the “denial of the Palestinian right to self-determination, de facto acquisition of territory by force, and breach of ‘intransgressible’ [sic] principles of international humanitarian law.”⁴⁷⁰ Like Al Haq’s 2006 case, this lawsuit was designed to circumvent the British legislative process and UK foreign policy in order to secure a judicially imposed embargo of all British “aid or assistance (military or otherwise) to Israel.”⁴⁷¹

The case appeared to be the first lawsuit initiated by the Gaza Legal Aid Fund, an organization established by Arab financier, Rashad Yaqoob. UK attorneys, Phil Shiner and

Daniel Machover (both involved in many of the cases on behalf of Al-Haq and PCHR described herein) represent the fund. British law firm Matrix Chambers also represented Al Haq. Along with Shiner and Machover, Matrix attorney Blinne Ni Ghralaigh participated in Diakonia and Al Haq’s 2008 conference in Brussels (see *supra* at pp. 22-23). Ghralaigh is an active member of Machover’s Palestinian Lawyers for Human Rights.⁴⁷² In 2009, she was a fellow at CCR, and is currently preparing “war crime” suits against an Israeli corporation, Ahava.⁴⁷³

In its pleading to the court, Al Haq alleged that the UK was required by “customary international law”:

- To denounce and not to recognise as lawful situations created by Israel’s actions;
- Not to render aid or assistance or be otherwise complicit in maintaining the situation;
- To cooperate with other states using all lawful means to bring Israel’s breaches to an end;
- To take all possible steps to ensure that Israel respects its obligations under the Geneva Conventions.⁴⁷⁴

As a result of these alleged transgressions, Al Haq’s claim for relief asks for the court to make a “declaratory order to the effect that the defendants are in breach of the UK’s international obligations” listed above, as well as to issue a “mandatory order” requiring the British government:

- To publicly denounce Israel’s actions in Operation Cast Lead and the construction of the Wall;
- To suspend all SIEL approvals to Israel;

⁴⁶⁸ Approved Judgement at para. 21 (1)-(3).

⁴⁶⁹ *Id.* at para. 21 (4).

⁴⁷⁰ For more information on how NGOs have used the Gaza War as a platform to proffer false and distorted legal claims as well as to further the campaign to isolate Israel internationally, see NGO Monitor’s Monograph, *The NGO Front in the Gaza War* (2009), available at http://www.ngo-monitor.org/data/images/File/NGO_Front_Gaza.pdf.

⁴⁷¹ Letter to David Miliband, February 3, 2010, available at <http://www.alhaq.org/pdfs/pre-action%20protocol%20letter%20to%20david%20miliband,%203%20february%202009.pdf>.

⁴⁷² See Diakonia, “Conference Report: Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe,” September 2008. Report available on file with the author.

⁴⁷³ Biography of Blinne Ni Ghralaigh, available at http://www.matrixlaw.co.uk/uploads/other/20_05_2010_12_06_16_Blinne%20ni%20Ghralaigh%20cv%202010.pdf

⁴⁷⁴ Statement of Claim, para 5. As noted on p. 11, *infra*, for a practice to rise to the level of customary international law there must be near unanimous state consensus and *opinio juris*. It is impossible to ascertain, however, what “customary international law” Al Haq claims was breached due to the vagueness of its claims (“situations created by Israel’s actions,” “maintaining the situation”). More importantly, however, given that dozens of states willingly and enthusiastically engage in diplomatic, cultural, economic, and military cooperation with Israel, it is clear that Al Haq’s assertions that such relations constitute a violation of customary international law are simply its own invention.

- To suspend all UK government financial or ministerial assistance directly given to UK companies exporting military technology or goods to Israel;
- To request that the EU suspend the EU-Israel Association Agreement on article 79 grounds and use best endeavours to ensure it is so suspended;
- To seek out and suspend any other financial or military assistance given by the UK government to Israel;
- To call for the Conference of the Parties to be convened to address Israel's grave breaches.⁴⁷⁵

Notably, Al Haq's filing omitted several essential factors in assessing whether a breach of international law had occurred: deliberate Hamas rocket and suicide attacks on Israeli civilians; Hamas' practice of embedding within civilian areas during the Gaza War; Hamas' ties to international terror networks and its state support by Iran, Syria, and North Korea; and international legal obligations of States pursuant to Chapter VII of the Security Council to block all support to terrorist organizations.⁴⁷⁶

The claim cited repeatedly to the ICJ's non-binding advisory opinion on the security barrier, yet failed to specify the relevance of the opinion to the Gaza War. Moreover, Al Haq's claim included several invented legal concepts, such as a Palestinian "self determination unit," assertions that Gaza remains "occupied" following the 2005 Israeli withdrawal,⁴⁷⁷ and allegations that Protocol III of the Prohibitions or Restrictions on the Use of Incendiary Weapons "prohibits 'in all circumstances' the use of incendiary weapons such as white phosphorus."⁴⁷⁸

More disturbingly, the claim referred to nonexistent Security Council resolutions. In several of the court

papers, Al Haq alleged that "the occupation of Palestinian territories since 1967 has been recognised as contrary to this peremptory norm of international law, and thus illegal, by the UN Security Council (see Resolution 3314)."⁴⁷⁹ No such resolution exists, however.⁴⁸⁰ It is unclear if Al Haq and its attorneys were deliberately attempting to mislead the Court by including this language.⁴⁸¹

Prior to filing its lawsuit, Al Haq's attorneys sent a 19-page "Pre-Action Protocol" letter to David Miliband on February 3, 2009. The letter, largely echoing the filed claim, demanded that the UK secretaries of state "set out in clear terms what evidence or action they point to . . . that the UK has complied with its international obligations both before and after Operation Cast Lead";⁴⁸² "a clear explanation . . . as to how . . . arms related trading activity with Israel can be in any way consistent with the UK's international obligations"; and to provide Al Haq with information as to whether Miliband will "seek suspension of the EU-Israel Association Agreement," and "if not, *why* not." Miliband was asked to waive several legal rights in advance, such as confirming that "no point will be taken by [Miliband] in respect of our clients [sic] standing." The letter concluded by seeking "a detailed description of UK compliance with the obligations set out above, by close of business on **10 February 2009**. In the absence of such a response, we intend to lodge proceeding in the High Court" (emphasis in original).

Adam Chapman for the Treasury Solicitors replied to the "pre-action" letter on February 20, 2009, remarking that the "Secretaries of State" were not "under any obligation to provide any of the assurances" sought, that Al Haq did not have "any standing to make the claims it makes," and that Al Haq would be forcing the domestic courts to be involved in "the conduct of UK foreign policy" and to

⁴⁷⁵ Statement of Claim, at para. 126.

⁴⁷⁶ See, e.g., Security Council Resolution 1373.

⁴⁷⁷ For more information of the baseless nature of this charge, see Avi Bell and Justus Weiner, "International Law and the Fighting in Gaza," available at <http://www.jcpa.org/text/puzzle1.pdf>.

⁴⁷⁸ White phosphorus, a legal and widely used smoke munition, is not considered an incendiary weapon nor is it covered by Protocol III. See, e.g., Fredman, *Precision Guided?*, *supra* note 222.

⁴⁷⁹ Statement of Claim, at para. 52.

⁴⁸⁰ Al Haq also distorts the content of Security Council resolutions 242 and 338 – neither of which "called for Israel to withdraw (resolution 242 (1967) and 338 (1973))[42] and prohibited any measures which purports to alter the character or status of the occupied Palestinian territories." See Statement of Claim at para. 42.

⁴⁸¹ A pre-action protocol letter, sent to David Miliband on February 3, 2009, also refers to a supposed Security Council Resolution 3314.

⁴⁸² See *id.*

“compel the Secretaries of State to make public statements of position and to take a series of actions in the conduct of the international relations between the UK and a large number of other states.”⁴⁸³ Chapman also stressed that with “no basis,” Al Haq’s claims were “an attempt to resurrect a series of argument considered and rejected” by the British courts in its 2006 lawsuit.⁴⁸⁴

Justice Collins (who also presided over the Hasan case) referred the case to the High Court of Justice Divisional Court to determine if the “domestic court [has] jurisdiction” over the claim; if so, whether such jurisdiction should be exercised; and whether Al Haq had the necessary standing to bring the claim.⁴⁸⁵

On July 27, 2009, Lord Justice Pill and Justice Cranston of the High Court of Justice issued a judgment. First, Justice Pill found that Al Haq would not “on the assumed facts, obtain the relief sought.” Specifically, he noted that underlying purpose of the case was for a judicial “condemnation of Israel,” and that it was beyond the competence of the “courts of England and Wales to decide whether Israel is in breach of its international obligations.” Justice Pill also remarked that the “dilemma in which Israel, a sovereign state, would be placed demonstrates the unacceptability of the claimant’s proposition.”⁴⁸⁶

Justice Pill further stressed that “this is not a case in which the breach of international law is plain and acknowledged or where it is . . . clear to the court. The Wall Opinion considers different issues and there has been no authoritative judgment upon Operation Cast Lead.”⁴⁸⁷

Furthermore, Justice Pill noted that the subject matter of Al Haq’s case related to “decisions affecting foreign policy,” and that “it is for the Government, and not the courts to decide. . . what actions are appropriate to comply with those obligations.”⁴⁸⁸ Justice Pill concluded that in the case, “there is no right even arguable to be claimed and the claimants should not be granted standing to make the claim they seek to make.”⁴⁸⁹

Justice Cranston also issued a decision which largely echoed the opinion of Justice Pill. At the outset, he remarked that “this claim for permission to proceed to judicial review is nothing but bold” and that “what the claimant ultimately wants is for the court to rule that Israel’s actions in Gaza are unlawful . . . or constitute war crimes.”⁴⁹⁰ As such he found that the claim is “not arguably justiciable” and “trespasses onto matters of high policy.”⁴⁹¹

Cranston further stated that proceeding with the case would require Israel’s obligations “to be defined and then breaches identified and proved on the basis of events occurring outside the jurisdiction,” it would require exploration of Israel’s justification such as “proportionality,” and it would then require delineating the UK’s obligations under customary international law.⁴⁹² It would “entail determination of knotty issues of law and fact” and would be “against the backdrop of possibly the most serious, protracted and controversial dispute in international affairs today.”⁴⁹³ The claim “would risk hindering the United Kingdom’s engagement with peace efforts in the Middle East.”⁴⁹⁴

⁴⁸³ Letter from Adam Chapman for the Treasury Solicitor, February 20, 2009, available at <http://www.alhaq.org/pdfs/response%20from%20secretaries%20of%20state%20%20february%202009.pdf>.

⁴⁸⁴ While Al Haq did not succeed in its efforts, Oxfam and Amnesty International were successful in a concerted lobbying effort in the UK Parliament to cancel two small arms contracts to Israel. See Asher Fredman, “A Farewell to Arms,” (forthcoming).

⁴⁸⁵ High Court of Justice, “Approved Judgment,” July 27, 2009, [2009] EWHC 1910 (Admin), Case No: C0/1739/2009, available at <http://www.alhaq.org/pdfs/Al-Haq%20v%20UK%20Judgment.pdf>.

⁴⁸⁶ Approved Judgment at para. 41.

⁴⁸⁷ *Id.* at para. 42.

⁴⁸⁸ *Id.* at para. 44.

⁴⁸⁹ *Id.* at para. 48.

⁴⁹⁰ *Id.* at para. 51.

⁴⁹¹ *Id.* at para. 53.

⁴⁹² *Id.* at para. 56.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

Referring to Al Haq's reliance on the ICJ opinion and the Articles on Responsibility of States by the International Law Commission (ILC),⁴⁹⁵ Justice Cranston remarked that "the [ICJ opinion] is not directly applicable to Gaza" and the ILC articles are "too open-textured to have a great deal of purchase in the present case." Justice Cranston also noted that the case would implicate comity principles.

Importantly, invoking the concern that such cases are simply a means to circumvent foreign policy, Justice Cranston noted that "the overall conduct of foreign policy is entrusted to those with a democratic mandate, the government . . . they are accountable to Parliament, to public opinion and ultimately to the electorate."⁴⁹⁶

Cranston's opinion concludes by ruling that Al Haq lacked standing, particularly because "in this case no one in the UK has sought judicial review of UK foreign policy regarding Israel's actions in Gaza." In addition, he

The judge rule that Al Haq lacked standing. He noted "if the claimant is correct, it would follow that any NGO, anywhere in the world, would have standing to bring a claim for judicial review."

noted the concern that "if the claimant is correct, it would follow that any NGO, anywhere in the world, would have standing to bring a claim for judicial review."⁴⁹⁷

In a press release issued following the court's decision, Al Haq stated that it "fully intends to appeal this disappointing and conservative ruling in which application of the relevant law has been sacrificed for the purposes of not

intervening in 'politics.'" The release closes with a mention that the "UK government did, after the claim was filed, order a review of all licenses for arms sales to Israel, and has recently placed an embargo on the export to Israel of certain weapons and machinery that were used during Operation Cast Lead," further evidence that the claim was filed as part of a PR strategy to have impact beyond the parameters of the case itself.⁴⁹⁸

Al Haq appealed the decision, and on February 25, 2010, the UK High Court of Appeal affirmed the lower court's rejection of permission for judicial review, effectively ending the case.⁴⁹⁹

Canada: *Bil'in Village Council v. Green Park Int'l, Inc., Green Mount Int'l, Inc. and Annette LaRoche*

The third case brought by Al Haq as part of the global BDS movement was *Bil'in Village Council v. Green Park Int'l, Inc., Green Mount Int'l, Inc. and Annette LaRoche*. The lawsuit was also one of several cases aimed at undermining the legitimacy of the Israeli justice system. The case was filed on July 7, 2008 in the Superior Court of Montreal, Quebec, Canada, by the Bil'in Village Council and its head Ahmed Issa Abdallah Yassin against two Quebec corporations and their sole director and officer, Annette Laroche.

The Village of Bil'in is located in the West Bank close to the Green Line and Israel's security barrier. It has been a flashpoint of the Arab-Israeli conflict for several years. Each week, activists for the International Solidarity Movement and Anarchists Against the Wall join local Palestinians to provoke violent confrontations with the Israeli military.⁵⁰⁰ Mohammed Khatib, leader of the Popular Committee

⁴⁹⁵ The ILC is a UN body charged with developing and codifying international law. The decisions of the ILC are not legally binding.

⁴⁹⁶ Para. 59

⁴⁹⁷ Para. 62

⁴⁹⁸ Al Haq, "Judgment handed down in the case of Al-Haq v Secretary of State for Foreign and Commonwealth Affairs," July 29, 2009, available at <http://www.alhaq.org/etemplate.php?id=468>.

⁴⁹⁹ Al Haq, "Press Release: Al Haq v UK Secretary of State for Foreign & Commonwealth Affairs et al.: Denial of Claim," March 8, 2010, available at <http://www.alhaq.org/etemplate.php?id=512>

⁵⁰⁰ Examples of violent confrontations. See e.g., "Violence at security barrier protests," *Jerusalem Post*, August 27, 2010, available at <http://www.jpost.com/Israel/Article.aspx?id=186210>.

Against the Wall and representative for Bil'in Village, was arrested in 2009 for distributing PFLP propaganda.⁵⁰¹

Although the Village of Bil'in had filed more than six cases in Israeli courts (some successful),⁵⁰² it appears the case was filed in Canada to expand the controversy internationally and to generate PR for its cause. The case was also intended to bolster the international BDS movement against Israel. According to Tom Reynolds, researcher for Al Haq, the organization originally envisioned filing a criminal suit in Canada, but decided after meeting with government officials that such an effort would be unsuccessful.⁵⁰³

In addition to Al Haq, Israeli attorney Michael Sfard and his associate Emily Schaeffer represented the plaintiffs. Michael Sfard has a long history of NGO activism. He has worked for PCATI, and served as the legal advisor for Yesh Din, Peace Now, Breaking the Silence, and other organizations. He has litigated several cases on behalf of NGOs in Israeli courts, including Yesh Gvul's case regarding the Shehade assassination. He has also represented Al Haq's General Director Shawan Jabarin in hearings related to a travel ban imposed on him because of his suspected ties as a leader in the PFLP terror organization. Sfard has represented several other PFLP members, and has also testified as a paid expert witness on behalf of the PLO in a lawsuit brought in US Federal Court in Miami by victims of terror attacks perpetrated by the Al Aksa Martyrs Brigades.⁵⁰⁴ Currently, Sfard is working with the London-based firm Matrix Chambers in preparing a lawsuit against the Israeli cosmetics company, Ahava.⁵⁰⁵

Emily Schaeffer also has an extensive background working with radical pro-Palestinian organizations, including Jews Against the Occupation, ICAHD, and Ta'ayush. She, too, has done legal work for Yesh Din.⁵⁰⁶

Evidencing that the main purpose for bringing the suit was to launch a massive PR effort to support the BDS movement and to associate Israel with the label of "war crimes," Sfard was featured in a program on Al Jazeera, "Courtroom Intifada," which aired shortly before oral hearings in the case. During his interview, Sfard admitted that this case was filed in order to "keep it in the news." In conjunction with the Al Jazeera piece, Schaeffer and Mohammed Khatib launched an 11-city speaking tour across Canada, also timed to coincide with the June 2009 oral hearings. The tour was organized by Solidarity for Palestinian Human Rights (SPHR), Tadamon!, and Young Jews for Social Justice, and its publicity included a press release entitled, "Bil'in tour: Israeli apartheid on trial."⁵⁰⁷ The NGO Medical Aid for Palestine also featured the case on its website, claiming it could accept tax deductible donations to defray legal costs. The Canadian Revenue Agency opened an investigation against MAP regarding the legality of this practice, as these donations were not for a "charitable" purpose.⁵⁰⁸

In their Motion Introducing a Suit, the plaintiffs claimed that the Canadian companies, "on their own behalf and as de facto agents of the State of Israel," were illegally constructing and marketing condominium units to the "civilian population of the State of Israel" on the "lands"

⁵⁰¹ Al Haq's Executive Director, Shawan Jabarin, was imprisoned at times in the 80s and 90s for his involvement with the PFLP. Both Israel and Jordan have denied travel visas to Jabarin on account of his alleged role as "among the senior activists" of the PFLP terror group. See NGO Monitor, "HRW/FIDH/OMCT statement on NGO official linked to PFLP," May 17, 2007, *available at* http://www.ngo-monitor.org/article/hrw_fidh_omct_statement_on_ngo_official_linked_to_terror_group; NGO Monitor, "2009 US State Department Human Rights Report & Al Haq's Shawan Jabarin: False Statements and Questionable Terminology," March 22, 2010, *available at* <http://blog.ngo-monitor.org/al-haq/2009-us-state-department-human-rights-report-al-haq%E2%80%99s-shawan-jabarin-false-statements-and-questionable-terminology/>.

⁵⁰² Described in more detail below at 70, *infra*.

⁵⁰³ Remarks of Tom Reynolds, "Accountability for IHL Violations" Forum, Al Quds University, March 2009. Notes on file with the author.

⁵⁰⁴ *Saperstein v. Palestinian Authority, PLO*, Case No. 04-20225-CIV, S.D. Fla. (2004).

⁵⁰⁵ At his expert deposition, Sfard invoked attorney client privilege when asked about the forthcoming case against Ahava.

⁵⁰⁶ Coby Ben Simhon, "Tough Love," *Ha'aretz*, May 20, 2010, *available at* <http://www.haaretz.com/weekend/magazine/tough-love-1.291280>

⁵⁰⁷ "Bil'in tour: Israeli apartheid on trial," May 29, 2009, *available at* <http://palsolidarity.org/2009/05/bil'in-tour-israeli-apartheid-on-trial/>.

⁵⁰⁸ "Support Bil'in's historic court case," March 3, 2009, *available at* <http://www.bilin-village.org/english/activities-and-support/Support-Bilin-s-historic-court-case>; Helene Buzzetti, "La bienfaisance, paravent fiscal?" *Le Devoir*, March 2, 2010, *available at* <http://www.ledevoir.com/politique/canada/284154/la-bienfaisance-paravent-fiscal>.

of Bil'in Village. By doing so, the plaintiffs accused the defendants of "aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose."⁵⁰⁹

The plaintiffs claimed that prior to 1967, the "Municipality of Bil'in had jurisdiction over the entire lands of the Village," including lands where they argued defendants were engaging in construction.⁵¹⁰ Interestingly, several of the plaintiffs did not contend that they had an ownership interest in these lands, but that these lands were "severed" and then "illegally assigned" to "another local council"⁵¹¹ created by Israel, thereby placing the lands outside of the village's "municipal jurisdiction." They further argued that the loss of the village's municipal jurisdiction "use" of its land⁵¹² was a violation of several laws including article 49(6) of the *Fourth Geneva Convention*, article 8(2)(b) (viii) of the *Rome Statute* of the International Criminal Court, the *Canadian Geneva Conventions Act* and *Crimes Against Humanity and War Crimes Act*, and local Quebec statutes.⁵¹³

To support their decision to file suit in Canada, the plaintiffs contended that their claims were not "justiciable" before the Israeli High Court of Justice, and that the court "has never ruled that Israeli settlements in the Occupied Palestinian Territories are illegal under international law."⁵¹⁴ The plaintiffs sought declaratory judgment from the court that Israel was in breach of several laws; a permanent injunction to "cease all construction, sales activity, transfer of rights, [and] marketing"; to remove all "building structures, equipment and material"; "return lands to condition they were in prior to the building construction"; an "accounting"; damages for "breach of statutory duties, the intentional commission of war crimes and negligence"; and \$2 million CAD in punitive damages pursuant to section 49 of the Quebec Charter of Human Rights and Freedoms.⁵¹⁵

As part of the proceedings, the plaintiff submitted an affidavit by Orna Ben Naftali, a professor at the College of Management Academic Studies in Rishon Lezion, Israel. Ben Naftali is on the board of Israeli NGO B'Tselem that has lobbied heavily in favor of the Bil'in protests and against the route of Israel's security barrier.

The defendants sought to dismiss the case primarily on three bases: *res judicata*, lack of standing, and *forum non conveniens*.⁵¹⁶ With respect to *res judicata*, defendants argued that three opinions of the Israeli Supreme Court, 3998/06, 1526/07, 143/06, stopped the plaintiffs from litigating their case in Canada.

On the issue of standing, the defendants claimed plaintiffs lacked standing to bring the case because according to decisions of the Israeli Supreme Court, plaintiffs had no proprietary interest in the lands in question in the case.

The defendants also asked the court to decline jurisdiction on the grounds that "direct applications have on numerous occasions been made on behalf of Plaintiffs," and that the Israeli High Court of Justice "is clearly the most appropriate forum for the issues raised by these proceedings" because of the plaintiffs' previous applications to that court regarding the same land in question; because all of the plaintiffs' and witnesses relevant to the case resided in Israel or the West Bank; all elements of proof raised by the plaintiffs were located in Israel or the West Bank; and because the issues raised by the proceedings would require knowledge and interpretation of Ottoman land law, Jordanian land and municipal law, military occupation law, and Israeli planning and usage laws. The defendants also pointed out that these laws were also raised as the applicable laws by the plaintiffs in their earlier proceedings in Israel. Any judgment rendered by the Quebec court would, therefore, require recognition and enforcement overseas.

⁵⁰⁹ Statement of Claim, at para. 9.

⁵¹⁰ *Id.* at para. 13.

⁵¹¹ *Id.* at para. 14.

⁵¹² *Id.* at para. 33.

⁵¹³ *Id.* at paras. 15-22.

⁵¹⁴ *Id.* at para. 29.

⁵¹⁵ *Id.* at paras. 35-6.

⁵¹⁶ See "Defendants Exception to Dismiss Action and De Bene Esse to Recognize Judgments." Defendants also proffered arguments of immunity and agency but these points were relatively minor and were dismissed at the outset by the judge. See *id.* at para. 13.

On September 18, 2009, Judge Louis-Paul Cullen of the Superior Court issued a decision dismissing the lawsuit and awarding the defendants partial costs.⁵¹⁷ At the outset, he noted that the plaintiff is “often repetitious and circular, occasionally contradictory.”⁵¹⁸ Judge Cullen then addressed the merits of the case. The court rejected the defendants’ defenses of sovereign immunity and *res judicata*. He also agreed that Yassin, the Head of the Village Council, had standing to bring the suit.⁵¹⁹ The court, however, dismissed the claims brought by the Village Council of Bil’in on the basis of standing.⁵²⁰ The court found that the “mere existence of municipal jurisdiction over the Lands does not confer any right to their use nor does it otherwise confer to the Council a sufficient interest to seek for its own benefit the convulsions of the Action.”⁵²¹

The court then engaged in a lengthy analysis of the *forum non conveniens* doctrine as to whether Canada was an appropriate forum to bring the lawsuit. The defendants had argued that the Quebec court should decline jurisdiction in favor of the courts of Israel, who were in a better position to adjudicate the case. The court first noted that most of the evidence and witnesses, as well as the events at issue in the case, were located in Israel and the West Bank. Moreover, the Israeli courts would be more familiar with the applicable law, and any judgment issued in Canada would have to be executed by the Israeli Supreme Court.

The judge next examined the plaintiffs’ argument that the High Court of Justice was unwilling to adjudicate alleged violations by Israel of the Fourth Geneva Conventions and in particular adjudicate the issue of the legality of settlements. In reviewing the opinion of Ben Naftali, the court found her views to be “inconsistent with the evidence.” In particular, that Ben Naftali’s interpretations

of several HCJ cases did not stand for the proposition she had set forth regarding the justiciability of the legality of settlements.⁵²²

Furthermore, the Court found that the plaintiffs “offered no evidence whatsoever to this Court of their alleged ownership of the Lands” in question or that such land was “confiscated.”⁵²³ Judge Cullen also highlighted that “as it is presently framed [plaintiffs’ case] can hardly lead to a just result.” He noted that the plaintiffs were seeking the demolition of many homes, yet had failed to include the “numerous owners or occupants” in the case, “thereby depriving those persons of the right to be heard, a fundamental tenet on natural justice.” The plaintiffs also attempted to bypass sovereign immunity laws by omitting Israel as a party in the suit, even though they

The court concluded that the plaintiffs were engaging in “inappropriate forum shopping” and that they simply chose a Quebec forum to “avoid the necessity of... proving” their case in Israel.

were indirectly seeking “an essential finding that [Israel] is committing a war crime.”⁵²⁴ Finally, the court noted that the plaintiffs had sought the benefit of Canadian statutes, yet had failed to implead the Attorney General or seek his authorization for the case which those laws required.⁵²⁵

The court concluded that the plaintiffs were engaging in “inappropriate forum shopping” and that a “review of the evidence simply does not bear out [the] preconception” made by plaintiffs that the HCJ was “unwilling to adjudicate on a politically sensitive matter.”⁵²⁶ Moreover, the court found that the plaintiffs simply chose a Quebec forum to “avoid the necessity of . . . proving [their case]

⁵¹⁷ Superior Court, “Judgment,” September 18, 2009, available on file with the author.

⁵¹⁸ *See id.* at para. 13. In particular, the court remarked on the contradictory claims of the plaintiff including allegations in some sections that the Village Council claimed no ownership interest in the land at issue, but in other sections, it alleged that it was denied enjoyment of “its property.”

⁵¹⁹ Yassin died on January 20, 2009, but his heirs continued the suit.

⁵²⁰ Decision at para. 144.

⁵²¹ *Id.* at para. 139.

⁵²² *Id.* at para. 282.

⁵²³ *Id.* at paras. 299-300.

⁵²⁴ *Id.* at para. 317.

⁵²⁵ *Id.* at para. 318.

⁵²⁶ *Id.* at paras. 327-328.

before the HCJ ... thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Quebec.”⁵²⁷

The plaintiffs appealed the ruling on October 19, 2009. The appellate filing was accompanied by the publication of a glossy report and a press conference. At the conference, Al Haq’s Executive Director Jabarin noted the organization would continue to bring lawfare cases: “We stand ready to raise the issue of corporate accountability and work with lawyers anywhere in the world to hold corporations accountable for their complicity in the policies of the Israeli occupation and the breaches of international humanitarian law in the occupied Palestinian territory.”⁵²⁸

On August 11, 2010, the Court of Appeal issued a decision affirming the lower court’s dismissal of the case. The court found plaintiffs’ assertions regarding the relevance of their alleged ownership interest in the lands to be contradictory, and that whether they had an ownership interest was essential to the case; otherwise, the plaintiffs were simply seeking a judicial “declaration on the policy of the ‘occupying state.’”⁵²⁹

The appellate court also found plaintiffs’ claims that Israel was not a necessary party to the suit to be unavailing given that the plaintiffs had claimed the Canadian companies were agents of Israel and “conspiring with Israel to commit acts that contravene the Fourth Geneva Convention.”⁵³⁰ It therefore reiterated that plaintiffs were simply trying to circumvent sovereign immunity laws.

Importantly, the court found plaintiffs’ claims to be “devoid of merit” that the Israeli HCJ would lack jurisdiction to hear the matters related to the dispute given that they had already litigated several cases on these same issues in that forum.⁵³¹ Moreover, plaintiffs’ own expert at the lower court had not disputed the jurisdiction of the HCJ.⁵³²

Finally, the court reviewed the lower court decision dismissing plaintiffs’ claims that Quebec was the appropriate forum for the case. In response, the court found that “It requires a great deal of imagination to claim that the action has a serious connection with Quebec.”⁵³³

On October 6, 2010, Al Haq and the Bil’in plaintiffs appealed the dismissal of their case to the Canadian Supreme Court.⁵³⁴

Though Al Haq has failed in all of its attempts to have foreign courts rule that the ICJ advisory opinion on the security barrier is a decision that legally binds Israel, the organization continues to harass companies doing business in Israel with vexatious litigation.⁵³⁵ In March 2010, Al Haq filed a criminal complaint against the Dutch company Riwal for alleged complicity “in the commission of war crimes and crimes against humanity . . . through its supply of mobile cranes and aerial platforms for the construction of settlements and the Wall in several locations in the Occupied West Bank.”⁵³⁶ On October 13, 2010, Dutch police raided Riwal’s offices.⁵³⁷ As of publication, the Dutch prosecutor has yet to decide whether to move forward with the case. There is no doubt, however, that Al Haq will continue to exploit this lawsuit and future cases for their PR value and to bolster its BDS campaigns against Israel.

⁵²⁷ *Id.* at para. 326.

⁵²⁸ Popular Struggle Coordination Committee, “Bil’in Seeks Justice in Canada: Taking Israeli War Crimes to the Canadian Court,” October 19, 2009, available at http://www.bilin-village.org/francais/xmedia/docs_divers/Bilin-Canada-appeal.pdf.

⁵²⁹ Court of Appeal, “Judgment,” August 11, 2010, available on file with the author (hereinafter Appellate Judgment).

⁵³⁰ *Id.*

⁵³¹ *Id.* at para. 58.

⁵³² *Id.* at para. 68.

⁵³³ *Id.* at para. 86.

⁵³⁴ Al Haq, “Bil’in Seeks Permission to Appeal to the Supreme Court of Canada the dismissal of its case,” November 6, 2010, available at <http://www.alhaq.org/etemplate.php?id=555>.

⁵³⁵ As noted, ICJ advisory opinions are not legally binding and Al Haq’s attempt to exploit national courts to “enforce” the non-binding decision are highly improper. This is especially the case here where the General Assembly request seeking the opinion was highly prejudicial and the ICJ proceedings lacked due process.

⁵³⁶ Al Haq, “Criminal complaint lodged against Dutch company for construction of settlements and ‘the Wall,’” October 14, 2010, available at <http://www.alhaq.org/etemplate.php?id=552>.

⁵³⁷ *Id.*

CONCLUSION

A

t the end of their article, McGann and Johnstone conclude that “NGOs as an international community lack the transparency and accountability in terms of finances, agenda, and governance necessary to effectively perform their crucial role in democratic civil society.”⁵³⁸

This assessment is especially true with regard to NGO promotion of universal jurisdiction and their involvement in the creation of international legal institutions such as the ICC. Rather than engaging in debate and taking seriously the difficult choices facing nation-states, such as how to weigh sovereignty and security concerns with human rights, NGOs “tend to be narrowly focused on a single issue, [and] less concerned with the balancing of interests required of policy leaders.”⁵³⁹ This myopic view of complex situations leads to further conflict, and paradoxically, to a dilution of the universality of human rights as NGOs tend to focus on the violations committed against only one side of the conflict or create immoral equivalencies regarding events.

While Israel is not the only target of NGO exploitation of universal jurisdiction (the US, for instance, is also facing similar problems), its case is instructive. The emergence of lawfare as a tactic in the Arab–Israeli conflict is troubling; all the more so because NGOs that claim to promote universal human rights are spearheading the effort and receive significant funding from European governments for these campaigns. Although the NGOs discussed in this publication claim to pursue the “end [of] impunity” or to seek “justice” for alleged “victims” of the Israeli military, it appears that such groups are really promoting their anti-Israel political agendas. They invest vast budgets in their public relations campaigns in order to identify Israel as a pariah state whose justice system refuses to punish violators of the most serious crimes. These campaigns erase the context of Palestinian terror and ignore its Israeli victims. Moreover, these NGO efforts appear aimed

more at interfering with Israel’s right to self-defense and hampering legitimate anti-terror operations. Rather than putting an “end to impunity” and “obtaining justice,” NGO lawfare makes the promotion and enforcement of universal human rights even harder to achieve.

⁵³⁸ McGann & Johnstone, *supra* note 9.

⁵³⁹ Davenport, *supra* note 11, at 119.

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