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Legal Mechanisms of the Council of Europe and the EU

by Bill Bowring, Birkbeck College, University of London

This paper is based on the talk I gave on Saturday 18 April 2009 at the Israel Review Conference and BDS Follow-up Meetings, “United Against Apartheid, Colonialism and Occupation: Dignity & Justice for the Palestinian People”, Geneva.

I was invited to speak first because of my experience since 1992 in taking cases against Turkey and then Russia at the European Court of Human Rights (ECtHR); and because I was recently in the West Bank as part of a UK delegation examining the Israeli Military Courts in the Occupied Palestinian Territories.

However, I should say that I have a certain amount of experience in the region. I first visited the West Bank and Gaza in 1987 in the context of the First Intifada, as a member of a two-person mission sent by the Arab Lawyers Union and the International Association of Democratic Lawyers (IADL), which was founded on 24 October 1946 in Paris by a gathering of lawyers who had survived the war against fascism and participated in the Nuremberg Trials. Rene Cassin, a drafter of the Universal Declaration of Human Rights, was named the first IADL President. The IADL, representing lawyers in all continents, played a key role in establishing the right of peoples to self-determination as a legal right in international law. The next, XVII, Congress of the IADL, at which the Arab Lawyers Union, including the Association of Palestinian Lawyers and the Palestinian Centre for Human Rights (Gaza) will be represented, takes place in Hanoi in June 2009. See <http://www.iadllaw.org/>.

For the mission in 1987, we were tasked with investigating a number of violations including the partial closure by Israeli forces of the women’s centre, the In’ Ash al-Usrah Society, in Ramallah, and the establishment of the unlawful Ketziot Detention Centre in the Negev Desert. Since then I have taken part in a number of human rights missions to Israel and the OPTs, have visited Gaza on three occasions, and took part most recently in a mission organized by the Bar of England and Wales and Lawyers for Palestinian Human Rights from 29 March to 3 April 2009, investigating the system of Israeli Military Courts in the Occupied Palestinian Territories. A Report of this Mission will be published later in 2009.

I helped to obtain £90,000 from the British Foreign Office for the project which, in 2006-7, worked in partnership with the Palestinian Bar Association, carried out trainings in Ramallah, Hebron, Nablus and Bethlehem, and sent some 12 young barristers, mostly women, from England to work with the Palestinian advocates for periods of two to three months. As part of this project we produced in 2006 a comprehensive Training Manual for Palestinian Lawyers. This is freely available on the internet at <http://www.barhumanrights.org.uk/docs/PalestiniantrainingManual.doc>, and describes in detail how to make best use of the various mechanisms available to Palestinian lawyers. Indeed, a significant part of our task in writing the manual was explaining the very limited but still highly

significant means of international redress available to Palestinian victims of Israeli violations of their rights under human rights and humanitarian law.

There are two themes which I wish to emphasise in what follows. The first is *complicity*, while the second is *accountability*.

I am a citizen of a country, Britain, which has a high level of complicity in the tragedy of the Palestinian people. From the Balfour Declaration of 1917 to Britain's dereliction of its duty to the Palestinian inhabitants of the Mandate territories, standing by while the Naqbah was perpetrated in 1948, to the recent assault on Gaza, this is a heavy responsibility. Indeed, Britain's role amounts to complicity.

There is a further irony, all too apparent when our Mission visited the Israeli Military Courts in April 2009. The operative law in those Courts is that contained in the British Emergency Defence Regulations of 1945. These were initially designed for use against Zionist terrorists, and were promptly adopted by those same terrorists when they came to power.

The question put to me for the purpose of today's contribution is as follows: what use can be made by the Palestinians of the mechanisms provided by the European Court of Human Rights (the ECtHR) and the European Court of Justice (ECJ)?

I am afraid that my answer is negative – Palestinians do not have the possibility of addressing complaints to these courts - subject to some clarifications.

First, I must distinguish between these two judicial instances.

The ECtHR, based in Strasbourg, was created as an organ of the Council of Europe (CoE), which now has 47 member states, with a total population of 850 million people. Israel is not one of those states (although Turkey and Cyprus are), and there is no prospect that it will be.

The ECJ, based in Luxembourg, is the judicial organ of the European Union, which, since enlargement, now has 27 member states, all of which are also members of the Council of Europe. The CoE and the EU are both legally based, that is treaty-based, organizations, unlike the Organisation for Security and Cooperation in Europe (OSCE) which is purely political. But there the resemblance between the ECtHR and the ECJ ends.

It is very important to understand the crucial differences between the ECtHR and the ECJ, and the organization of which they are part. Unfortunately, even the "quality" newspapers in Britain often report that the ECtHR is yet another interfering mechanism of the EU, which is thoroughly unpopular in Britain. Thus, the Human Rights Act 1998, which incorporates parts of the ECHR into English law, is also most commonly seen as an imposition by the EU. The great majority of British citizens have never heard of the Council of Europe.

Another key difference is as follows.

The Council of Europe, founded in 1949 as part of Western European solidarity in the Cold War, has three "pillars"- the rule of law, multi-party democracy, and protection of individual human rights – and has more than 200 treaties covering a wide range of subject matters.

The predecessor of the EU, the European Coal and Steel Community, began in 1950. The six founders were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. In 1957, the Treaty of Rome created the European Economic Community (EEC), or 'Common Market'. The EU is primarily concerned with economic integration, creating a serious competitor to the USA.

The EU now has a - non-enforceable – Charter of Fundamental Rights, and seeks to develop its own form of citizenship, but its greatest achievement so far is the “Euro-zone”.

There is much rich experience in the ECtHR. But there might be the following objection. Even if Palestinians could appeal to the ECtHR in Strasbourg, surely that court does not adjudicate on the most important demand of the Palestinians, their right as a people to self-determination?

But such an objection would be not quite accurate.

From the start, the ECtHR has been obliged to adjudicate issues arising from self-determination struggles. Thus, one of the first cases before the court was the inter-state complaint (in fact, two of them) brought by Greece against the UK (1957-9), several years before the UK permitted individual complaints, in 1966. Greece did not complain about violations suffered by its own citizens, but rather about the grave violations of human rights it alleged that the UK had committed in the British Army’s bloody suppression of the EOKA movement for union of Cyprus and Greece. The complaint was withdrawn when the status of Cyprus was resolved by a treaty between Greece and the UK.

Many of the cases brought against the UK during the 1970s until the Good Friday Agreement in 1997 concerned the conflict in Northern Ireland, notably the inter-state case brought by the Republic of Ireland (1971-1978), where the UK was convicted by the (then) Commission on Human Rights of the use of torture: the ECtHR found that the UK was guilty of “inhuman and degrading treatment”. In any event, the UK had violated Article 3 of the ECHR. The constant background to these cases was the demand by the Irish republicans for recognition by the UK of “the right to self-determination of the people of the Island of Ireland”. By the way, many republican homes in Northern Ireland display a Palestinian flag as a mark of solidarity, and Israeli flags are to be seen in Protestant, Unionist, districts.

I helped to take many cases against Turkey from 1992 onwards, on behalf of Turkish Kurds who suffered gross violations of their rights arising from the conflict in South-East Turkey. Turkey razed hundreds of Kurdish villages to the ground as part of its campaign against the PKK, and some 3 ½ million Kurdish people were uprooted and displaced to become refugees in their own country. It goes without saying that the Kurds’ chief demand is self-determination.

Finally, in 2003 I founded the European Human Rights Advocacy Centre (EHRAC), which has represented more than 50 Chechens in their complaints against the Russian Federation, in the Second Chechen War from 1999 onwards. Although all these complaints – of unlawful killing, disappearances, torture, destruction of property – are individual complaints, the judgments against Russia have significance for the Chechen people as a whole. Their struggle against Russian colonization for centuries, the genocide perpetrated against them when they were deported as a people in 1944, and the massacres of the First Chechen War (1994 to 1997), all have the same content - the struggle for self-determination.

So even if the Palestinians cannot bring complaints to the Strasbourg Court, they have much to learn from the experience of the Cypriots, Irish, Kurds and Chechens, and the means by which Britain, Turkey and Russia were held accountable.

I now turn to the ECJ.

Israel as a state cannot be brought before the ECJ, nor can Israeli leaders. But there are possibilities for arraigning before this court those EU member states which are guilty of

complicity with Israeli violations. The EU can do nothing without the active participation and consent of its member states, especially its largest states including the UK.

In this context it is important to remember the close ties between the EU and Israel, promoted by these same EU member states. Thus, the first Association Agreement between the EU and Israel was concluded on 20 November 1995, and came into force on 1 June 2000. Article 2 of this Agreement is supposed to require Israel to promote and protect the human rights of all under its control. On 10 April 2004 the European Parliament, more democratic but without executive power, voted to suspend the Agreement, in the face of Israel's gross violations of this provision. However, the relationship has continued, with the EU as Israel's major trading partner. On 16 June 2008 a decision was taken by the EU Association Council to upgrade the EU-Israel Association Agreement.

What does this mean in practice? The clearest answer is given by looking at EU arms sales to Israel. In 2007 these totaled €200 million. It is instructive to note that the most active exporter of arms to Israel was France, with sales totaling €126 million. Germany was far behind, with €28 million, followed by Romania, with sales of €17 million. By way of contrast, Sweden, with a large weapons industry, made no sales to Israel at all. Britain is not among the leaders, but has significant weapons sales to Israel; and perhaps more importantly, purchases weapons and weapons systems from Israel. The EU has had a Code of Conduct on weapons sales since 1998, but this is overseen at member state level, not by the European Commission in Brussels.

Britain's continuing complicity was demonstrated by the fact that not only does it purchase unmanned aircraft (drones) from Israel, but provides key components for them. These very weapons were used to particularly devastating effect in Gaza in Israel's recent assault.

In the case of the UK, weapons sales are only possible if an export license is granted by the government. To date, only 28 such licences have been refused. But legal action has been taken in the UK courts. The possibility of doing so was demonstrated in the High Court case *R (Hassan) v the Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin). And cases are being prepared in which individual member states, such as the UK, are challenged at the ECJ for violation of the EU's own rules.

These cases are supported by the IADL's regional association, the European Lawyers for Democracy and World Human Rights (ELDH), of which I am the President. And the IADL has published a White Paper on Israel's violations in Gaza, and is focusing its attention on lobbying the UN General Assembly to take action.

I conclude with the thought that even if Palestinians cannot take cases directly to the ECtHR or the ECJ, there is a great deal they can learn from the former, and actions that their supporters can take in the latter. This is what I mean by accountability.