

Epilogue

Al-Haq these days is rather more of a conventional organization than when it started. After close engagement with the coalition working on the development of the Palestinian NGO law, al-Haq finally departed from its company framework and in early 2004 registered under the Palestinian law.¹ It has a board of directors, the members of which are elected for three-year terms by and from within the membership of a General Assembly. The General Assembly consists of “working members” of al-Haq. These members are approved by the board, the applications accepted on a set of conditions including that they be “active and [. . .] have interests that are attested in the field of defending human rights and freedoms and to be an expert or academic personality with advanced academic degrees in the field of human rights and freedoms,” and be over the age of thirty.² The board of directors, *inter alia*, is charged with hiring and firing, approving terms and conditions, and approving the budget. Al-Haq’s website makes it clear that decision making in the organization lies with the general director, who consults with the heads of al-Haq’s three departments: Finance and Administration, Legal Research and Advocacy, Monitoring and Documentation. These four make up the Steering Committee, which meets weekly. There is still a regular general meeting of the whole staff, but it convenes on a monthly basis and there is no suggestion it carries organizational authority: al-Haq “encourages teamwork but also has clear lines of responsibility and accountability.”

Al-Haq confronts extraordinary times and extreme challenges that currently present bleak prospects for the achievement of the organization’s vision of seeing “the rule of law and standards of international human rights and humanitarian law implemented and adhered to, so that Palestinians can enjoy equal treatment with respect to their human dignity, free from occupation and with the full realisation of their right to self-determination.”³ The year 2017 witnessed a number of significant anniversaries: a hundred years since the 1917 Balfour

Declaration, seventy years since the 1947 Partition Resolution at the UN, fifty years since the 1967 Israeli occupation of the West Bank (including East Jerusalem) and Gaza Strip, and thirty years since the outbreak in 1987 of the first intifada. The following year, 2018, marked seventy years since the *Nakba* in 1948. In June 2017, al-Haq published a statement marking fifty years of occupation (issued jointly with six other groups) and noting two further “grim milestones” falling that same week: fifteen years since the occupation authorities starting working on the Wall, and ten years of the closure and naval blockade of Gaza.⁴ The years since 2000 also saw the eruption of the second intifada, during which al-Haq’s offices on Main Street, Ramallah, along with those of many other NGOs, were broken into by Israeli soldiers who destroyed equipment and wreaked havoc with the files; many areas under PA jurisdiction were reoccupied and—as Hajjar puts it—the PA infrastructure eviscerated.⁵ Suicide bombings inside Israel began to follow Israel’s “targeted assassinations” of leaders of the Palestinian resistance.⁶ In 2004 President Arafat died in France after three years confined to his compound in Ramallah, with allegations of poisoning quickly following his death. Widespread security breakdown preoccupied al-Haq and other parts of civil society. The victory by Hamas in the legislative elections of 2006 was resisted by Fatah, and the subsequent battle between the two factions in 2007 (referred to by Erakat as a “US-supported attempted coup”)⁷ left Hamas in control of Gaza, Fatah in power in the West Bank, a suspended Legislative Council unable to act, an increasingly divided judicial system, security forces with little accountability, competition between the different ruling authorities, factional retaliations against individuals and agencies, and serious lack of public funds following retaliatory actions by Israel (e.g., withholding tax credits) and Western donors to the PA.

The human rights implications of this division were enormous. In a 2007 consultancy paper on the challenges and opportunities of defending human rights in the oPt, Iain Guest noted:

After a year of Israeli incursions, targeted assassinations, poverty and international isolation, Palestinians are increasingly sceptical about the value and purpose of human rights. The decision by Western governments to insist on elections and then reject the result has created further cynicism.⁸

Al-Haq has issued and joined calls for national unity and reconciliation.⁹ It cooperated with allies in documenting and seeking redress for violations of the laws of armed conflict in the three sustained Israeli attacks on Gaza, as discussed briefly below.¹⁰ It documented Israel’s continuing seizure and expansion of its control over Palestinian land and resources and the violations of IHL and of human rights law to which Israel has continued to resort in order to quell opposition to this primary agenda, including the Wall and policies designed to strip East Jerusalem’s

Palestinians of their residency rights in favor of Israeli settlers and further isolate Arab Jerusalem from its Palestinian hinterland.

Al-Haq has continued to take on a wide set of the functions identified by José Zalaquett as possible approaches to the Palestinian authorities. In regard to Palestinian society more broadly, as well as cooperation with Palestinian schools and universities (including law clinics), al-Haq has engaged with a range of partners to develop programs and analytical and educational materials; for example, it partnered with the Israel/Palestine section of the Global IHL Resource Centre of Diakonia to provide highly regarded training on IHL. The organization also has a growing sense of its place in the regional and international human rights movement, notably through the vehicle of its Center for Applied International Law. The center contains al-Haq's public library as well as hosting seminars, training, and other events focused on the practical application of international law. Among the goals is the "transfer [of] al-Haq's practical experience in the areas of international humanitarian and human rights law to activists and students from Arab countries."¹¹ The year 2011 saw the center partner with the Tunis-based Arab Human Rights Institute to provide its first regional human rights seminar (in Tunis);¹² and since 2015 it has run applied international law summer schools in Ramallah for postgraduate law students and researchers invited from around the world. This growing sense of regional and indeed global leadership is shown in publications that seek to disseminate the methodological lessons learned by al-Haq field researchers and database workers down the decades. First among these is an Arabic-language *Guide to the Documentation of Human Rights Violations* aimed at "placing the experience of the first human rights organisation in the Arab world, al-Haq, in monitoring and documenting human rights violations into the hands of human rights activists in the Arab region, so that they can take from it whatever is appropriate for their own field of work."¹³

A second, related publication is in English and not drawn from al-Haq's direct experience but rather authored by a former Royal Artillery instructor in the British army who subsequently worked with NGOs including Human Rights Watch and Amnesty International in field investigations. In his introduction, Shawan Jabarin explains that he first encountered the author when investigating incidents in Nablus during the second intifada, and that "expert reports in different areas are considered important documents for supporting any file related to the criminal prosecution of Israeli war criminals."¹⁴ By this time, it had become clear that the international community was not going to hold Israel accountable for alleged war crimes and other laws of war violations committed during the massive assault on Gaza in 2008–9. The UN-commissioned fact-finding mission into violations by both Israel and Hamas was boycotted by Israel but attracted huge efforts from the Palestinian human rights community, including al-Haq. The substantial report that resulted (the "Goldstone report")¹⁵ noted *inter alia*:

The Mission was struck by the repeated comment of Palestinian victims, human rights defenders, civil society interlocutors and officials that they hoped that this would be the last investigative mission of its kind, because action for justice would follow from it. It was struck, as well, by the comment that every time a report is published and no action follows, this “emboldens Israel and her conviction of being untouchable.” To deny modes of accountability reinforces impunity, and tarnishes the credibility of the United Nations and of the international community. The Mission believes these comments ought to be at the forefront in the consideration by Members States and United Nations bodies of its findings and recommendations and action consequent upon them.¹⁶

No action was taken by the Security Council on the recommendations in the report, which included referral of the situation in Gaza to the prosecutor of the International Criminal Court by the Security Council acting under Chapter Seven of the UN Charter, should the Gazan and the Israeli authorities not at least commence good-faith investigations within a six-month period. Pressure was applied by the Obama administration on the Palestinian delegation not to push for its proposed resolution to the Human Rights Council, and the Palestinian side gave in, only to reverse its agreement to defer once the magnitude of the reaction to its decision among its Palestinian constituency manifested itself.¹⁷ The bitter story of the Goldstone report gave substantial impetus to the efforts by al-Haq and other Palestinian human rights organizations to activate more direct Palestinian access to the ICC, as discussed below, and thus to equip themselves with the tools required to deal with not only IHL and international human rights law but also, now, with international criminal law.¹⁸

As for its work in regard to the conduct of the Palestinian Authority, noted in the previous chapter, al-Haq did get involved in election monitoring after the arrival of the PA, but does not seem to have had the conversation about human rights and democracy that Zalaquett proposed should take place in such circumstances.¹⁹ In more conventional human rights work, it has published legal critiques and analyses of draft laws and the implementation of enacted legislation, and institutional challenges (the establishment of the State Security Court for example); and taken positions of principle, notably against the death penalty since its implementation in the West Bank and Gaza. It has engaged widely in human rights training, and it has intervened on countless occasions by letter and memo to Palestinian officials about a range of issues within its mandate of defending rights and freedoms and promoting the rule of law.²⁰ The organization—or rather, certain individuals at the organization—is also informally consulted or otherwise contacted by individuals working with different branches of the Palestinian Authority to pass on time-sensitive information about situations of concern, sometimes enabling timely intervention.

Al-Haq’s appeals to the PA invoke Palestinian law as well as human rights and rule-of-law principles. The State of Palestine had its status upgraded at the UN

in 2012,²¹ and two years later acceded to seven of the core international human rights treaties (as well as the Geneva Conventions).²² There is now a range of more specific obligations that may be invoked and a variety of new institutional mechanisms and considerations at work in the PA in relation to human rights and international law. For example, al-Haq took a leadership role in challenging the PA's Cybercrimes Decree Law of 2017 and the subsequent draft decree law amending it. A comment by al-Haq describes the complex layers of communications and interactions involving Palestinian governmental institutions (ministries, legal advisors, committees, the office of the Public Prosecution) and nongovernmental actors (al-Haq and other civil society organizations), the Independent Commission for Human Rights, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the UN OHCHR. Towards the end of 2017, the PA's Committee on the Alignment of Legislation with International Conventions (on which al-Haq was sitting, with DCI-Palestine, as nonvoting civil society participants to discuss the Cybercrimes Law) rejected the amendments proposed by al-Haq and others. Al-Haq's comment on this affair notes:

Consequently, questions arise about the significance of this Committee, the role it plays, and the continued role of civil society organisations in debating regulations upheld by the official authorities in spite of explicitly contravening the provisions of the Palestinian Basic Law, international conventions, and relevant international standards.²³

Lori Allen's 2013 critique of PA and security figures acting "as if" human rights mattered beyond the rounds of training and going through the motions, might seem to apply here, although not to the Palestinian NGO actors and indeed not, it seems from this narrative, to all the Palestinian officials. But Allen's analysis does give some idea of the different levels at which Palestine, as a weak state, "performs" human rights.²⁴ At the same time it sheds light on how al-Haq, along with other Palestinian human rights organizations, is responding to the use of decrees by the Ramallah-based Palestinian executive to issue legislation in the sustained absence of the Palestinian Legislative Council since the Fateh-Hamas split. In a January 2018 meeting that it hosted about the Law by Decree on the High Criminal Court, al-Haq joined forces with over two hundred civil society organizations to call for the decree law to be repealed and for lawyers to decline to appear before the Court; constitutionally, the decree law did not "satisfy the prerequisite of necessity" that was required by the Basic Law for executive approval of such legislation in the absence of the PLC.²⁵

Much of al-Haq's immediate public-facing work, whether regarding violations by Israel or addressing the PA, is now carried out in established or ad hoc coalition with other groups. Al-Haq works in a much more populated human rights field than when it began. In 2007, Iain Guest noted over twenty-five hundred NGOs registered with the PA, estimating the number of those fitting "the

conventional profile of professional human rights monitors” as just under forty.²⁶ Al-Haq remains the largest and most established in the West Bank. Along with Al Mezan and PCHR in Gaza, it is one of the three preeminent core or “generalist” Palestinian human rights organizations; a fourth, LAW,²⁷ had expanded during al-Haq’s difficult years to take the latter’s place as the leading West Bank human rights organization, but LAW came to an ignominious end in the early 2000s in a financial scandal that did much to increase public skepticism about human rights NGOs.²⁸ The organizations that cosigned al-Haq’s statement on fifty years of occupation are more specialized, and include one community action group based in al-Quds University, a Jerusalem civic coalition, and others focusing on refugees and prisoners’ rights.

Al-Haq engages with other Palestinian human rights NGOs and rights-based groups in the West Bank (including East Jerusalem), the Gaza Strip (most closely with Al Mezan, directed by former al-Haq researcher Issam Younis, but also with PCHR, directed by Raji Sourani), inside Israel’s 1948 borders (Adalah), and in the Israeli-occupied Syrian Golan, where al-Haq encouraged Syrian colleagues as they established the Al-Marsad Arab Human Rights Centre in 2003. Formalized coalitions in which al-Haq participates include the Palestinian Human Rights Organizations Council (PHROC) and the Palestinian NGO Network (PNGO). Single-organization public statements about particular developments are less frequent. On the other hand, al-Haq has been criticized for electing not to publicly associate itself with the Palestinian civil society initiative calling for boycott, divestment, and sanctions (BDS) which was launched in 2005: one long-standing friend of the organization attributed this to an “organizational mystique of being apolitical,” but it may also be linked to institutional survival.²⁹

One of the most prominent examples of outward-facing cooperation with other oPt human rights NGOs in recent years has been conducted in parallel with extremely internal, confidential cooperation, investigation, and development of argumentation by the organizations involved. This has been the sustained cooperation firstly in lobbying the Palestinian authorities to sign on to the statute of the ICC despite explicit threats and/or inducements designed to prevent such a move by Israel, the United States, the United Kingdom, and others; and secondly in gathering evidence from the field of alleged crimes by Israeli individuals that come under the jurisdiction of the Court. An interview from 2016 with Raji Sourani of PCHR and Shawan Jabarin of al-Haq is deftly presented as a forum where “two of the most prominent Palestinian human rights defenders [. . .] discuss their commitment to the legal process despite the political realities that limit its promise to deliver justice.”³⁰ In it, Sourani provides some background on PCHR’s work on grave breaches of the Fourth Geneva Convention, previous Palestinian attempts to persuade the first ICC prosecutor to intervene in regard to violations during Israeli attacks on Gaza, and US and EU pressure applied to dissuade the Palestinian leadership from signing on to the ICC Statute once it became clearly eligible

after its status was upgraded at the UN.³¹ The PA refrained from signing the ICC Statute when it ratified other international treaties in April 2014. Sourani describes intense lobbying of the Palestinian authorities after Israel's 2014 assault on Gaza, not only by human rights organizations and other civil society groups, but by all of the various political factions (including Islamist groups) to have President Abbas sign on, arguing, among other points, that the very legitimacy of the PA required it to defend (and be seen as defending) Palestinian lives. In the end, the Palestinian leadership signed the Rome Statute at the very end of 2014, the day after the UN Security Council "failed to adopt a draft resolution that would have affirmed the 'urgent need' to reach within 12 months a peaceful solution to the situation in the Middle East and would have paved the way to a Palestinian state with East Jerusalem as its capital."³² The ICC prosecutor opened a preliminary investigation to examine the situation in the acceding state party. The PA did not itself at that time submit files relating to alleged crimes on its territory. Erakat observes that "the Palestinian leadership has pursued ICC jurisdiction formulaically, without any appreciation for its political nature."³³ But the Palestinian human rights community was not waiting for the PA to act in this regard, and, as Sourani put it in the interview, the PA had learned from the "tragic and strategic mistake made on the Goldstone file" and was not standing in the way of the NGOs.³⁴

By the end of 2017, al-Haq, PCHR, Al Mezan, and Al-Dameer had submitted five substantive communications to the ICC prosecutor in The Hague supporting allegations of particular war crimes and crimes against humanity attributable to identified Israeli military and civilian individuals with high levels of authority and responsibility. The first contained evidence from Israel's 2014 offensive against Gaza, with "illustrative instances of murder, persecution, torture and other inhumane acts as well as intentional attacks on civilian persons and objects and extensive destruction not justified by military necessity." The second focused on crimes committed in Rafah by the Israeli military in a specific four-day concentrated assault in August 2014, following Israel's invocation of the so-called "Hannibal doctrine" when an Israeli soldier went missing and was presumed kidnapped; this file focused on "unlawful attacks against Palestinian civilian population and their infrastructure and property." The third dossier presented evidence to argue that Israel's extended closure of the Gaza Strip constituted the crime against humanity of "persecution" under the Rome Statute. The fourth concentrated on the West Bank (including East Jerusalem) to present evidence for "the crimes of persecution and apartheid" against the occupied Palestinian population, "forcible transfer" of the occupied population and the "implantation of Israeli settlers in their stead," the "extensive appropriation and destruction as well as pillaging of Palestinian property," and three hundred cases of "wilful killing and murder." The fifth communication argued that Israel was "unable and unwilling to conduct effective investigations into international crimes committed during the July–August 2014 Israeli military offensive," as a matter of policy and structure. "Justice

for Palestinian victims must be obtained as a prerequisite for genuine and lasting peace,” said Jabarin.³⁵ In late 2019, the ICC prosecutor finally moved on the “situation of Palestine” and submitted “the question of territorial jurisdiction” to the Court’s Pre-Trial Chamber. Al-Haq and its allies gave a qualified welcome to the move, producing a lengthy intervention that concluded that “the PTC examination [. . .] is a redundant and moot point, amounting to an unnecessary delay in the progression of the situation to full investigation.”³⁶ Subsequently the organizations submitted their observations to the PTC, and the International Commission of Jurists argued similarly in an amicus brief that failure to accept jurisdiction “would run counter to the [Rome] Statute’s object and purpose of combatting impunity for serious crimes under international law.”³⁷

It is in giving the lie to official Israeli self-images of justice and the rule of law as the basis of its governance (as well as in holding the Palestinian authorities to account) that current Palestinian human rights work, albeit in much more complex circumstances, most closely evokes the impetus that established al-Haq in the late 1970s. The level of violations and the extraordinary degree of impunity built into the Israeli systems as Palestinian lives, homes, and livelihoods are destroyed in front of the world’s media time and again have combined to provoke searches for new avenues of redress. At the same time, the situation has provoked a refusal to participate in redress systems designed for form alone. In a high-profile move in 2016, B’Tselem announced that after twenty-five years of investigating and submitting complaints for Palestinian victims and survivors of abuse of force by the Israeli military, it had come to the conclusion that “cooperation with the military investigation and enforcement systems has not promoted accountability, but helped lend legitimacy to the occupation regime and whitewash it.” It has decided to “stop playing a part in the system’s charade.”³⁸

Accountability is a central pillar of the work of many Palestinian human rights groups. Attempts have been made to have individual third-party states investigate and prosecute alleged grave breaches of the Fourth Geneva Convention committed against members of the protected Palestinian population by high-level Israeli officials, as originally explored by al-Haq’s Enforcement Team. Al-Haq’s current accountability focus developed from a “war crimes project” instituted in 2006 and then expanded to include other venues, processes, and actors.³⁹ The universal jurisdiction work was led from the mid-2000s on the Palestinian side by PCHR, taking off after the second intifada when, as Hajjar puts it, Israel became “the first state in the world to publicly proclaim the legality of ‘pre-emptive targeted killing’” after a post-Oslo “doing-and-denying phase.”⁴⁰ Al-Haq has also worked with allies to mobilize third-party legal systems in defense of international law, for example in the United Kingdom in a petition for judicial review of UK conduct on arms sales to Israel in regard to Israel’s breaches of international law in its 2008–9 assault on Gaza.⁴¹ Michael Kearny traces the development of these litigation initiatives to the ICJ’s 2004 advisory opinion on the Wall and its confirmation of state

responsibility and individual criminal accountability in the oPt.⁴² And al-Haq has directed efforts towards investigating, publicizing, and sometimes seeking to litigate in third countries on foreign businesses with co-ventures, partnerships, and other contractual relationships with Israeli settlement-based enterprises, contending that “the presence of companies in illegal Israeli settlements and the exploitation of Palestinian natural resources by such companies [. . .] constitute manifest violations of international law.”⁴³ This work is done in close cooperation with allies outside the oPt and draws momentum from the preparation by the UN OHCHR of a “database of all business enterprises engaged in certain specified activities related to the Israeli settlements in the Occupied Palestinian Territory” pursuant to a 2016 Human Rights Council resolution. Publication of the database was delayed for some years, but a first release was made early in 2020.⁴⁴ The organization was the 2019 recipient of the Human Rights and Business Award from the UN Forum on Business and Human Rights, which called al-Haq “a recognised leader” in the development of this area of human rights work in the region.

After returning from the brink of dissolution in the late 1990s, al-Haq has consolidated its position within the regional human rights movement, through joint interventions (notably with CIHRS), issue-specific coalitions such as that on the death penalty,⁴⁵ and membership (sometimes in elected leadership roles) of regional networks—notably EuroMed Rights⁴⁶—and international alliances including FIDH, OMCT, and Habitat International Coalition.⁴⁷ Al-Haq remains the West Bank affiliate of the ICJ.⁴⁸ To some extent, these networks continue, in a world of communications unimagined in al-Haq’s early years, to play their role in the “boomerang” effect described by Keck and Sikkink, amplifying al-Haq’s messages and projecting them internationally whence they reverberate back, to Israel and nowadays to the PA.⁴⁹ They also play a vital solidarity role as al-Haq becomes increasingly targeted by Israel. In 2017, for example, OMCT wrote an open letter to the UN secretary-general, Antonio Guterres, regarding “slandering statements” made to the press by Israel’s permanent representative about al-Haq and Al Mezan. The language used by the Israeli ambassador recalls that used against LSM in its early days:

Ambassador Danon said that “*Al Mezan is an organisation which cooperates with Hamas, an internationally recognised terror group,*” and linked “*Al Haq (. . .), led by Shawan Jabareen*” to the so-called “*PFLP terrorist organisation.*” Ambassador Danon went on falsely characterising both human rights groups as “*supporters of terrorism,*” and “*inciters of violence.*”⁵⁰

But this is not just more of the same. In March 2016 al-Haq issued a statement putting on record the increasingly vicious harassment of the organization (false communications to donors and staff members, smear campaigns, etc. through social media) that the organization noted as “coinciding with, and as a result of, the progress achieved at the level of the International Criminal Court and decisions at the

EU level regarding the labelling of settlement products.” The reason for the statement was that this campaign had now risen to the level of death threats made in anonymous phone calls to Shawan Jabarin and another staff member.⁵¹ The complex context of the so-called war on terror, the 2003 invasion of Iraq and US and European interventions in other wars in the region since the uprisings of 2011, together with Israel’s critical identity as a key US ally (if not indeed its vanguard) in regional power and resource struggles, embolden extremists in a divided Israel and mute those attempts that European states might make to defend the principles of international law. European states’ interventions and their narrowing security-lens view of the region have weakened key third-party states as potential allies in seeking Israel’s respect for its international law obligations in relation to the Palestinian population of the oPt.⁵²

The concept of “lawfare” links two areas of official Israeli policy and discourse that have been identified by scholars as marking twenty-first-century developments, along with the global “war on terror” paradigm and the related war model (as compared to a policing model) within which the Israeli state engages with Palestinians in the oPt post-Oslo.⁵³ Lawfare, according to Kearney, is a “critique of human rights activism and advocacy [that] emerged in response to human rights litigation during the ‘war on terror’ [. . .]. Its primary goals are to delegitimize human rights activists and discredit international law.”⁵⁴ Neve Gordon argues that human rights organizations are themselves “increasingly being constituted as a security threat” in order “to enable primarily Israel and the US to carry out military campaigns unhindered.”⁵⁵ Nongovernmental projects and commentators hostile to Palestinian attempts to invoke international law in defense of their rights have deployed the lawfare narrative “to present Palestinian engagement with the law as being the latest and most invidious manifestation of the terrorist threat.”⁵⁶

Gordon and Kearney agree that Israeli official discourse took up the lawfare narrative “to limit the content and application of IHL in Israel’s wars” after the publication of the Goldstone report and the arrest warrant issued in London in late 2009 against then Israeli foreign minister Tzipi Livni;⁵⁷ for Gordon, “the report itself was reconstituted in the Israeli public domain as a national threat.”⁵⁸ Israeli prime minister Benjamin Netanyahu told an Israeli security institute (against the background of the Goldstone report) that “organisations that claimed to support the principles of human rights and international law [were] the third strategic threat to Israel’s security”—that is, “third after Iran and Hizbullah.”⁵⁹ Israeli human rights groups that had cooperated with or provided information to the UN fact-finding mission were rounded on with substantial official and public vitriol, as was Richard Goldstone; the single largest donor to Israeli human rights groups announced it would not provide funding to Israeli groups supporting the exercise of universal jurisdiction against Israeli officials.⁶⁰ Draft laws to restrict sources of foreign funding for groups supporting the universal jurisdiction work or associating themselves with the BDS movement reached different stages of the

legislature.⁶¹ In June 2018 the Israeli Ministry of Strategic Affairs and Public Diplomacy issued a report “calling on the European Union and EU states to halt their direct and indirect financial support and funding to Palestinian and international human rights organisations that ‘have ties to terror and promote boycotts against Israel.’” Al-Haq and its NGO partners considered that this “reveals the State of Israel’s direct official involvement in smear campaigns against Palestinian human rights organisations and their European partners.”⁶²

The other area is what Hajjar terms “state lawfare.”⁶³ If the first form of lawfare involves the Israeli state (and others) impugning Palestinian attempts to mobilize the law as something to be resisted in the (global) war on terror, then this second form concerns the Israeli state’s arguments for and application of doctrines of IHL that seek to render “lawful” serious violations of IHL rules. Hajjar’s focus is on both Israeli and US policy arguments for the legality of their publicly declared targeted killing policies. Erakat considers this “legal work” by Israel, supported in large part by the United States, to constitute “two fundamental and interlocking shifts. The first was to unsettle the applicable legal framework regulating the Israeli state’s relationship to Palestinians. The second was to change the laws of war that regulated a belligerent’s right to use force more generally.”⁶⁴ Hajjar notes the documented (but denied) history of Israel’s extrajudicial executions in the oPt from the first intifada, with an increase in the 1990s following the redeployment of Israeli troops from Palestinian Area A and suicide bombings of Israeli targets (including civilian targets) from 1993. She dates the public adoption of “targeted killings” as a “lawful” policy within the war model of engagement from early in the second intifada. Concluding on the policies in both Israel and the US, she notes:

These attempts exemplify state lawfare because they deviate from and defy international consensus about what is lawful in the conduct of war and armed conflict. In the case of Israel, the asserted right to engage in targeted killing in Gaza and the West Bank hinges on the (internationally rejected) proposition that they are no longer occupied and therefore are legitimate sites of warfare, and that extra-judicial execution of people who ostensibly cannot be arrested is a legitimate form of national self-defense.⁶⁵

Hajjar quite rightly points out that as a manifestation of “state lawfare” this is not a departure for the Israeli state, which in the first months of the occupation changed its mind about the *de jure* applicability of the Fourth Geneva Convention and since then has declined to recognize the restraints it places on the conduct of an occupying power. The annexation of East Jerusalem, Israel’s policies of land expropriation and settlement, and its “pioneering legacy of ‘legalizing’ torture (in 1987)” are other cases in point, away from the conduct of military action.⁶⁶

Another important change to the way al-Haq works now lies in its relations with human rights organizations in and from Arab states. It was particularly after Oslo that the Palestinian groups began to develop sustained relationships,

sometimes formalized in networks. Besides the opening up of communications and the fact that al-Haq had met and worked with some of its Arab counterparts in the lead-up to the Vienna World Conference, these groups were beginning to meet together more frequently, and the establishment of the PA meant that al-Haq had many more political and governance issues in common with human rights groups in Arab states.⁶⁷ After initial disagreements about how al-Haq might approach the PA and something of a honeymoon period with the newly established authority, patterns of executive overreach and interference, security abuses, and judicial shortcomings and lack of capacity began to manifest and to be challenged by Palestinian civil society. The struggle with the PA over the NGO law has already been noted; more recent years have seen an encroachment of executive interference and threats of further closure of space for dissent, *inter alia* with the Cybercrimes Law. Across the region (and indeed elsewhere), with the “war on terror” and particularly after the Arab Spring, draconian legislation and arbitrary implementation put human rights organizations and individual defenders at substantial risk—for example, laws criminalizing libel or slander of public institutions or heads of government or “disseminating false information,” severe restrictions on the freedom to legally constitute associations, and constraints on the receipt of funding for human rights work, in particular foreign funding.

The “foreign funding debate” has been particularly vehement in Egypt, with some early human rights actors there arguing against taking funds from outside agencies, both for pragmatic political reasons (how it looks to the constituency) and for reasons of principle—that it should be possible to raise sufficient funds from internal sources, to rely on the voluntarism of participants in the movement, and to avoid the risk of locally determined human rights priorities being overtaken by donor-driven agendas.⁶⁸ As the Arab movement professionalized (often at the pressing of funders) and European and US governmental and private (foundation) donors made funds increasingly available for human rights work in the Middle East, and indeed for human-rights-and-democracy work (this the elision noted by Zalaquett in his report to al-Haq), governments hostile to scrutiny from their domestic groups used the fact of foreign funding to allege a range of dubious intentions and suspect backers and to impugn the patriotism of those in receipt of funds aimed (according to that narrative) at changing the nature of the national identity and priorities at the behest of foreign powers. There appears to be widespread acceptance of official discourses to the effect that human rights is a fundamentally Western concept, that the discourse is deployed in a power struggle against authentic national values, and that foreign funds (at least potentially) work against the sovereign interests of the state.⁶⁹ In Palestine, Eyad El Sarraj, head of Gaza’s Community Mental Health Programme and one of the first commissioners general of the national human rights institution (ICHR), noted in a reflection on his arrest and detention by the PA that “the usual line is that human rights are Western and used in particular by the United States to control Palestinians

and Arabs. A human rights activist is, therefore, suspect.”⁷⁰ According to Hajjar, for many Palestinians there is “an enduring perception that human rights remain an instrument of Western governments, often invoked in ways that discriminate against Arabs and Muslims.”⁷¹

And indeed there is plenty of evidence that the human rights discourse has been very inconsistently deployed by European powers and the United States.⁷² Indeed, one of the major obstacles to promoting human rights in Palestine and the wider Arab state region is the selectivity in approach to enforcement of international law displayed by powerful third-party state actors. Often these precedents are related to inaction on Palestine/Israel compared with action on (against) Arab states; one example often cited (and noted by al-Haq at the time) is the West’s response to Iraq’s 1991 invasion and occupation of Kuwait, while Chase refers to “the counterproductivity of a US invasion of Iraq [in 2003] that invoked human rights as one of its justifications—albeit in passing and artificially.”⁷³ As Megally observes, “double standards of this kind were and are recited all over the Middle East and North Africa,” with considerable negative impact on the idea of “human rights.”⁷⁴

These debates have infused and conditioned the human rights debate in Palestine since Oslo. Raji Sourani told the 1998 meeting on the Arab human rights movement, for example, that “nobody raised the question of foreign funding before the Oslo accords” but that now the Palestinian groups were being “accused by the Palestinian National Authority of being organisations with secret agendas, implementing the will of foreign governments, even though their activities are fully transparent and accountable.”⁷⁵ The point about transparency was made in contrast to widespread corruption in the PA. There was Palestinian executive interest in controlling the inflow and use of funds from abroad, as well as, probably, in distracting attention from stories about internal PA corruption, and the general objection of a government (in this case, recently installed, and itself heavily dependent on foreign support, financial and other) to criticism from domestic human rights groups about violative practices. A 1999 report from the office of the UN’s Special Coordinator for the Occupied Territories (UNSCO) on support to the rule-of-law sector in Palestine showed some twenty million dollars (of a total of something over one hundred million) having gone to NGOs focused broadly on human rights, legal development, and civil education.⁷⁶ Hammami and Hajjar have both analyzed the attacks against the NGO sector that followed in the public arena, with NGOs “vilified as ‘fat cats’ exploiting donor funds for their own enrichment and at the cost of an increasingly destitute population.”⁷⁷ Hammami further noted:

In quiet, some sectors of the NGO community noted the alarming disparity between the amount of donor money channelled through NGOs to human rights and legal issues (even if the most conservative estimates are used), and the paltry impact these NGOs have had on the rule of law and the protection of human rights.⁷⁸

This remains key. Al-Haq, alongside its peers in the Palestinian human rights movement, was and is implicated not only by public distrust of and resentment at funds coming in from abroad, but also by a lack of belief in the capacity of the human rights and international law effort to have any impact in improving salient features of life in the oPt.⁷⁹ In 2012, Shawan Jabarin acknowledged that “in the Occupied Palestinian Territories, there is little faith in the principles of human rights. Notions of justice, accountability and international law mean too little to too many.”⁸⁰ If the chief factor for this was Israel’s repeated performance, the second was “the international community’s apathy and what often amounts to complicity in the deteriorating situation” across the oPt. Jabarin’s piece insisted nevertheless on holding the PA to account, in that “human rights should not simply be a by-product of good governance” (part of Allen’s “performance” of human rights), but rather should be fundamental to the governance project itself: “Ultimately, for as long as the PA continues to dismiss its obligations and refuses to respect the rule of law, neither liberation nor justice will ever come to Palestine.”

The challenges are enormous, and for many the situation appears bleaker than ever. Al-Haq is not alone in arguing that it may no longer be adequate or appropriate to frame what is happening in the oPt as “merely” occupation. Note has already been made of the developments in the law of armed conflict particularly since the 2003 US-led invasion and subsequent military occupation of Iraq. But the recent recognition of “the transformative goals of certain occupations” (such as the project in Iraq with its “stated purpose of reforming their political systems in a democratic direction”) does not apply to Israel’s purpose in the oPt; and nor yet has Israel conformed to the “conservationist principle” which requires minimal intervention in the existing legal and economic order of occupied territory.⁸¹ John Dugard, an eminent South African jurist and at the time UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, summarized his argument in his 2007 report (when the occupation reached forty) as follows:

The international community has identified three regimes as inimical to human rights—colonialism, apartheid and foreign occupation. Israel is clearly in military occupation of the OPT. At the same time elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying Power and third States?⁸²

For Dugard, the question was whether an occupation that may have begun as a lawful (if temporary) regime becomes unlawful when it clearly “acquires some of the characteristics of colonialism and apartheid” and continues for, then, nearly forty, now over fifty years – and if so “what are the legal consequences?”⁸³ Dugard said that “clearly none of the obligations imposed on the occupying Power are

reduced as a result of such a prolonged occupation.” He referenced a 1990 paper by Adam Roberts, a reprise of the latter’s paper to Palestine’s first international law conference convened by al-Haq in January 1988.⁸⁴ Dugard argued for these questions to be put to the International Court of Justice for an advisory opinion. Meanwhile, popular references to “Israeli apartheid” increased after the second intifada.⁸⁵ In the event, Dugard’s home state, South Africa, provided follow-up to the questions in his report through a major international law research project led by a South African-funded team and involving researchers from al-Haq, under the title *Occupation, Colonialism, Apartheid?*⁸⁶

Dugard concluded his 2007 report with a vehement indictment of the failure of the West to “demonstrate a real commitment to the human rights of the Palestinian people. [. . .] There is no other case of a Western-affiliated regime that denies self-determination and human rights to a developing people and that has done so for so long.”⁸⁷ References to colonialism as a frame through which to view Israel’s treatment of the oPt have increased in the face of Israel’s relentless expropriation and exploitation of land and water resources for use by Israeli settlers, and its denial of the Palestinian right to self-determination. Al-Haq’s 2017 call on the international community to act to end the occupation fifty years on invoked Israel’s “broad colonial aims” and stated that “Israel’s occupation and associated policies and practices fragment the Occupied Palestinian Territory, violate the collective and individual rights of Palestinians and amount to colonialism.”⁸⁸

The year 2017 also saw the publication and then withdrawal of a report commissioned by ESCWA from a team comprising Richard Falk, who followed Dugard as Special Rapporteur, and Virginia Tilley, editor of the report and the book from the South African-led project on occupation, colonialism, and apartheid. The ESCWA-commissioned report was specifically to consider the question of apartheid in relation to Israel’s treatment of the Palestinian people.⁸⁹ The authors declared that they were “aware of the seriousness of this allegation” but that “available evidence establishes beyond a reasonable doubt that Israel is guilty of policies and practices that constitute the crime of apartheid as legally defined in instruments of international law.”⁹⁰ The reaction from Israel and the United States was, according to Falk, “what can only be described as hysteria.”⁹¹ UN secretary-general Antonio Guterres instructed the ESCWA head, Rima Khalaf, to have the report taken off the website; she refused and resigned; the report was withdrawn. Falk said it reminded him of the US reaction to the Goldstone report. The PHROC expressed its dismay at this “political pressure,” declared that the member organizations (including al-Haq) would adopt the report’s conclusions and analysis, and called on the prosecutor’s office at the ICC “to take [the report] into account during its preliminary examination into the situation in Palestine.”⁹² Besides intense hostility and sensitivity to any invocation of apartheid as a descriptor for Israeli policies and practices, because of the image of apartheid South Africa, the fact that apartheid (as a crime against humanity) falls within the ICC jurisdiction raises

again for Israel and its allies the red flag of criminal proceedings in a tribunal governed (at least in theory) by a conception of the rule of law not compatible with that developed and projected by Israel as part of its narrative of state lawfare.

Facing the upcoming fiftieth anniversary of the occupation, in his 2016 panel interview alongside Sourani, Jabarin insisted that “Palestine, in its legal and jurisprudential aspects, is a test for the whole system of international law.”⁹³ The anniversary-laden year of 2017 started with the Israeli Knesset purporting to “regularize” the status of Israeli settlements built on expropriated private Palestinian land in the West Bank, and ended with the United States declaring recognition of Jerusalem as the capital of Israel and the imminent relocation of its embassy from Tel Aviv; both are surely indications of annexation rather than occupation.⁹⁴ Protests in Jerusalem and a sustained hunger strike by Palestinian prisoners marked the months in between. Al-Haq’s public response to the so-called “Trump Declaration” denounced the violations of principles of international law that Trump’s move endorsed, including the prohibition of the acquisition of territory by force, and asserted that “the recognition of Israel’s unlawful annexation of East Jerusalem amounts to complicity in an unlawful settlement enterprise which was condemned by Security Council Resolution 2334 in 2016.”⁹⁵ It called on the UN General Assembly to refer a request for an advisory opinion to the ICJ on “the question of Israel’s annexation, colonization and apartheid,” notably substituting “annexation” for “occupation”; it called on High Contracting Parties to the Geneva Conventions to convene a meeting to address Israel’s breaches; and EU states to take the lead in facilitating peace negotiations in the place of the United States. Its call on the Palestinian political authorities can be compared with its intervention in 1991 with the Palestinian delegation setting off for Madrid when it emphasized the limits set by IHL on representatives of a protected population, but took “no position with regard to the merits of the political process in question.”⁹⁶ Faced with the so-called Trump Declaration on Jerusalem, al-Haq insisted:

It is imperative that the Palestine Liberation Organization immediately and permanently end peace negotiations with US President Trump, who is positioning the US as a transgressor of international law. In light of the deliberate sabotage of the status of East Jerusalem, Al-Haq calls [for] the disbandment of the Palestinian Authority’s security coordination and all political coordination with Israel, which is effectively entrenching the occupation and facilitating Israel’s colonial agenda.⁹⁷

This is a weighty call made in light of a reckoning that, on balance, the gains of Oslo are more than outweighed by losses both already inflicted and on the horizon. It is not one that al-Haq would have made in its formative years; it illustrates the urgency felt at the risk that the Trump declaration and subsequent action pose, as al-Haq put it, to “the entire international legal system [. . .] and the reciprocal maintenance of peace and security.”

In April 2020 there followed a more detailed “Open Letter to the UN Security Council on Israel’s Plans to Annex the West Bank” in the wake of the release by

the US administration of its Peace to Prosperity Plan and reports of an agreement on the future of the occupied Palestinian territory between the two men poised to lead Israel's government (Netanyahu and Benny Gantz) after successive inconclusive elections. US secretary of state Mike Pompeo was reported as stating that "the annexation of parts of the West Bank is ultimately Israel's decision to make." Al-Haq's intervention presented many of the mechanisms available to third states set out in its 1990 "Representation to States Signatory to the Fourth Geneva Convention" discussed in chapter 5. Reminding the Security Council of the "obligation to ensure respect as an essential component of third state responsibility" under IHL, al-Haq insisted that "to fail in this obligation is to legitimise colonialism, consolidate apartheid, and to fatally undermine efforts at securing enjoyment of human rights through the rule of law." Thus, al-Haq invokes key elements of its resistance agenda dating back to its establishment in 1979, and forward to a future which, post COVID-19, many hope will involve a reconfiguration or reconstruction of the lawful means through which peoples and communities seek more generous, more inclusive conceptions of peace and justice.

