



# Boycotting Unjust Legal Proceedings

November 2016

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## Preface

This background report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances, the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available in English and relevant local languages. We will also develop fully theorised accounts of some of the themes explored in these practitioner reports for academic audiences.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website ([www.lawyersconflictandtransition.org](http://www.lawyersconflictandtransition.org)) and will be circulated via our various networks and twitter account (@lawyers\_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

[www.lawyersconflictandtransition.org/contact](http://www.lawyersconflictandtransition.org/contact)



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Kieran McEvoy PhD

Director, *Lawyers, Conflict and Transition* Project

November 2016

## Acknowledgements & Disclaimer

This background report was prepared by Emma Catterall, in association with the *Lawyers, Conflict and Transition team members, Kieran McEvoy, Louise Mallinder and Anna Bryson*. Earlier research assistance was also provided by Alyssa Bernstein. All views expressed, and any errors, remain the responsibility of the author.

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## Executive Summary

A legal system or proceeding can be considered as unjust if it operates in contravention of international law and established legal norms and practices by, for example, failing to guarantee the right to a fair trial, discriminating against certain societal groups, or operating in a way that is 'rigged' in favour of a particular outcome. Examples explored in this report include Apartheid-era courts in South Africa, internment hearings in Northern Ireland, military tribunals at Guantánamo Bay, and Israeli military courts in the Occupied Territories. In such contexts, lawyers must strike a balance between their obligation to represent their clients to the best of their abilities and concerns that by taking part in such legal proceedings they are legitimating an inherently unfair legal system. Drawing on illustrative examples, the aim of this paper is to discuss the value of boycott as a strategy of resistance against an unjust legal system or proceeding. In particular, it explores the factors that are likely to influence lawyers' decision to boycott or participate.

### Origins and Definition

The paper begins by briefly tracing the origins of the boycott term. Although the term was coined in the 1880s during the Irish Land Wars it is clear that the practice of boycott has a much longer history. Countless groups, from labour movements and consumers, to activists and indeed nations have engaged in boycotts. Lawyers are no exception. Regardless of which group initiates a boycott, or what the end goals are, the practice remains the same—it is the withdrawal or refusal to engage with an organisation, nation, body, or person, as an expression of protest or dissatisfaction. While some boycotts may have the communication of dissatisfaction as the goal itself, others may have more instrumental objectives, such as making the process or practice in question unworkable or raising public outrage to the point where the authorities have no choice but to change behaviour or practice.

### Lawyers' Role in Unjust Legal Proceedings

The paper continues with a discussion on lawyers' role within unjust legal systems. As their participation makes proceedings possible, there is an understandable concern that they become complicit in the injustice. This begs

wider questions as to whether lawyers should be expected to take on the burden of wider moral responsibilities, or instead function as 'apolitical' professionals adhering to the law of the land. Scholars often draw a distinction between 'cause' and 'conventional' or 'client' lawyers when considering lawyers' responses to injustice. While conventional lawyers may opt to participate as part of their duty to the court or client, cause lawyers often appear to actively seek to take on these additional responsibilities in pursuit of a higher realisation of justice. These lawyers may choose to participate in unjust proceedings, not only to defend a client, but as a form of resistance. They may also choose to boycott such proceedings for the same resistant reasons.

### **Resistance Strategies**

The use of boycott by lawyers represents a deliberate shifting of the legal 'voice' of the lawyer away from legal setting towards a self-conscious awareness of the symbolic and political power of 'exit'. The use of 'voice' denotes the verbal communication of dissatisfaction to injustice and—for lawyers—the normal place for the exercise of such voice is within the court itself. However, the 'exit' of lawyers from an unjust legal process signifies a refusal to participate in such proceedings as a move away from legal and the technical forms of resistance to injustice towards a more explicitly political stance.

### **Decision to Boycott/Participate**

Lawyers' decision to boycott or participate in an unjust system or proceeding depends on the interplay between several factors. Central to this is a debate regarding the risks of providing legitimacy to the legal process in question and the opportunity to achieve gains via litigation. In this debate lawyers face a dilemma: gains and reasoned legal arguments may aid in reducing injustices for individual clients—including improvements in procedural rights and more favourable plea bargaining—but hamper efforts to resist injustice as a whole. Indeed, just as the state can point to instances where the state authorities lose as proof positive that the system is just, so too can participation strengthen the very norms lawyers seek to change. Cases suggest that when there is little hope for justice working within the system—via an internal/voice strategy—exit (or boycott) may be considered a more effective, if not the only, option.

Another aspect of lawyers' decision concerns the conflict with lawyers' professional sense of morality and responsibility towards their client. While some lawyers may participate out of such a moral and professional obligation towards clients, or a belief that they can change the system from within, others may refuse to participate on principle—refusing to lend credence to 'sham' proceedings. However, exiting the system on moral grounds may have the added consequence of abandoning clients to their fate. In some cases, the decision to boycott is made for lawyers via the decision of the client. Politically motivated prisoners may choose to accept harsher punishment to advance their cause by boycotting trials they believe are unjust, or by co-opting their defence to put the government on trial in the court of public opinion. However, in situations such as this, defendants themselves make the decision of whether to participate or boycott. The decision to boycott is more problematic when it is ordinary citizens seeking representation.

A final aspect that lawyers will inevitably have to consider relates to the diverse nature of the legal profession, elements of which mitigate against the ability to organise a collective boycott. First, the political views of legal professionals are heterogeneous, which can make agreement on injustices and collective action difficult. Second, as lawyers are able to choose their own clients, a complete bar on representation is unlikely, as there may well be other lawyers willing to take the place of those boycotting the courts, thus reducing the pressure on the unjust system to change. Therefore, even if lawyers opt to boycott, there is no guarantee that it will be effective at bringing about change. However, the cases reviewed here do suggest that boycotts, in combination with a strategy to raise public awareness of injustice, can produce changes.

### **Importance of External Resistance**

In the examples highlighted here the majority of lawyers chose to participate in unjust legal proceedings. Despite this preference, there are some instances where lawyers do adopt an exit (or boycott) strategy. Several lawyers refused to participate in individual circumstances, and bar associations chose to adopt boycott stances—either long-term or short-term. If lawyers choose to exit the



system quietly the effect of their boycott will inevitably be muted. For lawyers seeking to further resist injustice, an exit strategy which includes making noise about the boycott is a logical development. With such an approach, exit is not only withdrawal of technical legal services, but also an attempt to expose and raise awareness of injustices to outside audiences, building pressure for change.

### Summary

The paper concludes by highlighting that participation in unjust systems can produce modest gains for clients—such as more favourable plea-bargains or improvements in procedural rights. However, such an approach, as illustrated by the internment hearings in Northern Ireland, represents a degree of cooperation with a system that is inherently unjust. Therefore, lawyers may turn to boycott as a way of expressing resistance. Boycotting, as a mechanism of change, should be judged on what it accomplishes. From the cases considered here, boycotts have not significantly altered the core injustices of unjust legal proceedings, despite the modest gains they have achieved. Difficulties in organising collective action in a heterogeneous profession, in addition to the moral obligation lawyers have to clients and justice, all constrain the ability to effectively organise a boycott.

The cases addressed in this paper outline the difficulties facing lawyers in resisting an unjust legal system and achieving change through boycotts. Nonetheless, there are circumstances in which boycotts can assist in addressing injustice. Specifically, drawing attention and raising awareness of an injustice can provoke mobilisation to act among government officials, international human rights organisations, the media, and wider public. Successful boycotts in history have spurred broad social movements that created the momentum needed for change. While this would indicate that there is 'strength in numbers,' the cases analysed here illustrate that there can also be strength in an individual stance. It is clear that individual lawyers who speak out and express their discontent with unjust legal proceedings (whether through participation or withdrawal from the system) can make a difference. Therefore, whether through the use of boycott or participation, a primary goal for lawyers in unjust systems may be turning an individual voice into a chorus.

## Introduction

A legal system or proceeding can be considered as unjust if it operates in contravention of international law and long established legal norms and practices by, for example, failing to guarantee the right to a fair trial, discriminating against certain societal groups, or operating in a way that is 'rigged' in favour of a particular outcome. Apartheid-era courts in South Africa, internment hearings in Northern Ireland, military tribunals at Guantánamo Bay, and Israeli military courts in the Occupied Territories, have all thrown down challenges for lawyers. In such contexts they can either comply with the existing rule of law or respond with strategies of resistance. This paper focuses on the latter and discusses in particular the role of boycott—withdrawal from the system—as a strategy of resistance against unjust legal proceedings. To understand this strategy, it is necessary to consider the factors that lawyers must weigh up when deciding whether to boycott or participate. These include the risk of regime legitimisation, the potential gains of litigation, and lawyers' professional and moral obligations to the courts and to their clients. Additionally, the heterogeneous nature of the legal profession presents difficulties in organising collective action. The interplay between these different variables will be discussed.

The paper begins with a description of the origins and definition of the boycott concept and a brief illustrative outline of how groups, including lawyers, have deployed it over time. This is followed by a discussion of 'unjust' legal proceedings and the role of lawyers therein. The paper goes on to outline a framework in which to understand resistance strategies—including boycott—that lawyers employ in the face of unjust proceedings. The factors that affect this choice will be discussed and the role of boycotting lawyers is considered. The paper concludes by highlighting the utility and potential strength not only of collective action, but also of individual lawyers who take a stand in resisting unjust legal systems.

## Boycott: Origins, Definition & Use

Boycotting is a practice much older than the term itself.<sup>1</sup> Denoting a form of social ostracism, or economic or political non-cooperation, the term was coined in Ireland in the 1880s.<sup>2</sup> Irish landlord agent, Captain Charles Cunningham Boycott, was ostracised by the local community after attempting to evict tenants that refused to pay rent. Organised by the Irish Land League, workers withdrew their labour and merchants refused to sell to Boycott in a broad campaign of social, political and economic isolation. Despite an organised effort by sympathetic Ulstermen to mitigate the effects of this campaign, Boycott eventually admitted defeat and left Ireland with his family. The widespread media coverage of the struggle between this individual and the Land League popularised the term, and solidified 'boycotting' as an effective protest tactic.<sup>3</sup>

Boycotts remain a much discussed strategy in political and social movements, perhaps most prominently in recent years with regard to the Palestinian solidarity movement and its efforts to encourage international Boycott Divest and Sanctions (BDS) movement against the ongoing Israeli occupation of territories seized after the 1967 war.<sup>4</sup> Historically, countless groups, from labour movements and consumers, to activists and nations, have engaged in boycotts. Labour movements widely adopted the tactic in the United States (US) in late 19th century. While usage declined in the US early in the 20th century,<sup>5</sup> boycotts have been sparingly employed in efforts to protest working conditions and low wages—such as the United Farm Workers' grape boycott in the late 1960s. Consumers engage in boycotts to express dissatisfaction with the practices or ethics of organisations. A notorious example is the consumer boycott of Nestlé in the 1970s over claims that the organisation used aggressive advertising to encourage new mothers from less economically developing countries to use

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<sup>1</sup> Boycotting, defined in its widest sense, 'has been resorted to since the dawn of history. The Jews shunned the Samaritans; the Pharisees boycotted the Publicans, as far as social intercourse was concerned.' Harry Wellington Laidler, *Boycotts and the Labor Struggle Economic and Legal Aspects* (John Lane Company 1914) 27

<sup>2</sup> Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (Oxford University Press 2011)

<sup>3</sup> Gerard Moran, 'The Origins and Development of Boycotting' (1985) 40 *Journal of the Galway Archaeological and Historical Society* 49-64

<sup>4</sup> Joshua Sperber, 'BDS, Israel, and the World System' (2015) 45 (1) *Journal of Palestine Studies* 8-23

<sup>5</sup> Leo Wolman, *The Boycott in American Trade Unions* (Johns Hopkins Press 1916)

infant formula instead of breastfeeding.<sup>6</sup> Civil rights activists boycott to protest discriminatory policies and advocate changes; one of the most well-known being the 1955 Montgomery bus boycott that contributed to the dismantling of Jim Crow segregation on buses and launching the civil rights movement.<sup>7</sup>

Another broadly successful and comprehensive boycott was that brought against South Africa in an effort to end Apartheid. From divestment and economic sanctions to consumer and cultural boycotts, the nation became the target of an international isolation campaign—in combination with protests and boycotts within South Africa itself. While the economic sanctions and divestment campaign had a substantial effect on the South African economy and apartheid policies, the sports boycott is often attributed particular symbolic importance, given the cultural significance of sport to white South Africans.<sup>8</sup> Indeed, despite the expulsion of South Africa from the International Olympic Committee and international federations of sport, it was actions against the international rugby and cricket teams that proved particularly instrumental in causing embarrassment, and unsettling the self-identity of white South Africans.<sup>9</sup> In particular, the Stop-the-Seventy-Tour rugby campaign in Britain and anti-tour campaigns in New Zealand forced the leaders of Apartheid South Africa to reconsider their role in the international community. This example demonstrates an important factor associated with a successful boycott; namely, the identification of valued or weak areas susceptible to pressure.

Regardless of what group initiates a boycott, or what the end goals are, the practice remains the same—it is the withdrawal or refusal to engage with an organisation, nation, body, or person, in an expression of protest or dissatisfaction. While some boycotts may have the communication of dissatisfaction as the goal itself, others may have more instrumental objectives

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<sup>6</sup> James E Post 'Assessing the Nestlé Boycott: Corporate Accountability and Human Rights' 27 (2) *California Management Review* 113-131

<sup>7</sup> Donnie Williams, *The Thunder of Angels: The Montgomery Bus Boycott and the People Who Broke the Back of Jim Crow* (Laurence Hill Books 2006)

<sup>8</sup> Colin Wintle, 'The Human Rights Movement Against Apartheid South Africa: The Impact of Boycotts, Divestment, and Sanctions' (2016) 8 *Waterloo Historical Review*; Douglas Booth, 'Hitting apartheid for six? The Politics of the South African Sports Boycott' (2003) 38 *Journal of Contemporary History* 477-493; Marc Keech and Barrie Houlihan, 'Sport and the End of Apartheid' (1999) 88 *The Round Table* 109-121; Malcolm MacLean, 'Anti-Apartheid Boycotts and the Affective Economies of Struggle: The Case of Aotearoa New Zealand' (2010) 13 *Sport in Society* 72-91

<sup>9</sup> Colin Wintle op. cit.

in mind, such as incapacitating the entity in question or raising public outrage to a point where there is no choice but to change behaviour or practice.

As with other groups, lawyers are no strangers to boycotts, and have readily employed the tactic to express discontent over issues including insufficient fees or processes,<sup>10</sup> poor working conditions,<sup>11</sup> and dissatisfaction with court proceedings.<sup>12</sup> While many boycotts are short in duration and scope, others have continued over extended periods with broader goals in mind. For example, in 2007, Pakistani President General Pervez Musharraf suspended the Chief Justice of the Supreme Court, Iftikhar Muhammad Chaudhry. Lawyers responded with a successful two-year movement demanding Chaudhry's reinstatement—a movement lawyers later used to demand democratisation.<sup>13</sup> Lawyers and bar associations across the country boycotted the courts, with wide adherence<sup>14</sup> and at considerable personal cost, as lawyers' income was connected to litigation. This effort was combined with street protests and marches, media campaigns, and support from opposition parties. This case makes it clear that the 'repertoire of contention'<sup>15</sup> employed by lawyers 'can be as diverse as any social movement.'<sup>16</sup>

## Unjust Legal Proceedings

In addition to the campaigns mentioned above, lawyers have also engaged in the boycott of specific legal proceedings. The motivation for this is generally

<sup>10</sup> For example, lawyers in England and Wales boycotted legal aid work in response to a 17.5% cuts in fees. 'Criminal justice delays grow as legal aid boycott takes hold' *The Guardian* (8 July 2015) <<https://www.theguardian.com/law/2015/jul/08/criminal-justice-delays-legal-aid-boycott>> accessed January 2017. Similarly, defence lawyers in Edinburgh and Glasgow boycotted the courts over a change in legal aid. Lawyers argued that changes would undermine the rights of accused people to a fair trial, with those unable to afford representation choosing to plead guilty instead. 'Lawyers boycott court in row over changes to legal aid system' *Daily Record* (19 November 2012) <<http://www.dailyrecord.co.uk/news/scottish-news/lawyers-boycott-court-in-row-over-1445607>> accessed 20 January 2017

<sup>11</sup> In 2011, the St Lucia Bar Association boycotted the courts in protest over the poor working conditions in the court. 'Lawyers boycott St Lucia's courts' *Stabroek New* (17 February 2011) <<http://www.stabroeknews.com/2011/archives/02/17/lawyers-boycott-st-lucia%E2%80%99s-courts/>> accessed 20 January 2017

<sup>12</sup> Telangana lawyers boycotted the region's courts, demanding bifurcation of the existing common High Court for Telangana and Andhra Pradesh. 'Telangana lawyers boycott courts over demand of separate High Court' *The Financial Express* (1 August 2014) <<http://www.financialexpress.com/archive/telangana-lawyers-boycott-courts-over-demand-of-separate-high-court/1275448/>> accessed 20 January 2017

<sup>13</sup> Zahid Shahab Ahmed and Maria J Stephan, 'Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan' (2010) 17 *Democratization* 492-513

<sup>14</sup> Lawyers that continued to appear before courts were shunned by bar associations and had their licenses threatened with cancellation. Shoab A Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 1008.

<sup>15</sup> Sidney G Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge University Press 2011) Term originally coined by Charles Tilly, *The Contentious French* (Harvard University Press 1986) 4.

<sup>16</sup> Shoab A Ghias op. cit. 1006

linked to a belief that the proceeding is inherently unjust. However, the definition of an unjust legal proceeding is far from straightforward. A broad conceptualisation may include a system or proceeding that is in breach of international human rights law, prevents the right to a fair trial, discriminates against certain societal groups, or is 'rigged' in favour of a particular outcome.<sup>17</sup> Law professor, Alexandra Lahav, suggests that there are several aspects to a 'just' procedure: it should be adversarial in nature; allow clients and their lawyers' access to evidence; have charges and procedures established in advance; with the process overseen by an impartial decision-maker.<sup>18</sup> Violations of these provisions can contribute to a more specific conceptualisation of an unjust system or proceeding, with greater violations indicating more severe injustice.

Scholars have identified several characteristics of unjust legal proceedings in commentaries of the military commissions at Guantánamo,<sup>19</sup> and the military courts in the Occupied Territories.<sup>20</sup> In 2003, the National Association of Criminal Defense Lawyers (NACDL) in the US advised its members that it would be unethical to represent an accused before the military commissions at Guantánamo.<sup>21</sup> The reason for this stance was the view that the conditions imposed by the Department of Defense would make it impossible for lawyers to provide adequate or ethical representation for defendants.<sup>22</sup> Specifically, the rules imposed significant constraints on lawyers' access to closed proceedings and protected information, placed restrictions on the time and duration of contacts with clients, and allowed for the monitoring of lawyer-client conversations. In addition, lawyers and legal scholars criticised the specifications

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<sup>17</sup> Mary Cheh, 'Should Lawyers Participate in Rigged Systems-The Case of the Military Commissions' (2005) 1 *Journal of National Security Law & Policy* 375

<sup>18</sup> Alexandra D Lahav, 'Portraits of Resistance: Lawyer Responses to Unjust Proceedings' (2009-2010) 57 *UCLA Law Review* 725

<sup>19</sup> Martha Minow, 'Breaking the Law: Lawyers and Clients in Struggles for Social Change' (1990) 52 *University of Pittsburgh Law Review* 723; Matthew Ivey, 'Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism' (2010) 66 *NYU Annual Survey of American Law* 211; Mary Cheh op. cit.

<sup>20</sup> Michael A Olivas, 'Breaking the Law on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes' (1990-1991) 52 *University of Pittsburgh Law Review* 815; George E Bisharat, 'Attorneys for the People, Attorneys for the Land: The Emergence of Cause Lawyering in the Israeli-Occupied Territories' (1998) *Cause lawyering: Political commitments and professional responsibilities* 453-486; George E Bisharat, 'Courting justice? Legitimation in Lawyering under Israeli Occupation' (1995) 20 *Law & Social Inquiry* 349-405; Ellen Yaroshefsky, 'Zealous Lawyering Succeeds against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay' (2008) 13 *Roger Williams University Law Review* 469

<sup>21</sup> Committee National Association of Criminal Defense Lawyers (NACDL) Ethics Advisory, *Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions, Opinion 03-04*, (August 2003)

<sup>22</sup> Mary Cheh op. cit.

of crimes and minimal evidentiary standard as being tilted toward findings of guilt. Procedures were further criticised for a lack of outside, impartial review, and for being set ad hoc rather than in advance, with ex post facto laws permitted.<sup>23</sup>

The military courts in the Occupied Territories have been similarly criticised. In 1989 two major reports detailed the experience of lawyers working within the military court system and identified numerous international law violations.<sup>24</sup> Other studies highlighted the unjust conditions in which Palestinian detainees were being held and tried. In particular, the opportunities for bail to be granted in security cases were found to be almost entirely theoretical, extensions to detention were common, and lawyers were often denied access to clients until after interrogation—of which an overwhelming number resulted in a statement of guilt. In addition, challenges to detention were impeded by 'secret evidence', trials were significantly delayed and sentencing policies appeared predetermined.<sup>25</sup> In the words of the former chief military prosecutor in Gaza, 'I have difficulty remembering one person accused of terrorist activity who was acquitted. There are almost no such instances. Every person who is accused is found guilty. Sometimes on the basis of criteria which no Israeli court of law would accept. In 99% of the cases the accused come to court with a signed confession of guilt. That's suspicious.'<sup>26</sup> Indeed, plea-bargaining appeared to be a strategy adopted more by default, than choice—often as pre-trial detention promised to exceed the length of the sentence itself. In addition to the unjust conditions faced by detainees, many lawyers working in the military courts had themselves been arrested, detained, and attacked by Israeli Defence Force soldiers.<sup>27</sup>

In addition to specific unjust legal proceedings, lawyers must sometimes confront entire legal systems that are inherently unjust, such as South Africa during Apartheid. The law, developed along racial lines, was considered a

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<sup>23</sup> Ibid.

<sup>24</sup> B'Tselem, *The Military Court System in the West Bank*, (Israeli Information Center for Human Rights in the Occupied Territories (1989); Virginia Sherry, *Background Memorandum: Boycott of the Military Courts by West Bank and Israeli Lawyers*, (Lawyers Committee for Human Rights 1989)

<sup>25</sup> Michael A Olivas op. cit.

<sup>26</sup> Quoted in Virginia Sherry op. cit. 7

<sup>27</sup> George E Bisharat, 'Attorneys for the People' 468



systemic framework for the organisation of capital and as a tool of repression.<sup>28</sup> As such, Apartheid was a system not only inherently unjust, but also highly legalistic. Indeed, white South Africans were 'unusually conscientious about securing statutory authority for their abuses.'<sup>29</sup> However, a system that conforms to the rule of law does not mean that it is legitimate or fair if the law itself is inherently discriminatory—governments can use the law to maintain and carry out its oppression.<sup>30</sup> In situations such as these, where proceedings are recognised as unjust, lawyers face a dilemma regarding the appropriate level of participation.

### Lawyers' Role in Unjust Legal Systems: Comply or Resist?

Lawyers do not approach unjust systems or proceedings with a uniform stance. While some may choose to work within the system, others refuse to participate. Regarding the former stance, it is helpful to introduce a distinction between so-called 'cause' and 'conventional' or 'client' lawyers,<sup>31</sup> as it can affect the motives behind participation in unjust systems. Austin Sarat and Stuart Scheingold describe conventional lawyering as a client-focused, 'fee-for-service' activity, in which lawyers provide a skilled and zealous defence for clients, while serving the public interest. Cause lawyering is more political in nature; it is a form of 'moral activism'<sup>32</sup> and aims to use legal means to achieve greater social justice. Cause lawyers seek to advance social, economic, and political change—a focus that transcends client representation. Indeed, 'serving the client is but one component of serving the cause.'<sup>33</sup>

This distinction can help reveal the reasoning behind a lawyer's choice to participate in an unjust proceeding. For instance, conventional lawyers may opt to participate as part of their duty to the court or client, rather than to resist injustice. For example, despite criticisms of the unjust proceedings in Northern

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<sup>28</sup> Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Clarendon Press 1992)

<sup>29</sup> J. Lelyveld cited in John Morison, Kieran McEvoy and Anthony Gordon (eds), *Judges, Human Rights and Transition* (Oxford University Press 2007) 301

<sup>30</sup> David Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Bloomsbury Publishing 1999)

<sup>31</sup> These categories are not concrete, but can be considered as ranging on a continuum. Austin Sarat and Stuart Scheingold, *Cause lawyering: Political commitments and Professional Responsibilities* (Oxford University Press 1998)

<sup>32</sup> Kieran McEvoy, 'What did the Lawyers do during the 'War'? Neutrality, Conflict and the Culture of Quietism' (2011) 74 *The Modern Law Review* 350-384

<sup>33</sup> Austin Sarat and Stuart Scheingold op. cit. 4



Ireland during the emergency law regime, lawyers continued with 'business as usual' defending clients—reflecting what McEvoy has described elsewhere as a 'culture of quietism'.<sup>34</sup> This lack of resistance has been attributed to characteristics of the environment in 1970s Northern Ireland that reinforced continued engagement with the legal system after the introduction of emergency law. These include the small community of working lawyers who viewed themselves as professionals working in a highly competitive environment with a sense of duty to the court and to represent clients during a difficult time.<sup>35</sup> Moreover, despite calls by NGOs such as the Association for Legal Justice to boycott the internment hearings and criticisms of the non-jury Diplock proceedings from abroad, lawyers reported no inclination or utility in boycotting the courts.<sup>36</sup> Instead, the fractionalised society during the height of the conflict in Northern Ireland led some lawyers to consider the unjust proceedings necessary.<sup>37</sup> It is factors such as these, which may result in lawyers—particularly 'conventional' lawyers—to engage in unjust legal proceedings.

This raises a question of 'what exactly are our expectations from lawyers in conflicted societies?'<sup>38</sup> Lahav argues that when lawyers participate in unjust systems, they become complicit in the injustice, as their participation makes the proceeding possible.<sup>39</sup> However, is it reasonable to view lawyers as apolitical professionals working to 'sustain their status, income and monopoly in the marketplace?' Or, should lawyers be expected to take on the burden of wider, moral responsibilities?<sup>40</sup> Cause lawyers actively seek to take on these additional responsibilities in the pursuit of a higher realisation of justice. These lawyers may choose to participate in unjust proceedings, not only to defend a client, but as a form of resistance.

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<sup>34</sup> Kieran McEvoy, 'What did the Lawyers do during the 'War?'' op. cit.

<sup>35</sup> Jorgensen, B., (1982). Defending the Terrorists: Queen's Counsel before the Courts of Northern Ireland, *Journal of Law & Society*, 9 (1): 115-126.

<sup>36</sup> Birthe Jorgensen, 'Defending the Terrorists: Queen's Counsel before the Courts of Northern Ireland' (1982) 9 *Journal of Law in Society* 115

<sup>37</sup> Interviewees considered the Diplock courts, 'The best system possible in the circumstances.' Ibid. 121

<sup>38</sup> Kieran McEvoy, 'What did the Lawyers do during the 'War?'' op. cit. 377

<sup>39</sup> Alexandra Lahav op. cit. 729

<sup>40</sup> Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release* (Oxford University Press 2001); Stephen Ellmann, 'Lawyers against the Emergency' (1990) 6 *South African Journal on Human Rights* 228; Geoff Budlender, 'The Responsibility of Lawyers to Challenge Injustice' (1992) 40 *Cleveland State Law Review* 475

## Strategies of Resistance

For lawyers seeking to resist injustice, Lahav provides a framework to characterise the decision using two separate distinctions: exit and voice, and internal and external resistance.<sup>41</sup> These categories are not mutually exclusive, and can be combined in a single course of action. While 'exit' signifies a refusal to participate in unjust proceedings, encompassing collective and individual boycott, 'voice' denotes the verbal communication of dissatisfaction to injustice. In addition to this initial characterisation of strategies, resistance can be internal or external, denoting whether it takes place within or outside the unjust proceeding or system. This distinction highlights the expected source of change—whether it derives from inside (legal) or outside (extra-legal) the system itself.<sup>42</sup>

Voice can be expressed via internal or external resistance. Internally, lawyers can use reasoned legal arguments to challenge the proceeding and establish a record of injustices for use in appeals to a higher court. For example, lawyers representing Martin Luther King Jr. during the Montgomery bus boycott trial exercised an internal/voice strategy when they appealed to the federal courts following King's state court conviction. Externally, lawyers can utilise a voice strategy to catapult the proceeding into 'the court of public opinion'. While lawyers engaged in internal resistance aim to use the language and rules of the unjust proceeding to challenge it, an external resistance strategy seeks to challenge the system through political action. Whether lawyers opt to boycott or participate, external resistance calls on outsiders to recognise injustice and instigate pressure for change. The NACDL effectively engaged in this strategy when it publicly, and meticulously, outlined its opposition to the Guantánamo military commission system.<sup>43</sup>

## To Boycott or Not: Considerations & Consequences

The decision to boycott an unjust legal proceeding or system can be considered in light of the effects of participation in unjust proceedings. The main question

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<sup>41</sup> Categories originally developed by Albert Hirschman in relation to consumers' responses to declining firms. Alexandra Lahav op. cit. 749

<sup>42</sup> Ibid.

<sup>43</sup> Committee National Association of Criminal Defense Lawyers (NACDL) Ethics Advisory op. cit.

facing lawyers is which strategy is more likely to result in the desired outcome—whether that is to express dissatisfaction or overturn the unjust system itself. Issues including legitimation effects, the ability to make potential gains, lawyers’ moral obligations, the effect on clients, and the nature of the legal profession, all play a role in lawyers’ decision.

### **Legitimation Effects Versus Anticipated Gains**

A commonly expressed concern of participation in unjust legal systems or proceedings is that it can provide legitimacy to the process—even if lawyers are working to resist injustice. Participation can enable the appearance of an adversarial process and suggests that the proceeding or system is capable of producing just results. In an example of such an appearance, Lahav quotes Jules Browde, a lawyer representing black communities in Apartheid South Africa in the 1960s. Browde recounts the Attorney General of the United States approaching him in the early stages of a case to express admiration for his ability to openly air grievances about the government in court. The case was eventually halted by the arrest and detention of Browde’s witnesses after a state of emergency was declared; however, in that instance, Browde’s participation created an appearance of a fair trial, despite being personally opposed to the system.<sup>44</sup> Similarly, lawyers’ continued participation in the Diplock courts and internment trials in Northern Ireland, despite heavy criticism from abroad, symbolically and practically served to legitimise the proceedings.<sup>45</sup>

Concerns of lending legitimacy to an unjust or ‘rigged’ system through participation is a recurrent theme in debates on boycott. Defence lawyers working at Guantánamo Bay claimed that the commissions were a ‘sham’ and expressed concerns that their participation was ‘only adding to it... only making it look like it’s real.’<sup>46</sup> In cases such as these, lawyers may conclude that it is better to withdraw or ‘exit’ from the proceedings, rather than continue to provide adversarialism or support to an unjust system. This was the stance of the NACDL, who argued that the severe disadvantages imposed on lawyers in the

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<sup>44</sup> Jules Browde cited in Alexandra Lahav op. cit. 743

<sup>45</sup> Kieran McEvoy, ‘What did the Lawyers do during the ‘War?’ 363; Birthe Jorgensen op. cit.

<sup>46</sup> Interview With Guantanamo Bay Defense Lawyer cited in Alexandra Lahav op. cit. 746

military commissions at Guantánamo Bay, could only aid in ensuring 'unjust and unreliable convictions.'<sup>47</sup> Similarly, Felecia Langer, a prominent Israeli lawyer working in defence of Palestinian clients in the Occupied Territories opted to abandon her practice in the military courts citing, 'I cannot really help anymore, I cannot change anything, but by being there I am sanctioning the system. I am acting as a fig leaf, instead of openly and explicitly condemning it.'<sup>48</sup> A more recent example is that of B'Tselem, an Israeli human rights organisation, which has taken the position to no longer refer complaints of abuse against Palestinians to the Israeli military law enforcement system. Following a review of cases it had submitted, the organisation concluded that the system is 'a whitewash mechanism,' whose 'real function is measured by its ability to continue to successfully cover up unlawful acts and protect perpetrators.'<sup>49</sup>

Stances such as these reflect a belief that there is little hope for justice working within the system—an internal/voice strategy. If lawyers perceive little hope in effecting change, then withdrawal may be considered a more effective, if not the only, option. However, optimism regarding potential gains can also spur a decision to participate. In the early years of the Northern Ireland conflict, republican prisoners refused to recognise the legitimacy of the criminal courts. However, this tactic gradually changed with the realisation that successful challenges could be mounted.<sup>50</sup> Indeed, there may be many situations in which lawyers conclude that participation in an unjust system may derive gains that outweigh any legitimisation effects.

In the military courts in the Occupied Territories, George Bisharat argues that the legitimisation costs of participation have been relatively minimal, and while the benefits of participation have also been modest, these benefits exceed the costs.<sup>51</sup> Improvements in procedural rights, exposure of flaws in the court system, more favourable plea bargaining, and the establishment of the court of appeals—which did not exist before 1989—have been attributed to the efforts of

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<sup>47</sup> Committee National Association of Criminal Defense Lawyers (NACDL) Ethics Advisory op. cit. 1

<sup>48</sup> Cited in George E Bisharat, 'Courting Justice?' op. cit. 359

<sup>49</sup> B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, (Israeli Information Center for Human Rights in the Occupied Territories 2016) 37

<sup>50</sup> Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland* 565, 550

<sup>51</sup> George E Bisharat, 'Courting Justice?' op. cit.

lawyers. Moreover, lawyers have played a key role in monitoring and documenting human rights abuses. If lawyers sympathetic to Palestinian interests chose to boycott the system, then the military court would have been permitted to continue without challenge. A similar conclusion has been made regarding the legal system in Apartheid South Africa. While the international community imposed economic and cultural boycotts, lawyers consistently opted to oppose Apartheid from within, using an internal/voice strategy—despite limited opportunities for success.<sup>52</sup> Richard Abel, a socio-legal scholar, reasons that the system was vulnerable to litigation as it 'used legal institutions to construct and administer apartheid.'<sup>53</sup> While this strategy resulted in 'modest' gains, such as protection from harsher punishments, Abel notes how this strategy aided in 'slow[ing] the project of grand apartheid until politics could reverse it.'<sup>54</sup> If nothing else, lawyers ensured that those held in detention without trial were periodically heard from in court—a better result than if they were never heard from at all.<sup>55</sup> Therefore, participation can serve to protect clients, current and future, from the worst abuses of the state through small victories.

Gains, however, present a danger of strengthening support for unfair processes by reaching acceptable results.<sup>56</sup> Civilian and military defence lawyers for detainees at Guantánamo Bay have managed to obtain several concessions for their clients through an internal/voice strategy. For example, Joshua Dratel, civilian defence lawyer for David Hicks, successfully negotiated changes to commission rules, which removed monitoring of lawyer-client contact, and enabled the ability to seek discretionary adjournments, expert consultation outside the defence team on unclassified information, and to contest closed proceedings.<sup>57</sup> In addition, Charles Swift and Neal Katyal, lawyers representing Salim Ahmed Hamdan, attained a US Supreme Court ruling in 2006 declaring the military commissions unconstitutional.<sup>58</sup> However, these gains were short-lived,

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<sup>52</sup> Stephen Ellmann, 'Law in and Legitimacy South Africa' (1995) 20 *Law & Social Inquiry* 407-479

<sup>53</sup> Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (Routledge 1995) 3.

<sup>54</sup> *Ibid.* 548, 522

<sup>55</sup> Stephen Ellmann, 'Lawyers against the Emergency' *op. cit.* 229

<sup>56</sup> *Ibid.*

<sup>57</sup> Ellen Yaroshefsky *op. cit.*

<sup>58</sup> Alexandra Lahav *op. cit.*

with Congress overturning the Supreme Court decision, and new commission rules being introduced.<sup>59</sup> The result of the lawyers' zealous defence for both detainees achieved little in the end; however, the government often cited their defence as evidence that the system offered a 'fair, legitimate and transparent forum.'<sup>60</sup> As such, modest victories may in turn be used to further legitimise an unjust system.

The gains presented here in the Occupied Territories and Guantánamo Bay derive from proceedings that, while unjust, are extensions of nations in which democratic principles and the rule of law are valued.<sup>61</sup> Bisharat concedes that it is unlikely that many repressive nations will offer similar opportunities and space to achieve gains from within the system—internal resistance.<sup>62</sup> The use of litigation to challenge unjust proceedings requires lawyers to believe in the existence of fundamental legal principles, found in universal texts, through which a just result can follow reasoned argumentation and interpretation.<sup>63</sup> Moreover, for arguments to have impact, lawyers must believe that the judges are sufficiently neutral or susceptible to a liberal legal tradition. In situations such as this, lawyers may decide that litigation is worthwhile. However, if lawyers perceive judges as following a strictly positivist interpretation of the law—not likely to be easily persuaded by alternative arguments—an exit strategy may be considered more appropriate. As such, lawyers' beliefs in the extent to which the judge and court can be persuaded will also contribute to a decision of how and whether to participate.

Overall, one aspect of lawyers' decision as to whether to boycott or participate in unjust proceedings revolves around a debate between the risks of legitimation and potential gains via litigation. In this debate, lawyers face a dilemma; gains and reasoned legal arguments may aid in reducing injustices for individual clients but hamper efforts to resist injustice as a whole. Indeed, as noted above, the state can point to victories as signs that the system is just and participation can thus strengthen the very norms lawyers seek to change. Examples

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<sup>59</sup> *Ibid.*

<sup>60</sup> Ellen Yaroshefsky *op. cit.* 493; Alexandra Lahav *op. cit.* 747

<sup>61</sup> George E Bisharat, 'Courting Justice?' *op. cit.*

<sup>62</sup> *Ibid.* 403

<sup>63</sup> Alexandra Lahav *op. cit.* 783-4

presented here would suggest that boycott is a strategy for lawyers seeking to resist injustice that hold little to no hope of changing the system from within.<sup>64</sup> However, the modest gains in detainee conditions would suggest that additional factors are involved in this decision. In many cases, it appears as though it is the potential, rather than guarantee, of victories (modest or significant) that encourages participation.<sup>65</sup>

### **Lawyers' Professional Moral Obligations to Clients and Justice**

Participation in unjust proceedings can conflict with lawyers' inner sense of morality and justice. Some lawyers may participate out of a professional and moral obligation towards clients, or a belief that they can change the system from within to restore a sense of justice. Dina Kaminskaya, a Soviet lawyer who represented defendants in political trials, expressed a moral obligation to stand with dissidents, despite the limited chance of success in proceedings predetermined by the Communist Party.<sup>66</sup> Others experience this conflict more acutely. For example, Joshua Dratel, the civilian defence lawyer of Guantanamo detainee, David Hicks, was required to choose between agreeing to new rules in a system he believed to be unjust and abandoning his client to face the commission without his help. In refusing to accept the new rules, Dratel explained to the commission—and wider public—that, 'I cannot sign a document that provides a blank check on my ethical obligations as a lawyer, my ethical obligations to my client, my ethical obligations under the rules of professional responsibility for the State of New York to which I am bound.'<sup>67</sup> This resulted in Dratel's disqualification and he was thus no longer able to represent Hicks. When offered the opportunity to remain by Hicks' side without the ability to advocate on his behalf, Dratel responded, 'I'm not going to pretend that I'm here functioning when I'm not entitled to do my job.'<sup>68</sup> Similarly, Charles Swift, a member of Salim Hamdan's legal team, decided to forgo attending, and providing exculpatory evidence to, his client's Combatant Status Review Tribunal, believing the proceedings to be unjust and predetermined.<sup>69</sup> While

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<sup>64</sup> Ibid. 758

<sup>65</sup> Stephen Ellmann, 'Law and Legitimacy in South Africa' op. cit. 250

<sup>66</sup> Mary Cheh op. cit.

<sup>67</sup> Joshua Dratel cited in Alexandra Lahav op. cit. 740

<sup>68</sup> Ibid. 740

<sup>69</sup> Ibid.

Swift's evidence was unlikely to have altered the outcome for his client, Hamdan severely criticised his lawyer, feeling abandoned. Indeed, lawyers face a difficult dilemma when considering whether to participate in a legal proceeding that they believe offers little or no hope of redress. Although Swift attempted to explain to his client that the courts were legitimate in appearance only, and that argumentation was futile, 'the distinction was meaningless to Hamdan.'<sup>70</sup> As such, exiting the system on moral or professional/ethical grounds obviously has the added consequence of abandoning clients.

In some cases, the decision to boycott is made for lawyers by their clients. Those that are politically motivated are indeed often inclined to boycott trials they believe to be unjust, or to co-opt their defence to make public speeches designed to put the government on trial in the court of public opinion.<sup>71</sup> For example, Ali al Bahlul and Ahmed Al-Darbi, detainees at Guantánamo, both opted to boycott their own trials, refusing to recognise the legitimacy of the proceedings.<sup>72</sup> For political prisoners, trials are 'always played out against the potential historical and political backdrop to their struggle.'<sup>73</sup> Therefore, they often choose to accept harsher punishments with the aim of advancing their cause. This was the approach adopted by Nelson Mandela during the Rivonia trial, in which he used the courtroom to put forward a competing narrative of the injustices of Apartheid to local and international audiences. Marwan Barghouti, an elected member of the Palestinian Legislative Council, also adopted this approach. Arrested on charges of terrorism and tried in an Israeli civilian court, Barghouti refused to allow his lawyers to plea-bargain or represent him in the courtroom.<sup>74</sup> However, in each of these cases, defendants themselves made the decision as to whether to participate or boycott. Boycotting unjust proceedings may be justifiable in cases concerning political prisoners, as prisoners may

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<sup>70</sup> Ibid. 742

<sup>71</sup> Richard L Abel op. cit. 533

<sup>72</sup> 'Terror Suspect Upsets Plan to Resume Trials in Cuba' *The New York Times* (12 January 2006) <<http://www.nytimes.com/2006/01/12/us/nationalspecial3/terror-suspect-upsets-plan-to-resume-trials-in-cuba.html>> accessed 20 January 2017; 'Guantanamo defendant calls trial a 'sham'' *Los Angeles Times* (10 April 2008) <<http://articles.latimes.com/2008/apr/10/nation/na-gitmo10>> accessed 20 January 2017; Matthew Bloom, 'I Did Not Come Here To Defend Myself': Responding to War on Terror Detainees' Attempts To Dismiss Counsel and Boycott the Trial' (2007) *The Yale Law Journal* 70-119

<sup>73</sup> Kieran McEvoy, 'Paramilitary Imprisonment in Northern Ireland' op. cit. 546

<sup>74</sup> Awol Allo, 'Marwan Barghouti in Tel Aviv Occupation, Terrorism, and Resistance in the Courtroom' (2016) *Social & Legal Studies* 1-22; Lisa Hajjar, *Courting Conflict the Israeli Military Court System in the West Bank and Gaza* (University of California Press 2005) 234.



choose this path. However, the decision is more problematic when it is ordinary citizens seeking representation. For example, many defendants in the military courts in the Occupied Territories were not activists, but labourers and landowners caught up in the struggle. These defendants seek representation and want to be heard in court with the hope of obtaining a minimal sentence. Indeed, for ordinary defendants, the debate over whether the courts have legitimacy is sometimes seen as essentially 'an intellectual privilege.'<sup>75</sup> As Stephen Ellmann notes, lawyers that choose to turn down clients are most likely causing a 'blow to the autonomy of someone who, as a victim [of an unjust system], has probably already suffered many such blows.'<sup>76</sup> This moral conflict helps us to understand lawyers' continued participation in the Occupied Territories. While lawyers have had little success in overturning the unjust system, they have achieved modest gains in improving conditions for individual clients.

Related to this is a question of whether, ethically, lawyers have a duty to participate in, rather than boycott, an unjust legal system. Lahav describes collective boycotts as coercive; they force proceedings to stop, not through judicial or democratic political processes, but because lawyers play a necessary role in the system's functioning.<sup>77</sup> While legal and reasoned litigation have the potential to persuade the government or court to address procedural injustices, refusal to participate forces the government's hand. Moreover, collective boycotts can leave defendants without representation or lead to significant delays in trials for detainees. While this is a concern that will contribute to a lawyer's decision, there have been few instances in which collective boycotts—especially those leaving defendants unrepresented—have been possible.

### **Difficulties and Drawbacks in Organising Collective Boycotts**

In addition to weighing anticipated gains of litigation with the risk of legitimation, and lawyers' moral obligation to the court and clients, the nature of the legal profession imposes constraints on the ability to organise a collective

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<sup>75</sup> Ronen Shamir, 'Adalah Virtual Roundtable Response' (*Adalah Newsletter*, 2008) <<http://adalah.org/newsletter/eng/feb08/roundtable/roundtable.html>> accessed 20 January 2017

<sup>76</sup> Stephen Ellmann, 'In a time of trouble' op. cit. 254

<sup>77</sup> Alexandra Lahav op. cit.

boycott. Lahav points to two reasons behind this; first, the political views of legal professionals are often very diverse which can of course make agreement difficult.<sup>78</sup> In Northern Ireland, a small NGO - the Association for Legal Justice - attempted to organise a boycott of the internment hearings during the emergency law regime.<sup>79</sup> However, members were unable to carry a consensual decision amongst the lawyers and so continued to offer services. Second, as lawyers are able to choose their own clients, a complete bar on representation is difficult, as there will likely be other lawyers willing to take the place of those boycotting the courts. This has the effect of reducing the pressure on the unjust system to change. Indeed, in the military commissions at Guantánamo, detainees are automatically assigned military counsel, regardless of whether civilian lawyers, such as members the NACDL, decide to boycott. This was also the situation hampering the West Bank lawyers' boycott of Israeli civil and military courts in the Occupied Territories—one of the few examples of an extended, collective lawyer boycott in response to an unjust system.

The boycott by West Bank lawyers began in 1967 in a symbolic act to express hostility to the occupation, with the expectation that a wider boycott from other professional groups and sectors would follow.<sup>80</sup> While the boycott had the support of the Jordanian Lawyers' Union—who provided financial compensation to maintain the strike—West Bank lawyers did not hold a monopoly over the supply of legal services in the Occupied Territories. Instead, Gaza and Israeli lawyers stepped in to take their place, resulting in little change to the functioning of the military courts, or to occupation more generally. The boycott suffered a further setback in 1971, when several lawyers grew frustrated and resumed practice. By the mid-1980s, approximately one-third of West Bank lawyers had resumed working in the Occupied Territories.<sup>81</sup> The boycott failed to encourage additional professions to follow suit or exert significant pressure on the military courts. However, the lawyers' wide adherence to the cause for four years marked a significant achievement in itself—given the heterogeneity of views in the legal profession.

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<sup>78</sup> Ibid.

<sup>79</sup> Kieran McEvoy, 'What did the Lawyers do during the 'War?'' op. cit. 363

<sup>80</sup> George E Bisharat, 'Attorneys for the People' op. cit.

<sup>81</sup> Ibid. 461

Bisharat proposes that a more effective tactic may have been the collective rejection of plea-bargaining.<sup>82</sup> Given that between 95-99% of cases resulted in this outcome,<sup>83</sup> if every defendant was to reject such a deal and proceed with a court trial, it would place significant strain and costs on the military court system. However, this tactic was never attempted on a wide scale due to its presumed infeasibility. Overall, this approach would have demanded significant discipline and sacrifice on the side of defendants, as it would have likely resulted in longer sentences—at least in the short term. Moreover, there was concern that other lawyers or defendants would not comply, and therefore undermine the boycott's efficacy. While this approach may have appealed to political prisoners and lawyers seeking to resist injustices, for ordinary citizens swept up in Israeli repression, this tactic would likely be considered a price too high to pay. As a result, defendants and lawyers working in the military courts instead attempted to maximise individual interests within the available channels of the military court system—in other words, plea-bargaining.<sup>84</sup>

Even if lawyers opt to boycott unjust proceedings, there is no guarantee that it will be effective at bringing about change, as the West Bank lawyers' boycott illustrates. Arab and Israeli lawyers defending Palestinians in Israeli military courts also tried boycotting the courts during the first Intifada in protest over unsatisfactory detainment conditions. However, lawyers had to organise three month-long boycotts during the space of a year, as their demands for improved conditions were continually ignored<sup>85</sup> —questioning the utility of such an approach. Moreover, boycotting lawyers felt public pressure to continue providing legal services for those being arrested, and therefore resumed practice.<sup>86</sup> Overall, there are few examples of successful lawyer boycotts of unjust legal proceedings. Although, Mary Cheh does indicate that the NACDL's ethics opinion on conditions at Guantánamo—in addition to criticism from legal

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<sup>82</sup> George E Bisharat, 'Attorneys for the People' op. cit. 474.

<sup>83</sup> B'Tselem report 95% of defendants aim to plea-bargain. B'Tselem, *The Military Judicial System in the West Bank - Follow-up Report*, (Israeli Information Center for Human Rights in the Occupied Territories 1990); 99% is the figure cited in Virginia Sherry op. cit.

<sup>84</sup> However, some defendants have more political reasons for opting to plea-bargain. Specifically, going to trial implies that the system is 'capable of dispensing 'justice.'" Lisa Haijar op. cit. 234

<sup>85</sup> Michael A Olivas op. cit.

<sup>86</sup> Lisa Haijar op. cit. 174

scholars and the media—contributed to the government’s decision to alter commission rules. This would suggest that boycotts, in combination with a strategy to raise public awareness, can produce changes. This leads to the following question: is boycotting unjust proceedings sufficient, or should lawyers play a further role in resisting injustice?

## Boycotting Lawyers & the Value of External Resistance

Lawyers that face an unjust legal system can adopt resistance strategies that can be classified as exit or voice/internal or external. The examples cited in this report would indicate that participation—an internal/voice strategy—is more common than exit. Indeed, the majority of lawyers chose to participate in the military commissions at Guantánamo, the Israeli military courts, courts in Apartheid South Africa, and internment proceedings in Northern Ireland. Despite this preference, cases also illustrate that there are instances in which lawyers will adopt an exit strategy. Several lawyers refused to participate in individual circumstances (for example, Felecia Langer, Joshua Dratel and Charles Swift), and bar associations chose to adopt boycott stances—either long-term (as in the case of the NACDL and West Bank lawyers in the Jordanian Lawyers’ Union), or short-term (such as the sporadic Arab and Israeli lawyers’ boycotts). However, the question remains as to what lawyers should do in this exit role? Do lawyers attempt to further resist injustice or exit from the system quietly? Lahav argues that the latter stance positions lawyers as bystanders to injustice, passing the responsibility to others.<sup>87</sup> In contrast, those that aim to further resist injustice can adopt an external/voice strategy, whereby exit is not only withdrawal, but also an attempt to raise awareness of injustice to outside audiences, building pressure for change. The NACDL adopted this stance in its boycott of the Guantánamo military commissions. The public nature of its condemnation served to ‘increase the volume of the organisation’s voice within the larger political debate.’<sup>88</sup> Similarly, Dratel capitalised on the media attention following his refusal to agree to new commission rules, by publicly criticising the injustices of the proceedings and defending his client.

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<sup>87</sup> Alexandra Lahav op. cit.

<sup>88</sup> Ibid. 751

The effectiveness of an external/voice strategy may be better illustrated in cases where lawyers have participated in unjust proceedings, while simultaneously pursuing an external/voice resistance strategy. Indeed, Bisharat argues that lawyers working within the Israeli military courts have been most effective in drawing local, national, and international public attention to the injustices facing their clients by virtue of their continued work in and understanding of the detailed practices of the system.<sup>89</sup> Through interviews, commentaries and demonstrations, lawyers have played a key role in exposing hidden injustices of the Israeli military legal system—without which, outside audiences would have little understanding.<sup>90</sup> Similarly, Michael Mori, Guantánamo military defence lawyer for David Hicks, engaged in a rigorous internal resistance strategy, using voice to confront the injustices of the system. However, it was the external/voice strategy employed in tandem that has been attributed as more effective in securing gains for his client. Indeed, Mori held numerous press conferences in which he criticised the injustice of the commissions, and travelled to Hicks' native Australia to rally public opinion and the Australian government to assist his client. These cases indicate the potential importance of an external/voice strategy as a source of change—particularly when participation fails to significantly alter injustices.<sup>91</sup> Therefore, boycotting lawyers' causes may be better served if combined with an extensive external/voice strategy. As Mori conceded, 'in a rigged system... all you can do sometimes is just to try to let people know what's going on and why it's unfair.'<sup>92</sup>

## Conclusion

An unjust legal system or proceeding presents lawyers with a challenge regarding their role in the process. They must weigh the potential gains of participation with its legitimation effects, moral and professional obligations to clients and the court, as well as the difficulties in organising collective action given the heterogeneous nature of the legal profession. The cases presented here suggest that boycotting is generally a strategy for lawyers (and clients)

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<sup>89</sup> George E Bisharat, 'Attorneys for the People' op. cit. 470

<sup>90</sup> David Luban, 'Lawfare and Legal Ethics in Guantánamo' (2008) 60 *Stanford Law Review* 1981-2026

<sup>91</sup> Mary Cheh op. cit. 405

<sup>92</sup> Michael Mori cited in Alexandra Lahav op. cit. 740

who hold little, or no, hope in the system—a last resort.<sup>93</sup> By contrast, for lawyers that see opportunities for internal resistance, litigation can produce modest gains for clients—such as more favourable plea-bargains or improvements in procedural rights. However, participation is unlikely to address the fundamental injustices of the proceeding or system itself. Rather, as noted earlier, Abel highlights the role of law during Apartheid South Africa. Despite attaining ‘modest’ gains, participation could be conceived of as a strategy to ‘slow the project of grand apartheid until politics could reverse it.’<sup>94</sup> Indeed, it was the role of collective and sustained boycotts, from both within South Africa, and at an international level that resulted in the necessary momentum and pressure to initiate fundamental change.

Boycotting is the withdrawal or refusal to engage with an organisation, nation, body, or person, in an expression of protest or dissatisfaction. However, this form of protest cannot be considered in isolation from its effects. Boycotts are a mechanism of change, and therefore should be judged on what they accomplish. Captain Boycott’s tenants were successful in driving him out of Ireland; the United Farm Workers’ grape boycott was successful in achieving an agreement over wages; the consumer boycott against Nestlé forced the World Health Organisation to introduce measures on the marketing of breast-milk substitutes; the Montgomery Bus Boycott spurred the Civil Rights Act; the multiple boycotts against South Africa were successful in their goal of helping to end the system of Apartheid, and; the lawyers’ movement in Pakistan was successful in reinstating Chief Justice Chaudhry and removing President Musharraf from office. While each of these boycotts differed in aims and scope, all had one factor in common—they resulted in broad social movements that created the momentum needed for change. However, while wider research on boycotts would indicate that there is ‘strength in numbers,’ the cases described above illustrate that there can also be strength in the individual. Indeed, it is clear that individual lawyers who speak out and express their discontent with unjust legal proceedings—through both their participation and external/voice strategies—can raise awareness among government officials, international human rights

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<sup>93</sup> Alexandra Lahav op. cit. 757

<sup>94</sup> Richard L Abel op. cit. 548, 522

organisations, the media, and wider public of injustice. Therefore, whether through the use of boycott or strategic participation, a primary goal for lawyers in unjust systems may be turning an individual voice into a chorus.

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