

## Palestine and International Law Conference: Effectiveness and Prospects

### Session 3

## Palestine in the UN: the consent and the variable, the present and the future (Written Transcript)

### Panelists:

**Prof. John Dugard:** Former UN Special Rapporteur on Palestine (2001 - 2008)

**Prof. Richard Falk:** Former UN Special Rapporteur on Palestine (2008 - 2014)

**Prof. Michael Lynk:** Former UN Special Rapporteur on Palestine (2016 - 2022)

**Moderator: Dr. Ardi Imseis:** Assistant Professor of International Law at Queens University and former Editor-in-Chief of the Palestine Yearbook of International Law (2008 - 2019)



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## **Introduction:**

### **Dr. Ardi:**

**“The involvement of the United Nations in the Palestine problem over the years has twisted the organization’s image and fragmented its reputation and prestige as no other issue has” Former UN Under-Secretary General, Brian Urquhart, 1987 memoir**

As part of my reflection over my own time as United Nations official on Palestine and my desire to be critical of the way the organization and international law has engaged with the cause and its people overtime, in the forthcoming book on the United Nations and the Question of Palestine, I attempt to examine how and why Urquhart’s observations still resonates with us today.

To reset that Westerns, posit that the United Nations is the custodian of the international legal order, but has it been left up to decide when it comes to Palestine? To What extent has it landed to be part of the problem as opposite to be part of the solution? What UN machinery has been problematic and why? What UN machinery may offer prospects for positive change and why? And finally, what strands in both legal and political round tell us of where we may be headed with Palestine at the UN?

To discuss these and other questions, with me today in the Panel professors John Dugard, Richard Falk, and Michael Lynk. To my extent of knowledge, this is the first time the three of them set together in a public panel. The uniqueness of this event rests in the fact that each of them were in position of UN Special Rapporteur of the situation in Palestinian territories occupied by Israel since 1967, for what would be an aggregated total of 20 years by the time the last of them steps down from the role in March next year. Together, their work remarks the most consistent and principled on international law and the question of Palestine articulated toward the UN machinery since the organization’s ill-fated engagement with the problem since 1947. Together, these men form witness to the plight of the Palestinian people and Palestine since 1967 in ways that few had, giving them the privileged position from which to share their important views with us today. In doing so, they help to keep the

Palestinian story in front and at center of the United Nations, helping to sharpen the collective understanding of the situation as it is evolved over time, as much as helping shape new paths for us to take on the road to resolve that problem once and for all.

## **Opening Remarks:**

### **Prof. John Dugard:**

Let me start by saying that my approach to the United Nations and the question of Palestine is colored by my experience as a South-African who opposed Apartheid in that country. During the Apartheid era in South Africa, we looked to the United Nations for hope and for a solution to the problem of Apartheid in South Africa, and although it took many years the United Nations to point to the right direction and ultimately play a role in the dismantling and overthrow of the Apartheid.

So, as a lawyer and as an activist in South Africa, I did -what was to large extent- guided by the leds of the United Nations in my approach to the situation. I think that was rewarded because the United Nations ultimately succeeded in contributing to the end of Apartheid.

Now, when we compare it to the situation in Palestine, I must complicit I am very disappointed in the overall conduct of the United Nations. Let me just look at each of the institutions that considers the Palestine Question. First of all, let me begin with QUARTET (Quartet on the Middle East), created by the Security Council as the body responsible for promoting peace in the Middle East. I do not think that it is an understatement to say that the QUARTET has been quite a disastrous institution, it hasn't contributed at all, whatsoever, in the solution for peace in the Middle East. It has been guided and obstructed -at the same time- by the United States and it achieved absolutely nothing.

Turning then to the Security Council, yet we found the security council has to a large extent been obstructed by the United States, but what I do find disappointing is that other member

states of the United Nations have not been prepared to stand up and describe the way in which the Security Council failed in its trustee to promote peace and justice in the Middle East. I do think that it would be possible, as permanent members and non-permanent members to point out that the United States simply obstructed the whole peace process.

Turning to the General Assembly, I founded that General Assembly has been disappointing in the sense it has repeated the same resolutions year after year without responding to new developments. While I was Special Rapporteur, I frequently suggested themes that the General Assembly might perceive but they never did so. I think it is important that the General Assembly addresses the question of Apartheid, for instance, civil society as a major voltage sees the situation in the occupied Palestinian territory as it keen to Apartheid, and it is time for the General Assembly to address this in its resolutions. But to date, it has not did so.

I think it is also important to consider recommended action on the crime that the United Nations General Assembly used in South Africa beginning with the imposition of an arms embargo on South Africa.

Finally, I don't think that one should fail to mention that the Secretariat by large has failed as well. When I was a Special Rapporteur, I was always struck by the number of molls that I have found in the top excellence of the Secretariat, not the Secretary General himself -at my time Mr. Kofi Anan- but the secretaries and important officers in the secretariat, malventeed me that they regarded Israel as a state that should be treated very gently.

### **Prof. Richard Falk:**

Let me first thank the conveners of this event, particularly Ihsan Adel, for brining us together. It is a particular source of satisfaction to be joined with John and Michael in such an occasion. This is, of course, the day of international solidarity with the Palestinian people, and in a sense, it is a very crucial moment in which to emphasize the strategic role of non-governmental solidarity, popular solidarity of people. Because for reasons, John summarized

very well, the intergovernmental structures of diplomacy, as filled through the UN, have proved to be a huge disappointment in the case of Palestine. And I see that they come eventually to play an important role in the dismantling of Apartheid in South Africa. It is, in my view, the greatest challenge to double solidarity that make pressure be exerted over the UN, so that it will be in a sense coerced from below to play a countable role in resolving the Palestinian struggle.

Having said that, I think it is important to recognize that the UN was designed to give primacy to geopolitics. There is no other reason to have conferred a right of veto on the most dangerous and powerful political actors in the world. In a fact, these actors were the five permanent members to the Security Council who were given an exemption from an obligation to respect international law, at least within the framework of the UN. It is not surprising that when an issue is of geopolitical importance to one of the 5P, particularly the US, it would block the UN from implementing international law. This led many people, interested in the progressive role for the UN, to be disappointed and disenchanted with its praise in world politics.

I take somewhat different view of this; I think the UN has shown an incapacity to implement international law when it crashes with geopolitical interest. At the same time, there is a very important level of political engagement, what I call a legitimacy war, which is an authoritative establishment of legal and moral rights. And the UN has played a crucial role in the symbolic politics that has been extremely important in shaping world history since 1945. It has been especially important in relation to the anti-colonial wars, all which have been won by the weaker side militarily.

And why they have been won? Essentially because they were prevailed in the legitimacy war and that was coupled with the mobilization by national resistance that was determinant to pay any price for achieving their rights.

The Palestinian story is in missed with this historical circumstance. In a sense that Palestine was the victim of settler colonialism at the time when colonialism was collapsing all over the world. It was contrary to the flow of history. And because it was contrary to the flow of

history, it evoked both powerful resistance to the imposition of this colonial structure, but also it led Israel to impose what became, from an outset, an Apartheid structure to maintain what they call “security”. In other words, the Apartheid was impeded in the creation of a settler colonial state that was under attack internationally and by regional forces and by the people who were displaced from their own country, from their own homeland. And the original sin of Zionism, in my view, is the establishment of a Jewish state in an extensionally, non-Jewish society.

In this context, that I think recognition of Apartheid as a core crime of Israeli occupation and the decisive obstacle from achieving peace between those two peoples, it is a moment of hope in a sense that this understanding of the Apartheid core in the oppressive relationship has moved from the fringes of Palestinian to become the mainstream understanding of the character of relationship between Israel and the Palestinian People.

I would add in closing that the Israeli recourse to branding its critiques as anti-Semite and now calling the six widely respected and courageous defenders of human rights in the oPts as terrorist organizations, this -in my view- exhibit their moral panic. It is a sign of weakness not a sign of strength. And it shows the Israeli recognition that the path that led South African liberation and the end of Apartheid as a path that Palestinians are beginning to pursue in a way that threatened the Apartheid structures of control that Israel has relied upon and has weakened the unconditional geopolitical support even in the United States that has been accorded to Israel.

When organizations like Human Rights Watch in the US and B’tselem in Israel agree on the core reality of Apartheid, it is no longer can be something excluded from the perception of situation. And so, I find hope in the present situation, but the challenge for the rest of the world is to exhibit a more militant form of solidarity than has existed in the past.

**Prof. Michael Lynk:**

Let me first of all thank the organizers of this wonderful array of forums and speakers who are participating in this whole day event, and I’m honored to be a small part of this.

I listened very closely to what Johan and Richard had said and I myself agree with everything that they've put forth in their remarks. I just want to add few things. From my experiences, the United Nations when it set its very best, was capable of playing a very important and indispensable role regarding the question of Palestine. Let me mention three things with respect to this:

First, it is important that the UN has established a rock-solid right spaced framework, grounded in international law, to both supervise this interval of occupation and for establishing the rights to which the Palestinians are entitled to, starting, obviously, from the right to self-determination.

Secondly, the UN has published many excellent human rights documentations of the many violations committed by Israel during 54-year-old occupation. This is critical, in my view, because the UN has the credibility and the resources to keep an international spotlight on the injustices endured by the Palestinians.

And third, over the years, the UN has provided a vital international political forum, and lately almost the only international forum for the question of Palestine to be regularly raised. The General Assembly has stated that the UN has a permanent responsibility over this question until it is satisfactory resolved in all of its aspects, in order to keep in mind as we dispassionately assess the role of the UN.

But I must add that, in my view, the UN has frequently not act at its very best with regard to discharging the considerable Israeli responsibilities regarding the question of Palestine.

The UN can be on many occasions greater than in some of its parts, particularly with respect to issues like treaty making, with the defining of international problems, demonstrating international law leadership, to find solutions to these deep problems that would be faced as a global community. But the UN can be in other issues much less than these parts. Particularly, one or more influential international actors expressed great opposition to preventing the UN from meaningly address and resolving of important global or regional issues, and Palestine is such an issue.

Why such passivity from the Security Council on this issue? Why is the UN General Assembly continuing to watch with its eyes wide open the continue disappearance of Palestine with such passivity? How else do we evaluate the problem at the very core of this question which is why has this issue persisted unresolved for 74 years, which is almost as old as the UN itself, with absolutely no end in-sight?

### **Dr. Ardi's Comment:**

It seems that one of the issues steams from your remarks is that the UN is a place that might be problematic in terms of options available, say the Security Council, given the primacy of geopolitics, about which Richard has spoken up, that is impeded in the UN Charter system. At the same time, the UN has placed a sight for a potential action, which Richard and Michael mentioned to be the "legitimacy war".

### **Discussion Part:**

**Question 1:** What the specific actions, you think, can be taken in the United Nations to advance the rights of the people of Palestine and finally end the situation of war? For instance, Michael has mentioned in his reports the need to go back to the International Court of Justice for a second advisory opinion on the legality of the continued presence of Israel in the occupied Palestinian territory. John mentioned, for instance, likening the situation and what happened in South Africa to the situation in Palestine. What possibilities are there for the General Assembly to create a new Special Committee on Apartheid, this time focuses on Apartheid by Israel?

**Prof. Dugard:** The open of a Special Committee on Apartheid is a good start. But one must remember that it is for the political organs of the United Nations to take action. While the Security Council is completely humped from taking action by the US veto. I think it is important that the General Assembly should start to flex its muscles. I cannot understand why it does not use its recommendation tool positively. Why does it not recommend on



imposing arms embargo on Israel? Some 15 years ago, I have recommended such action to be taken. It has not been considered yet.

The root of the problem is that Israel is armed by Western powers and is able to commit atrocities in Gaza, in particular, but also other occupied Palestinian territories. And I think it is important that the General Assembly should consider recommending an arms embargo. I think it should also identify Israeli policies as constituting Apartheid. I know that this is a crisis to many western states, but I do think that there is probably a majority in the United Nations General Assembly that would support the labelling of Israel as an Apartheid state.

**Prof. Falk:** I totally agree with what John has just said. I think the empowerment of the General Assembly is something that is called for not only in relation to Palestine, but also in relation to other global issues, including control of nuclear weapons, for instance. But I think that the core obstacle is one of political will. And that is why I emphasize so much on global solidarity that has to be an increased awareness and of more militant activism in order to generate the political will on the part of the non-Western world to amount an effective challenge.

It seems to me that there are a conceptually imaginative ways to achieve that challenge, including analogue to the Uniting for peace resolution which was declared after the Korean war experience. Where the Security Council could not act effectively to impose the charter, there is a positive responsibility on the General Assembly to take action. And I think that could make a significant difference and could lead the non-Western countries to feel that they could play a role in challenging the excesses of geopolitics and taming the abuses to the UN Charter.

**Prof. Lynk:** I see three possibilities for the UN to play a role, particularly located at the UN General Assembly. First of all, is what Richard and John has just mentioned, which is the Uniting for Peace, that was developed in 1950 because the Security Council was hampered by the threat of veto in case of the Korean Question. I don't see why the General Assembly cannot take action to impose arms embargo on Israel through Uniting for Peace resolution,

while the Security Council is paralyzed from taking such action by the ability of the US to bring a veto.

Remember that this occupation for Israel is that of an exceptionally low cost, Israel has decided it can bear the criticism that it sometimes receives from the United Nations as long as that criticism is without consequences. And as long as this continue happening, Israel will take it as means to say that we have freedom to do what we wish with respect to the occupied territories. Only when Israel begins to feel the bite of international sanctions, will there be hope for a change in public opinion in Israel and for the political direction in Israel as well.

The second option is I think the possibility going to the International Court of Justice in the Hague for a second advisory opinion. I think this should be done on the question of whether or not the prolonged occupation has become illegal or not. The international community, and particularly, the West will begin viewing some aspects of the Israeli occupation as illegal, such as the settlements, annexation of the East Jerusalem, or the location of the Wall in the West Bank, but it assumes that the occupation is otherwise lawful. I think that Israel has stood beyond all of the parameters that has been designed by the international humanitarian law and the laws of occupation, and I think it would be an important political as well as legal declaration coming as a request from the General Assembly to the ICJ to ask for an opinion on whether such an occupation has become illegal.

Thirdly, the importance of the General Assembly to show its support through resolutions with regard to the issue of investigations by the officer prosecutor at the International Criminal Court. This is a single most important mean we has today to try to bring Israel accountable. I think that Richard has said that panic that has been shown by Israel in wanting to designate the six Palestinian human rights and humanitarian organizations as terrorist organizations therefore unlawful, comes in part because several of them have been instrumental in bringing forth complaints and evidence to the international criminal court that Israel is in violation of the Rome Statute to the ICC.

These are all the important forms to use, and I think that while I praise the UN General Assembly for passing overwhelmingly resolutions on the situation in Palestine each year, we have to go beyond resolutions and beyond criticism and try to find some meaningful action in support to ending the occupation.

**Question 2:** Clearly more meaningful action is required from the UN General Assembly, but I think you'd all agree that we do not live in the 1960s, 70s, 80s, anymore where there was a groundswell of the anti-colonial, post-colonial age produced to great support for action in support to the Palestinian people and their cause. Take for instance, the recognition that the Palestinian people were genetical people by the United Nations in 1970s, that the PLO is their sole legitimate representative, that they have the right to self-determination, and that this self-determination should be achieved on the occupied Palestinian territory. All these resolutions were produced by the General Assembly through 1970s and 80s, that were very supportive politically to the Palestinians. In the current time, do the Palestinians enjoy the same level of political support in the General Assembly, that goes beyond the resolutions it had passed, simply through inertia?

And if not, what is the role of the civil society? Richard, you have mentioned the need for a more militant civil society, can you flash up to us what do you mean? Is it the BDS movement? What does that look like?

And then Michael just to ask you, if I might, on the ICJ second advisory opinion which you had mentioned through your argument, why is the Israeli occupation or continue presence in the oPts illegal? What is the substance for that?

**Prof. Falk:** I think the BDS is the most visible expression of what I called militant activism on behalf of the Palestinian struggle. If one relates this to the UN, there is an interesting opponent paradox that the UN has stated in one of its resolutions, I think in 1970s, that Zionism is a form of racism. It showed the strength of geopolitical pressure that led to

nonrational withdraw of that resolution by just stating that the previous resolution has been cancelled.

At the same time, as this more authoritative assessment of Israel as not only racist but as guilty of the international crime of Apartheid, coming not from political actors but from respected objective human rights NGOs that have a reputation of leaning in the direction of Israeli legitimacy, at least in its basic sense. Even if B'tselem has been, for instance, critical of several practices, it was within the framework of the legitimacy of the Israeli state. And for Human Rights Watch, which has been associated with rival Zionism. To make this moment, long comprehensive report authenticating the allegations of Apartheid seems to me to be a challenge to the UN, to the General Assembly, to people all over the world, to take seriously the severity of the victimization of Palestinian people. And I'm pointing out John's very instructive writing recently, that in his judgement have been grown up as an opponent of Apartheid in South Africa, that the occurrence in Israel is worse in certain clear aspects than what have been experienced by the majority population in South Africa. And so, it is a moral crisis for the international civil society, the UN, and the International Law generally.

**Prof, Lynk:** I advocate for the importance of turning to the ICJ for a second advisory opinion. This time focusing on the question on whether the Israeli occupation has become illegal. I advocate for this and I said so in a report that I have issued as a Special Rapporteur 4 years ago in October 2017. I said this today, because it is firmly believed that Palestine is foremost a justice issue, and as there are very important political features to it, there are very important legal features to it.

I think because International Law is so on board with the Palestinian request for justice and end of occupation and self-determination that it is important to be able to use that framework of international law and human rights. In my report, I said on law that there are four important features that any occupier has to obey in order for the occupation to be legitimate. Remember that we are in the 21<sup>st</sup> century, where alien rule is an exception and can only be justified as short, temporary and in exceptional circumstances. What I laid out in my report is that there are four things that we draw from the laws of occupation. First of all,

the occupation cannot annex any part of the occupied territory. Second, the occupation must be temporary, and the occupier must try to bring to an end that occupation and return the territory to the sovereignty, which is the people under occupation. The third test with respect to this is the occupier has to act for the best interest of the people under occupation. Fourth test, the occupier has to administer the territory in good faith, including in compliance with international law and in the directions of international community and the United Nations.

When you look at the Israeli occupation, 54 years old into the occupation, the longest occupation in the modern world, it is in violation in each of these four parts of the test. When you think of modern occupations that probably retained their legality. I think about the American occupation of Japan after the second world war, roughly 90 years ago, and the allied occupation of Germany, again roughly 90 years old. When I think with respect to American coalition occupation of Iraq that lasted -at least formally- between 9-10 years, I think that an occupation which lasted for 54 years is turning into a form of conquest. Someone could ask why not turning to the ICJ with the question of Apartheid by Israel. I believe it is an important step but which will need several years to get an assessment of, as there is a need of aligned academic and legal studies on this issue before the court can decide. Therefore, I strongly support the re-establishment of a Special Commission on Apartheid. However, an issue that we can get a positive supporting response in is the question on the legality of the prolonged occupation.

**Question 3:** To John Dugard: You have mentioned that the UN played a successful role in ending the Apartheid in South-West Africa, but this took several decades and four advisory opinions from the ICJ and it was not until the 1990s that the Apartheid fell. What lessons this experience could bring to Palestine?

**Prof. Dugard:** I agree with Michael completely on that the advisory opinion on the legality of occupation and question of Apartheid in the occupied Palestine would be primary helpful. I think its primary purpose would be to delegitimize the Israeli occupation and to make it difficult for Western powers to continue to support Israel. I think it is important under the spine that Western powers tend to promote policies according to human rights

considerations, even if they don't carry this very consideration into practice. But I do think that a strong advisory opinion would be of great assistance.

Let me reiterate that the ICC plays a pivotal role in this whole affair and the international criminal court is not a United Nations body. But I don't see any harm being done if the General Assembly or the United Nations express an opinion that the prosecutor of ICC should take more urgent steps to initiate a prosecution of Israelis responsible of war crimes and crimes against humanity in the occupied Palestine.

The prosecution has taken an inordinate amount of time in order to reach the stage of initiating an actual investigation. Now, embarking on the delay of process for the initiation of the prosecution. I think the General Assembly can endorse the need for more urgent part from the ICC.

Ardi could I just raise another issue which steams from the mention of decolonization by Richard. I think it is very sad that states which have played a crucial role in the decolonization process, African and Asian states, have forsaken Palestine which after all is a colonization issue. The regime in occupied Palestine is not an Apartheid regime but also a colonial regime. Nelson Mandela, when he was set free has said that South Africa will not be liberated until Palestine is also liberated. I find it very strange that there is no initiative on the part of African Union to identify Palestine as a decolonization issue. On the contrary, the African Union has recently grown an observant status to Israel. One needs to discuss the failure of the African-Asian states to identify Palestine as a decolonization issue and to support the liberation of Palestine as it has done with respect to the states during the decolonization era.

**Question 4:** What role third states have on the occupying power and in support to the Palestinian people in line of international law, even domestically?

**Prof. Richard:** This question goes into what the world can do given the inability of the UN to play a role in transforming the situation of the Palestinian people. I think for instance, the US can impose unilaterally an arms embargo which can lead to a dense psychological effect

on other countries and would be a source of pressure that would lead the Israeli to reconsider their political options. In other words, the South African transformational politics provide a very instructive mobilizing for how to proceed in the context of Israel. It was domestic political movements that led the US and the UK against their strategic interests, to impose sanctions, eventually on South Africa, and support the imposition of sanctions. At that time, militant activism focusing on governments of critical countries could be very effective both in itself and in leading the UN to opposition of, or first embarrassment and secondly, responding in such a way as to play its role in a more functional way.

**Question 5:** If I may end with asking a question to Michael: There was the Wall Opinion very one-sided strong opinion that was completely disregarded by Israel with no consequences, is there any more reason to think that a second advisory opinion on the legality of prolonged occupation would be disregarded similarly with the jurisprudential emphasis that this is only advisory, it is not obligatory? I wouldn't hold high expectations that it would change policies being pursued by Israel. It will be a contribution to what I have been calling "the legitimacy war".

**Prof. Lynk:** Basically, I guess what you are asking me if the Palestinian Authority put most of their political weight, which they don't have much of, toward pushing the General Assembly to ask for a second advisory opinion, what change would this bring to Palestinians?

Let me answer this way: the important question of the first advisory opinion put forward in 2003-4 on the legality of building the wall where it was built, which 85% of it was built in the occupied Palestinian territories, was a form of a secondary question with regard to occupation. The value of my proposed question is whether the Israeli occupation is still legal; A) I think there is high odds of getting an answer "No", it is illegal under the law of occupation, but B) that question and ideally that answer, goes at the very heart of what this issue is all about. I think it is a great step forward with respect to pushing for an end of the occupation and for Palestinian self-determination.

I think it is considered a number of times whether at the end of the day you believe in the eventuality of the two-state solution or you say that the two-state solution date has passed,

and we have to work on a one-state democratic solution. No matter where you land on those questions, you have to argue that the occupation must come to an end. And if the occupation is deemed indeed illegal then you go at the heart of the issue and grasp with respect to the issue of legitimacy and the legitimacy debates with regard to this.

With regard to the issue of using national forms to push the issue in question particularly leading Israeli leading, political, administrative, and military figures possibly in breach of war crimes under the Rome Statute. That is an interesting strategy.

On a positive side, we have to point out that a number of states have incorporated the Rome Statute into its domestic laws, including my own country of Canada. And at the very heart of what could be considered as a war crime under the Rome Statute are settlements which every state, that has incorporated the Rome Statute into its domestic legislation, has kept all the definitions of war crimes including settlements in occupied territories into their domestic legislation.

The challenge is that countries are often careful, I'm particularly talking about Canada and Europe, in putting filters when they incorporated the Rome Statute into their domestic legislation to ensure that an action could not go forth unless it first received the approval of attorney general of the country, and that always has been a problem. Because it provides a political filter by which to protect Israel against the consequences of its own actions. While I'm very much in favor of turning to domestic laws, however, I think that this must be done very carefully and very strategically.

**Prof. Dugard:** I would like to make two points. First of all, on the 7<sup>th</sup> of December an important decision will be taken by the Appeal court in the Hague in a case brought by the *Palestinian Mr. Saeda vs. Present Israeli Minister of Defense Benny Gantz*. He claims and argues that Benny Gantz while he was generally in charge over operation protective edge, which is responsible for killing his family in Gaza. Mr. Saeda is a Dutch citizen, so the court has jurisdiction. Mr. Gantz raised the question of immunity arguing that as an Israeli senior official and now Minister of Defense, is entitled to immunity. The court shall pronounce on that issue on 7<sup>th</sup> of December.



Returning to Michael's idea of the importance of an Advisory Opinion, the 2004 Advisory Opinion has failed not only because the states failed to carry out and give due consideration to the opinion which was advisory at the end, but the UN Secretary General and the Secretariat had also failed to lead the UN in that respect. It is also important to stress that in 2004, the Deputy Legal Advisor of the Legal Affairs in the United Nations, gave an opinion, which I find extraordinary, in which he advised the Secretary General that he was under no obligation to give effect in anyway to the Advisory Opinion.

So, to a large extent, the deputy council of the legal affairs was also responsible for not acting on the advisory opinion results. This decision of the UN officials passed unnoticeably. Therefore, I believe that it is important to bring the Secretariat officials on board.

**Question 6:** I have recently read an article in the European Journal of International Law that argues that if second advisory opinion is happened and determines that Israeli's existence in the oPt is illegal as such, a law on state responsibility requires the Israeli to end the occupation forthwith and unconditionally. This goes undermining what I call "the negotiations condition". There is a universal position held at the UN that the only way to end an occupation is through bilateral or multilateral negotiations between the occupied powers, the powerful bodies operating in bad faith, and the Palestinian people who are living underfoot of the occupying power and who has no power whatsoever. So, the power balance between them at the negotiations table, even if there were negotiations, would not necessarily produce an actuatable result. What your views on the issue of negotiations imposed by the United Nations and universally on the parties of this conflict?

**Prof. Lynk:** What the decolonization era from 1945 onward has taught us is that virtually every situation where people under colonialism were negotiating for an end to their subordinate status, they were not negotiating over specific terms of much longer time for occupation or the powers that the occupying powers will remain to have in their country. They were negotiating simply for the complete end of occupation. There have been very few exceptions to this in the modern world.

The only exceptions I can think of are two: First, in respect to Ireland: the negotiations are led to the continuation of British rule over Northern Ireland, which interestingly drew inspiration from the Oslo negotiations that begin in 1991 and continued through the 1993 declaration of principles.

This leads me to the second point is that what has happened in respect to Palestine over the last thirty years in Madrid process started thirty years ago is over how much Israel is going to be able to continue with its annexation of lands, its continuation sum of the settlements, its continuation with holding over most of Jerusalem. This all tells me that the whole framework of *realpolitik*, is yesterday's playbook. There have been several recent very insightful records that are coming, one of them is earlier this year from the Carnegie Endowment for International Peace which said that the diplomatic *realpolitik* playbook which have been used up until now with a great series of failures has to be replaced by a rights-based framework. In a rights-based framework, with use of framework of international law and of UN resolutions, make me able to say that when they set down again with first of all the supervision of international community it will be to end completely the Israeli occupation not to negotiate how much Israel could retain with respect to that. That has to be consistent with the entire era of decolonization of the last 75 years.

**Prof. Falk:** I remember that in the course of the Oslo Diplomacy, Palestinians were advised informally by the US government not to raise international law issues. For instance, pertaining to the illegality of settlements. Because this would disrupt the negotiating process. It is just the opposite of what Michael has proposed.

In other words, the Palestinians were told; well, wait till the final stages of negotiations come about, then you raise your grievances under international law. But, of course, Israel had no intention to get to the final stages of negotiations and it used the process as a way of gaining time to expand the settlements and essentially can make withdraw -if not impossible- much more problematic with hundreds of thousands of settlers to persuade to leave the settlements or to force to leave the settlements. So, I think it is extremely important to understand that a rights-based framework of diplomacy is a precondition for meaningful

negotiations leading to a sustainable peace. But it is even that is somewhat problematic without a geopolitical shift away from the unconditional support for Israel as a Jewish state operating within an Apartheid structure. You could have again a situation where the negotiations need some provisional conclusions and Israel would completely ignore them supported de facto by the United States and maybe the EU. So, it takes more than international law and rights-based framework to change the political equation, in my view. That's why I come back to militant activism as an essential compliment to the emphasis on empowering the General Assembly or seeking law-based solutions either domestically or internationally.

**Prof. Dugard:** of course, the insistence of the European states or the United States that the future of Palestine can only be resolved by means of negotiations between the two states, Palestine and Israel is completely ridiculous. I think the Oslo process you recall that, what Richard rightly pointed out, that Palestinians were persuaded to go into the negotiations without proper legal advise, and without any real international lawyers to advise them. Whereas the government of Israel has been advised and led by its legal team completely. So, I think one must realize that you cannot conduct negotiations between one dominant power on the one hand and one weak on the other. Negotiations have to be carried out with an honest broker. And I think it is generally agreed that the United States is not the honest broker in this process. So, the United Nations have to appoint some other body in order to ensure that negotiations are fair. On the same time, negotiations must be premised on the understanding and due respect to international law. For instance, the Fourth Geneva Convention prohibits annexation and the hand on of an occupied land to the occupying power. And so, this idea of land swaps is not something that should be on the table in any negotiations. One has to insist on fair negotiations based on respect for international law.

## Q & A Section:

### Question from Francesca Albanese:

-Are there any General Assembly member states that you see potentially eager to propose and impose sanctions against Israel? And What is your advise to NGOs and other community based organizations for trying to carry that accountability agenda forward?

**Prof. Dugard:** South Africa might be one of the states that can carry on that issue. South Africa was one of the states to condemn the classification of the six organizations as terrorist organizations. Of course, South Africa has suffered from Apartheid, and it knows Apartheid when it sees it. But one state is not enough, and this is where I think it is important that the former colonial states join South Africa in its insisting on UN action.

**Prof. Lynk:** It maybe that this shall require strategic decisions from the Palestinian Authority itself. I think that many states from South Africa to Asian former colonialized countries as well as non-governmental organizations, movements and civil society are in many ways probably thirsty to have a clear direction from the Palestinian Leadership where they should be going.

Is a two-state solution still a viable aspiration for Palestinians to follow? Yes, Palestinians should and has right to demand it under occupation. But whether that would lead to a genuine two-state solution in current and foreseeable circumstances is something else. And I think that in some ways there hasn't been a kind of strategic vision that civil society can rally around and that many member states and international allies to Palestinians can rally around. So, for all the things we can ask from the international community that sympathetic to the Question of Palestine, there needs to be a new direction for the Palestinians that puts ways forward in a very same way that through the 1970s and 1980s that ANC provided a clear strategic direction for the world on isolating South Africa. But also visiting what kind of post-Apartheid society it was interested in wanting to create. That -I think- appealed to the inspirations of many to wanting to be a part of the struggle to bring it to an end of Apartheid. Can the Palestinian Leadership also bring that kind of strategic aspiration as well?

**Prof. Falk:** One of the sources of the failure and disappointment with the Palestinian struggle has been the absence of unified and effective leadership. And to some extent, the PA leadership has been co-opted by Israel and the US in playing a collaborative role and depending on the financial flows that are subject to Israeli and the US control. Partly, what have contributed to the fragmentation of Palestinian leadership is terrorizing Hamas, even after it has entered the political process, as a terrorist organization, making it difficult for other countries to follow.

The important point I think with regard my experience in the UN is that most government delegations will not be moved to act especially in controversial areas, unless the affected political authority pushes very hard. And the Palestinian leadership has not pushed very hard.

In fact, they have taken -in some context- positions that were deliberately moderating what could have been a more challenging set of initiatives. And I refer particularly to the way in which Palestinian authority has helped with the marginalization of Goldstone report at the Operation Cast Lead. And further the way in which the Palestinian authority weakened several General Assembly resolutions during my term. As a Special Rapporteur, I had to be very friendly with the President of the General Assembly during that period, the former Nicaraguan Foreign Minister, who was sympathetic with the Palestinian cause, and he constantly had to defend his more militant positions against the Palestinian Authority who was arguing for not upsetting the Europeans and not displeasing Washington. So, the Problem of Palestinian leadership is quite central to what we have been talking about.

**Question from Susan Akram:**

In all your experiences as Special Rapporteurs on the oPt, could you share your observations about the extent to which you believe your reporting to the UN has pushed the envelope in putting pressure on states to re-examine their support for what is happening on the ground and their support for Israel?

**Prof. Dugard:** I have one major success and that was on the Wall. In 2003, I started to report on the construction of the wall that was taken by states and by the General Assembly and by the Palestinian Ambassador and ultimately the Advisory Opinion was requested. But that the only occasion in which I felt that I have achieved anything. On other occasions, I was labelled by many European delegates as being part of the problem and not part of the solution, and I think it is a problem that Richard and Michael has also experienced.

**Prof. Falk:** Yes, I certainly experienced that same problem, and I would say though that the success of the reports in my period I would measure mainly by influencing a little bit the discourse that have been in the UN, that became somewhat more acceptable to talk about colonialism and Apartheid in the context of the Israel-Palestine struggle. John started this process in his final report, and I continued to stress these issues and I think the discourse is influential principally in established NGO and civil society groups. I found a number of important civil society organizations rely on these reports to their informational and normative basis for taking action. I have a couple of experiences, one with the Brazilian government, in which the Prime Minister told me that they relied very much on our reports in order to shape their policy toward Palestine. And that happened two to three times in my 6-years.

**Prof. Lynk:** Regarding my reports, I got a confess that I'm a great gardener and I always believed in the idea that what you plant would blossom later on.

I see that with respect to my reports. Particularly my October 2017 report advocating for a second advisory opinion, and I think that there is gathering forces that are paying much closer attention to the idea that going for a second advisory opinion has a lot of strategic and legal sense to it. But I also say, I think our reports have a lot of importance in themselves. Because I think that they reflect some of the very best UN thinking. I have spoken to a number of UN officers who work closely on the issue of Israel and Palestine, and they will say things to me that they don't say in their reports, as they face their own bounders, but are glad to see that there is an outlet within the UN system where these things can be said. And as well, I frequently rely upon civil society for their advocacy and for the quality of their own

reports and those are reflected, I guess, in cheating my own thinking and my own writing in these particular reports. So, I think, they are grateful for that. That they find these great expressions for the positions that they want taking and find a voice through the UN Special Rapporteur. So, I see lots of sense and lots of value in the kinds of reports that I've done and certainly I'm standing on the shoulders of giants in respect to the reporting that have John and Richard done before me.

### **Question concerning Palestine Statehood:**

There are some people who believe that the juridical existence of a Palestinian state in West Bank and the Gaza Strip is mere symbolism. That this state, because it is under occupation and not truly free, only perpetuates more of a problem than bringing with it some form of solution. I wonder what your thoughts are on the value of Palestine as a state in international legal order. And in particular of the important moves of the ICC in this regard and possibly the ICJ giving the events go there?

**Prof. Dugard:** I am proponent of a Palestinian statehood. I think this thing should has certain distinct advantages and I'm pleased that the ICC has recognized its existence of a Palestinian state, be it only in the context of the ICC. The matter is still before the ICJ. I do think it is important that Palestinian statehood become recognized because until that happens, Palestine will not be taken seriously.

**Prof. Falk:** The ability to participate in international society depends in achieving the status of statehood. So, access to the ICC is extremely important and the ability to participate in treaty making frameworks and secondary institutions of UN itself like UNESCO, and having more status in relation to General Assembly is important symbolically and substantively.

I think that there are certain disadvantages that appointed to the question. There is no doubt it doesn't seem like a state in relation to its domestic reality. Because it acts somewhat independently internationally but it is completely paralyzed with respect of its internal reality.

**Prof. Lynk:** I associate myself entirely with what Richard and John said in this regard.

**Question:** A number of participants are asking about the impact of Abraham Accords. Any views on the move by Israel and other members of the Arab world to sort of create relations? And what the impact of those types of reports on the situation going forward?

**Prof. Falk:** I think that the Abraham Accords first of all has to be seen as opportunistic arrangements that gave the incentives to normalize relations with Israel during the Trump era and beyond, with Biden as well. And is part of an attempt in the region to create an anti-Irani coalition. It gave several countries weapons, prequirtments that they desired. In Morocco state, it resulted in a unilateral declaration by the US government that it supported Moroccan claims in Western Sahara territorial sovereignty, which is -of course- legally irrelevant, but geopolitically significant.

And generally, it should be understood that these regimes in the region don't speak for the public. These authoritarian regimes opportunistically relating to their autonomic and political interest in survival and shaping the region according to their own special interest. So, I think it is a very shapy from Israel's point of view. As, the UAE has recently indicated a variance from what Israel expected by its overturns to Turkey, for instance. So, it is a complicated story, and it is part of Trump's one-sided sight of the region riding these governments into this relation.

It is partially also because these regimes see the Palestinian struggle as of a large cost. That is the most damaging perhaps from the Palestinian point of view. That this is possible because they see it as a lot of cost, they see their domestic control as sufficiently unchallengeable, that they can ignore their own public opinion. Because the public opinion of the Arab world continues to overwhelmingly support the Palestinian struggle. So, it is revealing in a number of ways, and I touched just upon a few.

**Prof. Lynk:** I think the test is do something like an Abraham Accords bring an end to the occupation and the realization of Palestinian self-determination closer or does it push it further away. That is where you have to ask yourself, and I think it is undisputable the way that Israel treats the Abraham Accords is a legitimization over the occupied territories. And it is a further listening to the international pressure and spotlight on the injustices of the



occupation. I see no evidence over the last year and a half that the Abraham Accords have done anything but assist Israel in consolidating its *de facto* annexation of the occupied territories.

**Prof. Dugard:** Richard has framed the Abraham Accords as part of the Trump legacy, but it is important to remember that part of the Trump legacy is the relocation of the US Embassy from Tel Aviv to Jerusalem. And it is sad to note that the Biden Administration continued these decisions on the part of the Trump Administration. To large extent, this simply compares to my views that the United States cannot be considered to be capable of becoming an honest broker in any peace process.

## **Closing remarks:**

**Dr.Ardi:**

In his 1993 monograph representations of the intellectual Edward Said wrote that Palestine is an issue:

*“where fear of speaking out about one of the greatest injustices in modern history has hobbled, blinkered, muzzled many who know the truth and are in a position to serve it. or despite the abuse and vilification that any outspoken supporter of Palestinian rights and self-determination earns for him or herself, the truth deserves to be spoken, represented by an unafraid and compassionate intellectual”.*

I think that you would agree with me that our three panelists are perfect embodiments of the unafraid and compassionate intellectuals of which Professor Said spoke.

We thank each of you, John, Richard and Michael for providing examples of what it means to be an engaged scholar in the world, striving to speak truth to power and placing trails for all to follow to create more just and peaceful reality, including for the people of Palestine.

Whatever criticism the United Nations may reasonably be subjected to. The collective body of work of independent experts for the UN, stands testaments to its continued value and importance.

What is equally true, however, is that that value will only be fully realized if men and women of their convection and character dare to take up the challenge your individual and collective legacies leave us with. I have every confidence that that challenge will be met.

With that said, I think the organizers of this conference have a [special presentation to make](#), so I hand it over to Michael to share a word or two before we then pass over to Ihsan Adel.