Jurists For Palestine Forum

Summary of the Webinar on:

Economic Responsibility of Third-Party States Arising from the ICJ Advisory Opinion on Palestine

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Speakers:

- **Tara Van Ho**: University of Essex Law School
- **Dr. Shahd Hammori**: Kent University
- **Lara Elborno**: International Arbitration Lawyer
- **Kinda Mohamadieh**: Third World Network
- **Mark Taylor**: Author of War Economies and International Law

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Speakers' Discussion

Dr. Shahd Hammouri on Palestinian Self-Determination, Decolonization, and Economic Responsibility

- The moment the advisory opinion came out in July last year, we were faced with the question of how it is that we take this forward. The starting thoughts behind this panel came when we wanted to have a reading of this decision that is Palestinian-led, that talks to the ethos of how we envision the future of Palestine, as well as a global South-led reading of the court's decision. Herein, I will provide the primary premise for how we started to think about this collectively, and how we can envision this.
- The argument that I will put forth is quite simple. It is that Palestinian self-determination is inherently decolonization. That is the premise for envisioning the way forward. Though that may seem like a pretty straightforward premise. However, sadly, the world that we live in has worked through colonial erasure, as well as the erasure of the experiences of the global South, in order to deem such a logical conclusion actually quite absent. How building on this premise and the way to envision going forward, we can talk about third state economic responsibility, as well as the UN General Assembly resolution.
- So, to begin with, the court has given us quite a strong decision, in the sense that it has told us that Israel violated at least three Jus Cogens norms in international law. And that means peremptory norms of international law, which means that this is the highest level of rules in the international legal system.
- Why? Because the violation of the prohibition against aggression, the prohibition against racial discrimination and apartheid, as well as the protection of the people's right of self-determination. What do we have when we look at that from a holistic perspective? It is indeed the image that Palestinians have talked about since 1948. It's a typical image of what is called in law alien domination and subjugation, colonization in short.
- So, once we perceive this case as a case of classic act of colonization, the materiality of what is happening here extends beyond 1967. And the legal premise for that is Israel's violation of the people's right of return.

- It is important to recall that one of the conditions for the acceptance of the state of Israel in the United Nations was the recognition of the Palestinian right of return. So here we are talking about an accumulated international wrongdoing by not recognizing the people's right of return, adding to that the accumulated wrongdoing of not paying reparations, adding to that of course the apartheid system that Israel has instilled against Palestinians within its own borders.
- Herein, we understand decolonization as inhibiting the whole of what is known as historic Palestine. So, my premise here finds support in both the separate opinions of judges Iqsou and judge Youssef, who perceive of Palestinian self-determination as decolonization, seeking to envision it on that premise.
- Meanwhile, it is very well known that the envisioning of the right of self-determination in international legal scholarship is indeed limited, to say the least. There is a poverty in our imagination of the right of self-determination. And why is that? It is because of the erasure of the experiences of states of the global South. It is simply because these stories are not told. To think that statehood or democratic or institutional democracy are the end goal of self-determination in a context of colonization is false.
- In short, the experience of post-colonial states has shown us that claiming independence honestly means nothing. Indeed, this Western-led imagination of the right of self-determination has led states of the global South to be stuck in what can only be called a perpetual process, rather than unleashing the substance of self-determination.
- Herein, if we look at founding documents such as the Algiers Charter, we find that the right of self-determination is inherently premised on non-exploitation, non-domination, as well as the right of return. To establish a legal and institutional system that enshrines within its constitutional values not to dominate these people and also not to economically exploit them.
- That is indeed the lesson learned from the experiences of the Global South. Herein, to speak about Palestine, the relevant precedents are Angola, South Africa, Namibia, Zimbabwe, Algeria. We need a harmonized reading of international law, which gives value to prior General Assembly resolutions. As recalled by Mohammed Bajawi, UN General Assembly resolutions are an important space for the expression of positions of states of the Global South.

- Actually, a critical reading of it tries to give more weight to UN General Assembly resolutions in international legal making. So here I move on to the more solid question. What are the questions that we need to ask in order to envision third state responsibility once we establish Palestinian self-determination as decolonization? So as noted by Wissam, the first layer that the court has told us about, which is to suspend all economic activity where Israel purports to be acting on behalf of the occupied Palestinian territory.
- How can we take this forward? Some would like to only limit that to economic activity that has to do with the settlements. That is indeed the most reductive and harmful reading that one could have. We're not talking only about the settlements here. And actually, as an economic exercise, it is almost impossible to differentiate between the Palestinian economy and the Israeli economy due to their co-dependence. And we will be publishing a study soon to that end.
- There is a lack of information as to how each of the economies are connected. This is again a very typical case of dependency in the context of colonization. It is impossible to disentangle the two economies. Herein, if we are to only follow that as our way forward, we would be stuck in institutional mediocrity, not what is needed for such a context of extremity.
- Another way to look at it is to look at the second layer pushed forth by the court, where it said that states need to undertake efforts to prevent trade or investment relations that assist the maintenance of the illegal situation created by Israel in the occupied Palestinian territory.
- So, what do we mean by such acts? So here what I'm proposing is, the way forward is to start by the question of what is the purpose of third state responsibility here? Ending colonization and protecting the Palestinian people. Herein, the main way forward is by economic restrictions on the perpetuating states. And here I recall the wording of the UN General Assembly resolution in 1982 where it talked about Israel and said that states have the duty to cease forthwith individually and collectively all dealings with Israel in order to isolate it in all fields. Which means going forward and here I am quoting the General Assembly, deploring any political, economic, military, technology support to Israel that encourages Israel in committing acts of aggression and perpetuating its economy.
- So, away from only the duty to prevent genocide, based on this reading, we have a way to assert that third states have a duty to impose a three-way arms embargo on Israel, energy

embargo on Israel, focusing on the technology industry, finance industry, and starting with the question of what leverage does each state have towards stopping or isolating the Israeli war economy. And that is the only way forward.

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Dr. Kinda Mohamadieh on Trade Law and State Obligations in implementing Economic Measures against Violations

- In light of the ICJ advisory opinion, we wanted to look at the legal framework that would be applicable to trade measures by third states in relation to Israel. Our work clearly points towards the two results that we can come to. One is that comprehensive trade measures against Israel are not only permitted but are required in order for third states to fulfill their obligations under international law following from the ICJ advisory opinion that confirmed Israel's overall presence in the occupied Palestinian territory as unlawful, including because of the frustration of the Palestinian people's right to self-determination. The second point we come to is that trade law provides the legal basis to undertake such comprehensive trade measures while remaining obligations under WTO law.
- So, in this light, states are compelled to act individually and collectively, such as under the umbrella of the WTO and under other relevant regional and international organizations where they participate as member states. And to unpack this, I would like to speak to three issues. One, the basis for third states legal obligations. Second, what WTO law specifically provides for. And third, the scope of trade measures that also Shahd started to tackle.
- In regards to third state obligations, given the ICJ's affirmation that Israel is breaching peremptory norms of international law and the ICJ's emphasis on the *erga omnes* character of the breached obligations. The legal framework supporting third states' actions, including in relation to trade, rests on two primary pillars under the law of states' international responsibility. Basically, here we need to be looking at Articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts. On responsibility of states for internationally wrongful acts.
- And here we have two considerations. One, that states have a positive obligation to cooperate to end these serious breaches of peremptory norms. And this obligation applies to states whether or not they are individually affected. And the second important thing is

that there is no specification of the form of this cooperation. So, it could occur under the UN or other arrangements, including ad hoc arrangements by groups of states. And in the context of trade, we would see that the action under the WTO is an important step that states should consider.

- Now when it comes to the obligation not to recognize as lawful a situation, the situation created by the breach and not to aid and assist in maintaining the situation, which is the second pillar for the third state's obligation, this extends beyond aiding and assisting in committing the serious breach. It is about maintaining the situation resulting from the breach. And in the previous practice, such as in relation to apartheid, the UN General Assembly was clear in affirming that continued trade relations with the state committing the grave violations would assist this state in defying the world opinion, in aggravating the danger of violent conflict, and in nullifying the efforts of the UN to solve the problem.
- So, in this context, we see that this obligation provides a basis for states to legitimately avoid all types of normalized international cooperation with Israel. Now, trade measures, as mentioned, have been covered under the General Assembly resolution of September 2024, which basically have translated the ICJ opinion into practical actions or what the ICJ referred to as precise modalities required to end the illegality of Israel, but also were covered under the opinions of the UN Human Rights experts and the opinion of the UN Independent International Commission of Inquiry that came after the ICJ advisory opinion. And it's important here to underline that the way the General Assembly resolution and the UN experts and the Commission of Inquiry approached this, they indicated that the economic relations concerned here should include relations that could pose a risk of contributing to the unlawful presence and to pose a risk of contributing to the maintenance of the unlawful situation and they definitely indicated that these economic relations we're talking about go beyond the dealings with the illegal settlements.
- Now, what does WTO law say? WTO law already incorporates bases allowing states to take such exceptional trade measures, particularly if we look at Article 21C under the General Agreement on Tariffs and Trade, which is also replicated under other WTO agreements, it provides an exception allowing states to undertake measures to pursue their obligations under the United Nations Charter for the Maintenance of Peace and Security. And so basically it allows them to pursue measures despite these measures being unlawful in normal circumstances. So, and here just to indicate that most third states trade relations

with Israel are governed by WTO rules. Some might have additional free trade agreements or other arrangements, but these would be additional to what is provided under WTO law. And most of free trade agreements would replicate the exceptions that I will be discussing today.

- So basically, this exception under WTO law is a realization already incorporated in the architecture of WTO rules that sets the hierarchy between states obligations under the UN Charter and those under WTO law. And very particular to 21C is its wording. It sets a broad rather than a strict correlation between the measure taken and the set objective. So, it does not require, unlike other parts of this exception, a necessity test, for example. And thus, we would argue that it would allow states to undertake broad trade measures in pursuance of fulfilling their obligations arising from or in the context or as a result of Israel's illegality. And in the history of practice under the GATT, basically preceding the establishment of the WTO, this exception which existed at that time was already used in relation to implementation of UN resolutions.
- The last issue I want to address is giving additional justifications to what Shahd addressed to why we need to be talking about comprehensive measures rather than measures focused on the illegal settlements. One point is that is arising from the systemic nature of Israel's prolonged violations. The ICJ advisory opinion was clear that the scope of the obligation not to assist in maintaining the illegal presence of Israel is broader than the mere assistance in maintaining the settlements. The other point that we need to consider is the entrenched integration of the Israeli economy with the occupied Palestinian territory. And here there's a lot that could be said. One is that the role of Israel as an occupying power cannot be understood as an act isolated from the overall operations of the Israeli state and the Israeli economy. Also, that Israel's practices and policies and laws overall create the conditions for facilitating the exploitation of the Palestinian economy, which in turn benefits this exploitation of the Palestinian economy in turn benefits the overall broader Israeli economy.
- And it's very interesting that in 2022 UNCTAD released a report that studied how the Israeli economy benefits from Israel's role as an occupying power and as such from the resources it extracts from the occupied Palestinian territory and the Palestinian people. And in addition to that, the illegal settlements.

- In addition to that, the illegal settlements are in permanent state of expansion. So, their boundaries in relation to the rest of the occupied Palestinian territory is not static, which basically undermines the attempts to organize business relations, including trade and investment relations, in a way that respects the obligation to differentiate between the dealings with Israel and the dealings with the occupied Palestinian territory.

Lara Elborno on the Role of Bilateral Investment Treaties and the Challenges and Opportunities for Accountability

- Today I'll be speaking about how states' implementation of the advisory opinion may affect the international investment law framework, in particular Israel's bilateral investment treaties and other treaties with investment provisions which Israel has concluded with third states. So, the first question is what should happen to Israel's bilateral investment treaties, I will be referring to them as BITs in this presentation.
- Based on the publicly available information on UNCTAD's website, it appears that Israel maintains a total of 36 BITs and nine other treaties with investment provisions which are in force. For example, Israel has concluded BITs with the Philippines, UAE, Japan, Azerbaijan, Guatemala, Serbia, Armenia, Cyprus, Turkey, Albania, Kazakhstan and China.
- For those who may not be familiar with these types of agreements, essentially, they are treaties which aim to encourage and protect investments made by investors from one state in the territory of another state. In particular, these treaties contain substantive provisions ensuring, for example, that such investments would be entitled to fair and equitable treatment and shall not be expropriated.
- These treaties also contain an investor state dispute resolution clause which allow investors from one state to sue the other state for reparations including restitution and compensation before an international arbitral tribunal in the event that the state where the investment is made through its acts or emissions breaches the substantive guarantees provided for in the investment treaty.
- So for example, under the Israel-Japan BIT, Israel agrees to protect Japanese investments in the territory of Israel and Japan agrees to protect Israeli investments in Japanese territory. Furthermore, investors from Japan can sue Israel if Israel mistreats Japanese

investments in breach of the treaty and investors from Israel can sue Japan if Japan mistreats Israeli investments in breach of the treaty.

- If we look back at the ICJ's advisory opinion, we see that the court, when spelling out the legal duties of states as it relates to Israel's unlawful presence in the oPt decided that states have a duty not to recognize as lawful the existence and continuation of Israel's illegal presence in the oPt.
- In explaining what that means, the court has enumerated three key obligations of states as it concerns economic and investment relations.
    - The first is an obligation to abstain from treaty relations with Israel where Israel is acting as though the OPT forms part of its territory.
    - The second is an obligation to abstain from economic dealings with Israel concerning the OPT which may entrench Israel's unlawful presence in the OPT.
    - The third is an obligation to take steps to prevent investment relations that assist in the maintenance of the illegal situation created by Israel and the OPT.
- So what does that mean in practice and in particular as it concerns Israel's investment treaties?
    - In analyzing the legal consequences of the advisory opinion's language, Professor Wilde prepared a legal opinion at the request of the Hague and in that legal opinion he put forward the argument that in order to comply with the court's requirements, third states in the EU must adopt a complete reciprocal trade including arms, finance, investment, scientific, technological, audiovisual, cultural, educational, and sporting embargo against Israel. And he explained that states must prohibit all trade, including in arms, investment, and any other forms of financing, technology transfer, and the provision of charitable support with the Israeli state and Israeli entities, including universities.
    - Professor Wilde's analysis in support of a total embargo on third state relations with Israel is rooted in the factual reality that as he says, "the economic dimensions of the Israeli presence in the OPT are inextricably linked to the Israeli economy generally", meaning that all economic and trade dealings with Israel concern in one way or another all parts of the OPT and all such dealings may entrench the presence. So, if we follow Professor Wild's analysis, that would support the conclusion that investment treaties with Israel should be terminated and that

states should take further affirmative steps to ban investment by its nationals and corporations with the Israeli state or Israeli entities.

- I'd like to consider just what the practical consequences of a state's termination of its investment treaties with Israel would lead to. And as a general matter, I've identified three main consequences.
    1. In the first instance, termination would close the door on claims for compensation by Israeli investors in the territory of states with whom Israel has signed BITs against those states arising out of such states' treatment of their investments. Israeli investors have previously brought a few cases under BITs to two third states. In some cases, they've been successful and they've received awards for compensation. In some cases, they have not. There are currently a number of pending cases as well. In the event of termination, pending cases would not be affected, but the effect of termination would be to make it such that investments made prior to notification of termination would continue to be protected for typically 10 years under what is called a sunset clause that is contained in many of these BITs. Investors could conceivably continue to bring claims for years to come in any event.
    2. The second consequence is that termination would also close the door on possible claims for compensation against Israel by foreign investors with the nationality of one of the states with whom Israel has signed an investment treaty. As far as I know, Israel has never been sued by a foreign investor under its BITs, but this possibility exists because of the existence of the BITs.
    3. The third possible consequence of termination is that termination would also close the door on possible claims for compensation against Israel by foreign investors with the nationality of one of the states with whom Israel has signed an investment treaty, and this may include Palestinians with such nationalities, arising out of Israel's treatment of the investment in the OPT. Now you may be wondering here how an investor in the oPt could theoretically sue Israel on the basis of an Israeli BIT. And although I don't believe that this particular scenario has been tested before an arbitral tribunal, we can draw inspiration from a number of cases for compensation that were filed against Russia by Ukrainian investors under the Russia-Ukraine BIT for investments

made in Ukrainian territory annexed by Russia to envisage how similar claims could be brought by claimants with the nationality of one of the states with whom Israel has a BIT against Israel for its acts and emissions against investments in the oPt in violation of BITs.

- You can, for example, imagine that there may be any number of individuals or entities who invested in the oPt for the benefit of Palestinians and whose investments were destroyed through Israel's acts and emissions. And I just want to make a point here that the extent to which such a claim will be successful will depend on whether the claimant in that case can overcome the jurisdictional hurdles. In particular, the main one is going to be with respect to the fact that it has made an investment in the territory of Israel.
- Now territory is typically defined under these BITs and in some cases with the Israeli BITs, it refers to territory over which Israel exercises jurisdiction. So here the argument would be that Israel's BITs should apply to an investment in the OPT because Israel exercises jurisdiction over the OPT irrespective of whether that jurisdiction is exercised lawfully or not. And when you look at the cases brought under the basis of the Russia and Ukraine BIT, you see that this is a type of analysis that was accepted. In 2017, we had decisions on jurisdiction in the cases of Belbek v. Russia and Private Bank v. Russia, and in those cases the tribunals found that the Russia-Ukraine BIT was applicable to territory regarded as illegally occupied by the international community. And I can speak more about this in the question and answer, but I just want to say here that if we accept that the consequences of termination of Israeli BITs would be to close the doors on claims against Israel and also third states brought by Israeli investors.

- One of the additional questions which I think arises to test whether termination may actually be necessary in this case to ensure compliance with the advisory opinion is whether termination would drive foreign investors away from investing in Israel. And the evidence I'm aware of suggests that this may not be the case. In

the literature, the nexus between the existence and the amount of foreign direct investment in a state and the existence of a BIT regime is not well established.

- In 2009, Carl Savant and Lisa Sachs wrote in their Oxford chapter entitled The Impact of Foreign Direct Investment on BITs that the influence of BITs on FDI is weak, especially in redirecting the share of FDI flowing from or to BIT signatory countries. In fact, there's even data which shows that countries which have terminated BITs, for example, Ecuador, Bolivia, South Africa, Indonesia, and India, in those cases, investment flows from former BIT partner countries were more likely to increase rather than decrease after BIT termination. So, whether Israel will suffer from decreased foreign direct investment in connection with eventual termination of its investment treaties, I think, is an open question. Moreover, Israel can continue to provide incentives to foreign investors through its national laws to continue to drive FDI as it does. I want to be clear that I think the inextricability argument that put forward by Professor Wild is compelling especially as it concerns economic and trade agreements when we consider the very broad language used by the court.
- But I think that with respect to the specific and narrow case of the bilateral investment treaties, given that there's no reason to believe that termination would have impact on driving investment away from Israel, much less driving away investment that assists in the maintenance of the illegal situation created by Israel and the OPT, I think it's possible that termination of Israel's BITs may end up being only symbolic, as opposed to a means for ensuring states' compliance with the advisory opinion, and it may have the unwanted consequence of closing the door to claims by investors in the OPT, including Palestinians, with the nationality of the state with which Israel has a BIT. And I think that's something that is currently unexplored, and we should certainly consider the possibility that these types of claims could be made.
- Finally, in closing, I'll just say whether or not states decide to apply a total embargo, which includes terminating BITs with Israel, I think there's good reason to consider that termination of other agreements pertaining to trade arms energy with Israel should be higher priority for action by states seeking to comply.

Mark Taylor on Sanctions and their Strategic use in International Law

- I need to start with a disclaimer because I'm a public servant. I'm an employee of the government here in Norway. I don't do anything in relation to Palestine, but I need to state that nothing I say here is in any way a reflection of government policy or the policy of the agency I work for. It's just me in my private capacity as somebody who's studied and has written on the issue of international legal regulation of war economies.
- So I'm going to try and do three things:

    1. Sketch outlines of sanctions as an area of law so that our audience leaves with a bit of a sense of how these things work, how they play out.

    2. Point to the precedent for the use of sanctions, building on the previous presentations which laid the legal foundation under international law for why states would be imposing sanctions as a form of enforcement.

    3. Suggest a strategic approach or a way of thinking strategically about building a case for sanctions against Israel.

- And I will, if I have time at the end, give a few less well-informed words about anti-boycott legislation.
- Sanctions are legal measures that impose economic costs on designated targets, which can be countries or entire economies, organizations or networks, or individuals. There is a distinction in the literature between old-style comprehensive sanctions that affect entire countries or economies, versus targeted sanctions focused on individuals or organizations. Sanctions can also be national or unilateral (e.g., comprehensive US sanctions against Iran or Cuba) versus international or multilateral (e.g., targeted UN sanctions against ISIS). The EU's increasing use of sanctions, especially against Russia due to aggression against Ukraine, blurs this distinction. EU sanctions are multilateral within the EU but unilateral because they are not authorized by the UN Security Council.
- Historically, sanctions come from two lineages that overlap in the 21st century:

    1. Economic warfare: Terms like siege, blockade, and embargo represent attempts to force an opponent to bend to the attacker's will by denying resources, sitting

alongside other forms of economic warfare such as currency manipulations and military targeting of economic resources.

2. Enforcement tools: Economic measures as coercion to enforce international norms. This goes back to the League of Nations and sits in the UN Charter. Modern sanctions are a mixture of both these logics.

- The substance of sanctions can include matters related to international peace and security, national security, human rights violations, and violations of international humanitarian law (IHL). In the past five years, sanctions have been increasingly applied to issues of global human rights, including against Israeli settlers.
- The most common form of sanctions is an asset freeze, which isolates the target from global value chains. These sanctions can be quite specific to individuals or entities and can cover any economic transaction. Other sanctions include travel bans, arms embargoes, commodity sanctions, and sectoral sanctions (e.g., in the energy or finance sectors, as seen with Russia). The US is the largest sanctioneer globally, leveraging its jurisdiction based on the size of its economy and the role of the US dollar as a reserve currency. The US also enforces sanctions more actively than the UN.
- Israeli individuals have been subject to unilateral sanctions. In February 2024, the US and UK imposed targeted sanctions on settlers from the West Bank. These sanctions were lifted by Donald Trump but remain in effect in the UK under its global human rights sanctions regime. UN multilateral sanctions have historical roots in addressing racial discrimination and apartheid, notably in Rhodesia and South Africa in the 1960s. The logic behind those sanctions is similar to the situation Palestinians face today in Israel and the occupied territory.
- Do sanctions work? Not on their own or quickly, but they do have effects, both intended and unintended. These effects need to be considered in advance when designing a sanctions strategy. Sanctions are particularly good for ensuring that countries meet their international law duties with respect to apartheid, genocide, and occupation in Palestine. They ensure that businesses or citizens of other countries are not contributing to violations of international law. Sanctions are also effective at signaling the market about who not to do business with. They are a form of regulation, not a substitute for

accountability. Civil society organizations in the US and Europe are already engaging with US and EU bodies to design and implement targeted sanctions regimes.

- Although I don't have time to go into detail about anti-boycott laws, I can mention that these laws are a form of resistance against attempts to constrain our ability to resist violations of international law, particularly related to Palestine.

Dr. Tara Von Ho on Business, Human Rights, and Conflict-Sensitive Legal Approaches

- I'm aware that as an American, the last thing a group of Palestinian international lawyers need is for me to come in and tell you what to think. Instead, I view my role here as a means of facilitating knowledge as to how there are inroads in the law to realize your vision.
- I'm going to also try to cover anti-BDS legislation. All I have right now is a bullet point because Mark couldn't. So that will be the last little bit. And if I don't get to it, then we will do Q&A.
- I'm going to center my comments on the United Nations Guiding Principles on Business and Human Rights, or what I will call the UNGPs. The UNGPs set out international standards around how to regulate business activity when it harms human rights and the responsibility of states and businesses when that harm arises and facilitate reparations for victims.
- The UNGPs are implemented in a variety of different ways, including through the OECD member states who are responsible for working with businesses and victims to come to a positive outcome in reparations for victims where businesses have breached the responsibility to respect. The guiding principles are also being implemented through domestic legislation, most notably but not exclusively in Europe. So far, the laws that have been adopted are in an EU law directive, Germany, France, Norway, but you are also seeing development in places like Japan and potentially in the next few years in Colombia and Kenya and Thailand.
- So, while the guiding principles on their own are not binding on either states or businesses, they do set out a very strong normative claim. We are also seeing them implemented through judicial decision-making in both international and domestic arenas. So,in the domestic arena, we're seeing a lot of court cases use the UN guiding principles to set out

the duty of care that businesses owe when it comes to human rights violations that are committed abroad. We're also seeing them used not necessarily to set out that duty of care, but rather to inform what the duty of care looks like and to give normative weight to a responsibility on businesses to respect human rights.

- There are three pillars to the guiding principles. The first is that the states have an ongoing duty to protect human rights that stems from their existing international human rights obligations. There is an extraterritorial impact to this. While that extraterritorial impact was debated at the time the guiding principles were accepted or adopted by the Human Rights Council, several UN treaty bodies have clarified that states have an obligation to regulate the extraterritorial impacts of their corporate nationals.
- So, if you were an EU business, the EU has a responsibility, or the EU member state that you're in has a responsibility to regulate your activities when they impact the rights of Palestinians in Israel. I say that it's a responsibility to regulate. The guiding principles initially talked about a smart mix, a combination of compulsory and non-compulsory measures that are aimed to encourage businesses to respect human rights. But Germany gave us the largest real-life experiment in international law that we, I think, have ever had when it tried to say that it didn't necessarily need to regulate its businesses to ensure they respected human rights, that they could just encourage them to think about how much they care about human rights, and they would adopt good due diligence processes, and everyone would live in harmony.
- Between 13 and 19 percent of German businesses adopted appropriate due diligence over the next four years. And Germany has been forced into a position because it said that it would regulate if its businesses didn't meet their responsibility to respect human rights. It's now been forced into the position of doing that regulation because they believe that if they just hoped that capitalist organizations would be good for human rights, that it would work but it did not.
- So now, the claim that there's a duty to regulate, that it has to be binding, has been strengthened, and there's a burden of proof on states now to defend a decision not to regulate. So that binding implementation of the guiding principles through domestic law will start to take off more in coming years.
- What is this business responsibility to respect human rights? Because that's the second pillar of the guiding principles, and it's where it made the most innovative contribution to

international law. The business responsibility to respect says that businesses should refrain from harming human rights in all their activities, operations, or via their products. To do this, they're expected to conduct human rights due diligence, which assesses their real and potential risks that they pose both directly through their operations, products, and goods, and indirectly through their global value chains and other business relationships.

- They should be undertaking a mapping exercise of this from a victim's rights approach so that they're looking at the impact that they have on victims' rights rather than simply the impact that they have on their own financial standing. They should be doing this in consultation with stakeholders and particularly with directly affected rights holders. Once they undertake that mapping exercise, they are expected to develop mitigation plans. And if they have caused or contributed to a harm, terms I will return to in a second, they're expected to provide reparations and to cease the harmful conduct.
- If they're only directly linked to the harm, they're expected to use their leverage to affect change in their business partners. Again, I'm going to return to cause, contribute, and directly linked to in a moment.
- In conflict-affected areas, which is actually quite broadly defined, but obviously Israel and Palestine fit, that human rights due diligence is supposed to add a layer of heightened human rights due diligence. And according to the UN Working Group on Business and Human Rights, that includes not just understanding direct and indirect impacts, but also having a conflict-sensitive lens in which you look at the dynamics and the way in which you affect the actors to the conflict.
- So, this requires businesses to understand how they sustain and promote violence through their activities. And it's this that gives the greatest possibility for using the UNGPs to advance Shahd's vision. Because a conflict-sensitive lens has to look not just at whether you are directly contributing to an individual harm, but are you actually supporting, affecting, changing the way in which the Israeli government is able to affect harms?
- As I said before, where a business causes or contributes to a harm, they are required to change their behavior to stop the harm to the victims.
- Where they're only directly linked to, they need to use their leverage to effect change. Traditionally, it's been assumed that contributions via taxation can only ever be directly linked to. That businesses don't incur responsibility to provide remedies or to change their behavior simply because they engage in taxation or they pay taxes. In 2022, in relationship

to Russia and Ukraine, I started to reevaluate this assumption. And I'm drawing on that reevaluation here that the resulting work will come out shortly.

- For cost contributing directly linked to, there are five factors that matter. The first is the power of the business to affect the harm itself, or over its own participation in that harm. So there's a bigger responsibility on transnational corporations than there are on businesses that are domesticated in an authoritarian state or in a problematic state.
- The severity of a harm matters, the predictability of a harm matters, and the business's effort to use mitigation measures, which includes using its leverage.
- Applying that to businesses in Israel's economy becomes quite simple. Transnational corporations have a great deal of power because they get to choose where they operate. They are not bound to operate within Israel, they can choose to terminate the relationship. They also have a great deal of independence specifically for that because they can choose to leave.
- Severity, we're talking about three jus cogens and norm violations as Shahd set out. We're also talking about genocide or accusations of genocide, credible violations of the Genocide Convention, according to the ICJ. And when it comes to predictability, we've already heard about how there are systemic and structural approaches and policies that mean that there is not going to be a change unless we see a significant change in the Israeli government.
- Finally, mitigation measures: this is where effective leverage can be used, but the failure to use effective leverage moves a business from directly linked to, to contribution. And here, I think the question is, can you even have effective leverage in a context like Israel, where you have decades of systemic and structural violations and policies and practices that survive not one or two administrations, but again, multiple different parties, every governing body? In that circumstance, I think the answer is no. There's no such thing as an ability to have mitigation. There's no ability to use leverage effectively in that context, which means that transnational corporations in particular that have the power and the independence to leave, that know about the severity of the harm and the predictability of the harm, become responsible by continuing to operate within Israel, just as they would become responsible if they continued to operate in Russia following the invasion of Ukraine.
- In a situation like that, businesses have to change their behavior and figure out a way to provide reparations and remedies. That's going to require consultation with stakeholders

on the ground in Palestine. It's going to require something that is much more comprehensive than what we see currently in reparations programs between businesses and individuals that are harmed because you are talking about structural and systemic violations.

Q & A

Question 1: Can you elaborate on the exploitation of natural resources within the context of de facto annexation and the role of third states towards the annexed territories and corporate dealings?

- **Dr. Tara Van Ho's Response:** Under international law, de facto annexation is unlawful. The role of third-party states is to exercise their influence to end such unlawful activities. The International Court of Justice has affirmed that third-party states must use their powers to halt violations, including the exploitation of natural resources. The Fourth Geneva Convention imposes a duty on third-party states to ensure compliance with international humanitarian law, which includes the protection of natural resources for the occupied population. States must regulate their companies to prevent their involvement in the annexation and exploitation of resources.

Question 2: Where there are no bilateral agreements, how can private investors be made accountable?

- **Dr. Tara Van Ho's Response:** Even if a state does not act to regulate its businesses, private investors can still be held accountable. The guiding principles allow civil society to challenge businesses based on their involvement in violations, regardless of a state's inaction. Civil society plays a crucial role in holding businesses accountable and ensuring they fulfill their responsibilities under international law.

Question 3: Are the UN guiding principles a mechanism only for states to regulate corporate activity, or can civil society use them to force corporate responsibility and compliance with international law?

- **Kinda Mohammadieh's Response:** The UN guiding principles are primarily intended for states and businesses, but civil society can also use them to hold businesses accountable. We must challenge how businesses use these principles to hide behind due diligence procedures instead of taking action to end their involvement in violations. Civil society must advocate for clarity from the UN bodies on how these principles should be applied in such cases to prevent businesses from exploiting their complexity.
- **Dr. Tara Van Ho's Response:** The guiding principles are about the state's responsibility in the first pillar and the business's responsibility in the second, but they can also be a tool for civil society to influence corporate behavior. Civil society can push for accountability by using domestic law to establish what a duty of care means for businesses operating in conflict zones and ensuring that businesses comply with these principles, especially when they are involved in systemic violations.

Question 4: In regard to the WTO agreements, if countries don't comply with those agreements, what are the consequences?

- **Mark Taylor's Response***:* Non-compliance with WTO agreements exposes countries to sanctions and challenges in the dispute resolution mechanism. These sanctions are particularly relevant when states fail to meet their trade obligations. However, these issues extend beyond commercial aspects and also include political consequences, especially in the context of human rights. As we've seen with the cases of Russia and Syria, sanctions can be an effective tool in holding countries accountable for violations, and this experience should be applied to Israel as well.

Question 5: Can you discuss the issue of anti-boycott laws and their effect on human rights activism and business practices?

- **Mark Taylor's Response:** Anti-boycott laws, particularly in the US and Europe, are a direct threat to human rights activism and the business and human rights movement. These laws attempt to criminalize efforts to hold businesses accountable for their involvement with Israel. The challenge is to build a movement that resists these laws and pushes for accountability. We must draw on the experiences of sanctions in other contexts, such as Ukraine and Syria, to advocate for similar actions against Israel's violations.