



“Law and Politics: Options and Strategies of International Law for the Palestinian People”

An International Law Conference organized by the Birzeit University Institute of Law, the Civic Coalition for Palestinian Rights in Jerusalem and the Decolonizing Palestine Project and convened at the University of Birzeit on 8 – 9 May 2013

Summary of Proceedings and Outcomes

Prepared by the organizing committee, July 2013

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I. Introduction: the Conference and the Follow-up Process

Aims and objectives

This conference aimed to create space for Palestinian academics, human rights activists and political actors to discuss options and strategies of international law from a theoretical and practical perspective. It was to critically reflect on the impact and limitations of the international humanitarian law (IHL) paradigm that has dominated discourse and policy on Palestine for the past 45 years, and to examine alternative legal frameworks which are more appropriate for the analysis of Israel's oppressive regime. Finally, and on this basis, the conference was to discuss legal strategies, including mechanisms and practical steps, which can build respect of the human rights of the Palestinian people, in particular the rights to self-determination and reparation, and of the respective international obligations of Israel and third parties.¹

The conference specifically aimed to:

- Increase the legitimacy, visibility and support of the debate about alternative international law paradigms;
- Examine possible practical strategies, including risks, and build consensus among the participants about the appropriate legal analysis, strategies and actions;
- Motivate participants to engage in follow-up activities to be implemented after, and separately from, the conference.

The conference

An audience of 350 persons, mainly Palestinians attended the conference, among them 60 specially invited Palestinian guests who participated in closed roundtable discussions on the second day. Palestinian participants represented the distinct mix of target groups required for achieving the aims of the conference. Palestinian human rights lawyers, staff of Palestinian human rights organizations, members of Palestinian political parties and activists in civil society campaigns and youth movements engaged in discussion with Palestinian academia and officials. This, and the fact that participants came from a variety of geographic areas, including the northern and southern West Bank, Jerusalem, 1948 Palestine/Israel and the Gaza Strip (via video conference), gave the conference a distinct character which was noticed positively by many. Participation of a group of Palestinian academics and activists from Beirut (via Skype) had to be postponed for the follow-up process in order to keep logistics and the number of discussants at a manageable level. Unfortunately (but not entirely unexpected), PA and PLO leadership responded to the conference invitation only partially: although several, including the PLO Department of International Relations and four ministers attended the first day, only legal advisers of the Ministry of Foreign Affairs and staff of the PLO Negotiations Support Unit (NSU) participated also in the in-depth roundtable discussions on the second day.

The debates at the conference showed that in-depth discussion and consensus-finding on legal frameworks, strategies, mechanisms and practical steps was difficult mainly for three reasons:

- i) the large number and diverse background of the participants;
- ii) the fact that the issues raised by the conference were new for many participants who do not usually apply legal concepts and frameworks in their activities. The majority

¹ See the conference concept note at: http://lawcenter.birzeit.edu/iol/en/conEdu/legal_encounters/2013/621_1.pdf

were unaware of the meaning and limitations of certain concepts in international law and/or the way in which legal concepts and frameworks are used, re-interpreted and developed internationally and applied to the case of Palestine. Hence, they could not easily see how international law can be used for practical legal and political strategizing; and,

- iii) the wide-spread frustration and sense of powerlessness vis-à-vis the Palestinian leadership which is perceived as unaccountable to its constituency and unwilling to engage and support initiatives coming from civil society.

Nevertheless, the conference resulted in agreement on some basic issues pertaining to the merits of the legal frameworks of colonialism and apartheid, the principles that should guide a new Palestinian strategy and the use of international legal mechanisms such as the ICJ and ICC. Participants also identified issues which remained little understood, controversial or undecided and in need of further study, and suggested some practical steps that should be taken in the follow-up to the conference. All of these are described in detail in this report.

Follow-up and next steps

Planning of the follow-up process was started immediately after the conference in order to take advantage of the opportunities created. The broad and diversified participation in the conference had shown that Palestinians recognize the importance and urgency of the conference agenda and contributed to public visibility of the debate. Visibility and legitimacy of the debate about appropriate legal frameworks and strategies have also been enhanced by the extensive reference to the conference by the UN Special Rapporteur on Human Rights in the OPT Richard Falk in his latest report to the UN Human Rights Council.²

Two months after the conference, follow-up activities are implemented at two levels:

Development of a practical plan of action based on the suggestions from the conference

Consultations undertaken by an informal working group composed of members of the conference organizing committee, speakers, chairs and participants, as well as other Palestinians committed to the common agenda. A series of meetings for this purpose was launched on 2 July 2013, with the aim to:

- Reach agreement about activities to be implemented, including prioritization in terms of timing and resources;
- Agree on modalities and mechanisms of implementation (who, when, how);
- Adopt a mechanism for coordination.

Publication of the conference documents by the organizing committee:

- Conference proceedings and outcomes (English and Arabic) to guide and support the follow-up process;
- Preparation of the BZU Palestine Yearbook of International Law (2014), which will be dedicated to the theme of conference and include the papers presented by the speakers.

² See para. 5 and 55 (a) at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23%20-21_en.pdf

II. Conference Proceedings

1. Methodology

The conference was implemented as a two-day event hosted by the Birzeit University Institute of Law on 8 – 9 May 2013. The first day was open to the public; the second day was conducted in two closed roundtable discussions with specially invited participants. It was agreed that participants in the roundtables on day-2 would not be cited and that sessions would not be recorded.

On day-1 (public conference, 8 May), expert inputs in form of substantial presentations were provided by the speakers who are international scholars and Palestinian lawyers renowned for their work on issues relevant for the conference agenda. Two speakers (Richard Falk, Anis Kassim) who could not obtain entry permits to occupied Palestine from the Israeli authorities gave their presentations via Skype. Presentations were followed by discussion with the audience. Closing thoughts about day-1 were presented by Diana Buttu, who also served as rapporteur of the public conference. (For the program of the public conference, see: http://lawcenter.birzeit.edu/iol/en/index.php?action_id=106&id_legal=616)

Speakers also provided input and served as resource persons in the two closed roundtable sessions on day-2 (9 May). Participants in the roundtables were asked to examine the international law frameworks of colonialism and apartheid, as well as strategies and mechanisms (ICJ, ICC, and others) which were presented as possible options on day-1, and to assess their merits and risks in challenging Israel's oppressive regime over the Palestinian people and advancing the right to self-determination, including the right of return of the refugees. Participants were also asked to propose practical steps which should be taken after the conference.

A group of 10 persons from the Gaza Strip, including academics and human rights activists, participated in the first roundtable discussion through a videoconference hosted by PNGO. The roundtable discussions were documented by Ziyaad Lunat in his role as rapporteur of day-2. (Copies of the program of day-2 are available upon request.)

The issues debated in the conference, in particular in the roundtables on day-2, constitute the main immediate outcomes of the conference. They include differences of opinion and points of agreement, as well as questions and practical steps identified for the follow-up process (see below, section III). These outcomes will guide the planning of the follow-up process.

2. Presentations (inputs) by the speakers

Session I - IHL Globally, Reflections regarding Palestine

Richard Falk:

Falk noted that IHL sets limits on the actions of states in the context of belligerent occupation with the aim of protecting civilians. These protections and limitations came after the close of the Second World War as an attempt to fill in the gaps that existed in IHL before the Geneva

Conventions were enacted. However important the attempts to extend IHL protections to civilians, Falk noted that there are two central weaknesses in IHL which have limited the benefits also for Palestinians:

All laws of war tend to be subordinated to the imperatives of military necessity under battlefield conditions. As such, the notion of security in practice trumps the constraints imposed on belligerent occupiers and the protections accorded by IHL, although if the political conditions existed for ensuring compliance, the clear and unqualified constraints of the Fourth Geneva Convention would be upheld.

While all parties to the Fourth Geneva Convention have an obligation to ensure its implementation (Article 1), states have lacked political will to ensure that the articles and principles are upheld, despite Israel's flagrant, repeated and systemic violation of fundamental rules and principles set forth in the treaty.

Falk also asserted that the language of the Fourth Geneva Convention, although setting forth valuable guidelines even in situations of prolonged occupation, was never fully adequate to the situation confronting Palestinian living under occupation. Israel from the outset of occupation had designs to incorporate East Jerusalem, appropriate water from Palestinian aquifers, and build settlements, which with the passage of time has created a variety of circumstances that make an end to the occupation impossibly difficult to achieve through diplomatic means.

Falk presented three frameworks for addressing the Palestinian situation:

- (1) The Oslo paradigm, in three variations. First, it is the deficient text of the Oslo agreements, without reference to Palestinian self-determination and statehood; no Israeli obligation to withdraw and excluding many rights under international law. It must be noted that the assumption was that these agreements would be valid for five years only. The second version is the political reality created, which is a hybrid of annexation, apartheid and prolonged occupation, without any end to occupation in sight. Finally, there is the daily reality on the ground, characterized by non-compliance with the Fourth Geneva Convention and fragmentation of the territory under occupation in forms inconsistent with the protection owed to the civilian population.
- (2) Positive law, i.e., existing treaties such as the Fourth Geneva Convention and its Additional Protocol. This framework is useful for exposing the unlawfulness of specific practices of the occupying power, and for challenging the legitimacy of Israel's actions – as done, for example, in the ICJ advisory opinion on the Wall. The problem with the positive law framework is that it tends to reinforce the perception that the conflict is exclusively about territory, leaves out many rights of Palestinians (the refugees, for example), and doesn't address the right-less circumstances of the population when occupation doesn't end after a reasonable period of time.
- (3) Prolonged occupation, i.e., an occupation lasting more than five years. This framework allows us to ask all the important questions: at what point does an occupation assume the character of a *de facto* annexation? Should an occupation extended beyond five years automatically impose an obligation to withdraw from the territory or establish the rule of law in accordance with international human rights law? At what point does a

regime that doesn't allow the civilian population any benefit from the rule of law become a system of apartheid? And to what degree does the occupying power's policy of changing the demographic composition correspond to ethnic cleansing? Such circumstances should result in a new legal regime that protects the rights of the Palestinians, with a convention and an ombudsman to oversee implementation.

Falk recommended that the notion that the language of positive law is sufficient to describe the Palestinian experience with what is best characterized as Israeli settler colonialism should be abandoned. He suggested that the legal framework should be enhanced by combining positive law with the framework of prolonged occupation, and that further recourse to the ICJ for a clarifying advisory opinion might be useful at this stage.

Session II – Historical Development of the IHL Paradigm in Palestine

Charles Shamas:

Shamas explained that his involvement with IHL began with his work at al Haq and Mattin, and that it was clear at the time that Israel's practices in the OPT were part of a colonial policy that dated back at least to the 1930s. He noted that IHL was initially seen as an important set of promises which states had made, and as an important tool for protecting the Palestinian victims of Israel's practices, such as the settlements, forced displacement and deportation.

Shamas emphasized the need to treat law as an instrument which can be used to compensate for the lack of power to enforce respect of Palestinian rights. Therefore, legal claims must be addressed to parties who recognize that they have obligations, such as courts, public opinion and third states, and they must be formulated in a manner that will compel them to act on their obligations.

He argued that the IHL paradigm has become an obstacle because of mistakes made. He noted that in retrospect the biggest mistake is to assume that we can get Israel to respect Palestinian rights by invoking its obligations under IHL, international human rights law or the UN Charter. This is impossible, because the claim of sovereignty over the entire British Mandate Palestine is incorporated into Israel's domestic law and prevents *de jure* application of the law of occupation by Israel.³ Another mistake is to call on states to act in order to get Israel to comply with IHL, instead of invoking the responsibility which is most widely recognized, i.e. the responsibility of every state not to recognize nor render aid or assistance to the unlawful situation created by Israel. The lesson learned is that we should help states identify their own violations of this obligation and what they must do in order to operate lawfully. In this way we can raise the cost paid by Israel for maintaining its own paradigm.

With regard to the historical process in which IHL became sidelined, Shamas noted that by 1991 the U.S. was able to convince the Palestinian leadership to drop the demand for enforcement of the Fourth Geneva Convention – i.e., the demand for “regulation of the occupation” - in

³ See, Area of Jurisdiction and Powers Ordinance, No. 29 of 5708-1948, at: <http://israelawresourcecenter.org/israelaws/fulltext/areaofjurisdictionpowersord.htm>. This law is still valid, although an amendment of another law enacted by the Knesset on 27 June 1967 (Section 11B of the Law and Administration Ordinance) gave the government a choice whether or not to incorporate the 1967 occupied areas into the state.

exchange for a promise that the Madrid-Oslo process would end the occupation. Other states and the EU were, thus, no longer compelled to think about what they would have to do in order to comply with their own IHL obligations, but were offered the alternative of accepting what the parties had agreed upon in the negotiations.

Allegra Pacheco:

Pacheco pointed out that the main problem with IHL is that it is an instrument to *regulate* occupation. Occupation *per se* is not illegal, the rights of the occupying power are weighed against the rights of the occupied population, and many privileges are granted to the occupier.

Pacheco traced the historical development of Palestinian positions and demands. She pointed out that the current situation where Palestinian rights are limited to the rights protected by the Geneva Convention represents an almost complete turnaround from 1948 – 1967, when Palestinians held that partition of Palestine (UN Resolution 181 of 1947) violated the right to self-determination, demanded full repatriation and implementation of Universal Declaration of Human Rights and focused on the right to resistance.

While noting that IHL provides basic protections and sets restrictions on an occupying power, including important prohibitions such as the prohibition on collective punishment, Pacheco argued that it was important to recognize the limitations to IHL:

- (1) No mechanism to reduce the privileges of the occupying power, and no standard to end or outlaw occupation; IHL grants indefinite privileges (e.g., in Area C and the use of expropriated land)
- (2) Palestinian self-determination is suspended
- (3) Only partial protections are provided
- (4) Enforcement depends upon the will of state parties
- (5) Reinforces the fragmentation of Palestine and the Palestinian people

Pacheco suggested that IHL continues to be the dominant framework because it validates the existing role of the PA and international assistance, provides a justification for sidelining the debate about other legal frameworks, and allows parties to continue to adopt a “wait and see” approach.

Pacheco concluded that IHL is not enough for moving forward, and that there is a need for new legal frameworks which make the occupation illegal, criminalize Israeli practices, and support unification of Palestine and Palestinians. She recommended three possible frameworks to be considered: self-determination, the Apartheid Convention, and the Declaration on Granting Independence to Colonial Countries and People.

Mudar Kassis:

Kassis pointed at some of the fundamental flaws of international law in general. One problem is the lack of separation of powers: the same states that create international legal instruments are also charged with implementing them. Another problem is that all states are not equal, with some states enjoying veto power in the UN Security Council. This results in a situation where powerful states shape international law and implement it in line with their interests.

Kassis concluded that Palestinians have seen little enforcement of international law for these reasons, and that international law is of limited use for the Palestinian struggle against Israeli colonialism.

Session III – What is International Law’s Role in Liberating Palestine?⁴

Stephanie Koury

Koury reflected on (the absence of) international law in the peace negotiations, based on her experience in the PLO’s Negotiation Support Unit (NSU) which is a donor supported unit set up to provide technical legal support to final status negotiations.

She noted that the main flaws in the negotiations were certainly the lack of a law in the negotiating framework, citing as one example the Clinton parameters which suggested a political solution based on percentages of what was to be Israeli or Palestinian. The overall approach was defined by what Israel considered to be practical, and there was immense pressure on the Palestinian negotiating team. The NSU did not have an overall legal framework of self-determination; it rather applied international law separately to the various areas of negotiations. It tried to establish certain principles, but this was watered down over time by pressure from third states.

Koury focused on the period of 2002 – 2004, when she worked with the NSU. At that time, there were no final status negotiations but a situation of crisis. The Mitchell Commission was set up by the international community to find a way to end violence and go back to negotiations. The NSU tried to insert law and focused on settlements as cause of violence. In the end, there was some success: settlements were linked to violence and a full freeze was called for in the Commission’s report. However, when it came to implementation, the Palestinian position was undercut by U.S. and Israeli insistence on putting security first. The same approach was then adopted in the Quartet’s Roadmap. Palestinian negotiators tried to get the sequencing changed but failed. All negotiations in this period were with the U.S. only, even the Quartet did not help much to get out of the bilateral framework. For example, there were discussions mainly with the EU concerning the monitoring mechanism on settlement expansion which was called for by the Mitchell Commission. The end result was a U.S. mechanism with confidential reporting.

Koury pointed out that what worked in the build-up to the ICJ advisory opinion on the Wall was that everyone, UN agencies, civil society and leadership, was raising this issue. Although this wasn’t really coordinated, it helped build momentum. The fact that the EU approached the NSU after the ICJ had accepted to take up the case and criticized Palestinians for obstructing the negotiations by choosing to resort to the law is an example of how pressure was applied on the Palestinian side to not rely on legal frameworks. Post ICJ, it was a Palestinian shortcoming that there was no strategy for how to make use of the advisory opinion. There was a lack of commitment by the leadership – the only ones who really used the ICJ opinion was civil society, such as the BDS Campaign for example.

⁴ Sessions III and IV were reversed at the conference for technical reasons. Presentations are summarized here in the sequence initially planned.

Koury summarized lessons learned: avoid bilateral talks in the current framework; base negotiations on a coherent legal framework of self-determination; develop a strategy for dealing with pressure; the importance of accountability by the leadership, integration of civil society and best technical advice.

Anis F. Kassim

Kassim noted that the deliberate neglect of international law as a tool for solving the conflict over Palestine, and as an alternative to violence, has been a constant even after the establishment of the International Tribunal on the Former Yugoslavia and the ICC. Kassim asserted that Palestinian leader share responsibility for this neglect.

Kassim explained that, based on personal experience, the reason for the lack of a Palestinian legal strategy is not mainly political pressure, but the fact that Palestinian leaders like all Arab leaders with the possible exception of Egypt, do not know how to use international law as an instrument of politics. He gave the example of how, until 2011, we were told by the PLO that membership in the UN was important, because we could argue that Palestine was an occupied member state and not “disputed territory”, and that this would help to end the occupation. This argument was ill-advised; if it was true, it could have been used by Syria, Jordan and Egypt in the past. More recently, support for the non-member observer state was solicited on the grounds that we could ratify the Rome Statute of the ICC. When observer state status was achieved, we were told that we were going back to negotiations. Kassim emphasized that the only brilliant exception was the ICJ advisory opinion on the Wall. He suggested that the reason why it could go forward probably had to do with the fact that Chairman Arafat was under siege at the time.

Kassim asserted that it is imperative for the Palestinian leadership to utilize the ICJ and ICC, and that the U.S., U.K. or France will most likely not be able to prevent such a move. He also called upon the Palestinian leadership to support private initiatives against Israeli war crimes in domestic courts, as well as the use of international law as a means of building economic and political pressure on Israel as done by the successful BDS Campaign. He recommended that on the diplomatic front in the UN and elsewhere, the credentials of Israeli officials should be challenged, and that Israeli apartheid should be exposed in order to weaken Israel’s legitimacy and international standing.

Session IV – Options and Strategies of International Law for Palestine

John Dugard:

Dugard said that he believes that there are international law mechanisms that can be useful, despite the critique voiced in the earlier sessions on international law in general and IHL in particular. He suggested that the main problem is not the law but those who do not act upon the legal rules, including first of all Israel, but also the U.S., EU, Quartet, the prosecutor of the ICC, as well as the PA which has missed so many opportunities for using the law to the benefit of the Palestinian people.

He explained that he would suffice to say here that there is a system of apartheid in the OPT and focus his presentation on the ICJ and ICC as potentially useful international mechanisms.

ICJ: a second ICJ advisory opinion could be pursued through the General Assembly or through UNESCO of which Palestine is a member. In principle there is enough support within the GA for another advisory opinion, but there are a number of problems and challenges. Back in 2004, the head of the Palestine mission in the UN, Nasser al Kidwa had lobbied hard for states to support the ICJ opinion on Israel's Wall in the OPT. Now, the first problem would be getting PA support for such a move. The second problem is the question that should be submitted to the ICJ. The Court should be asked to examine Israel's prolonged occupation, and the question should be as wide as possible. This is a lesson from the 2009 ICJ opinion on Kosovo, where a narrow question resulted in a very narrow opinion. A third issue to be considered is the composition of the ICJ. Unlike in 2004, the current ICJ is not composed of judges with direct knowledge of Palestine and the region. Finally, there is the problem that the credibility of the ICJ has suffered from the manner in which states have ignored the 2004 advisory opinion. It may be reluctant, therefore to give a second, comprehensive opinion.

ICC: a state that is not a party to the ICC may, pursuant to article 12(3) of the Rome Statute, accept jurisdiction for crimes committed in its territory. The PA's 2009 declaration of acceptance was important in this regard, but the prosecutor took three years to determine that he could not make a decision about whether Palestine was a state. Now that Palestine is a state, the prosecutor could initiate investigation into the settlements as a war crime based on the 2009 declaration. However, she has stated that she will only take steps if Palestine ratifies the Rome Statute, and the PA has been reluctant to do so.

Dugard concluded by reminding of the international consensus that there can be no peace without justice, which is the foundation of the ICC. Palestine has been treated as an exception for obvious political reasons. The opening of ICC investigation into Israeli war crimes would dramatically weaken Israel's international standing, even if it does not result in prosecution. This can be achieved in a very short term, if the PA can be convinced to adopt a strategy based on law.

John Reynolds:

Reynolds explained the background and definitions of several legal concepts and frameworks which allow a more holistic treatment of Israel's oppressive regime.

Settler colonialism: colonialism was not prohibited by international law at the time the State of Israel was established. The normative shift began only in the 1950s as result of anticolonial liberation movements and the advance of the Third World project at the UN. Colonialism was expressly prohibited in the 1960, when the UN adopted the Declaration on Granting Independence to Colonial Countries and People. Earlier colonial processes in which settler colonial societies had established themselves as nation-states were immunized and normalized by the language of the UN resolutions. The prohibition does not apply *within* the borders of existing states, even where founded as the culmination of aggression, colonization, ethnic cleansing or genocide (e.g., United States, Australia). Hence, even though Israel can be understood as a settler-colonial state, only Israeli practices in the OPT fall under the international legal framework of colonialism, posing similar limitations as those of IHL. However, the framework allows us to address the systemic elements of the control regime, including settler colonialism's derivatives of population transfer and apartheid.

Population transfer (ethnic cleansing), i.e., dispossession, deportation and the implantation of settlers that have facilitated the process of colonization: Historically, population transfer was accepted in international law and often recommended as a means of resolving ethnic conflicts and tensions involving national minorities, including in the aftermath of both world wars. At the end of the Second World War, however, forced population transfer was also defined as a war crime and crime against humanity by the Charter of the Nuremberg Tribunal (1945). Subsequently it was prohibited and criminalized under the Fourth Geneva Convention and the Rome Statute of the ICC.

Apartheid: a system of institutionalized discrimination and racial domination, typically arising in a settler colonial context. Although derived from the particular experience in South Africa, apartheid has an international legal status and definition which is universally applicable. The prohibition of apartheid as a state practice is a *jus cogens* norm of international law; the crime of apartheid for which individuals may be criminally responsible is a crime against humanity under the Rome Statute of the ICC. Significantly, in 2012, the UN Committee on the Elimination of Racial Discrimination called on Israel to eradicate any policies of apartheid or segregation that adversely impact Palestinians. The solution to apartheid is ending institutionalized discrimination in order to allow self-determination of the oppressed group. A “one-state solution” throughout the entire territory covered by an apartheid control system is not necessarily the preordained outcome of the end of apartheid, as illustrated by the example of Namibia, whose people exercised self-determination through independence from South Africa.

Reynolds concluded that the frameworks of colonialism, apartheid and ethnic cleansing can be of descriptive and normative value in understanding the entrenched and ideological nature of Israel’s control system. He recommended continuing to move beyond humanitarian law but without abandoning IHL, because these various legal frameworks are not mutually exclusive, and all of them have their own shortcomings. International law has historically been shaped as a product of the European colonial project, and structural biases remain embedded. If international law is to be used in the Palestinian social and political struggle, then, the way forward lies in tying together the progressive elements of the various legal frameworks in a manner that serves a clearly articulated long-term political strategy, including the so-called “legitimacy war”. This must be clearly distinguished from the tactical use of law – pragmatic and opportunistic interventions aimed at short-term results that can contribute towards attainment of the larger strategic goal; for example the use of the legal mechanisms discussed in this conference.

George Bisharat:

Bisharat explained that his presentation aimed to provide guidelines for thinking about an integrated long-term strategy for liberation that is anchored in international law. He emphasized that such a strategy must not be limited by the horizons of current real-politic, and that it must be understood that no strategy is self-executing and requires leaders who are willing and able to carry it out. This requires the fostering of Palestinian leadership that is accountable to the people and the weaning of Palestinians from donor dependency.

Bisharat suggested that an integrated strategy should be developed in a process of careful deliberation along the following guidelines:

- (1) It must integrate the rights and interests of all Palestinians: citizens of Israel, external refugees, West Bank and Gaza Strip
- (2) It must not limit legal action to litigation of cases in courts, but also include legislation, action in international organizations, human rights reporting and diplomacy
- (3) It must combine legal action with political action and media work
- (4) It must be integrated vertically through coordination between government, civil society and individual citizens

He argued that taking time for deliberation will not result in lost opportunities because any political agreement signed with Israel at this point will result in the surrender of substantial Palestinian rights in exchange for a not-fully sovereign Palestinian state.

With regard to integration of all Palestinians, Bisharat argued that it is necessary for three main reasons: (i) it is a moral imperative owed by Palestinians to each other in a situation where fragmentation is increasing; (ii) acting as a collective is an imperative for pragmatic, political reasons, e.g., it allows us to raise demands such as an Israeli equal rights guarantee for all its citizens, and it is required for democratic decision making on political concessions if/when this will be necessary; and, (iii) because a two-state solution is either undesirable or unattainable. He noted that agreement with any one of the three is sufficient reason for adopting a new, integrated strategy.

With regard to integration of legal action, Bisharat noted that litigation has its limitations; no court will render a judgment that has not been earned through political struggle. He presented one example of a legal action that could be taken in the framework of an integrated strategy: an ICJ advisory opinion about whether Israel's regime over the entire Palestinian people since 1948 amounts to the crime of apartheid. He argued that the Convention on the Crime of Apartheid provides space to review the wide swathe of Israeli practices.

Bisharat recommended that the Palestinian leadership announce the suspension of negotiations and the start of a process of strategic deliberation. In terms of immediate action, he recommended that Palestine take the necessary steps for the opening of investigation into Israeli war crimes by the ICC.

III. Main Outcomes of the Debates

1. Main issues debated, including differences of opinion and points of agreement

1.1 Colonialism, apartheid, forced population transfer (ethnic cleansing): appropriate legal frameworks?

The discussion was initiated by the brief inputs from guest speakers. These inputs included sources defining these legal frameworks,⁵ and a summary of their added value in comparison with the IHL framework of occupation:

⁵ UN Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by General Assembly resolution 1514 (XV) of 14 December 1960; International Convention on the Suppression and Punishment of the Crime of Apartheid (1976); A.S. al-Khasawneh and R. Hatano, *The human Rights Dimensions of Population Transfer*

- Colonialism, apartheid and forced population transfer are legal frameworks which capture the historical experience of the entire Palestinian people. They cannot be applied to the OPT without reference to the discriminatory and oppressive Israeli legal and political regime that pre-dates the 1967 occupation. These frameworks, therefore, transcend and help overcome the separation between “Israel and the OPT” and the fragmentation of the Palestinian people which have resulted from the dominant IHL paradigm. For example, the policies of closure and blockade employed by the Israel against Palestinians in the occupied Gaza Strip are best characterized as inhumane act under Article 2c of the Apartheid Convention (preventing a racial group from participation in the political, social, economic and cultural life of the country ...), and the same Article also applies to all Palestinian refugees who are denied the right to return.⁶
- Colonialism and apartheid are defined as racist regimes which are always absolutely prohibited in their *entirety*. Under IHL in comparison, occupation *per se* is lawful, and an occupation regime may remain lawful even if certain policies and practices of the occupying power are illegal or constitute war crimes.
- Colonialism and apartheid result in legal responsibility for states, in addition to their obligations under the Fourth Geneva Convention and other treaties. All states have the duties not to recognize nor render aid or assistance to colonialism and apartheid, and to cooperate to end these violations. Moreover, apartheid and forced population transfer are also criminalized and entail individual legal responsibility.
- Colonialism, apartheid and ethnic cleansing resonate negatively worldwide and can serve to mobilize public opinion and political support. The language of colonialism resonates in particular with formerly colonized nations in Africa, Latin America and elsewhere. It can be used, for example, with the African Union whose political backing is needed in the UN General Assembly for an ICJ advisory opinion, and for bringing a case to the ICC. The African Union is likely to offer support due to the perceived bias of the ICC against Africans.

In the discussion, several participants, including the participants from Gaza, asserted that IHL should not be abandoned. Others, in particular members of the Palestinian academia, did not see the merits of applying apartheid and colonialism to the Palestinian situation, arguing that “all existing international applies to Palestinians”. In response, it was argued that international law is not static, but is undergoing a continuous process of interpretation and transformation. International law is, thus, a tool for advancing Palestinian rights and interests to the extent Palestinians and their supporters partake in the on-going process of interpretation and development of the law. One scholar alerted of the fact that Israel, in particular, is engaged in constant contestations over definitions and classifications of IHL to further its own agenda, and that its interpretations have got much more traction in the context of the “war on terror” paradigm promoted by the U.S. Some examples of Israeli “successes” are the re-interpretation of attacks by non-state actors as ‘armed attacks’, the right of a state (even an occupying power)

including the Implantation of Settlers. Preliminary Report, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, 2-27 August 1993, E/CN.4/Sub.2/1993/17 of 6 July 1993, para. 15 and 17

⁶ A detailed study of how apartheid applies to Israel’s polices and practices in the OPT was led and sponsored by the Human Sciences Research Council of South African government research council. See, “Occupation, Colonialism, Apartheid?”(2009) at: <http://www.alhaq.org/attachments/article/232/occupation-colonialism-apartheid-executive.pdf>

to invoke self-defense under the UN Charter against non-state actors, the concept of pre-emptive self-defense and the creation of a new category of ‘illegal combatants’. Israel has justified the use of violent externalized modes of control against the occupied Palestinian population on this basis, in particular against Gaza since 2008, and has found (partial) support even among serious human rights organizations and the ICRC.

Several participants, including legal advisers of the PA Ministry of Foreign Affairs and politicians, were unfamiliar with apartheid as defined in international law and/or reluctant to abandon the language of IHL they are accustomed to. This was illustrated, for example, by statements claiming that the apartheid framework would undermine the right to self-determination, or that adoption of a colonialist understanding of the context would lead to the conclusion that the whole of historic Palestine is “occupied”. Finally, criticism was raised by many of Palestinian politicians, including Abu Mazen, for using “apartheid” in their political speech, while disregarding the consequences that flow from its legal meaning.

Points of agreement/legal frameworks:

- Most participants agreed that apartheid and colonialism are frameworks that should guide Palestinian strategies which seek to overcome the limitations of the IHL paradigm currently in use.
- Participants also agreed that IHL should not be discarded, that efforts to ensure respect of IHL in the OPT should continue, and that Israeli efforts to reinterpret IHL to suit its interests must be challenged.
- Many participants raised the need to foster awareness about the legal meaning and consequences of apartheid and colonialism under international law among relevant sectors of Palestinian society.

1.2 Toward a Palestinian strategy based on the legal frameworks of colonialism, apartheid and IHL

One participant suggested that such a strategy should have self-determination as the overarching goal, and should: i) outlaw the occupation; ii) include the entire Palestinian people (those in the OPT, citizens of Israel and the external refugees); and iii) empower people. It was noted that the BDS movement has already adopted this approach, and that this approach has consensus among Palestinians. Staff of a Palestinian human rights organization questioned whether we actually know what is the Palestinian consensus.

A major part of the discussion revolved around the obstacles faced in advancing a strategy against Israeli colonialism and apartheid. Among the obstacles addressed was the resistance of the international community, including UN bodies, against the apartheid framework, because of the political pressure exerted by Israel, the United States and affiliated lobby-groups. One example presented was the recent UN Fact Finding Mission on the Israeli settlements which clearly identified elements of the crime but avoided explicit mention of “apartheid” in its report. Asked by Palestinian human rights organizations to explain why, members of the Mission said that explicit reference to apartheid “isn’t helpful.”

Participants, however, were primarily concerned about the lack of political will among the Palestinian leadership and the division between the authorities in Gaza and the West Bank. There was agreement that the strategy should be designed in a manner that will allow

implementation by civil society irrespective of the position of the leadership. At the same time, participants concurred that support of the leadership will be required at some point for any strategy to be effective, and that cooperation with the leadership must be sought. In this regard, it was emphasized that an anti-apartheid strategy does not necessarily contradict leadership objectives and interests, and that prospects of cooperation may be enhanced if the strategy is designed in a manner that makes it useful also for PA/PLO diplomacy.

In this vein, it was pointed out that the Palestinian anti-colonial and anti-apartheid strategy must build on the past achievements of the PLO, and take into account the gains and risks resulting from the current statehood drive. One participant listed the main achievements of the PLO:

- 1 – WB and Gaza are defined as “occupied territory”
- 2 – PLO is recognized as the legitimate representative of all Palestinians
- 3 – State of Palestine exists as a matter of law
- 4 – ICJ ready, willing and able to seize itself on the matter of Palestine
- 5 - There is a possibility of accession to the Rome Statute/ICC

With regard to the current statehood drive, another participant commented that the fact that this was an independent Palestinian initiative, which was pursued despite US and Israeli opposition, should be noted positively, in addition to the access to the ICC. At the same time, the statehood drive entails serious risks:

- 1 – It may contribute to a process of downsizing of Palestine, possible even reducing its area to the West Bank and excluding Gaza
- 2 – It may reduce the Palestinian people to those residing in the West Bank
- 3 – It may result in the eclipse of the PLO by the PA, the latter becoming the actual “state”.

Points of agreement/strategy

- Many of the participants agreed that development of an anti-colonial, anti-apartheid strategy should proceed.
- Future discussion about the appropriate strategy should be guided by the parameters identified in the roundtable, and it should examine in-depth a number of relevant proposals presented by guest speakers in the conference.

1.3 Utilizing international legal mechanisms: lessons learned, steps to be taken

Participants discussed if and how international legal mechanisms, including the ICJ and ICC, could be used as part of a Palestinian anti-colonial and anti-apartheid strategy.

A second ICJ advisory opinion on Israeli colonialism and apartheid – some practical lessons learned from work for the 2004 ICJ opinion on the Wall, as well as additional issues to be considered in preparations for a second ICJ opinion, were summarized by guest speakers:

- The first ICJ opinion was only possible because the PLO was fully supportive and mobilized. The PLO mission at the UN in New York effectively lobbied member states to accept the GA resolution to recommend the case of the Wall to the ICJ.
- At the same time, civil society undertook intensive awareness-raising and advocacy about the Wall which complemented the PLO initiative.

- When compiling the file, a decision was taken to rely only on UN sources, in order to strengthen the credibility of the case.
- A shortcoming of the 2004 opinion is its lack of practical and detailed recommendations to third states on what they should do in order to implement their own legal obligations. The ICJ affirmed third state obligations in a very general manner, and this has been an obstacle to more effective use of the opinion.
- The current composition of the ICJ is less favorable than in 2004, as judges are less familiar with the context in Palestine. This composition of the court will change in a couple of years and must be monitored.
- Strategic planning for a second ICJ opinion must include a plan for how the opinion will be used, and a contingency plan for how to handle an opinion that does not meet expectations.

Participants differed in their assessment of the value of ICJ advisory opinions. On the one hand, many human rights advocates have argued that the Wall Opinion of 2004 is a milestone that has facilitated substantially the success of civil society advocacy and the BDS campaign, and that the ICJ is the primary international mechanism for achieving an authoritative legal opinion affirming that Israel's occupation regime amounts to colonialism and apartheid and is, therefore, unlawful and criminal in its entirety. On the other hand, several participants in the roundtable, including members of political groups, expressed doubt about the ICJ course of action, arguing that the 2004 opinion has been of little use due to lack of enforcement.

Participants were also divided over which of the two proposed questions to the ICJ would be most appropriate. Some favored the question proposed by John Dugard ("What are the legal consequences of a regime of prolonged occupation, with features of colonialism and apartheid resulting from the establishment of Jewish settlements, in the Occupied Palestinian Territory, including East Jerusalem, for the occupied people, the occupying Power (Israel) and third states?"), mainly because the case could be argued based on hard international law and the extensive UN record pertaining to the OPT. Others feared that exclusive focus on the OPT might lead to more fragmentation of Palestine, the country, and its people, in international law and favored, therefore, the question proposed by George Bisharat ("Does Israel's treatment of the Palestinian people as a whole - citizens of Israel, residents of the Occupied Palestinian Territories, and external refugees - breach the prohibition of apartheid under international law?"). Participants agreed that the merits and risks of either require further discussion.

The ICC option – Israeli settlements as an international crime – Once more, some important facts and issues to be considered were summarized by guest speakers:

- Unlike the ICJ option, the ICC option is available immediately, either upon ratification of the Rome Statute by Palestine, or based on the 2009 open-ended declaration of the PLO accepting the jurisdiction of the ICC.
- Only crimes committed after the declaration/accession to the Rome Statute will be considered; for this reason, a case should be brought against the Israeli settlements as an international crime.
- The lack of territorial jurisdiction does not prevent Palestine's accession to the Rome Statute because independent ratification of the Statute has been accepted from other entities of similar status, such as the Cook Islands, a dependency of New Zealand.

- The mere opening of an ICC investigation, even if prosecution is not forthcoming, would be an important step towards the international isolation of Israel.

Other mechanisms proposed by participants - The inter-state complaint mechanism under the Covenant for the Elimination of Racial Discrimination (CERD) was suggested by a human rights lawyer as a means for the PLO/Palestine to obtain a legal finding on Israeli apartheid from independent experts. The CERD complaint mechanism could be used immediately, (if/as soon as Palestine has ratified the Covenant), as part of the preparation for an ICJ advisory opinion, or as a (temporary) substitute, if the idea of the ICJ has to be dropped or postponed.

Another human rights lawyer pointed at ways whereby the PLO/Palestine could move away from the Oslo framework and improve its standing in negotiations with Israel, as well as in the United Nations. It could do so by challenging the idea of Israel as a Jewish state, for example by demanding that Israel implement legislation that guarantees full equality for all its citizens, and by promoting a new GA resolution in this regard.

As participants examined these various mechanisms and options, the lack of political will and support by the Palestinian leadership took once more center-stage. Many participants deplored the abuse of the ICC option as a political threat and bargaining chip, and a recent announcement by Abu Mazen that all “unilateral moves” (meaning the ICC) against Israel would be put on hold in order to give negotiations a chance. Others, including NSU legal advisers, encouraged participants to look at the leadership in a more nuanced way, saying that there are some who could be supportive and should be approached in order to advance the strategies and options discussed here.

Another suggestion raised by a Palestinian lawyer and former NSU staff was that there should be a discussion within Palestinian society about the ICC and ICJ, in order to ensure that these options are understood and people are aware of the cost they may entail in terms of political isolation and sanctions instigated by Israel.

Points of agreement/international mechanisms

- There was agreement about the need to continue the discussion about the appropriate and effective utilization of the ICJ, ICC and other international mechanisms and tools with both, specialists and the wider Palestinian public.

2. Issues and practical steps suggested for the follow-up process:

- a) Awareness-raising and training activities should be undertaken to educate relevant sectors of Palestinian society, in particular civil society activists, university students and politicians, about the meaning and consequences of apartheid, colonialism and forced population transfer in international law, and about possibilities and risks of the IJC and ICC options. These activities should help people apply and express themselves through the language of these frameworks, avoid and challenge meaningless “political” labeling, and shape an informed public opinion about if/when/how Palestinians should approach the ICC and/or ICJ.

- b) A forum should be created for the development of a proposal of an integrated Palestinian anti-colonial, anti-apartheid strategy. Such a forum should involve members of the Palestinian human rights, legal and political community in Palestine and outside (via skype). It should identify the main elements of the strategy and provide answers to the important question of how the Palestinian leadership can be influence and engaged. For this purpose, the forum should:
- Study in-depth a number of relevant proposals presented by guest speakers in the conference. These include in particular the proposal of an “integrated strategy for liberation” (George Bisharat), and the ideas raised by John Reynolds in his paper on "legal resistance: strategies and tactics" for garnering the support of international legal and political fora and public opinion. The forum should also examine the merits of the strategy proposed by Charles Shamas for the “passive enforcement” of third-state obligations at a technical level.
 - Identify the technical support, including research, expertise, etc., required for the development of the strategy.
- c) A team of experts should be composed to formulate a proposal of the most feasible and effective utilization of the international legal mechanisms discussed in the conference, in particular the ICJ and ICC, in the context of a broader anti-colonial and anti-apartheid strategy. The team’s proposal should include, among others:
- Answers to the unresolved question if and how Palestinian legal initiatives based on positive/hard international law (and, thus, focused on the OPT) can be used tactically in a manner that transcends the fragmentation of the Palestinian people, rights and territory, or whether OPT-focused initiatives necessarily reinforce the existing fragmentation. The team should formulate an opinion on this basis about the questions to the ICJ proposed by John Dugard and George Bisharat, and about a possible case to the ICC on the Israeli settlements as a war crime.
 - Recommendations regarding the most effective and feasible next steps for advancing Palestinian initiatives in these mechanisms. In this context, the team should assess possible practical steps suggested in the conference. For example, should a case for the ICJ be prepared already now in anticipation of appropriate timing for submission? Should a concept note for an ICC/ICJ strategy be prepared as a tool for seeking green light from Abu Mazen to proceed? Should the idea of an inter-state complaint to CERD be pursued?