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Author(s): Gonca Oğuz Gök

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Evidence for Hope? Assessing the Role of the UN Human Rights Council Special Rapporteurs on the Course of the Palestinian Question

Gonca Oğuz Gök*

*“I felt that the Palestinians deserved and needed an independent voice within the UN system and that the UN, for all of its shortcomings, has become a politically relevant arbiter of the **legitimacy** and **illegitimacy** of competing **claims of right** in conflicts that are brought to its attention”*
(Richard Falk, 2015)

Abstract

The Palestinian Question has been at the heart of the United Nations (UN) since its establishment. Yet, the “intergovernmental” mechanisms of the world organization have proven to be largely ineffective in finding a just and sustainable solution to one of the most important and intractable issues of the UN-era. In between political and diplomatic struggles, the UN Human Rights Council Special Rapporteurs on Palestine are increasingly regarded as the only truly independent and expert voices as well as valuable sources of information regarding the issue. However, the special rapporteurs are one of the least studied aspects of the UN regarding the Palestinian question. Drawing highly on the social constructivist premise on the role of ideas and norms in constructing/deconstructing the legitimacy discourse in international politics, this study attempts to theoretically question and empirically analyse how the “actorness” of the special rapporteurs have the potential to affect the course of the Palestinian question. The article concludes that the mobilization of normative arguments on the Palestinian Question at the transnational level and framing the issue for collective debate supported by technical and knowledge-based legal expertise of UN Special Rapporteurs may confer a renewed legitimizing role for the United Nations.

Keywords: Palestinian Question; United Nations; Human Rights Council; Special Rapporteurs; Legitimization

Introduction

The Palestinian Question has been at the centre of United Nations (UN) agenda since the British transfer of responsibility as a mandatory power in Palestine from the League of Nations to the UN in 1945. Since then the UN has been given the historical responsibility of finding a just and peaceful solution to the question. As of yet, the world organization is home to the political and diplomatic struggle between the generally pro-Palestinian consensus of the international community of the UN General Assembly resolutions and the so-called

*Gonca Oğuz Gök; Associate Professor, Department of International Relations, Faculty of Political Science, Marmara University, Istanbul, Turkey. Email: goncaoguzgok@gmail.com.

power politics at the heart of UN Security Council veto mechanism (Falk 2018).¹ Among others, the UN Human Rights Council (HRC) in Geneva, formerly known as the UN Commission of Human Rights (CHR), has become one of the few arenas within the UN in which different and competing viewpoints from various actors still prevail regarding the Palestinian question. As an inter-governmental body with various structural and procedural limitations, the role of the HRC has so far had little political traction in pushing for a just and peaceful solution to the Palestinian question (Falk 2017).

In between the aforementioned internal UN struggles; a mechanism called the UN Human Rights Council Special Procedures, especially the work of the special rapporteur on Palestine in particular, as well as the staff support of the Office of Human Rights High Commissioner (OHRHC) are increasingly valuable sources of information regarding the Palestinian question. The Special Rapporteur on Palestine is often regarded as the only truly independent and expert voice available to the Palestinian people and thus the Human Rights Council utilizes the work of the rapporteurs as part of its Universal Periodic Review (UPR) process and as a contribution to its special sessions. The work of the rapporteurs is also cited during Human Rights Council debates by non-governmental organizations (NGOs) and civil society actors (Smith 2011: 180). Their status as independent experts is at the heart of their perceived legitimacy which in turn puts them in a position of authority regarding the human rights dimension of the Palestinian question. Despite this, the special rapporteurs are one of the least studied aspects of the United Nations system of protecting human rights in general and regarding the Palestinian question in particular.

Acknowledging the *social constructivist* premise that technical expertise, mobilization of information, and diffusion and fixing of meanings are important sources of International Organizations' (IO) power and authority in international politics (Barnett & Finnemore 2004), this article attempts to theoretically question and empirically analyse how the actorness of the special rapporteurs have the potential to affect the course of the Palestinian question. In order to answer this, the article will first comparatively and theoretically analyse the role and actorness of the UN Human Rights Council with that of its special procedures mechanism in terms of its strengths and limitations regarding the institutionalization and implementation of international human rights norms. Secondly, the article will specifically focus on the role of the UN Human Rights Council Special Rapporteurs on the Palestinian question. Drawing highly on the social constructivist premise on the role of ideas, norms, knowledge, and argument (Finnemore & Sikkink 2001: 392) in constructing/deconstructing the legitimacy discourse in international politics, this study attempts to understand the role of UN Special Procedures mechanism in general and to the Special Rapporteurs on the Palestinian question in particular.

Assessing the Role of the UN Human Rights Council: Old Wine in a New Bottle?

Following World War II, human rights have become a so-called "legitimate" field of focus at the UN. The creation of the UN in 1945 was the first step towards increased placement of value on human rights. Soon after in 1946, the UN created a sub-body to deal with the promotion of human rights. The Human Rights Commission (HRC) was the first international organization mandated to deal specifically with international human rights. The Commission

achieved numerous successes in the early years of its establishment such as the preliminary drafting of the Universal Declaration of Human Rights in 1947 which was notable for the fact that so-called Third World states from Latin America and Asia were also able to be active along with powerful Western states in the drafting of Universal Declaration of Human Rights at the UN Human Rights Commission (Waltz 2001: 54).

After its establishment, the UN Commission of Human Rights (CHR) received a large number of individual petitions complaining about a range of allegations on human rights violations in several member states. Very early, the commission announced that it had no power to take any action in response to charges by individuals of human rights violations by governments. In the early days of the UN, the CHR focused solely on elaborating human rights standards. In this regard, the Economic and Social Council (ECOSOC) passed a resolution in 1947 that the Commission had “no power to take any action in regard to any complaints concerning human rights”.²

With the wave of decolonization in the early 1960s, numerous new member states were admitted to the UN at the General Assembly, bringing new priorities to the Council. Small states from the Third World applied to the UN in their struggle for self-determination and thus the platform has become one to which competing legitimacy claims of new emerging norms on human rights are taken. Drawing from the social constructivist perspective, Neta C. Crawford (2002) argues that ethical arguments, especially those regarding human equality and the rule of law, have played the most important role in the decolonization process in the UN platform by gradually undermining the legitimacy of existing colonial practices. Moreover, criticisms of apartheid and racism were also brought to the CHR during the 1960s. Accordingly, in 1965, the CHR was faced with a number of individual petitions from South Africa and came under considerable pressure to deal with them.³ One should note here that among others, the struggles against apartheid functioned as a catalyst which led to CHR Resolution 125(XLII) on June 1967, creating the possibility of holding a public debate on violations of human rights in all countries (Pinheiro 2011: 162-163). In other words, in 1967, the CHR was empowered to investigate human rights practices in individual states without their permission and struggle for human rights challenged the very sovereignty principle as well as creating space for institutional change at the UN. Furthermore, focusing initially on the standard-setting during the first 20 years of its existence, step by step the implementation of these standards became the second focal point of the work of the CHR (Freedman 2011: 26).⁴

Although these developments could be regarded as the evolution of the CHR as well as its institutional change, the real progress or effectiveness of the institution is debated. Many criticisms have been levelled at the CHR’s structure throughout the years. It was first criticized based on membership criteria as human rights abuser states could serve as members of the Commission. Secondly, powerful states have been able to avoid scrutiny due to the difficulty in holding them accountable for human rights abuses (Freedman 2013). Some of the major criticisms towards the CHR encompassed membership of known abuser states, naming and shaming of countries through country-specific resolutions, absence of membership criteria, etc. (Redondo 2008). Additionally, Israel has argued that it has been denied membership in the Asian Group by its Arab members and that the Commission has increasingly evolved towards a biased slant against Israel⁵ (Freedman 2011: 26).

Nevertheless, the UN Commission of Human Rights has been noteworthy through its drafting of the Universal Declaration of Human Rights and its role during the struggle for decolonization and the anti-apartheid movement.

In 2005, referring to the criticisms regarding membership and effectiveness at the UN World Summit, the then UN Secretary-General Kofi Annan recommended that the Commission be replaced with a smaller and more effective Council (Moss 2010: 125). Accordingly, the General Assembly decided to reform the Commission in March 2006 and the newly created institution was renamed the Human Rights Council (HRC). The HRC was to report directly to the General Assembly and to be composed of 47 member states responsible for strengthening, promoting, and protecting human rights around the globe. It was therefore established by the General Assembly, not the ECOSOC, and serves as a subsidiary body of the GA. Interestingly, the HRC is the only body in the UN platform in which the number of members decreased through reforms (from 53 to 47).⁶ The Council was mandated to assume the Commission's standard-setting role which includes recommending that the General Assembly adopt human rights norms. The Council is given the power to undertake certain supervisory roles, such as monitoring state compliance with human rights. A new mechanism called "Universal Periodic Review" was also introduced. Furthermore, the Council was empowered to suspend member states as a direct response to the criticism that known abuser states held Commission membership. Finally, the Council is mandated to work within the wider UN system and with civil society actors to protect and promote human rights (Freedman 2011:106-109).

Despite these structural reforms, the Council's effectiveness in protecting human rights has continued to be limited. Despite the fact that the Council has issued a significantly greater number of resolutions than to the Commission (30 in 2006 versus more than 150 in 2018),⁷ critics argue that since its creation, the vast majority of the Council's time and attention has been focused on general thematic issues rather than country-specific mandates⁸ (Gujadhur & Lamarque 2015). Some have also pointed to the fact that while the Council has responded to violations of human rights, it has been notably selective in terms of the limited range of situations addressed (Freedman 2011). On the other hand, compared to other organs of the UN, the Council remains one of the few mechanisms in which developed Western states remain outnumbered by developing non-Western countries. Secondly, the Council is mandated to work within the wider UN system and with civil society actors to protect and promote human rights. Therefore, the body has the power to share information with, and receive information from, those actors (Jordaan 2015: 465). Above all, HRC fact-finding missions and special procedures, the work of the special rapporteurs, have become one of the most crucial mechanisms in the 2000s in terms of contributing to the work of the HRC on human rights.

The Role of the UN Human Rights Council on the Palestinian Question

At the end of World War I, Palestine was one of several former Ottoman Arab territories which became mandated territories by the League of Nations. After World War II, Britain transferred responsibility to the UN which took up the question of Palestine in February 1947. The UN proposed terminating the mandate rule and partitioning Palestine into two

independent states, one Palestinian Arab and one Jewish, with Jerusalem internationalized.⁹ One of the two states proclaimed its independence as Israel and following a two-year armed conflict; over half of the Palestinian Arab population fled or were expelled. The result of the 1967 War was Israeli occupation of the Gaza Strip and the West Bank, including East Jerusalem, creating a second wave of forced Palestinian immigrants numbering at approximately half a million.¹⁰

The United Nations Human Rights Council specifically took up the issue of human rights in the Palestine question after the 1967 War. Initially, the Security Council Resolution 242 formulated the principles of a just and lasting peace, including an Israeli withdrawal from the territories occupied during the conflict and a just settlement of the refugee problem. Resolution 237, adopted in August 1967, called on Israel to allow the return of refugees and to observe international conventions governing the treatment of civilians in times of war. In 1968, the General Assembly reasserted the right of refugees to return to their homes and established the “Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories”.¹¹

The UN Commission on Human Rights issued its first resolution in 1968, titled “Human Rights Situation in the Occupied Territory”. In fact, after 1967, one can observe a fundamental transformation in the evolution of the Palestine question at the HRC. The issue evolved from being viewed as a refugee problem to be recognized as an important issue involving the fundamental rights of the Palestinian people to return to their homeland and to national self-determination.¹² The systemic effects of normative developments regarding human rights in late 1960s also contributed to this renewed conceptualization towards the Palestinian question. In parallel, the UN General Assembly established the Committee on the Exercise of the Inalienable Rights of the Palestinian People in 1975 and conferred on the PLO (Palestinian Liberation Organization) the status of observer in the Assembly and in UN conferences.¹³

When examining the UN Commission of Human Rights resolutions throughout years, particularly after the 2000s, there has been a notable qualitative and quantitative change regarding the Palestinian question both in terms of the number and the subject matter. As **Table 1** illustrates, HRC resolutions were limited both in the number and scope during the first decade of its establishment, namely between 1968 and 1978. In fact, until 1993, a total of 13 resolutions were issued with respect to human rights and 3 on self-determination and Israeli Settlements (see **Table 1**).

1993 marked a turning point in which the CHR decided to appoint its first special rapporteur with a mandate to investigate human rights violations until the end of the Israeli occupation of territories occupied since 1969.¹⁴ As seen in **Table 1**, the number of resolutions regarding the human rights situation in Palestine almost tripled from 11 to 28 between 1994 and 2000. The Council could therefore be viewed to begin to perceive the Palestinian question from a human rights perspective after the Cold War. Similarly, greater attention was paid to the expansion of Israeli settlements in the Council following the Cold War. The Middle East Peace Process gained a new agenda during the 1990s. The real surge occurred in the 2000s in terms of both the expansion of missions and the growing number of resolutions with a widened agenda on the Palestinian question.

Table 1: CHR and HRC Resolutions on Palestinian Question¹⁵

	HR	RSD	MEPP	IS	HRIC	RCR	IMO	GHR	EAJ	FFM	Total
1968- 1978	6	2	-	-	-	-	-	-	-	-	8
1982-1993	11	1	-	1	-	-	-	-	-	-	13
1994-2000	28	1	7	7	1	-	-	-	-	-	44
2001-2005	18	2	-	4	-	-	-	1	-	-	25
2006-2010	26	3	-	4	-	2	3	⁴ (FFM)	-	6	48
2011-2018	10	6	-	9	-	-	-	-	6	6	37
Total	99	15	7	25	1	2	3	5	6	12	

HR: Human Rights Situation in Occupied Territories; **RSD:** Right to Self Determination; **MEPP:** Middle East Peace Process; **IS:** Israeli Settlements; **HRIC:** Human Rights Inquiry Commission to be Established; **(RCR)** Religious and Cultural Rights; **(IMO)** Israeli Military Operations; **(GHR):** Grave Violations of Human Rights; **(EAJ)** Ensuring Accountability and Justice in Occupied Palestinian Territory; **(FFM):** Reports of Fact-Finding Missions.

The 2000s marked the establishment of the HRC's fact finding missions to investigate violations of human rights, such as the UN fact-finding mission on the Gaza conflict in 2009, the UN fact-finding mission on the Gaza flotilla in 2010, and the UN fact-finding mission on Israeli settlements in 2012. In addition, the Human Rights Inquiry Commission was established in 2000. As seen in **Table 1**, one can trace an increased number of HRC resolutions, especially after the Council's establishment in 2006. Furthermore, the new issues of religious and cultural rights were added to the Council's resolutions. In the last decade in particular, ensuring accountability and justice became a growing concern on the Council's agenda, possibly corresponding to a shift in terms of an increased focus on the issue of accountability (see **Table 1**).

Therefore, one can trace the evidence of a shifting discourse with respect to the Palestinian question in UN Human Rights Council focusing more on issues of accountability and justice. Similarly, the Council has begun to highlight the political dimension more than the human rights dimension. Furthermore, in June 2007, the United Nations Human Rights Council voted in favor of making the human rights situation in Palestine a permanent item on the Council's agenda, a move that might also be argued to affect the increased number of resolutions on the Palestinian question.¹⁶ On the other hand, as the only permanent council agenda item on a specific country and issue, Item 7 on Palestinian issues is highly criticized for being biased against Israel.

Although these numbers illustrate an evolution in the Council's growing interest in the Palestinian question, apart from the fact-finding missions in the 2000s, its effectiveness in creating actual outcomes have so far been largely limited. In fact, the increased number of

resolutions and growing agenda has led some to accuse it of being biased against Israel and putting disproportionate attention to Israeli violations of human rights as compared with countries that are worse offenders. On the other hand, as Richard Falk puts it, these criticisms sometimes focus more on the messenger than the message itself. Yet, as an inter-governmental body, the Council's resolutions have so far proven to have limited political traction in changing the established discourse, mobilizing different humanitarian actors in global governance, and persuading and pressuring governments to enact a just and peaceful solution to the Palestinian question. Nevertheless, despite criticisms towards its effectiveness in realizing its purpose, it is still one of the few institutional arenas in which both Western and non-Western priorities still prevail on the Palestinian question.

More importantly, the work of the HRC has been supported from various mechanisms including civil society actors, fact-finding missions, and special procedures. In this regard, the work of the special rapporteurs, more generally known as the Special Procedures, supported by the Special Procedures Branch (SPB) of the Office of the High Commissioner for Human Rights (OHCHR) have been more important than the Council, which is composed of governments. Having said that, the remainder of this article will theoretically analyze the actorness of the other mechanism established under Human Rights Council, namely the Special Procedures and the Special Rapporteurs on Palestine.

The Actorness of the UN Human Rights Special Rapporteurs: A Social Constructivist Analysis

Human rights special procedures are regarded as being the strongest protection actors across the United Nations Human Rights machinery (Ramcharan 2011). "Special Procedures" is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. In fact, the establishment of first special procedures goes back to the 1960s, and the struggle against the apartheid regime in South Africa. In 1965, the Commission on Human Rights was faced with a number of individual petitions from South Africa and came under considerable pressure to deal with them. As a result, in 1967, the Commission departed from previous practice and established an ad-hoc working group of experts to investigate the situation of human rights in Southern Africa. This ad-hoc working group can be considered the first Special Procedure of the Commission on Human Rights.¹⁷ Yet officially, the United Nations Commission on Human Rights (CHR) only appointed its first special rapporteur with a country mandate in 1979 to report on human rights abuses in Chile under the Augusto Pinochet dictatorship (Pinherio 2011: 162-163). Subsequent country-specific human rights-related appointments were in El Salvador, Equatorial Guinea, Bolivia, and Guatemala in the early 1980s and slightly later, in 1984, in Afghanistan and Iran (Subedi 2011: 207).

Special Procedures either refers to an individual, a special rapporteur, or an independent expert/working group. They are prominent, independent experts working on a voluntary basis and appointed by the Human Rights Council.¹⁸ They issue reports to the HRC on their findings and recommendations as well as to the General Assembly. They sometimes emerge as the only mechanism that has the ability to alert the international community to

certain human rights issues, as they can address situations in all parts of the world without the requirement for countries to ratify a human rights instrument. The Office of the High Commissioner for Human Rights (OHCHR) supports the work of rapporteurs, independent experts, and working groups through its Special Procedures Branch (SPB), which provides centralized support to the special procedures as a system.¹⁹ Special procedure mandate holders gather and publish information about gross violation of human rights and issue recommendations (Ramcharan 2011). In practice, the special rapporteurs perform a supervisory, consultative, advisory, or monitoring function rather than one of enforcement. In other words, they are not legally binding on states (Subedi 2011: 203). Special procedures serve as the main entry point into this system for victims and human rights defenders where they can voice their experiences, concerns, and expectations. However, there is limited scholarly and theoretical examination of the nature and impact of the role of the special rapporteur in the normative evolution of international human rights norms (Subedi, Wheatley, Mukherjee & Ngane 2011: 155).

Their actorness differs from that of the Human Rights Council in the sense that UN special rapporteurs for human rights have played an important role in monitoring and fact-finding missions on human rights and in performing a critical role in shaping the content of human rights norms. In the words of the then UN Secretary-General Kofi Annan, they are “the crown jewel of the system” (Piccone 2011: 207). They have been credited for bringing the human rights work of the UN to the ordinary men and women of the globe (Subedi, Wheatley, Mukherjee & Ngane 2011: 155). The HRC uses the work of rapporteurs both as part of its universal periodic review and as a contribution to its special sessions. The work of rapporteurs is also increasingly cited within Council debates by NGOs and civil society, states, and treaty monitoring bodies (Smith 2011: 180). Furthermore, the main reference points for special procedures’ examination of a state’s human rights record range broadly from the general provisions of the Universal Declaration of Human Rights and other widely accepted human rights standards. In this regard, they have several important advantages over treaty bodies in that “they are not restricted to the text of any one convention; they may examine any UN member state, not just those states that have ratified a treaty” (Piccone 2011: 209).

The question is then, where do they derive their authority and actorness? Experts appointed by the HRC to serve as special procedures are independent of governments, serve in their personal capacities, and carry out their mandates on a volunteer basis. Their authority is largely derived from their professional qualifications to address specific human rights situations objectively as well as the political mandate they receive from the UN Human Rights Council. One of their greatest assets is a sense of passion and commitment to the cause of human rights which, combined with subject matter expertise, creates a kind of legitimacy and authority for calling attention and promoting action to protect human rights. Increasingly they have been viewed by civil society, the media, and by many governments as a reliable and even authoritative source of useful information, helpful analysis, and policy guidance (Falk 2017). In this regard, special rapporteurs exercise power not through coercion but through mobilization of information. Officials in international organizations such as the UN often insist that part of their mission is to spread, inculcate, and enforce global values and norms (Barnett & Finnemore 1999: 708). Therefore borrowing from Weber, as Social

Constructivists would argue, they look like rational-legal authorities, in which the source of their authority largely derived from their perceived impartiality as well as legal-technical expertise on human rights issues (Barnett & Finnemore 2004). They are powerful precisely because they are able to affectively create the appearance of de-politicization and ideological neutrality/objectivity.

As Barnett and Finnemore (1999: 708) argues, the IO authority is highly dependent upon being perceived as impersonal, technocratic, and neutral and in not exercising power but serving others and the presentation and acceptance of these claims is critical to their legitimacy and authority. There are considerable amounts of constructivist studies on the role of *epistemic communities*²⁰ (Haas 1992) on the social construction of reality (Finnemore & Sikkink 2001). For instance, Ratner's (2000) study of the OSCE's High Commissioner for Minorities placed the High Commissioner (HC) in a unique position to construct new international norms and rules. In this study, lawyers have been shown to do extensive social construction again, often in conjunction with international institutions that consolidate and formalize the new social facts lawyers create. Burley & Mattli's (1993) analysis of the efforts of community lawyers to empower the European Court of Justice illustrates the ways in which professional groups can translate their own shared understandings into formalized organizations and legal structures. From a social constructivist perspective, Kratochwil (1989) also examined the role of legal reasoning in persuasion and other social construction processes.

Similarly, the capacity of UN special rapporteurs to mobilize information and build technical legal expertise based on perceived impartiality are their main source of power and authority on human rights issues. These features confer them a uniquely flexible and independent role as well as legitimacy to play in a system otherwise dominated by governments. Therefore, for all of its difficulties, the role of special rapporteur is of great value as a means of *shaping the legitimacy discourse* through mobilizing and diffusing information. Degrees of effectiveness largely depend on the motivation, background, and ability of the individual rapporteur, as well as on the political sensitivity of the mandate. In addition, the importance placed on human rights issues rises and falls over time with respect to the extent of interest exhibited and as reflected in the wider geopolitical trends (Falk 2017).

The Role of the UN Special Rapporteurs on the Palestinian Question

The UN Human Rights Commission established a mandate in Palestine in 1993 with the official name Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967.²¹ Unlike other mandates, the mandate on Palestine was established to last "until the end of Israeli occupation" (Falk 2017). Accordingly, the Commission appointed the first special rapporteur, René Felber, from Switzerland, whose task was to assess the situation, work with governments and civil society to collect information, report findings publicly, and make recommendations, if necessary.²² There have since been seven rapporteurs on Palestine, including Felber (see **Table 2**). However, two figures, John Dugard (2001-2008) and Richard Falk (2008-2014) are considered very influential in terms of the length of their term of office and their contributions to changing the

discourse on the human rights dimension of Palestinian question through mobilizing and diffusing information.

Table 2: Special Rapporteurs on the Situation of Human Rights in the Palestinian Territories Occupied since 1967

S. Michael Lynk (Canada)	2016-present
Makarim WIBISONO (Indonesia)	2014-2016
Richard FALK (USA)	2008-2014
John DUGARD (South Africa)	2001-2008
Giorgio GIACOMELLI (Italy)	1999-2001
Hannu HALINEN (Finland)	1995-1999
René FELBER (Switzerland)	1993-1995

The Work and Actorness of John Dugard as Special Rapporteur for Human Rights on Occupied Palestinian Territories (2001-2008)

John Dugard was appointed Special Rapporteur on the Situation of Human Rights in the Palestinian Territories in July 2001, a mandate he held until 2008. He became a member of the UN's International Law Commission in 1997 and served as its Special Rapporteur on Diplomatic Protection from 2000 to 2006. He also served as ad hoc Judge in the International Court of Justice (2002-8).²³ Being also a former South African law professor, his reports on the violations of human rights in the Palestinian territories consistently upheld a technical rule of law approach to the question of Palestine.

An analysis of his reports demonstrates that one of the recurrent themes in his reports during his term was the use of language including occupation, colonialism, and apartheid. Dugard raised the issue of whether Israel's practices on occupied territories matched the legal definition of apartheid in South Africa. In his January 2007 report, his enquiry was as follows:

The international community has identified three regimes as inimical to human rights-colonialism, apartheid and foreign occupation. Israel is clearly in military occupation of the OPT. At the same time, elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying power and third states?²⁴

One of the recurrent themes in Dugard's reports was also accountability. In his 2007 Report, Dugard compared the Palestinian question with that of the apartheid regime in South Africa:

Israel's practices and policies in the OPT are frequently likened to those of apartheid South Africa... Although the two regimes are different, Israel's laws and practices in the OPT certainly resemble aspects of apartheid, as shown in paragraphs 49-50 above, and probably fall within the scope of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.²⁵

The end of Dugard's term coincided with Israel's Operation Cast Lead (December 2008-January 2009), considered one of the most destructive military operations carried out in Gaza. John Dugard, along with other experts, was appointed by the Arab League as head of a fact-finding mission established in February 2009 with the tasks of investigating and reporting on violations of human rights law and international humanitarian law. The report concluded that war crimes and crimes against humanity and possibly genocide by individual soldiers, as well as war crimes committed by Hamas (Debbas 2010: 249). Dugard's Arab League report called upon states with domestic international criminal jurisdiction to consider the apprehension and prosecution of those responsible for planning and implementing Operation Cast Lead (Plessis 2010: 305). One should also mention the Goldstone Report written by an ex-judge of the Constitutional Court in South Africa and former Chief UN Prosecutor at the International Criminal Tribunals for the former Yugoslavia and Rwanda – Richard Goldstone – in 2009. Goldstone was appointed Head of a United Nations Human Rights Council fact-finding mission in Gaza. Goldstone's 2009 report also found that Israel failed to look into alleged misconduct by its soldiers and used white phosphorous in violation of international law, the report also calling for greater accountability (Plessis 2010: 302):

The systematic discrimination, both in law and in practice, against Palestinians, in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions compared with that applicable to Israelis), and practice during arrest, detention, trial and sentence compared with Israeli citizens is potentially in violation of the prohibition on persecution as a crime against humanity (Dugard & Reynolds 2013: 898).

In one of his publications, Dugard argued that states expected the West to respond to the Palestinian question in the same way it responded to apartheid; with action through the United Nations, governments, and civil society (Dugard 2007).²⁶ In an article published in the prestigious *European Journal of International Law*, Dugard concludes that “there are indeed strong grounds to conclude that a system of apartheid has developed [over Palestinian territories]” (Dugard & Reynolds 2013: 912). According to Dugard & Reynolds (2013), the existence of a such regime, amounting to an internationally wrongful act, has clear implications under public international law. Dugard argued that “international law may retain a role through the light that it shines on the normative issues to be resolved in this context” (Dugard & Reynolds 2013: 912).

The question then is what were the concrete outcomes of Dugard's reports or of the fact-finding missions such as the Goldstone Report? Gowlland-Debbas (2010) argued that Dugard's recommendations for referral to the International Court of Justice (ICJ) must have played a role in pressuring states to act in 2003. In fact, at the 23rd meeting of its tenth emergency special session on 8 December 2003, the General Assembly decided in resolution ES-10/14 in accordance with Article 96, paragraph 1, of the Charter of the United Nations, to request that the International Court of Justice urgently render an advisory opinion on the “legal consequences arising from the construction of the wall being built by Israel”.²⁷ On 9 July 2004, the International Court of Justice delivered its advisory opinion stating that “all State Parties to the Fourth Geneva Convention were under the obligation to ensure

compliance by Israel with international humanitarian law as embodied in that Convention.”²⁸ Again, increased reference to accountability on many platforms might also have played a role in the HRC’s resolutions in 2000s which increasingly stress the issue of Ensuring Accountability and Justice in Occupied Palestinian Territory (see **Table 1**). During September 2009, lawyers for 16 Palestinians sought to obtain an international arrest warrant for the Israeli Defence Minister, Ehud Barak, in a London court over alleged war crimes in the Gaza Strip. The accusations against Barak were based, in part, on Goldstone’s report but did not materialize due to his diplomatic immunity from prosecution (Plessis 2010: 307).

One should note here that the UN has so far not taken any initiatives for enforcing these reports calling for accountability. However, even if the UN cannot enforce the reports of Dugard and Goldstone, it has the effect of re-enforcing initiatives by individuals and civil society organizations, NGOs, and others that feel more empowered to take action to implement these dimensions of international law. Hence, it is important to appreciate the UN’s legitimizing role over public discourse.²⁹ As such, Dugard’s reports on the violations of human rights and international humanitarian law have been relied upon as an authoritative judgement in various civil society initiatives. Dugard’s report along with conclusions of independent-expert fact-finding missions seems to have legitimised civil society initiatives such as the Boycott, Divestment and Sanctions (BDS) initiative.³⁰

The Work and Actorness of Richard Falk as Special Rapporteur for Human Rights on Occupied Palestinian Territories (2008-2014)

One of today’s most prominent scholars of International Law, Richard Falk, replaced Dugard as the new Special Rapporteur of Human Rights on the Palestinian question. An American law professor, Falk’s reports on the violations of human rights in the Palestinian territories consistently upheld a rule of law approach to the question of Palestine. Falk also referred to concepts such as apartheid, ethnic cleansing, and occupation in his reports in an effort to change the public discourse on the Palestinian question:

In all respects, there is a dual order maintained in the West Bank that is completely analogous to the kind of duality one found in apartheid South Africa. It should be underscored that according to the Rome Statute (which set up the International Criminal Court) apartheid is a crime that does not depend on establishing a resemblance to what existed in racist South Africa. It is essentially a discriminatory system of dual law and a dual political regulatory system that privileges one part of the society and is punitive toward the other.³¹

In his own words:

Further along this line, by superseding the rhetoric of “occupation” and by viewing the Palestinian reality as one of “apartheid”, “ethnic cleansing”, “annexation”, and “settler colonialism”, I continued in my reports an effort begun by Dugard to use language that more accurately conveyed the true depth of the Palestinian ordeal than the formal euphemisms commonly relied upon in diplomatic discourse (Falk 2017: 89).

Yet one should note that, during his term and afterwards, Falk chose to place a greater focus on two aspects: (1) the contest over legitimacy and (2) non-violent resistance and the role of civil society. According to Falk:

The core of the Palestinian struggle has shifted away from both armed resistance and international diplomacy, at least temporarily, and that it now centers on various coercive forms of nonviolent resistance that are bolstered by growing pro-Palestinian activism in global civil society, including within the United State and western Europe. In this regard, the BDS (Boycott, Divestment, and Sanctions) campaign is emblematic of a legitimacy war being waged on many fronts that the Palestinians are winning (Falk 2017: 89).

Accordingly, in his 2012 Report, Falk called on civil society to take measures:

The Special Rapporteur calls on civil society to vigorously pursue initiatives to boycott, divest and sanction the businesses highlighted in this report, within their own national contexts, until such time as they bring their policies and practices into line with international laws and standards, as well as the Global Compact.³²

Making comparisons with South Africa again, Falk framed the struggle for Palestinian human rights as a legitimacy war and placed significant importance on creating a global campaign:

It's not that international law is so effective as a way of constraining behavior, but it does clarify the limits of acceptable behavior. I think it's been very helpful in strengthening the civil society Boycott, Divestment and Sanctions campaign ... So I think there is a set of developments that, in certain ways, resemble what the anti-apartheid campaign in South Africa managed to do – which was to create, in its legitimacy war, a global battlefield. The campaign was waged globally.³³

Thus, one should also underline the crucial aspects of growing transnational civil society initiatives that have been widely regarded as successful, similar to the campaign in South Africa in the late 1980s.³⁴ As Dugard argued, the international campaigns of the 1960s on decolonization and the anti-apartheid movement of the 1980s supported by the workings of normative and ethical arguments in the context of international law represent one of the major political success stories of the third world's human rights struggle performed at the UN platform (Dugard & Reynolds 2013: 913).

In sum, one of the defining characteristics of the work of Richard Falk was to revert attention once again back to world body as the centre of this legitimacy war. In his various remarks, Richard Falk upheld the importance of the continued relevance of the United Nations on the Palestinian question. Falk himself attributed this point as one of the outcomes of his mandate as Special Rapporteur of Human Rights on the Palestinian question:

I was able to formulate this new phase in the Palestinian struggle that included an appeal to the UN to be more active as a direct participant in the global solidarity movement (Falk 2017: 89).

Conclusion

Prominent scholar in the field of International Organizations, Inis Claude (1966) wrote as early as the 1960s about the role of UN in world politics from a realist perspective. According to Claude (1966: 368), world politics is not only a “struggle for power”, but also a “contest over legitimacy”. Later, the role of UN was extensively analysed by Social Constructivists who underlined that the UN, with its various mechanisms and bureaucracy, is not only an instrument in power politics, but also enjoys considerable “rational-legal authority” with its ability to mobilize information and more importantly turns “information” into “knowledge” (Barnett & Finnemore 2014).

The “intergovernmental” mechanisms of the UN have proven to be largely ineffective in solving one of the most important and intractable issues of the UN-era, the Palestinian question. Ample evidence can be found supporting a change in the 2000s with regards to the number and content of resolutions issued by the UN Human Rights Council. In this regard, tracing the content of the HRC and CHR illustrates that the issue evolved from a refugee problem to a human rights issue up until the 2000s. The 2000s marked a change in the language towards calling directly and openly to accountability and justice on the Palestinian question. In this respect, the work of people like Dugard, Falk, and Goldstone has proven to be essential and influential.

In a world in which “multiple loyalties and overlapping authorities”³⁵ (Bull 1977) flourish, these independent law experts at the UN have served as meaning architects in the international human rights movements through their impersonal, technocratic, and neutral manner. Their knowledge-based expertise on international law has proven to be the main source of power. The UN HRC Special Rapporteurs could be conceptualized as “epistemic communities” (Haas 1992) specifically in terms of their ability to frame the Palestinian issue for collective debate. It reminds the world community that there are other platforms of response at the UN than states and that the world organization, despite all limitations, has historically proven to be a crucial player in this “contest over legitimacy” (Plessis 2010: 302).

Whether the diffusion of new ideas and data could lead to new patterns of behavior or prove to be an important determinant of international policy coordination on Palestinian issue is yet to be seen. In this regard, the decision of some states, including the US, to relocate their embassy in Israel to Jerusalem and to recognize the city as the capital of Israel despite UN resolutions on the status of Jerusalem since 1945 seem to push the hope for a peaceful and sustainable peace to its limits. Although these political moves at the state level appear to deepen the Palestinian cries, they also serve to make it more visible to the international audience. In a highly fragmented world with a decreasing faith in democracy, human rights, and multilateralism ushering in an increased appeal of authoritarianism, the future of the UN’s legitimization function seems to be more relevant than ever. Human rights issues rise and fall over time and it is important to remember that this particular moment in history is not an exception, nor it is the worst in history.

Above all, the *mobilization of normative arguments* on the Palestinian Question at the transnational level and framing the issue for collective debate supported by technical and *knowledge-based legal expertise* of UN HRC Special Rapporteurs may confer a *renewed legitimizing role* in the United Nations. In the words of Richard Falk:

In the end, the function of this particular special rapporteur is to lend credibility and commitment to the hope for a just and sustainable peace that allows these two peoples to live together benevolently (Falk 2017:91).

Notes

1. Richard Falk, "The U.S. Withdrawal from the UN Human Rights Council", Foreign Policy Journal, June 22, 2018, (<https://www.foreignpolicyjournal.com/2018/06/22/the-u-s-withdrawal-from-the-un-human-rights-council/>).
2. ECOSOC Resolution 75 (V) (1947), available at (<https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>).
3. See <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>.
4. Known as the "1503 Procedure", a confidential complaints procedure open to states, NGOs and individuals was established in 1970. According to this, countries could be investigated and CHR action could be taken even without national cooperation. From the 1980s onwards a system of monitoring mechanisms was also developed under the auspices of the CHR.
5. The tone of Israeli criticism towards the HRC increased with the establishment of permanent "Item 7" on Palestinian question later in 2000s.
6. Membership is based on *equitable geographical distribution* with seats distributed among the regional groups as follows: Group of African States, 13; Group of Asian States, 13; Group of Eastern European States, 6; Group of Latin American and Caribbean States, 8; and Group of Western European and other States, 7. See http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/algati/30_Human_Rights_Council_and_Special_Procedures.pdf.
7. <https://www.ohchr.org/EN/HRbodies/HRC/Pages/Home.aspx>.
8. For example, at the 25th session of the Council (March 2014), Turkey delivered a cross-regional statement on behalf of 58 states arguing that "the Council's program of work has reached its limits in terms of its available time", and that "the increase in numbers and length of resolutions may reduce their quality and effectiveness, especially in the absence of better implementation". See Subhas Gujadhur and Toby Lamarque, "Ensuring Relevance, Driving Impact: The Evolution and Future direction of the UN Human Rights Council's Resolution System", Universal Rights Group Policy Report, January 2015. Available at (<https://www.universal-rights.org/programmes/human-rights-institutions-mechanisms-and-processes/the-growth-effectiveness-and-impact-of-human-rights-council-resolutions/>).
9. Resolution 181 (II) of 1947 (<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>).
10. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D442111E70E417E3802564740045A309>.
11. Ibid.
12. Ibid.
13. <https://www.un.org/unispal/history/>.

14. E/CN.4/RES/1993/2 (A+B) (<https://www.un.org/unispal/chr-res-on-qop/>).
15. The data used here is obtained from UN Official Database. (<https://www.un.org/unispal/human-rights-council-resolutions/>).
16. UN Human Rights Council Makes Israel Permanent Agenda Item, available at (<https://www.haaretz.com/1.4944826>).
17. <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>.
18. As of 1 August 2017, there are 44 thematic and 12 country mandates. (<https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx>).
19. <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.
20. Interest in the political effects of experts and specialized knowledge has existed in IR for decades. However, a specific research program on the networks of knowledge-based experts, conceptualized as “epistemic communities” was introduced by Peter Hass in the late 1980s and early 1990s. See Haas, P. (1992). “Introduction: Epistemic communities and international policy coordination”. *International Organization* 46 (1), pp. 1-35.
21. E/CN.4/RES/1993/2 (A+B) (<https://www.un.org/unispal/chr-res-on-qop/>).
22. <https://www.ohchr.org/en/hrbodies/sp/countriesmandates/ps/pages/srpalestine.aspx>.
23. <https://gruber.yale.edu/justice/john-dugard>.
24. A/HRC/4/17, 29 January 2007, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, John Dugard (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/105/44/PDF/G0710544.pdf?OpenElement>).
25. Ibid.
26. J. Dugard (2007) “The Future of International Law: A Human Rights Perspective”, Universtait Laiden, April 2007 available at: (<https://www.peacepalacelibrary.nl/ebooks/files/334367921.pdf>).
27. A/ES-10/PV.23 (8 December 2003).
28. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/B59ECB7F4C73BDBC85256EEB004F6D20>.
29. Interview with Richard Falk, available at (<https://www.globalpolicy.org/component/content/article/189/50404-israel-palestine-conflict-interview-with-richard-falk.html?itemid=id>).
30. <https://www.globalpolicy.org/component/content/article/189/50404-israel-palestine-conflict-interview-with-richard-falk.html?itemid=id>.
31. Interview with Richard Falk, available at <https://www.globalpolicy.org/component/content/article/189/50404-israel-palestine-conflict-interview-with-richard-falk.html?itemid=id>.
32. A/67/379, September 2012, “Report of the Special Rapporteur Richard Falk on the situation of human rights in the Palestinian territories occupied since 1967” (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/515/86/PDF/N1251586.pdf?OpenElement>).
33. <https://truthout.org/articles/interview-with-un-special-rapporteur-richard-falk-legitimacy-is-the-agency-of-history/>.
34. <https://www.globalpolicy.org/component/content/article/189/50404-israel-palestine-conflict-interview-with-richard-falk.html?itemid=id>.

35. The term first used by Hedley Bull (1977) while defining “New Medievalism”.

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About the Author

Gonca Oğuz Gök is Associate Professor at the Department of International Relations, Faculty of Political Science, Marmara University based in Istanbul, Turkey. Her research is focused on Global Governance, United Nations, Norms and Institutions.