



ISRAEL *and* INTERNATIONAL LAW

Summary CONVERSATIONS Episode 1

The International Criminal Court (ICC) and United Nations resolutions

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In this Conversation, Professor Gregory Rose (Wollongong University) discusses the legal status of UN resolutions. He explains that courts and tribunals often erroneously refer to UN resolutions as authoritative sources of law. Specifically he critiques the interpretation and use of UN resolutions by the International Criminal Court (ICC) in its recent decisions concerning “The Situation in Palestine”.

Are United Nations resolutions binding law?

There are many different kinds of United Nations resolutions. Resolutions differ in terms of (a) which body adopts them, (b) whether they are expressed as “decisions” or “recommendations”, and (c) what they contain.

Most resolutions adopted by UN bodies are expressed as recommendations. The vast majority of UN resolutions are not binding.

The two main UN organs that adopt resolutions are the General Assembly and the Security Council.

UN General Assembly resolutions

- Most *UN General Assembly* resolutions concern the maintenance of international peace and security and of cooperation in economic, social, cultural, educational, health and political fields. These resolutions are adopted by a two-thirds majority of members present and voting. These resolutions are recommendations only, and are not binding.
- *UN General Assembly* resolutions on internal UN administration matters of budget and rules of procedure are binding.
- Although not formally legally binding, UN General Assembly resolutions may have extrinsic value, such as by providing evidence of the expression of a State’s opinion as to the development of international customary laws. The voting participation pattern and whether the content of the resolution articulates a legal rule or a finding of fact affect the weight of that resolution as evidence.

UN Security Council resolutions

- *UN Security Council* resolutions adopted under Chapter VI of the UN Charter on the maintenance of peace and security are recommendations only, and are not binding.

- *UN Security Council* resolutions adopted under Chapter VII (on the maintenance of peace and security) are decisions, and are binding. Resolutions adopted under Chapter VII usually explicitly state that they are decisions and are adopted under Chapter VII.
- All the UN Security Council resolutions concerning Israel since 1945 have been adopted under Chapter VI, not Chapter VII, and are therefore not binding.

What is the relationship of the international judiciary to United Nations resolutions?

UN resolutions do not bind international courts and judicial tribunals. However, they are increasingly acknowledged and “obeyed” (i.e. seen as authoritative) by courts. This is a reflection of the fact that international tribunals and courts are becoming more politically active.

The most important international court is the International Court of Justice (ICJ). The ICJ has two different functions: (a) it can decide on disputes between States when asked to do so by those states; and (b) it can issue an “advisory opinion” when asked to do so by a UN organ.

- When exercising its advisory jurisdiction, the ICJ is bound by the scope of the UN General Assembly resolution requesting advice. This advisory jurisdiction, which was originally a technical function, has become a politically-driven legal tool by which blocks of UN member states use the General Assembly to obtain a favourable opinion from the ICJ. A good example is the 2004 Advisory Opinion on the “Wall”, where the (predominantly Arab and Islamic) UN member states had a biased resolution adopted in the General Assembly, which in turn asked the ICJ for an advisory opinion.
- The judges of the International Court of Justice are appointed by the General Assembly. The ICJ has no authority to critique UN resolutions, and is subordinate within the UN hierarchy.

Does the International Criminal Court treat United Nations resolutions as binding?

An international tribunal may interpret the scope of the treaty under which it is constituted to decide on the scope of its own jurisdiction. Usually, a tribunal prefers expansive interpretations. It might rely on UN resolutions to interpret its treaty.

- The International Criminal Court [Pre-Trial Chamber](#) relied on UN General Assembly resolution 67/19 (2012) to come to the view that the Court has jurisdiction over crimes committed by Israeli leaders “in Palestine”. In this indirect way, it gave this very politically-driven UN resolution a binding effect.
- Two judges in the Chamber majority failed to analyse the resolution in terms of its content or its voting pattern, or to contextualise its effect as evidence of opinion in international customary law.
- The dissenting judge (the Hungarian Judge Peter Kovács, who is the more senior and the president of the chamber) wrote a [Dissenting Opinion](#) twice as long as the majority that went into these issues and heavily criticized the majority for their interpretation and application of resolution 67/19.

What lies ahead in the International Criminal Court case concerning the “Situation in Palestine”?

The recent [decision](#) of the ICC Pre-Trial Chamber that it has jurisdiction over crimes committed in the Gaza Strip, “East Jerusalem” and “West Bank” presents challenges both for Israel and for the ICC itself.

- Neither the ICC jurisdiction nor the interests of justice are clear in this case on behalf of Palestine. It has been 7 years already in the preliminary examination phase prior to

commencing investigations and prosecutions might run easily another 15 years. Given the high expense and low prospects of success, the case might be regarded as wasteful.

- The ICC is serving a political function in this case, which poses many risks to it as an international institution. Its funding and reputation, and the willingness of states to cooperate with its staff, are at risk.
- The playing field in the ICC tilts against Israel and there is no fair or winnable legal game.
- This “Situation in Palestine” has been a politically-driven process intended to attack Israel, from the beginning. A crime of *indirect transfer of civilians* was inserted in the ICC’s Statute of Rome when it was being negotiated in 2000 specifically to prosecute Israel (article 8(2)(b)(viii) of the Rome Statute). The ICC Prosecutor has consulted and collaborated intensively with Palestinian officials and NGOs over the past decade. The ICC prosecutor, Fatou Bensouda, announced commencement of the formal investigation during the final months of her tenure, in order to pave the way for the incoming prosecutor, Karim Khan, to implement that investigation when he starts his 9-year terms as Prosecutor in June 2021.
- ICC States Parties have limited possibilities to influence these events. Although a State Party might object or even initiate a dispute (under article 119 of the Rome Statute) within the ICC Assembly of States Parties, a majority will isolate any objector, as a result of leverage exercised by the 56-member block of the Organisation for Islamic Cooperation.
- Therefore Israel needs to take political steps to counter the ICC. It can prohibit within its domestic jurisdiction all cooperation, funding or activities that support the ICC prosecution. It can also seek to mobilize external political support, in the form of non-cooperation by other countries with the ICC, their reviews of ICC performance and budget, and even sanctions on ICC staff.