

Session 1 - The UN, international law and issues of legitimacy

23 September 2021

Prof. Gregory Rose: The rule of law in international law and the role of the United Nations

The rule of law in international law and in the UN exists, but it is limited. In terms of global peace and security and resolution of conflict, the law is “mostly geopolitics and ineffective”. In terms of maritime, transport, civil aviation, communications and exchange of other services and goods, it is mostly rules based and more effective.

What are “The rule of law” and international law?

The expression “rule of law” was coined by an English law professor named Albert Dicey (1835-1922) referring back to the tradition of the control over sovereign power by law that emerged in 1215 in England when King John of England was forced to sign the *Magna Carta* presented by the lords of the land.

The rule of law has a range of different aspects, some of which are the subject of considerable debate. The core concept is that no one should be above the law. Indeed, the law applies to everyone equally. The judiciary has to be independent and impartial and government institutions are to act in accordance with the law.

In this context, the UN is an artifact of international law and subject to the rule of law. Pursuant to its own Charter, the UN is bound to operate in accordance with it, including the principle that all states are sovereign and equal (article 2(1) UN Charter)

International law is a legal system. However, in comparison to most domestic legal systems, it is weak because it lacks the coercion of a global or collective sovereign to enforce it. There is no multinational peacekeeping force or international police force capable of imposing the rule of law, which means that the rule of law is essentially consensual – i.e. it is based on an agreement between sovereign states.

Article 38 of the Statute of the International Court of Justice defines the **sources of international law**. These are:

- **Treaties or conventions:** written and ratified agreements between States, based on consent.
- **Customs:** the widespread practice of states. In order for such a custom to be binding, there must be evidence that the states are of the opinion that this custom is binding (this is known as “*opinio juris*”). This raises questions: which kind of sources should be

used to determine such opinions? Should we take statements or votes or explications of votes in the UN into account? Must all states share that opinion, or can we rely on the the opinion of the majority?

- **General principles of law:** existing principles recognized by “civilized nations”, which are usually used to fill in gaps where treaties and customs are unavailable.
- **Opinions** of “highly qualified publicists”: this is a subsidiary source, to help interpret other materials. The element of numbers has a key role in this context too: if a lot of highly influential academics support a particular view, this will be regarded as persuasive evidence of a certain rule of law.

Sources of International Law

- ▶ Treaties
- ▶ Customs
(Opinions & practices)
- ▶ Principles
- ▶ Opinions

UN Charter article 38

 **CHARTER**
of **THE**
UNITED
NATIONS

AND STATUTE of THE
INTERNATIONAL COURT
OF JUSTICE

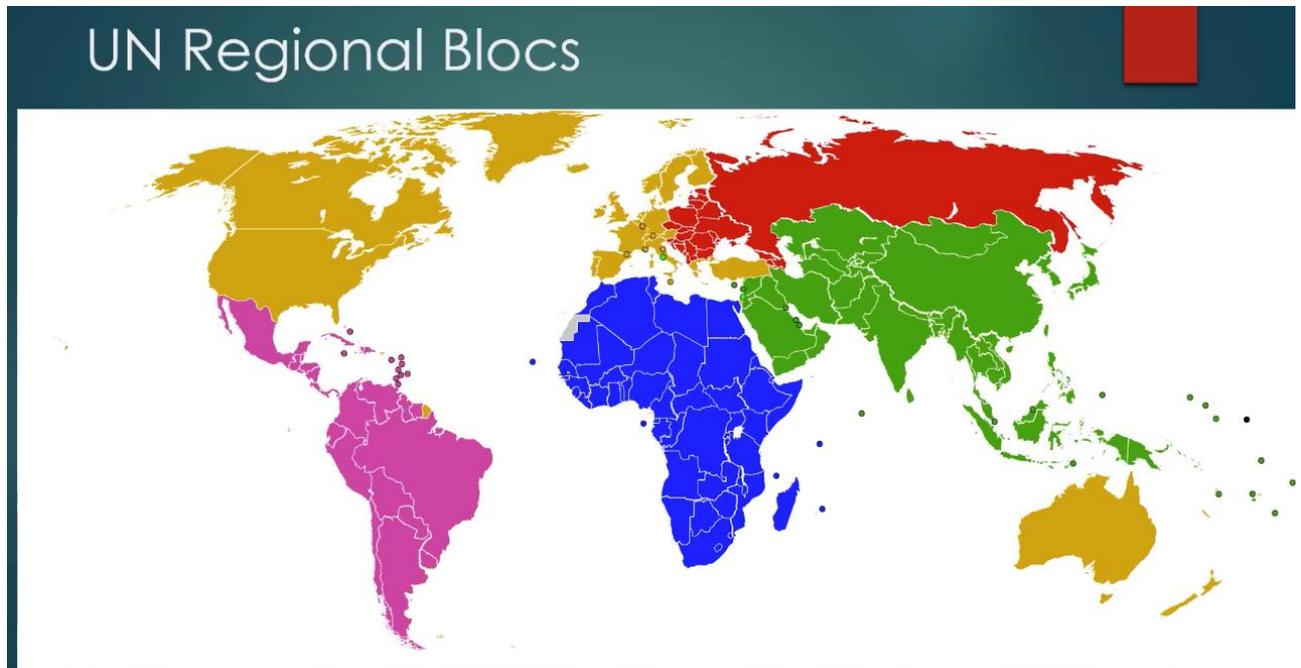
The voting practice of the UN

The UN General Assembly and Security Council are political bodies. They do not “make” international law. Technically, the only resolutions that are “binding” are Security Council resolutions adopted under Chapter VII of the Charter. None of the resolutions adopted by the Security Council over the years in relation to Israel have been adopted under Chapter VII.

The Security Council is the UN’s highest body. There are five Permanent Members (USA, China, Russia, UK and France) and ten Non-permanent biennial members. The member states of the Security Council have developed a practice which is actually in breach of the Charter. The Charter (art 27) requires that all the five Permanent Members of the Council must give an affirmative concurring vote in order for a decision to be made. In practice, the Permanent Members have adopted the practice that they can abstain from voting. This is what happened

in December 2016 when the Council adopted Resolution 2334, declaring settlements to be a “flagrant violation of international law”; the US abstained from voting on that resolution.

Voting in the United Nations General Assembly reflects the five regional blocs of countries:



To show how political the voting is, consider that when the UN General Assembly voted to admit Israel as a UN member in 1949, there were 58 UN members. 37 voted for, 12 voted against, and 9 abstained. But 33 years later, the UN counted 141 countries and 86 General Assembly members adopted resolution 37/123 condemning Israel as a “non-peace-loving state”. Since the UN is only open to peace-loving states, the language used in this resolution was clearly aimed at evicting Israel from the UN.

The Asian bloc contains 53 countries. The African bloc is the largest one with 54 countries. Over half of all UN members come from Asia and Africa (107/194). The third one is Latin America with 33 members. The Western countries (Europe, North America, Australia and New Zealand) comprises 28 members. The smallest is the Eastern European Group with 23 members.

Across regional groups, there are networks of UN member states, like the Organization for Islamic Cooperation (OIC) which has 55 members (including the Arab league with 23 members). Its member countries number an absolute majority within the African bloc and almost half the Asian bloc. Through its members, the OIC can carry the direction of voting in the UN, just like in an ordinary election. Those who have a special agenda will then vote in accordance with it.

This system is made possible by a legal fiction, called **sovereign equality**, based on the Treaty of Westphalia (1648). Each state is accordingly treated as if a person and has one vote. As an example, Nauru (5000 inhabitants) has the same vote as India (1.2 billion inhabitants).

Ironically, this distorted basis for voting based on the fiction of equality enables Israel to be treated unequally.

When politics enters international law

The creeping of politics into legal jurisdiction under UN institutions is an inevitable feature of the structure of the UN. Many decisions and cases regarding Israel show the blending of geopolitics with law. In the Security Council resolution 2334 of 2016 concerning the “illegality of settlements in Palestine”, the Security Council “*reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967 including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law*”. The Security Council was acting as a judicial body.

Sometimes, conversely, judicial bodies act as political bodies. Both the UN International Court of Justice Advisory Opinion on the Israeli *Wall* (2004) and the International Criminal Court’s 2021 decision that the Court has jurisdiction over crimes allegedly committed by Israelis on “the territory of Palestine” were largely based on the presumed legal authority of UN political bodies.

Empirical research has shown that bias of nationality exists within the international judicial tribunals: for example, when a dispute arises in the ICJ and a judge of the nationality of one of the parties involved is in that dispute, the judge is likely to vote in accordance with the interests of his/her country of nationality and its cultural and political affiliations.

If political power overrules law, there is no rule of law. In the UN, we can observe this play out as lawfare – leveraging the political power of numbers in the widespread campaign not only to politically demonize Israel but also to delegitimize Israel in international law.

Recommended Reading materials

- De Blois, M. and Tucker, A. *Israel on Trial*, 2017 chapters 1, 2 and 3
- Crawford, J. (ed.) *Brownlie’s Principles of Public International law* (8th ed.) Oxford 2012.
- Feinberg, N. *Studies in International law*, Magnes Press 1979.
- Koskenniemi, M. *The Politics of International law*, Hart Publishing 2011.



think.

ISRAEL *and* INTERNATIONAL LAW