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On the Symbolic Force of International Law: the Case of Gaza

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Abstract

This forum includes reflections from perspectives spanning international human rights law, international law and international political sociology to analyse the symbolic and 'paradoxical' power and limitations of international law. To what extent can it compel various voices – such state actors, judges or activists – to speak in a certain way? What is its capacity to settle disputes and to enact equality, justice and peace, to be a safety net for victims, and to lay the conditions for peace in international relations, as expressed by its proponents? And finally, can we describe the symbolic force of international law as "compelling", "constraining", or "coercive"? As the debate on this last question between William Schabas and Alain Pellet, appended to this forum, shows, semantic issues pertaining to translations between languages are closely linked to symbolic power relations.

Keywords

international law – symbolic power – United Nations – Palestine – Israel – freedom of peaceful assembly and expression

General comments, advisory opinions, court orders, international covenants, universal declarations: international law is embodied, developed and clarified

1 This is a collective article, published under the name "PARISS Collective" consisting of (corresponding author) Alvina Hoffmann, William Schabas, Alain Pellet. Each author, however, is responsible for their own contribution, and names of respective authors are listed next to the title of each intervention.

in many different documentary forms and by various actors, such as within the United Nations system, the International Court of Justice or the International Criminal Court. It is invoked by judges, prosecutors, independent experts, state parties pursuing other states for grave crimes, but also (student) protesters and activists whose rights to peaceful assembly and freedom of expression have been significantly curbed in the context of protests in support of Palestine.[2] This forum includes reflections from perspectives spanning international human rights law, international law and international political sociology to analyse the symbolic and 'paradoxical' power and limitations of international law. To what extent can it compel various voices – such state actors, judges or activists – to speak in a certain way? What is its capacity to settle disputes and to enact equality, justice and peace, to be a safety net for victims, and to lay the conditions for peace in international relations, as expressed by its proponents? And finally, can we describe the symbolic force of international law as "compelling", "constraining", or "coercive"? As the debate on this last question between William Schabas and Alain Pellet, appended to this forum, shows, semantic issues pertaining to translations between languages are closely linked to symbolic power relations.

Sciences Po, Activist Students, and Freedom of Peaceful Assembly
William Schabas

On 12 March 2024, members of Sciences Po's student community and its teaching faculty, including myself, received a message from 'The Direction of Sciences Po' entitled 'Following the occupation of Boutmy lecture hall'. The message said that '[t]his morning, members of our student community occupied the Emile Boutmy amphitheatre without a prior request made to the administration, and therefore without authorisation'. Moreover, '[t]hey organised a demonstration in support for Palestine from 8am to 12pm, which led to the cancellation of a Collège Universitaire lecture course'.

In effect, shocked by the extreme violence inflicted upon the Palestinian people of Gaza since October 2023, encouraged by the order of the International Court of Justice in *South Africa v. Israel*, and no doubt inspired by university students in the United States and elsewhere, Sciences Po students had become increasingly militant. Some of them were my own students. Two weeks earlier, on 28 February 2024, I had spoken to a group of perhaps 200 students as part

2 See also: United Nations Human Rights Special Procedures, "Statement from the UN Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association." October 2, 2024. https://www.ohchr.org/sites/default/files/documents/issues/association/statements/20241004-stm-sr-association.pdf.

of a panel that included South Africa's ambassador to France. The Dean of the Paris School of International Affairs attended, so I can only assume that use of the amphitheatre had been authorised, although it would not have bothered me if this was not the case.

The message of 12 March 2024, went on to condemn the 'unauthorised occupation', noting that 'Sciences Po also deplores a form of action and practices that deliberately fall outside the framework set for student and campus life, as article 3 of the student life regulations prohibits the disruption of the smooth running of Sciences Po's activities'. The message said that '[o]ne member of the student community was prevented from entering the amphitheatre, and accusatory remarks were made about one student association in particular.' It said the 'leadership' of Sciences Po would 'refer the matter to the relevant disciplinary section against those responsible for these intolerable acts within our institution'.

Intolerable acts? There was no suggestion of violence in the message from Sciences Po's administrators. There was no allegation of anti-Semitism. All that the pro-Palestinian students were alleged to have done was 'disrupt' the 'smooth running' of the institution. Oh yes, and there was also the unpardonable sin of making 'accusatory remarks' about 'one student association'. The 12 March message from Sciences Po's administration included the usual platitudes about the institution being 'a place of teaching and research, which advocates for pluralism and intellectual opposition, in the service of the debate of ideas and democracy'. But it also insisted that 'student and university life on our campuses, as well as on social networks, must comply strictly with the law and with our common rules. Any breach of these rules will be dealt with most firmly.'

And there was the allegation that a student had been prevented from entering the occupied amphitheatre. It seems to have been based on a social media message from the Union des étudiants juifs de France that claimed the pro-Palestinian activists had said: 'Ne la laissez pas rentrer, c'est une sioniste.' The UEJF tweeted that 'UEJF students are being targeted as Jews and zionists'. Interviewed the following day by *Le Parisien*, the student in question said that nobody had charged her with being a Zionist and that in fact she had been allowed to enter the lecture theatre.[3] The pro-Palestinian students noted that the student had a reputation for attending their gatherings where she photographed participants and then posted them on social media as a form of intimidation.

3 Thomas Poupeau, '« Toi, tu rentres pas! »: le témoignage de l'étudiante de Sciences-po refoulée d'un amphi mardi', *Le Parisien*, 13 March 2024.

President Macron didn't bother to check the facts before denouncing the pro-Palestinian students for 'unspeakable' and 'unacceptable' statements. The next day, Prime Minister Attal, himself a Sciences Po alumnus, rushed across the river to the rue Saint-Guillaume to demand of the university's administrators that they take measures to stop a 'dangerous minority'. Soon, the acts of Sciences Po's students were making headlines around the world.

Gabriel Attal was severely criticised for his intervention. Of course, Sciences Po's independence from political institutions is something to be cherished. Institutional autonomy is an important component of academic freedom, as the Special rapporteur on freedom of expression of the Human Rights Council has explained.[4] But the outrage at his conduct blurred the fact that the most intolerable of the 'intolerable acts', to borrow the formulation in the 12 March statement, was the attack by both the government and the administration of Sciences Po on activist students who did nothing more than exercise their fundamental rights to freedom of peaceful assembly as well as freedom of expression.

The Sciences Po students were in good company. Throughout the United States, and in other countries, university administrators interfered with the right of peaceful assembly by knocking down tent cities and prohibiting various forms of expression of solidarity with the people of Palestine. They almost certainly would not have reacted with the same harshness if the activities, instead of targeting Israel, had been directed against Russia with respect to the conflict in Ukraine or against China for treatment of the Uyghur minority.

Freedom of peaceful assembly belongs to a package of freedoms that includes freedom of expression, freedom of religion and freedom of association. Freedom of peaceful assembly is affirmed in article 20(1) of the Universal Declaration of Human Rights. These words are repeated in article 11 of the European Convention on Human Rights: 'Everyone has the right to freedom of peaceful assembly.' Article 21 of the International Covenant on Civil and Political Rights uses a slightly different formulation, of no particular legal significance: 'The right of peaceful assembly shall be recognized.' The European Court of Human Rights has described freedom of peaceful assembly as 'a specific form of communication of ideas'.[5]

In 2020, the United Nations Human Rights Committee adopted a General Comment on freedom of peaceful assembly. The Committee is established for the monitoring and implementation of the International Covenant on Civil

4 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 28 July 2020, A/75/261, paras. 37–41.

5 *Tatár and Fáber v. Hungary,* no. 26005/08 and 26160/08, § 38, 12 June 2012.

and Political Rights, one of the major United Nations human rights treaties. From time to time, the Committee adopts such general comments, which constitute a kind of digest or summary of the law on a specific provision of the Covenant or an issue of importance. Adopted by consensus by the 18-member Committee, whose experts come from various corners of the world (including France), the general comments are very authoritative. The Committee has adopted 37 such general comments since it began operation in 1977. General Comment 37, on freedom of peaceful assembly, is the most recent.

Peaceful assemblies often pursue goals that are not controversial and that cause little or no disruption, the Committee states in General Comment 37. It gives as an example commemoration of a national day or the outcome of a sporting event, both of which are familiar enough to Parisians. 'However, peaceful assemblies can sometimes be used to pursue contentious ideas or goals. Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity', the General Comment explains. 'These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy.'[6]

In other words, such disruptive assemblies must be allowed to take place 'without unwarranted interference and to facilitate the exercise of the right and to protect the participants', the General Comment continues. The International Covenant is an international treaty that imposes obligations upon States. President Macron and Prime Minister Attal must respect it as a question of law. Whether it applies to the administration of Sciences Po is a matter of some debate. But regardless of the technicalities, Sciences Po should respect the Covenant as well as the Universal Declaration of Human Rights from which the Covenant is derived. The Universal Declaration of Human Rights is a 'common standard of achievement' to be honoured by all, whether governments, educational institutions or individuals.

The General Comment speaks to the issue of unauthorized meetings and demonstrations. 'If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of article 21', it says. 'Collective civil disobedience or direct action campaigns can be covered by article 21, provided that they are non-violent.'[7]

6 General comment No. 37 (2020) on the right of peaceful assembly (article 21), CCPR/C/GC/37, para. 7.

7 Ibid., para. 16.

The General Comment goes on to address circumstances where there are indications of violence. It attempts to define the point at which a gathering may no longer claim the fundamental right of peaceful assembly. It notes that even if a few isolated members of an assembly are violent, this does not condemn the entire meeting. Moreover, the threat of violence from outside can in no way impugn the peacefulness of the assembly itself. However, as there is no suggestion of violence in the actions of the pro-Palestinian students, this issue need not be developed further here.

The point is, and this is my conclusion, the pro-Palestinian students were exercising their right to freedom of peaceful assembly. The negative tone of the 12 March message from the administration of Sciences Po, and the very real threat of disciplinary action, run counter to this fundamental right. The administration's 12 March statement is totally incompatible with the pompous pronouncement about 'the debate of ideas and democracy'. If Sciences Po is genuinely committed to such values, then it should not only honour and respect the right of students to assembly peacefully, it should welcome it.

Noisy and raucous manifestations of opinions, especially when they are driven by outrage about widespread acts of violence and cruelty, must have their place in the academy. Their protection is an important part of our shared values, not a threat to them. Let us hope that the spirit of our students during the second term of 2024 has only taken a summer break, and that it will return with even greater force and determination.

The paradoxical power of international law: On the ICJ's opinion on Israel's practices in the Occupied Palestinian Territory

Alain Pellet

On 19 July 2024, at the request of the United Nations General Assembly, the International Court of Justice (ICJ) delivered an advisory opinion on the legal consequences of Israel's policies and practices in the Occupied Palestinian Territory, including East Jerusalem. In a severe assessment of Israel's numerous and grave violations of its obligations as an occupying power, the Court stated that it "considers that the State of Israel is under an obligation to put an end to its illegal presence in the Occupied Palestinian Territory as soon as possible", to "immediately cease all new settlement activity and to evacuate all settlers" from the territory. From these findings, it derived a long series of obligations on Israel (in addition to the previous ones, 'to make reparation for the damage caused to all natural or legal persons affected in the territory'), as well as on all states and international organisations, including the UN.

Reactions were very mixed: more than positive relief on the Palestinian side, unreserved or measured approval, or outright hostility (not only on the Israeli

side). This diversity is reflected in the vote on the General Assembly resolution drawing the consequences of the Opinion (Resolution A/RES/ES/10-24, to be reviewed on 18 September): 124 in favour (including China, Russia, most of the States of the 'global south' and 13 European Union member States, including France), 14 against (including Israel, the United States, Hungary and the Czech Republic) and 43 abstentions (including 12 EU member states, notably Germany, as well as the United Kingdom and Ukraine). The hostile vehemence of Israel and its unconditional allies, as well as the efforts of Palestinian diplomacy to obtain the widest possible support for the resolution and thus indirectly for the ICJ opinion, show that it would be wrong to take these texts lightly.

It is true that neither the advisory opinions of the ICJ nor the recommendations of the General Assembly are legally binding – neither create obligations for those to whom they are addressed; but it is wrong to consider, as is too often done – including by eminent professors of law – that they are not "constraining", they exert an effective "constraint" in many respects, legal but also political and moral, on various actors, even if they do so in different ways.

The World Court's opinions state the law as it stands and cannot, in principle, be departed from. Given the aura of this jurisdiction, the "principal judicial organ of the United Nations" created by the Charter, the legal rules whose existence or violation it establishes and which it interprets are considered to reflect the "positive" law actually in force. And this is not without importance: all those whose task it is to apply the law will position themselves in relation to what the Court has said; its case law is an inescapable point of reference – as it expands and becomes more established, quotations from its decisions will invade textbooks and treatises on international law – and national judges (or lawyers), unfortunately often very ignorant in this field, will look to it to justify their judgments or pleadings, or to overturn it when it does not serve their purposes – but it is certainly easier and more convincing to say or write: "The ICJ said so" than to say: "The World Court is wrong" and to try to find arguments against the very well argued ones contained in the opinion. The same goes for political authorities and diplomats.

In themselves, the recommendations of the General Assembly are also constraining" in the sense that they exert pressure on those to whom they are addressed: they force States to adopt a position in relation to them, to invoke them when they can, and to justify not applying them. It would be difficult to explain the energy expended by member States to adopt or reject them if they were just empty words. The same applies to other international bodies, starting with the Security Council, which additionally has decision-making powers that the Assembly does not have. We could add that the "constraining" force of a resolution is increased when it is based on a judgement or an opinion, or

echoes their content, as is the case with the resolution of 18 September last year. It goes without saying that the circumstances in which the resolution is adopted (consensus or majority, composition of the resolution – in particular the diversity of the States that voted for it) have an impact on its real influence. The same applies to ICJ judgments or opinions, the authority of which can be diminished by a narrow majority (judges may not abstain and in the event of a tie, the President has the casting vote) or by the number of dissenting opinions (against the solution adopted by the majority) or individual opinions (in favour of the solution, but for different reasons).

The Court's opinion of 19 July was adopted by a very large majority (the judges voting separately on the various points at issue), although 14 judges attached a personal statement or opinion, including one dissenting opinion, that of the Ugandan Vice-President, who considered that, by agreeing to answer the questions put by the General Assembly, the ICJ had improperly substituted itself for the bilateral negotiations between the parties. It is difficult to see how clarification of the applicable law by the highest international court could prejudice future, and at present unlikely, negotiations. But if, one day, negotiations between Israel and the State of Palestine are resumed in good faith – Mr Netanyahu and his criminal obstinacy in flouting the most elementary legal principles will not last forever – the ICJ's opinion could and should provide valuable guidance (though not necessarily intangible, provided that the final settlement does not call into question the peremptory norms of international law – *jus cogens* – which the Court has also identified).

When, in May 2022, the Palestinian authorities, whom I had sometimes advised in the past, consulted me about a possible request for an advisory opinion to be adopted by the General Assembly, I was very sceptical: what was the point of asking the ICJ to repeat what the General Assembly and, for the most part, the Security Council itself had already said many times? But one argument in particular convinced me: 'No one, no body, talks anymore about the tragedy for the Palestinian people of Israel's endless and brutal occupation of their territory; it is completely overshadowed by Russia's war on Ukraine'. My interlocutors saw the referral to the Court as an opportunity to put the 'Palestinian conflict' back on the international agenda. This was almost a year and a half before the Hamas terrorist attack on 7 October.

It is tragic enough to have to admit that in the space of a few hours this bloody episode achieved what years of diplomacy had failed to do, and what was one of the purposes of the ICJ referral: to reawaken the interest of the international community in this forgotten conflict. In this context, it is obviously difficult to determine the respective roles played by the 7 October attack and the Israeli unleashing of violence on Gaza, on the one hand, and the advisory procedure

before the Court and the very firm opinion it delivered, on the other. The fact remains that 54 States and 3 international organisations submitted written statements and 52 made oral interventions, with Israel abstaining.

This was an unusually high level of participation – there were 49 interveners in the case of the wall built by Israel in the occupied Palestinian territory, but the previous record was 32 in the case of the separation of the Chagos Archipelago from Mauritius. Again, it is doubtful that they would have undertaken the costly and technically complicated preparation of these written and oral submissions if they had felt that they were pointless. Equally impressive was the very large majority who denounced the illegality of Israeli practices and policies in the Occupied Palestinian Territory (even though the 'Gaza war' was not the subject of the debates), in a way that was generally well argued in legal terms. And on at least one point, the result has been a significant change in the perception of the issues at stake and the objectives: the two-state solution, which seemed to have previously been completely forgotten, has made a spectacular comeback: many States, including the United States – in contrast to its previous attitude – have mentioned it as the only possible solution, and the Court sees it as a consequence of the Palestinian people's right to self-determination.

The resolution adds a political constraint to the Opinion: sponsored by thirty States, adopted by a majority exceeding the two-thirds threshold required by the Charter for an important issue, it incorporates all the conclusions of the Opinion, with some clarifications (in particular with regard to implementation deadlines). Some elements of the original draft, originally prepared by Palestine to make it more acceptable to reluctant States were abandoned, but the Assembly provides for the convening of two conferences: one under its auspices to examine the application of UN resolutions on the question of Palestine and the two-state solution, and the other of the parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to examine the measures to be taken to apply that Convention in the Occupied Palestinian Territory. The resolution also provides for the establishment of a mechanism to monitor violations of Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination committed by Israel and identified in the Opinion (this Article refers to apartheid, as the Court had emphasised).

The complementary nature of the request for an opinion, the resolution and the establishment of follow-up mechanisms show that the States, which generally support the Palestinian positions, albeit with many nuances, continue to believe that the law has a role to play in resolving the tragedy or tragedies linked to the conflict between Israel and Palestine, which is about to bloody the entire Middle East. This conviction is also borne out by two cases brought before the ICJ following the request for an advisory opinion.

On 29 December 2023, South Africa filed an application to have Israel condemned for genocide against the Palestinian people. Pending the judgment, the applicant State requested the Court on three occasions to take urgent interim measures to require Israel to cease its military operations in and against the Gaza Strip and to take immediately all reasonable measures in its power to prevent genocide against the Palestinian population, as well as effective measures to permit the delivery of humanitarian aid necessary to alleviate the difficult living conditions of the Palestinians in the Gaza Strip. In its first order, the Court, noting that "at least some of the rights invoked and sought to be protected by South Africa are plausible", recalled Israel's obligation under the 1948 Genocide Convention to prevent any act of genocide and to punish any incitement to commit genocide, and requested it to submit to the Court a report on all measures it had taken to that end. In the following order, the Court found that "the catastrophic humanitarian situation in the Gaza Strip at the time of its order of 26 January 2024 has continued to deteriorate" and consequently ruled that Israel must take all necessary measures to ensure the unimpeded and large-scale delivery of urgently needed humanitarian assistance and to ensure that its army does not commit acts of genocide. In its third order for interim measures, the Court noted 'the immense risk to which the military offensive at Rafah is exposing the Palestinian population' and ordered Israel to 'immediately cease its military offensive'. Eight requests for intervention have been filed, and more have been announced. Like South Africa itself, the intervening states intend to ensure that the interests of the international community as a whole prevail and to act to protect the rights of the Palestinians.

Following the same logic, Nicaragua filed a petition against Germany on 1 March to condemn the support, particularly military support through the sale of arms, that this country gives to Israel, not only for the genocide it is committing, but more generally in its entire shameful enterprise: war crimes and various violations of human rights and humanitarian law, racial discrimination and apartheid, violation of the right of peoples to self-determination, etc. Despite the worsening situation in Gaza and the rest of the Occupied Territories, the Court has refused to indicate the provisional measures requested by Nicaragua because of the lack of sufficient evidence that Israel is using weapons exported by Germany in the Occupied Palestinian Territories. This could change if evidence of such use is provided.

In these two cases, unlike the 2024 Opinion, the judgments to be rendered will be legally binding on the parties (and only on them). The first, at the request of South Africa, will say whether or not Israel, which very sparingly accepts the Court's jurisdiction, is responsible for genocide or acts of genocide, but will be limited to that. The second judgment, which will be delivered at the request of Nicaragua, will be limited to condemning Germany for violating

its own obligations to ensure compliance with the many other conventions to which both States are parties and the peremptory norms of international law violated by Israel. The two judgments will come, at best, three years after the applications were filed.

There is indignation, especially in the media, which shape public opinion, that none of this has any practical effect – as proof (but there are many others): a recent and somewhat frustrating interview I gave on France 5 TV: the two journalists, who were very kind by the way, kept telling me that all this (and in particular the opinion of 19 July) was pointless (and cutting me off every time I tried to break out of their mantra). I think this is an overly negative view: Firstly, because there are effects, at least in terms of discourse (Biden condemning the excesses of Israeli settlers in occupied Palestine and once again defending the long-forgotten two-state thesis); secondly, because it is adventurous to determine the situation that would have existed in the absence of UN resolutions and ICJ opinions, even if the current Israeli government (and no doubt the leaders of Hamas) are particularly insensitive to them; and finally, because these pessimistic 'observations' are made in the light of immediate events, whereas legal norms are intended to apply over time. In this respect, the large number of major cases brought against Israel since the first advisory opinion on the *Wall* case in 2004 shows at least one thing: the law is a long-term affair, a source of hope.

Nevertheless, we cannot ask it to do more than it is capable of doing. The law does its job, which is prescriptive; it is up to politicians to do their job, which is executive. And this dichotomy is particularly marked in the international order: within the State, coercion is institutionalised and generally used – even if there are rogue regimes – in the service of the law: the judges say it, the administration and the police carry it out. There is no such thing in international law: it is no more difficult to determine its content than it is to determine the content of domestic rules, but there is no (seriously) organised coercion, and even less a monopoly of coercion: it is dispersed in the hands of 200 States that claim to be 'sovereign above all'. When the machinery breaks down, as it is now, when the consensus on a minimum of basic principles of coexistence crumbles, the law can do nothing. All we can do then is to rely on reason to put an end to the spiral of war and to set in motion the virtuous circle of respect for law in which all the world's States have everything to gain – in the long run.

In the words of the President of the Court, Judge Nawaf Salam, in a statement accompanying the 2024 Opinion, "international law and justice are indisputable means of pacifying international relations. By establishing the law, the Court provides the various actors with a reliable basis for settling disputes in order to achieve a just, global and lasting peace'. But law and justice are no substitute for war. As I have written elsewhere, it is not the role of lawyers to

intervene 'on the ground'; the law is not enough to silence the guns; the courts can prevent a crisis, prevent its degeneration or deal with the aftermath of a conflict; they are of little use when it is raging.

Genocide and arrest warrants in a world of united nations: Can international law ever be more than symbolic?

Alvina Hoffmann

'Germany feels it has a special responsibility to contribute to the fight against and the prevention and investigation of any potential genocide and to send a message that states will be held accountable for all acts of genocide. Genocide concerns us all, wherever in the world it occurs.'[8]

On 15 November 2023, Germany submitted a joint intervention with Canada, Denmark, France, the Netherlands and the UK to the ICJ in support of the Gambia's case against Myanmar. In its press release, the German Foreign Office hailed this intervention as 'unprecedented in the history of the ICJ', as a 'sign of unity as regards the prosecution and legal investigation of the violence inflicted on the Rohingya [...] and state responsibility for the most serious crimes'.[9] Among other things, the joint statement underlined the World Court's 'vital role in the peaceful settlement of disputes as the principial judicial organ of the United Nations'.[10] Almost two months later, the German government declared its intention to intervene in the *South Africa v. Israel* case as a third party, denying genocidal intent in Israel's actions. Previously, Germany has also intervened in the *Ukraine v. Russia* case and thus participated in all three genocide cases currently before the International Court of Justice. These interventions and more or less restrictive interpretations of central articles in the Genocide Convention have rightly raised questions about legal double standards, about the purpose of third-party interventions and its differential effects on the three cases in question.[11]

8 Federal Foreign Office. "Statement on Germany's intervention in the proceedings against Myanmar in the International Court of Justice for alleged genocide." *Auswärtiges Amt.* November 17, 2023. https://www.auswaertiges-amt.de/en/newsroom/news/-/2632040.

9 Ibid.

10 Federal Foreign Office. "Joint declaration of intervention by the governments of Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom in the case brought by The Gambia against Myanmar at the International Court of Justice." *Auswärtiges Amt.* November 16, 2023. https://www.auswaertiges-amt.de/en/newsroom/news/-/2632022.

11 El Mahmoud, Khaled. "Measuring with Double Legal Standards: Germany's Intervention in Support of Israel before the ICJ." *Verfassungsblog.* January 25, 2024. https://verfassungsblog.de/measuring-with-double-legal-standards-germanys-intervention-in-support-of-israel-before-the-icj/; Schabas, William. "The Damp Squib of Third Party Intervention in Ukraine v. Russia." EJIL: Talk!. February 5, 2024. https://www.ejiltalk.org/the-damp-squib-of-third-party-intervention-in-ukraine-v-russia/.

Using this as a starting point and building on my work on transnational human rights struggles in Crimea, I propose to analyse the symbolic power of international law with its 'paradoxes' as aptly analysed by Alain Pellet. The UN, together with its World Court the ICJ, remain central forums for states and state coalitions, transversal alliances of lawyers and civil society to challenge impunity and to signal to victims that their plights are not forgotten. As I write this piece in early October 2024, Bolivia has just filed an application to join South Africa's case against Israel. Led by South Africa, which speaks for 'the global majority',[12] the coalition of states supporting the case now includes Mexico, Nicaragua, Colombia, Chile, Libya, Egypt, Turkey, Palestine, Spain, Ireland and Belgium – spanning the Global South and North. What makes the UN and South Africa legitimate spaces and actors to lead the charge against the crime of genocide?

The case was brought before the ICJ on 29 December 2023. In its order of 26 January 2024, the Court found that it was plausible that Israel's actions in Gaza amounted to genocide. The Court indicated provisional measures for Israel to stop engaging in such acts. From February onwards, South Africa submitted letters about the developing situation in Rafah Camp in southern Gaza, inviting the Court to indicate further provisional measures. Finally in May, South Africa submitted an urgent request to modify and indicate provisional measures, and on 24 May 2024, the previous provisional measures were reaffirmed with new ones indicated. Despite its ruling from 26 January, when the situation was deemed 'at serious risk of deteriorating 'it had now 'done so even further'.[13] As the war has just entered its second year, the ICJ as a space in which states try states for grave crimes appears at an impasse, despite its clear findings and the mobilisation of ever-growing coalitions of (small) states from almost all continents.

The ICJ, at the request of the UN General Assembly, has also powers to issue advisory opinions which do not involve state parties as in inter-state disputes. On 30 December 2022, the General Assembly adopted resolution 77/247, entitled 'Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem'.[14] Through the language of human rights law, it forged a large coalition of states to ask the Court to examine Israel's prolonged occupation of the Palestinian

12 Rao, Rahul. "How Settler Colonialism Ends." *Radical Philosophy* 216, Summer 2024: 70.

13 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order of 24 May 2024, I.C.J. 2024, p. 8. https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf.

14 87 states voted in favour, 26 against, 53 abstained and 27 did not vote.

Territory, how 'policies and practices of Israel [...] affect the legal status of the occupation, [...] and the legal consequences that arise for all States and the United Nations from this status'.[15] On 19 July 2024, the Court declared that the occupation of Gaza and the West Bank, including East Jerusalem, was unlawful. On 30 July 2024, a long list of 39 UN special rapporteurs, who are independent human rights experts on various thematic or country-related human rights issues, signed an official UN press release in which they hailed this 'historic' ICJ declaration which 'mandated Israel to end its occupation, dismantle its settlements, provide full reparations to Palestinian victims and facilitate the return of displaced people'.[16] Moreover, they stressed that this advisory opinion would serve 'as a critical tool to restore respect for international law'.[17] From my research I know that is quite rare, and therefore very significant, to see official press releases that are coordinated and co-signed by so many independent UN human rights experts working across a variety of thematic issues, underlining the transversal links between numerous human rights violations perpetrated by Israel's occupation.[18]

Following this advisory opinion, another General Assembly resolution was overwhelmingly passed on 13 September 2024, demanding an end to the occupation of Palestine. The advisory opinion had an important symbolic effect on countries like Germany for whom upholding international law is a central pillar of national identity and foreign policy. In a press release on 19 September 2024, the Federal Foreign Office explained Germany's reasons for *abstaining* from voting on the resolution. Germany pledged their 'full support' of the advisory opinion which 'made it clear that the status quo in the region cannot continue'. It went even further by stating that 'the Federal Government has reiterated time and again that [Israel's settlement policy] constitutes a violation of international law and stands in the way of a two-state solution'.[19]

15 United Nations General Assembly. "Resolution adopted by the General Assembly on 30 December 2022." A/RES/77/247. https://www.un.org/unispal/wp-content/uploads/2023/01/A.RES_.77.247_301222.pdf.

16 https://www.ohchr.org/en/press-releases/2024/07/experts-hail-icj-declaration-illegality-israels-presence-occupied.

17 Ibid.

18 See Hoffmann, Alvina. *Human rights struggles in a transnational field of power: Tracing transversal lines between UN special rapporteurs, spokespersons of Crimean Tatars and the Sámi people.* PhD Dissertation, King's College London, 2021; Hoffmann, Alvina. "Counter-Terrorism and Human Rights at the UN Security Council: Blurring Boundaries in a Social Space." *Global Studies Quarterly* 4, no.1: 1–11.

19 Federal Foreign Office. "Statement on the resolution of the UN General Assembly on the ICJ's advisory opinion regarding the legal consequences of Israel's policies and practices in the occupied Palestinian territories." *Auswärtiges Amt.* September 19, 2024. https://www.auswaertiges-amt.de/en/newsroom/news/-/2676262.

It abstained from the General Assembly resolution as it 'went beyond the advisory opinion', including setting 'an unrealistic deadline for ending the occupation', disregarding the need for direct negotiations between both parties, and making no mention of Israel's legitimate security interests and right to self-defence.[20] Nevertheless, the symbolic power of international law and the World Court has shifted even Germany's rhetorical legitimation and positioning as it chose to abstain; and yet the war rages on.

While we see these incremental changes initiated by the ICJ and carried by the collective voices of united nations at the General Assembly, the UN appears to stand as the foremost international organ to negotiate (re)solutions to the gravest threats to international peace and security. Given the UN's history with South Africa and the fight against apartheid, it is of great symbolic significance that South Africa should bring a case against Israel to the UN court. Apartheid rule in South Africa was perhaps the central issue for the UN since its inception for almost 50 years. As Saul Dubow noted, it was 'a key reference point for international developments in human rights and helped to legitimize the United Nations' aspirations to represent the higher ideals and conscience of the world'.[21] While during this time the UN human rights system designed diverse models of human rights commissions and fact-finding missions, the immediate success of it various actions, despite expending resources to act in unity and to escalate punitive measures, was quite limited: 'One might easily conclude that South Africa did more to shape the UN than the converse' as Dubow notes.[22] The same appointed experts to the commission on apartheid would later serve on a human rights mission to Israel and the occupied Palestinian territories in 1969.

The UN was one of many avenues and strategies to challenge apartheid. Another one was the International Defence and Aid Fund for Southern Africa (IDAF), based in London, which smuggled 100 million pounds into South Africa to defend thousands of political activists and to provide aid for affected families.[23] It grew out of Christian Action (CA), set up by Reverend John Collins. In 1954, he went to South Africa to see the effects of apartheid himself. In October 1968, he spoke at the Special Political Committee meeting at the UN Headquarters in New York. He emphasised the symbolic importance of the Defence and Aid Fund to build the best possible legal defence:

20 Ibid.

21 Dubow, Samuel. "Smuts, the United Nations and the Rhetoric of Race and Rights." *Journal of Contemporary History,* 43, vol.1, 2008: 43.

22 Ibid, 47.

23 International Defence and Aid Fund for Southern Africa. African Activist Archive. https://africanactivist.msu.edu/organization/210-813-532/.

> It was vital that people on trial under apartheid legislation should be provided with the best possible legal defence, even if the laws were such that there was little hope of their winning their cases. A good defence demonstrated the concern of the world outside, helped to bring out the real situation in South Africa, revealed police methods of intimidation and gained time for the pressures of world public opinion to exert themselves. That was probably the main reason why the South African Government was so strongly opposed to the International Defence and Aid Fund; that was presumably why it had harassed the members of the Defence and Aid Committees in South Africa and had banned those Committees, without the slightest legal justification, in 1966.[24]

As is the case now, what becomes evident is that a central function of the law, and its authority, is to shift what can be said about a particular issue, to mobilise 'world public opinion' and to expose the indefensible.

In the meantime, the relationship between the Israel and the UN continues to reach dangerous lows. In May 2024, Israel's Ambassador to the UN Gilad Erdan shredded the UN Charter in a tiny shredder during his speech protesting the General Assembly's resolution to expand Palestine's rights and privileges at the United Nations. In early October, Israel declared António Guterres *persona non grata* and banned him from entering Israel, alleging he had failed to unequivocally condemn Iran's attack on Israel or denounce Hamas' massacre on 7 October 2023, despite the opposite being true. On 7 October 2023, his spokesperson issued a statement that condemned "in the strongest terms" Hamas' attack,[25] and a year later a message to mark one year since the attack.[26] The ten elected members of the Security Council released a statement on 3 October 2024 which expressed 'concern about the escalation of tensions in the Middle East' and underscored the 'full support to the United

24 UN archive, 1968: 30.

25 Dujarric, Stéphane, Spokesman for the Secretary-General. "Statement attributable to the Spokesperson for the Secretary-General – regarding the situation in the Middle East." *United Nations,* October 7, 2023. https://www.un.org/sg/en/content/sg/statement/2023-10-07/statement-attributable-the-spokesperson-for-the-secretary-general-regarding-the-situation-the-middle-east.

26 António Guterres. "My message to mark one year since the October 7 attacks." *X,* October 6, 2024. https://x.com/antonioguterres/status/1842701303522431233?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1842701303522431233%7Ctwgr%5E0d9f3ca985c3c09dd2cb645cd9fffb8ecb4747da%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fnews.un.org%2Fen%2Fstory%2F2024%2F10%2F1155396.

Nations Secretary-General'.[27] These high-political struggles accompany long-standing attacks on UNRWA,[28] the United National Relief and Works Agency for Palestine founded in 1949, the targeting of UN humanitarian convoys and facilities,[29] and most recently UN peacekeepers in southern Lebanon as the war has now expanded into Lebanon.[30]

As the ICJ continues its three genocide proceedings, the International Criminal Court has released a series of arrest warrants (however not in the case of Myanmar): on 17 March 2023, for Vladimir Putin and Maria Lvova-Belova 'for the war crime of unlawful deportation of population (children) and unlawful transfer of population (children) from Ukraine to Russia'.[31] On 20 May 2024, ICC Prosecutor Khan applied for arrest warrants for Hamas leader Yahya Sinwar (and Mohammed Diab Ibrahim Al-Masri and Ismail Haniyeh who were since killed by Israel), as well as Benjamin Netanyahu and Yoav Gallant of Israel. The deliberations in the Russian case took just three weeks, while they are still ongoing in the latter. Strikingly, Khan stated in his application that 'all attempts to impede, intimidate or improperly influence the officials of this Court must cease immediately.'[32] As was later revealed in a Guardian and Israeli-based magazines +972 and Local Call investigation, this reference was directed at Israel which has engaged in a decade-long 'secret "war" against the court', deploying 'its intelligence agencies to surveil, hack, pressure, smear and

27 "Security Council's 10 elected members (E10) address the situation in the Middle East, reaffirming strong support for the UN Secretary-General – Statement." *United Nations,* October 3, 2024. https://www.un.org/unispal/document/securitycouncil-e10-statement-030ct24/.

28 BBC news. "UN says Israeli strike on Gaza school killed six of its staff." BBC, September 11, 2024. https://www.bbc.co.uk/news/articles/clyn400rm680.

29 "UN Humanitarian Convoy Targeted and Obstructed by Israeli Force – Statement by the Humanitarian Coordinator for the Occupied Palestinian Territory, Muhannad Hadi on the security incident affecting a UN convoy at Al Rashid Checkpoint in Gaza." *United Nations,* September 10, 2024. https://www.un.org/unispal/document/ocha-statement-10sep24/.

30 Mackenzie, James, Maayan Lubell and Michelle Nichols. "UN says Israeli tanks burst into peacekeeper base." *Reuters,* October 14, 2024. https://www.reuters.com/world/middle-east/israel-orders-evacuation-more-southern-lebanese-towns-amid-rising-displacement-2024-10-12/.

31 "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseywvna Lvova-Belova." *International Criminal Court,* March 17, 2023. https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

32 "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine." *International Criminal Court,* May 20, 2024. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

allegedly threaten senior ICC staff in an effort to derail the court's inquiries'.[33] Communications, from phone calls to messages, emails and documents by ICC officials such as Khan and his predecessor were captured.

In the face of such serious and long-standing practices of intimidation of ICC staff and attempts to impede inquiries, to speak the law, what is the symbolic power of international law and arrest warrants? While they might not end up in actual arrests – as recently as September 2024 Putin travelled to Mongolia, an ICC member – it does impose limits on an individual's capacity to travel within the jurisdiction of 124 ICC members. The idea is that the label of 'war criminal' could tarnish an individual's international reputation and contribute towards the slow, incremental changes that have been led by the ICJ cases and advisory opinion. And, to conclude this intervention, I will quote from Khan's application for arrest warrants, which offers us a glimpse into international lawyers' faith in their own profession:

> Let us today be clear on one core issue: if we do not demonstrate our willingness to apply the law equally, if it is seen as being applied selectively, we will be creating the conditions for its collapse. In doing so, we will be loosening the remaining bonds that hold us together, the stabilising connections between all communities and individuals, the safety net to which all victims look in times of suffering. This is the true risk we face in this moment.
>
> Now, more than ever, we must collectively demonstrate that international humanitarian law, the foundational baseline for human conduct during conflict, applies to all individuals and applies equally across the situations addressed by my Office and the Court. This is how we will prove, tangibly, that the lives of all human beings have equal value.[34]

'Binding', 'contraignant' and 'obligatoire': A distinction with a difference?
William Schabas

Preparing the three essays in both English and French versions hit an unexpected snag when Alain Pellet objected to use of the English

33 Davies, Harry, Bethan McKernan, Yuval Abraham and Meron Rapoport. "Spying, hacking and intimidation: Israel's nine-year 'war' on the ICC exposed." *The Guardian,* May 28, 2024. https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed.

34 "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine." *International Criminal Court,* May 20, 2024. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

word 'binding' for the term 'contraignant' that he had used in French. Perhaps I should have minded my own business, but I was copied on the correspondence and thought the word 'binding' wasn't a bad choice. In a series of exchanges with Alain, it became apparent that there may be terminological nuances in the French language that are difficult to reflect in English.

Initially, I had read Alain's text in the original French. Arrested by the word 'contraignant' in the second paragraph, I went immediately to the English translation for the equivalent. In truth, Alain wasn't really arguing there for anything to be 'binding'. The thrust of his paragraph was to challenge 'eminent professors of law' who dismiss advisory opinions of the International Court of Justice with the allegation that they are not 'legally binding' (*juridiquement obligatoires* in the original French). For some reason, our discussions seemed to focus on whether or not advisory opinions (and General Assembly resolutions) are 'binding' whereas Alain was trying to fight off attempts to dismiss their significance on the ground that they are 'non-binding'.

On this, I follow Alain's lead. We are on the same wavelength. And as a non-native speaker of French, I defer to his eloquent mastery of *la langue de Molière.* The extraordinary opinion of the Court on the Occupied Palestinian Territory is one of its great achievements, a landmark that will share the pantheon with other great rulings, among them *Corfu Channel*, the advisory opinions on Namibia, the Wall and the Chagos Islands, and *Nicaragua v. United States*. So much was said in the July 19 opinion, with such clarity, and with a quite exceptional level of unanimity amongst the members of the Court. It could not have come at a more vital time.

For many years I have urged my students to avoid the 'binding' and 'non-binding' dyad. It is generally used not to strengthen international law but rather to weaken it. In their reading or in previous courses, many have been taught to dismiss the Universal Declaration of Human Rights as 'non-binding', along with other seminal General Assembly resolutions, such as the 1960 resolution on the granting of independence to colonies. This greatly misrepresents the significance of such instruments.

I think that scorning the Universal Declaration as 'non-binding' is a legacy of the early decades, when many States were reluctant to admit the application of fundamental human rights to the territories they controlled in the Global South. It is striking that the 1960 decolonization resolution includes, in an operative paragraph, a call to 'observe faithfully and strictly' the Universal Declaration. It's the first time we see such a formulation. That's because the resolution was drafted by African States, most of whom were very new members of the United Nations.

What about those legal phenomena that are undisputedly 'binding'? For example, judgments of international courts and associated provisional measures orders. Does this classification as binding clarify anything? When provisional measures orders are defied, as they have been in recent months, the answer is that the courts state the law but that they do not enforce it. That's the task of other bodies, like the Security Council. What does it mean, then, to say a provisional measures Order is 'legally binding' if we cannot count on the Security Council to take steps for its enforcement?

Maybe French, and perhaps other languages, provides for a twilight zone between legal norms that are *obligatoires* and those that are not. Regardless of whether English even allows for this, I'd prefer to avoid trying to identify a kind of 'binding *lite*' and instead insist that the 19 July 2024 advisory opinion must be observed, respected and, above all, implemented.

'Binding' or ' Constraining", More than a Nuance

Alain Pellet

At the request of Didier Bigo, editor of the journals *Cultures et Conflits* and *PARISS*, I have written a short paper in French entitled *'La force paradoxale du droit international'* ('The paradoxical force of international law'), in which I try to show that even though there are hardly any mechanisms for enforcing compliance with international legal norms, they nonetheless exert a constraint on those to whom they are addressed. And this is true even if they are set out in instruments that are not legally binding.

Despite my imperfect English, I had translated this text, which was originally written in French, but I came up against a difficulty that I pointed out to those responsible of the publication: while I had no hesitation in translating the word '*obligatoire*' as 'binding', I had a problem with the correct way of translating '*contraignant*'.

After we had exchanged drafts of our respective contributions, William (Bill) Schabas wrote to me saying that 'binding' should be used to translate both '*obligatoire*' and '*contraignant'*, something for which my Cartesian mind was – and still is – unprepared: you cannot say that something that is not binding is … binding. This was all the more important for me because the whole point of my little article is to show that, even when the law is not binding, it is constraining: using the same word to refer to both situations would have rendered the whole article meaningless.

In the English text sent to the editors, I left the matter open and confined myself to suggesting a choice between three open-ended possibilities: '*compelling*', '*coercive*' or '*constraining'*. It was the latter adjective that was chosen by the professional translator commissioned by the publishers to review the

English text of my contribution. So, the problem is solved as far as the version intended for publication is concerned. This leaves the underlying question unanswered: what is the relationship between law and constraint? And, more specifically in the case of international law, how can a body of law that is largely devoid of institutional means of coercion nevertheless claim to be 'law'?

I am convinced that the misunderstanding between Bill and myself is largely due to what I believe to be a confusion on his part between two quite distinct but often (wrongly in my view) conflated notions: legal norms on the one hand, their sources on the other, and, perhaps, more profoundly to our very conception of (international) law.

First of all, we need to distinguish carefully between the notion of formal sources (which I find to have great virtues, even if it is often criticised) and that of norms; while the former are the processes by which the latter are enunciated, the latter constitute the very content of the law: 'the use of armed force is prohibited' or 'States … should take measures to conserve and, where appropriate, enhance sinks and reservoirs of greenhouse gases'. These are norms; they are laid down by various formal sources which, themselves, result from various processes: the constitution, the laws, a regulation or a presidential decision, a treaty, a custom, and so on. In the above examples, it is, respectively, a customary international rule and a provision in the 2015 Paris Climate Agreement.

Secondly, and still looking at these two examples, we can see that norms (or rules – I don't think the two words refer to distinct realities) can, on the one hand, emanate from sources of a very different nature and, on the other hand, regardless of their source, exert a very different degree of constraint on the States to which they are addressed. In the first case, there is indeed an obligation: there may be exceptions or nuances when we go into the details of the principle, but it does not lend itself to discussion: it is forbidden to use armed force; it is binding (*obligatoire*). In the second case, the norm is stated in the conditional tense, it is an incentive; it exerts a pressure – a constraint – *on* States, but they have enormous room for manoeuvre; although it is set out in a treaty (in principle binding), it is hardly more than constraining.

Our little quarrel with Bill arose over the Advisory Opinion delivered on 19 July 2024 by the International Court of Justice on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, which we nevertheless agree is remarkable. This Opinion illustrates our differences: it is obviously not binding as such, and we both agree on that. On the other hand:

– the vast majority of the norms it enunciates are binding, or even 'super-binding' because they fall within the scope of 'peremptory' law (*jus cogens*) from which no derogation is permitted; and

– by its very existence, the firmness of its wording and the very comfortable majority with which it was delivered, the opinion, while non-binding, exerts considerable pressure on the three categories of legal subjects to which it is addressed in accordance with the questions posed by the General Assembly (Israel – which is hardly sensitive to this pressure, the other States – which are unequally sensitive, and international organisations, in particular the United Nations, which can hardly be insensitive to the statements of its 'principal judicial organ'.) The Opinion is therefore undoubtedly constraining (*contraignant*), without being binding (*obligatoire*).