

# EVAP Episode 35\_ Ardi Imseis

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## SUMMARY KEYWORDS

International law, Palestine, Israeli occupation, International Court of Justice, advisory opinion, self-determination, human rights, apartheid, UN resolutions, legal consequences, international community, Gaza Strip, genocide, international legal order, mass atrocity prevention.

## SPEAKERS

Ardi Imseis, Jaclyn Streitfeld-Hall

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Jaclyn Streitfeld-Hall 00:12

Welcome to Expert Voices on Atrocity Prevention by the Global Centre for the Responsibility to Protect. I'm Jaclyn Streitfeld-Hall, Research Director at the Global Center. This podcast features one on one conversations with practitioners from the fields of human rights, conflict prevention and atrocity prevention. These conversations will give us a glimpse of the personal and professional side of how practitioners approach human rights protection and atrocity prevention, allowing us to explore challenges, identify best practices and share lessons learned on how we can protect populations more effectively.



Jaclyn Streitfeld-Hall 00:47

Today, I am joined by Ardi Imseis, a professor of International Law at Queen's University, legal counsel to the State of Palestine in their case at the International Court of Justice, and a former UN official who recently served on the Group of Eminent Experts for Yemen. He also recently published a book entitled "The United Nations and the Question of Palestine," through Cambridge University Press. Thank you for joining us today, Ardi.



Ardi Imseis 01:11

Thanks for having me.



Jaclyn Streitfeld-Hall 01:13

Ardi, you've long been involved in legal work relating to Palestine. Can you share a bit about your background in this area.



A

Ardi Imseis 01:21

Sure. I'm a Canadian, but also Palestinian heritage, and for many, many years, I have actively been engaged in the Palestine freedom struggle, but through the prism, if you like, with the use of international law. And organization I served in the United Nations in occupied Palestine for a total of about 12 years. Four years in the Gaza Strip, seven years in East Jerusalem or thereabouts, all of which were the United Nations Relief and Works Agency for Palestine Refugees in The Near East (UNRWA) as legal counsel to them. And left the agency, as we call it, in 2014 to just shift my career to the legal academy, did a PhD, and then moved on to Queen's University, where I've been teaching for the past six years. And throughout all of that, I built up a record to writing and researching on Palestine and United Nations and international law. Yeah, so it's a long standing, if you like, focus of my work, among other places, as you've mentioned earlier. And yeah, that's what I do.

J

Jaclyn Streitfeld-Hall 02:38

Last month, on 19 July, the International Court of Justice issued an advisory opinion on the legal consequences arising from Israel's occupation and settlement activity, among other policies. Can you provide our listeners with some background on why this advisory opinion was issued and what its findings were?

A

Ardi Imseis 02:58

I guess the first place to begin is to appreciate that there's no shortage of pronouncements made by the various principal organs of the United Nations on the situation in occupied Palestine and going on many decades. And we know that the territories occupied, and therefore the law of belligerent occupation, or international humanitarian law, as well as international human rights law are applicable and are the yardsticks by which the United Nations and the international community has measured Israel's practices and policies in that territory. And so for many decades, the United Nations principal organs, whether the general assembly or the Security Council or the Economic and Social Council and so on, had assessed Israel's behavior in that territory in relation to exclusively how they managed the occupation under IHL and also under human rights law. So among other things, the international community had built up a large record of resolutions, studies and other such as United Nations, demonstrating that Israel's settlement policy, for instance, its transfer of Israeli nationals into the territory occupied by it since 1967 are illegal and must end, are also home demolitions or torture or deportation of a protected population, you name it. The international community had pronounced upon these illegal practices of Israel, but one thing that it had yet to do so at least definitively, was pronounced upon the regime that gives rise to these violations of international law, these discrete individual violations of IHL or human rights law. What of the legality of Israel's regime in the occupied Palestinian territory? What of the legality of Israel's very presence in the occupied Palestinian territory. And so after some years of, if you like, research and advocacy, a group of us urged that a new advisory opinion be sought from the International Court of Justice on in effect, the continued presence of Israel in the occupied Palestinian territory on, I guess it would have been 31st or the 30th. I think of the end of December, 2022 the General Assembly of the United Nations put a series of questions together in a resolution to the International Court of Justice, the nub of which is, what are the legal consequences of Israel's continued presence in the occupied Palestinian territory? In that resolution, the General Assembly requests an advisory opinion on the International Court, from the International Court of Justice

on the following questions. Question A asks, what are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self determination from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the holy city of Jerusalem and from its adoption of related discriminatory legislation and measures? And you will note that in that question, there are all references made to these discrete violations that are the hallmark, or have become the hallmark of the occupation, again, the violation of the Palestinian people's rights, self determination, the settlement of the territory, the annexation of that territory, including measures aimed at altering the demographic composition and status of Jerusalem, as well as related discriminatory measures and legislation, etc. And then the second question put to the court is, how do those policies and practices of Israel referred to above affect the legal status of the occupation, and what are the legal consequences that arise for all states and the United Nations from that status? And as it happens, the International Court of Justice ruled, after deliberation and receiving submissions from a very large number of states, ruled that Israel's continued presence in the occupied Palestinian territories in itself unlawful is an internationally wrongful act, and along the way, made a number of very, very important rulings that put to rest, lay to rest, issues that had hitherto been debated. Yeah, so in my respectful opinion, after having worked on the case, but not because I've worked on the case, knowing the law and practice of the United Nations and on the question of Palestine, very, very intimately, I can say, without any reservation, that the ICJ advisory opinion offers a paradigm shift, a fundamental shift in the international law, certainly law at the United Nations on the question of Palestine.

J

Jaclyn Streitfeld-Hall 08:15

Can I press you to elaborate on why you think it's such a significant shift? Like, what is the significance of these findings moving forward?

A

Ardi Imseis 08:24


Sure, to appreciate the significance, one needs to appreciate the difference between mere adherence to the laws that govern occupation, IHL, the law of belligerent occupation, and the relationship between that and occupation law and occupation as a state of affairs and international law and practice. Vis-a-vis the right of states to territorial integrity and political independence, and noninterference and sovereign equality of states. So the first place to begin is to appreciate that occupation as such, is meant to be a temporary circumstance. And this one has lasted 56 going on 57 years, clearly not temporary. And the laws that govern occupation, as I said earlier, IHL, the law of belligerent occupation, do not speak themselves of the issue concerning how the occupation began or its requirement to be ended. Those laws just simply regulate how an occupying power manages its position as an occupying power in the territory. There's nothing in that law that requires the occupation to end. It just only implies that law that the occupation will be temporary. Wherever then does the requirement under international law that an occupied territory and occupation of a territory end, must end. Well, that rests in what we call the law governing the use of force of the *jus ad bellum*. The law that derives from Article Two, subsection four of the UN Charter. And so, as I said earlier, the United Nations has determined very clearly that a multiplicity or multitude of actions taken by Israel for many decades has violated the law of belligerent occupation, but nowhere has the United Nations been very clear or definitive. There have been some resolutions that have suggested it,

but I can talk about that further. It hasn't been definitive about the very legality of Israel's presence in the territory. Now that the court has ruled that Israel's presence in the territory is unlawful as a violation of the prohibition on annexation of territory conquered through force, which is a corollary of Article Two, subsection four of the UN Charter, a violation of the *jus ad bellum*, or the law governing use of force. And now that the Court has said that that violation is also a violation of the *erga omnes* obligation of all states to respect the right of the Palestinian people to self determination, the real difference is the value of this opinion arises from what the legal consequences are. That the occupation itself must come to an unconditional end as rapidly as possible. And there I'm quoting the court. They use a standard of as rapidly as possible. Now, one must look at the law of state responsibility. When a state engages in an internationally wrongful act, they're under an obligation, a three fold obligation, first to cease the act unconditionally, second to make appropriate assurances of non repetition, and third to make appropriate forms of reparation for any damage that flows to persons who are affected by that wrongful act. Now let's apply that law to the fact of Israel's illegal presence in the territory. If the presence in the territory is unlawful, then Israel is under an obligation to unilaterally withdraw from the territory and from all of the territory and unconditionally, and to do so immediately, or, as the Court said, as rapidly as possible. So you can see, this runs up against the hard political facts of what I have called in my research, the negotiations condition that holds an almost universally that is, it is a position almost universally held by all stakeholders, including the UN in many respects, up until now. That the only way to end the occupation of Palestine is for Palestinians, the weaker party, the people who are under foot of the occupying power who's engaged in bad faith and colonizing their territory, is for them to negotiate with the occupying power the end of the occupation. And that gives rise to the following, however, does one negotiate the end of their bondage with their jailer, who is keeping them underfoot in bad faith? Impossible, of course, and it runs against the principles of the law of state responsibility. So the bottom line is, Israel's regime is engaged in a series of discrete practices that are unlawful, and all of which must end with settlements and so on. But, the real internationally wrongful act that matters is their very presence in the occupied state of Palestine, its territorial integrity and political independence is being impeded by a bad faith occupying power that covets its land, that is colonizing that land, and the end of that situation can never be made subject to negotiation as whole. It is a requirement of international law that Israel vacate and vacate all of it, every last inch of it, every settler, every settlement, out of the territory and as rapidly as possible. There is also one more thing that, if you like, highlights the paradigm shift which we have here, and that along the way, the court determined, among other things, that Israel violates the Palestinian people's right, the self determination that it is violating the principle precluding the acquisition of territory through threat or use of force and so on. But it also indicated that Israel's practices and policies in the territory "violate the prohibition under international law, which is codified in Article Three of the Convention on the Elimination of All Forms of Racial Discrimination, violates the prohibition on racial segregation and apartheid." So for all of the debate that has existed up until now, following the Human Rights Watch reports and the Amnesty International reports and the reports of various special rapporteurs of the United Nations, which have indicated that Israel has imposed the regime of apartheid and racial segregation on the people of occupied Palestine. Well, that's all been laid to rest by the court once and for all. And of course, you can see where all of this is going. There's an anti apartheid movement, dear Jackie. It's happening right now, and the court has provided a great deal of wind in the sails of this anti apartheid movement. And it's only a matter of time before the occupying power and the fascists who run it, have to leave occupied Palestine.



 Jaclyn Streitfeld-Hall 15:22


That's really fascinating. And I think for our listeners who maybe don't know the difference between advisory opinions versus provisional measures versus actual rulings, you know, final rulings on cases from the court, you know are the recommendations from this opinion legally binding?

 Ardi Imseis 15:43

Yeah, good question. Very happy to answer that. In fact, they're not recommendations. So the first place to start is to acknowledge that, in fact, the court makes an authoritative determination of what international law requires. International law requires of the international community, again, the question put, the questions put to the court, pose those questions, or rather make the answer to those questions relevant for a number of parties. First and foremost, Israel, second, all states, third, the United Nations. So the answer is given to the General Assembly after having been asked the questions by the GGA, but the answer is relevant to all of those stakeholders, all of those subjects of the international system. They are not recommendations. Now a lot of folks say, well, it's just an advisory opinion, and therefore it's formally not binding. And while that's technically true under international law, the International Court of Justice exercises two types of jurisdiction. One advisory jurisdiction, where they'll issue a legal opinion on a question put to it by an organ of the United Nations that is vested with the authority to put that question to it under Article 96 of the UN Charter. And the second type of jurisdiction, contentious jurisdiction, where two states or more agree and consent to put their dispute of international law before the court for a binding ruling. And while it is also true that contentious hearings and adjudications are binding on the parties to those cases by virtue of the principle of consent, it is also true that advisory opinions are merely that just advisory however, and I underscore this word because the International Court of Justice, being the principal judicial organ of the United Nations, is uniquely mandated to provide authoritative interpretations of International Law on any matter. When they do so, and especially when those, if you like, items of international law with which it is seized are all, in any case, customary international law, which would be binding on all states in any case, or rooted in peremptory norms that is fundamental norms of international law, jus cogens norms, derogation from which is not permitted with a character that had, erga omnes, obligations attached to them. All of those things would be binding. And I can say very simply that the court's opinion in the Israeli practices case, the one that we're talking about now, all of it is rooted on jus cogens norms, peremptory norms, derogation from which is not permitted of erga omnes character, which are also customary international law. So they would be binding. All of those pronouncements are binding on all of the states and international organizations addressed by the court. Full stop. The long winded answer to say that the court's findings are binding on the international community, addressed in in the case Israel, third States and the United Nations.

 Jaclyn Streitfeld-Hall 18:57

Since you've mentioned the international community, I want to go back and pick up on something you said earlier, which is that a large number of states delivered interventions during the public hearings. Why do you think these interventions mattered?

 Ardi Imseis 19:00

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Ardi Imseis 19:12

Yeah, a really good point. And they mattered because, of course, when the court engages in an analysis of any international legal issue, there is an urgency to some cases and a lack, if you like, of some urgency to others. And so by having regional representation, a very, very broad representation of states in this case, we had more states participate in this particular case than any other case in the history of the court. And the history of its predecessor, the Permanent International Court of Justice. And so here you have anywhere between 55 and, I think just the low 60s, if you like, of states who either appeared in writing or orally. Some, some did not appear in both and so and from every region of the planet. And this demonstrates to the court the urgency of the matter, the also the consensus that exists among the whole of the international community, as represented through these regions. These regional groups, of what the international law requires, of what international law requires in respect of answering each of the questions put before it. So I'd say four fifths. Obviously, I was in the court at the time and taking very careful notes of what was said by all states. And I'd say about four fifths, maybe even more, of all the state that appeared were overwhelmingly clear on what international law requires, that the occupation is unlawful, that Israel is imposing an apartheid regime on the people of the occupied Palestinian territory, that the territory may not be conquered to use of force, that this is a violation of that principle, and so on. And with a small minority, 1/5 or less of states arguing against, but to varying degrees, there were only maybe two or three states that argued vociferously against the proposition that the occupation is unlawful. And tellingly, only one of those argued on the merits, the other ones were just basically saying the court has no jurisdiction as a matter of procedure, has no jurisdiction. It's not admissible. The Security Council sees that this matter, the peace process is ongoing, and therefore an issuance by the court of an opinion would prejudice the results of that process. Of course, these arguments are spurious. They made no sense at all to the court, not least because, as a matter of fact, there hasn't been a peace process ongoing for a very long time by virtue of the actions of the occupying power that continues to settle the territory and wreak havoc on it. But also because, as a matter of practice, the court would never, typically and never has, not seize jurisdiction over over a legal question that is put before it, particularly because it has a role to provide the parties to any conflict and to provide the international community with what, with an authoritative interpretation of what international law requires, such that if it ever does get to a negotiating table, the parties will know what is requiring them under international law, that any negotiations that do take place is or are rooted in international legal obligation, as opposed to as they have been in this case for many decades, realpolitik and sheer force. Again, I don't want to mislead the audience though, because the occupation is unlawful and Israel has an obligation to unilaterally withdraw as rapidly as possible. All of it, none of that, is subject to negotiation as a matter of international law.

J

Jaclyn Streitfeld-Hall 22:53

You know, since you've just referenced Israel's obligation again, you know, I know it's only been roughly a month since the announcement by the ICJ, but you know, what do you think the practical impact on the ground?

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Ardi Imseis 23:07

Yeah, that's the obvious \$64,000 question. And this is where any international lawyer who is honest and truthful with him or herself will acknowledge that international law, and law generally, is limited in its ability to influence practically matters on the ground. There is law,

and then there's material reality. Law exists in the discursive realm. It can push politics. It can set the parameters of what is legally and politically legitimate in discussions at the United Nations, or in discussions between states and so on. And ideally, it can help change policies. But where there are parties who are powerful and obstinate and do not pay much mind to the rule of law, wither the rule of law. And so if you look on the ground right now, the Israelis are proceeding with their actions in the Gaza Strip, with a level of barbarity and aggression waged against the Palestinian people not seen in the whole of their history as a people, and certainly in a level that the international community is not seen globally in this century, and the advisory opinion has had little impact on the where with all with occupying power and to pursue that course. So we must be honest with ourselves. At the same time, and I underscore this, gone are the days where third states, including the United Nations, as an international organization, will require or can acquire reasonably in their own policies vis a vis the Israel-Palestine conflict, that Palestine negotiate the end of their bondage. That is no longer the case. All states are under an obligation, as determined by the court, to first, not recognize the legality of Israel's presence in the territory, second, not to render aid or assistance in the maintenance of Israel's presence in the territory. And these are legal obligations that are binding on all states, and that means states must make policy changes, especially those vis a vis the Israelis and their bilateral relations with Israel, especially those states that trade with Israel, for instance, arms for instance. So let's flesh this out. And this was fleshed out, thankfully by the court in paragraph 278, of the opinion, which I would prefer your listeners to. But the court says, look, all authored states are under these obligations, not to render aid or assistance, nor to recognize as lawfully Israel's continued presence. And then it actually sets out some of the ways, not all, of the ways. It's a non exhausted list of some of the ways that states are obligated to act and can discharge this obligation, including to distinguish in their relations with Israel, between the occupied Palestinian territory on the one hand, and Israel proper on the other. To stop trade with Israel in so far as such, trade can be connected to Israel's continued presence in the occupied Palestinian territory. And they don't limit the meaning of trade that can include most anything, including arms, military goods and services, material, financial goods and services, banking, all manner of things. So all this to say, so long as any aspect of bilateral trade relations between third states and Israel is connected, or can be reasonably connected, to Israel's continued presence in the occupied Palestinian territory, those relationships must immediately cease, and so third states won't do this on their own, but civil society will press third states to do this on their own, eventually. And so you can see how this law might practically have an impact, but it will take some time in terms of follow up. And then, of course, there's follow up in the General Assembly of the United Nations, which is going to happen this coming session in the next few months.

J

Jaclyn Streitfeld-Hall 23:57

You know, as you've indicated, I think, in what you were just saying, you know, compliance by Israel with international law and other legally binding obligations, earlier you mentioned Security Council resolutions. There's also ICJ provisional measures in other cases, has been severely and historically lacking, and this was reiterated by the court in its findings. In the advisory opinion, what is your recommendation to members of the international community, you know, these third states and others, to ensure that continued violations and non compliance are brought to an end and that Palestinian populations are protected from further atrocities.

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Ardi Imseis 28:04



Yeah, look, as I said in closing, the last answer, the next step will be to turn to the General Assembly. General Assembly will receive the opinion this coming session, and in the resolution that receives it there. Ideally there are going to be some benchmarks set out by the General Assembly. This was done in the Chagos case, where the advisory opinion of the International Court of Justice on the United Kingdom's continued administration of the Chagos islands, issued in 2019, in which the court indicated that the United Kingdom and its administration is unlawful and has an obligation to withdraw its administration of the Chagos islands as rapidly as possible. So the same standard the General Assembly received that opinion, and it indicated in its resolution that the end of the administration by the United Kingdom must take place within, quote, six months, rather, no later than six months of the passage of the General Assembly resolution. So they put a time stamp on the end of the occupation or administration by the United Kingdom of the Chagos islands. And that's precisely what is likely going to happen in this case, there will be a time stamp placed on it, and once that takes place, of course, the Israelis, in all likelihood, will not leave the territory. They've made that abundantly clear. They have publicly stated and repeatedly so on the floor of the United Nations General Assembly, in fact, that they believe that the resort of the General Assembly to the International Court of Justice in this case, equates to terrorism and treachery and, so in the event that the Israelis continue to stay on, then that will only add to the number of resolutions that the Israelis have violated. Now it takes us back to your last question. It is true that empirically speaking, Israel is a serial violator of the United Nations Charter and resolutions of the General Assembly and the Security Council, and it goes on and on for decades. That much is true, but it is also true, and the Israelis know this, that there is state practice at the United Nations to impose obligations, or rather consequences and costs on serial violators of UN decisions, that is decisions of the Security Council, or UN resolutions and so on. And those consequences and costs are being examined as we speak. All when we do is have a look at how South Africa was treated following the 1971 advisory opinion on its continued presence in Southwest Africa or Namibia and the end of the apartheid regime, and how UN legislation and how advisory opinions of that court helped fuel the anti apartheid movement there and ultimately end it. We're now living in a different time, a time of social media, a time of rapid movement of change, and so we do hope again. I underline the word hope that there will be change brought about much quicker than it was done in the Libya case. But there can be costs brought to bear by the United Nations, including by the General Assembly, on the occupying power, who is present in occupied Palestine as an aggressor. This is an aggression, much like Russia's aggression against Ukraine, much like aggressions that took place during World War Two and so on, or Iraq's aggression against Kuwait, and it must end unconditionally, forthwith.

J

Jaclyn Streitfeld-Hall 31:57

Taking a step back. Can you tell us your views on what the situation in Palestine means for international legal order more broadly?

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Ardi Imseis 32:06

Yeah, absolutely, there's little question in my mind that the situation that it is prevailing now, especially in the Gaza Strip, where the Palestinian people have been determined by the International Court of Justice to possibly suffer a genocide, that the rights that they are to be protected from under the Genocide Convention are plausibly at risk. It's an inflection point in the



international legal order up until October the seventh of last year, especially in the West, Western policymakers were waxing lyrical about Russia's illegal occupation of Ukraine, its illegal annexation of portions of Ukraine, and pressing all manner of action at the United Nations, domestically as well, of sanctions against Russia or Russian assets, even in the cultural realm, you know, FIFA and UEFA and even the Olympic Committee, you know, pushing Russia and Russian athletes out, at least if they wanted to compete under their flag and so on. So action was taken there as clearly a political resolve to do that there. Well, what of occupied Palestine? I mean, when you compare occupied Palestine with the situation occupied Ukraine, you have similar circumstance where territory has been illegally annexed, territory is illegally occupied, and the law is identical right. The law prohibits, under Article Two subsection four, acquisition of territory through threat or use of force. The law requires the respect of the right of peoples to self determination, whether they be Ukrainian or Palestinian and so on. What accounts for this discrepancy in treatment between occupied Ukraine and occupied Palestine, or, for that matter, the situation in Yemen, which festers like an open wound on the conscience of the international community. What accounts for this difference of treatment? And the only reasonable response that can be offered by any person who is even half awake looking at the situation is that this difference in treatment by the West, by the great powers, who fashioned the international legal order for the whole of the international community, following the ravages of the Nazi fascists of World War Two. The only way one can justify this discrepancy is with resort to rail politic and just downright racism, right? The Israelis get passed by the United States because, you know, the special relationship, we'll call it, that the United States and Israel share, without regard for any principle of international law. Take, for instance under the Genocide Convention that all third states, all States Parties to the Genocide Convention, have an obligation that was triggered by the International Court of Justice's finding of a plausibility of genocide, in earlier this year. They have an obligation to prevent genocide; and the prevention of it, of course, does not require the genocide coalesce or that it crystallized that it actually happens. But if there's a real and substantial threat of genocide taking place, of a risk of genocide, as the Court determined, then that triggers positive obligations and duties of states like the United States to prevent said genocide from happening, right from saving lives. And notwithstanding that, the United States has armed Israel to the teeth and continues to arm Israel while it is pursuing its ravages on the people of Gaza. This is the inflection point, and unless the international community, perhaps through the conscience of civil society actors who put pressure on their states of nationality and so on. But unless the international community sees this and acts upon it principally and affirms the universality of international law applicable to all people, Israeli, Palestinian, Jewish, Muslim, Christian, Ukrainian, Russian and so on. Then the rules based international legal order as it is formed by these powers after World War Two, will be not worth the paper it's written on. So we are now at an inflection point, and only time will tell where we end upon the other side. My hope is, as an international lawyer, and hopelessly hopeful international lawyer, that having resort to the International Court of Justice and having resort to the principal organs of the United Nations, the General Assembly and so on, will help push the pendulum in the opposite direction and toward a world full of justice and not injustice, which we are seeing Palestinian people suffer more than any on Earth today.

J

Jaclyn Streitfeld-Hall 37:13

Thank you for joining us for this episode of expert voices on atrocity prevention. If you enjoyed this episode, we encourage you to subscribe to the podcast on Apple podcasts, SoundCloud or Spotify, and would be grateful if you left us a review. For more information on the Global Center's work on R2P, mass atrocity prevention and populations at risk of mass atrocities, visit our website at [www.globalr2p.org](http://www.globalr2p.org) and connect with us on Twitter and Facebook at GCR2P.

