THE JBI HUMAN RIGHTS LECTURE

International Law Under Fire: The International Rule of Law, International Lawfare and the Gaza War

Yuval Shany

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Jerry H. Biederman is Chairman of the JBI Administrative Council. Felice D. Gaer was the Director of the Institute from 1993 until her passing on November 9, 2024. Christen Broecker is Deputy Director of the Institute.

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Introduction

ON SEPTEMBER 26, 2024, experts, advocates, diplomats, and friends of the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) gathered in New York City for the 2024 JBI Human Rights Lecture. Professor Yuval Shany, the Hersch Lauterpacht Chair in Public International Law at the Hebrew University of Jerusalem and former dean of its law faculty, as well as a former independent expert member and chair of the United Nations Human Rights Committee, the independent expert mechanism that monitors governments' compliance with the International Covenant on Civil and Political Rights, delivered the lecture, entitled "International Law Under Fire: The International Rule of Law, International Lawfare and the Gaza War."

Professor Shany's observations come at a pivotal moment for the rule-based international order which JBI, and prior to its establishment, AJC, have long advocated and sought to strengthen for the benefit of all. Even as serious human rights crises and challenges around the world—including in Iran, Sudan, Russia and Ukraine, Venezuela, Afghanistan, China, and North Korea, and on issues including global antisemitism—urgently require international attention and engagement, the international norms and mechanisms that have been developed to address them are increasingly perceived by many stakeholders to be impotent, illegitimate, and politicized. Moreover, a diverse range of purported international legal authorities are increasingly articulating legal arguments that are dismissive of Israel's legitimate security concerns or even hostile to its very existence, as well as indifferent to concerns about the human rights implications of precipitously rising global antisemitism.

The JBI Human Rights Lecture series, inaugurated in 2014, has provided a forum for leading public intellectuals and legal scholars to address pressing topics related to the articulation and effective enforcement of universal human rights norms. Past lectures have addressed specific challenges related to asymmetric conflicts and the implications of increasing challenges by leading States to the concept of the universality of human rights.

In this lecture, Professor Shany identifies three significant trends that have precipitated the deep crisis in international governance we are witnessing today, and which has manifested dramatically in the application of inter-

national law norms to Israel in the context of its conflicts against Hamas in Gaza and Hezbollah in Lebanon since their attacks against Israel beginning on October 7 and 8, 2023, respectively.

Professor Shany first describes the failure of international security arrangements to enforce international law and prevent the rise of radical militancy, violence, and instability by non-state actors such as Hamas and Hezbollah that do not accept the validity of international legal norms. The second and third trends follow from this failure. First is the willingness of 'law-appliers' to adopt dubious legal positions reflecting an apparent indifference to the real-world challenges facing States that are affected by the actions of non-State actors that purposefully violate international law, and second is the related practice of international law-applying actors and bodies either engaging in the loose and hyperbolic use of international law as a form of lawfare against States whose security is affected by the actions of these non-State actors or failing to reject or condemn such hyperbolic rhetoric when confronted with it.

Surveying numerous recent instances in which international law-appliers have engaged in questionable or hyperbolic interpretation and application of international law norms to Israel, Professor Shany illustrates how the behavior of the very actors with a strong interest in maintaining international law's effectiveness—from the International Court of Justice, to the Prosecutor of the International Criminal Court, to the International Committee of the Red Cross, to independent UN-appointed experts and leading NGOs—is nevertheless having the opposite impact of that which these intend. Rather than encouraging Israel to bring its actions into greater compliance with international law and disincentivizing harmful practices by non-State actors, international law-appliers are fuelling a populist backlash against adherence to even well-established international legal norms within Israel and more broadly are eroding international law's credibility, causing disappointment among broad constituencies that have been persuaded by wild claims not borne out by evidence to hold unrealistic expectations of how international mechanisms should respond to events in the Middle East. Ultimately, these interconnected developments are fuelling the widespread perception—increasingly based in reality—of an international legal order that is either illusory or irredeemably politicized.

Professor Shany concludes his assessment of these disastrous trends with an urgent appeal to international law-appliers, including but not limited to the governments that are ultimately responsible for international norm ar-

ticulation and enforcement: "international law…should not be construed as a suicide pact." He calls on key states, international courts, and international organizations to exercise greater professional care and prudence; avoid articulating legal claims that run contrary to legitimate state interests at the heart of the rule-based order, such as the right to self-defence against acts of aggression; and avoid presenting deeply contested legal propositions as settled law and collapsing important distinctions between law and politics. Instead, he appeals for law-appliers to opt for incrementalism in legal interpretation and application, make it a greater priority to ensure office-holders at the UN and international courts are qualified and independent, and censure those actors that repeatedly violate basic norms of impartiality, non-politicization and neutrality rather than continuing to react lethargically to extreme examples of behavior unbefitting international legal experts.

In the comments that preceded and robust discussion that followed Professor Shany's lecture, participants commented on related trends including the implications of recent norm-generating efforts occurring in United Nations fora, where States acting through the UN General Assembly have asserted increasing authority to articulate the content of international law through non-binding resolutions in addition to or instead of in the form of binding treaties. Gratitude was expressed to JBI Director Felice Gaer for her decades of engagement with international human rights mechanisms and actors to ensure the rigorous, impartial, universal application and enforcement of human rights norms. Appreciation was also expressed to Robert S. Rifkind for his vision and generosity in establishing the JBI Human Rights Lecture series. Mr. Rifkind, a distinguished attorney and civic leader, served as Chair of the Institute's Administrative Council from 2000 to 2007 and remains an active member of its Steering Committee. His steadfast belief in the efficacy of law and indispensable need to guarantee and protect the human rights of every person has been an inspiration to JBI's Administrative Council and staff, and his ongoing involvement, advice, and support are deeply appreciated.

Throughout the event, participants including Professor Shany expressed their appreciation for and gratitude to JBI Director Felice Gaer for her decades of engagement with international human rights mechanisms and actors to ensure the rigorous, impartial, universal application and enforcement of human rights norms. While she had invited Professor Shany to deliver the JBI Lecture months earlier and had expressed her deep appreciation to him for his thoughtful engagement with these most sensitive issues at the heart of current discourse about international law and institutions, Gaer's health

had declined significantly in the weeks immediately preceding the event, and she was not able to attend it. Gaer passed away on November 9, 2024, leaving behind a legacy of determined and effective advocacy to overcome seemingly insurmountable political obstacles and in order to make the promise of the international human rights framework a reality for all.

We encourage those reading this lecture to join JBI in our ongoing efforts to counter the harmful trends Professor Shany has identified and to carry on Gaer's efforts to restore the integrity and legitimacy of the international rules-based system, on the effectiveness of which the lives and human rights of so many people around the world depend.

International Law Under Fire: The International Rule of Law, International Lawfare and the Gaza War

Yuval Shany

The international rule-based order,[1] which is built around respect for formal and informal norms that undergird international governance, including in the realm of international peace and security, is in a state of deep crisis. This is hardly a controversial proposition given the omnipresence of high profile violations of international law, such as the Russian invasion of Ukraine, the dramatic eruption of violence in the Middle East and Sudan, persistent concerns about China's policy vis-à-vis its neighbors, and serious democratic backsliding in places as diverse as Hungary, Venezuela and Turkey. One may add to this sense of lawlessness and helplessness the ongoing climate crisis, the crisis around governance of digital technology and the immigration crisis.

Underlying much of these multiple crises—sometimes referred to as a *permacrisis* (the 2022 Collins Dictionary word of the year)[2]—is the chronic weakness of international enforcement mechanisms. They often do not have the material capacity nor the political will to enforce international law against nefarious actors who reject international rules, or do not consider themselves bound by them, if and when they conflict with their political interests. Whereas the under-enforcement of international law is nothing new,[3] the seriousness of the violations, the stakes attached to them and the challenge they pose to world order, appear to be the worse we have seen in some time, at least since the end of the Cold War.

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[1] See e.g., Julinda Beqiraj, Iris Anastasiadou and Anna Darnopykh, The Rules-Based International Order: Catalyst or Hurdle for International Law? Discussion Paper, British Institute of International and Comparative Law (March 2024). For criticism of the term, see John Dugard, The Choice before Us: International Law or a 'Rule-based International Order'? 36 *Leiden Jounral of International Law* (2023) 223.

[2] https://blog.collinsdictionary.com/language-lovers/a-year-of-permacrisis.

[3] See e.g., Elena Kastelli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the non-injured state and the idea of international community* (2010).

Still, the problem arguably runs deeper than the challenge posed to the rule-based international order from a number of rogue states and cynical international actors. The rule-based international order is in a state of crisis also because of the way in which international law norms are being applied against certain states who are interested, in principle, in maintaining international order (or are, at least, not ideologically opposed to it). Such states find themselves, at times, unable to protect their most basic legitimate interests within a normative framework that is applied to them by certain law-applying mechanisms, which is based, in turn, on a very particular version of international law. This results in these states being pushed to adopt a more confrontational position towards the rule-based order than they would have otherwise liked to. This process of distancing between international law and the states to which it is potentially misapplied is further accentuated by perceptions of political bias in the operation of international organizations, which undercut their authority. Populist tendencies in some of these states further lead to push-back against the positions of international institutions that operate and/or apply norms in ways which are unacceptable to the local *demos*.[4]

This confrontational dynamic is particularly apparent in international conflicts, which are often asymmetric in nature and involve rogue states and non-state actors. This includes the US-led coalition military operations against Al-Qaeda and ISIS, which led to criticism by certain states who questioned the legality of basic features of these operations,[5] in a manner that largely coincided with their political interest in challenging the global dominance of the US. A prominent claim made in this regard, which I also mention below, has been the proposition that states do not have a right to self-defence under international law against non-state actors, including terror groups, that operate from inside the territory of other sovereign states, even if the other state concerned is a rogue or failed state that is "unwilling or unable" to curb the activities of the non-state actor.[6] While the phenomenon I

[4] On the link between populism and hostility towards international law, see e.g., Mattias Kumm, How populist authoritarian nationalism threatens constitutionalism or: Why constitutional resilience is a key issue of our time, *Verfassungsblog on Matters Constitutional*, Dec. 6, 2018.

[5] See e.g., Waseem Ahmad Qureshi, International Law and the Application of the Unwilling or Unable Test in the Syrian Conflict, 11 *Drexel Law Review* (2018) 61, 81-82; Kimberley N Trapp, Back To Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors, 56 *ICLQ* (2007) 141, 149.

[6] For a discussion, see Lucy V. Jordan, "Unwilling or Unable", 103 *International Law Studies* (2024) 151; Olivier Corten, The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?, 29 *Leiden Journal of International Law* (2016) 777.

discuss is general in nature, I will focus below on the current armed conflicts between Israel and Hamas in Gaza and Hezbollah in Lebanon in order to illustrate the dynamic of erosion of the rule-based international order due, in part, to questionable and/or hyperbolic interpretation and application of international law undertaken by actors who purportedly support its existence.

By way of background context, it is noteworthy that the armed conflicts in Lebanon and Gaza have both taken place in the aftermath of failures by international bodies to effectively enforce international law in order to maintain regional order and stability—that is, they are the result of a rule enforcement failure. Both armed conflicts erupted *after* Israel withdrew to the international border from South Lebanon and the Gaza Strip in 2000 and 2005, respectively. In the Lebanese context, the UN confirmed the status of the new border line (the "blue line") after the 2000 withdrawal;[7] and no serious claim was ever raised regarding the location of the new Gaza border line following the 2005 disengagement.[8] Still, despite the absence of a genuine border dispute,[9] both border areas became the *loci* of cross-border attacks against Israel in violation of international law.

Furthermore, both armed conflicts occurred after the collapse of international security arrangements that were designed to stabilize the border situation: In Lebanon—UNIFIL, which was entrusted by Security Resolution 1701 to ensure that South Lebanon would remain demilitarized[10]—has totally failed in doing so, and Hezbollah gradually rebuilt its military strength in the border area. In Gaza, an EU border assistance mission was set up after Israel's withdrawal in order to monitor the Rafah crossing point between Egypt and the Gaza Strip, so as to ensure that the crossing would not be used for weapon smuggling and the infiltration of wanted terrorists into the Gaza Strip.[11] However, the mission suspended its activities in 2007, following the violent takeover by Hamas of the Gaza Strip, with the monitors taking refuge in Israel.

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[7] UNIFIL Background, https://unifil.unmissions.org/unifil-background#Para2.

[8] See e.g., Security Council – Press Release, Israel's Disengagement from Gaza, Northern West Bank 'Watershed', Under-Secretary-General Tells Security Council, UN Doc. SC/8479 (2005).

[9] It may be noted that Hezbollah has made some claims over the years regarding Israeli presence in the Shebaa Farms – a small area captured by Israel in 1967 from Syria – alleging that Syria had unlawfully taken the area before that from Lebanon. Such claims were largely regarded by observers as merely pretextual – that is, designed to justify Hezbollah's continued existence as an "anti-occupation" militant group. See e.g., Asher Kaufman,

[10] The Israel-Hezbollah Conflict and the Shebaa Farms, 13 *Kroc Institute Policy Brief* (2006).

[11] UN Security Council Resolution 1701, August 11, 2006, UN Doc. S/RES/1701 (2006). https://eubam-rafah.eu/en/node/5048.

This effectively ended the operation of the border security mechanism.

The upshot of both rule-enforcement failures is that withdrawals by Israel to internationally recognized borderlines have created power vacuums, due to the combined effect of failures by the Lebanese government and Palestinian Authority to assert their governmental authority in the areas withdrawn from, and the feebleness of international bodies that accepted a peacekeeping and/or security monitoring role there. As result, both regions become hubs for radical militancy, violence and instability—culminating in attacks against Israel on October 7 from Gaza and on October 8 from Lebanon.

Still, almost every measure undertaken by Israel to protect itself from the growing threat posed by militant groups in Gaza and Lebanon encountered legal criticisms levelled against it by major international law bodies and notable experts. Such criticisms were based on debatable interpretations of international law doctrine, which tended to ignore, almost completely, Israel's legitimate security needs and regional stability interests. Since international law—paraphrasing Justice Jackson's quip about interpretations of the US Constitution[12]—should not be construed as a suicide pact, it is not surprising that Israel and some of its allies rejected most of these interpretations, which they considered to be legally dubious and practically unsustainable.

The cumulative effect of the multiple legal claims made against Israel on the basis of questionable legal constructions is that, in rejecting them, Israel has been gradually pushed deeper and deeper into a perceived zone of lawlessness, despite the real possibility that it was actually acting lawfully. Moreover, the invocation of questionable interpretations of international law against Israel in some contexts has undermined the ability of outside critics to invoke international law against it in other contexts, where it appears to have violated clear-cut rules of international law, without a plausible legal justification (A prominent example of such clear-cut illegality may be Israel's official West Bank settlement policy, which is incompatible with its own characterization of the West Bank as subject to the laws of belligerent occupation).[13] Once certain applications of international law are perceived as unreasonable and legally questionable, and perhaps also politically motivated, elements within Israel, including within the Israeli government, are quick to use such perceptions to deflect all international criticism directed against them, even with regard to measures which the vast

[12] *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949)

[13] For a discussion of the issue, see Yoram Dinstein, *The International Law of Belligerent Occupation* (2009) 240-242.

majority of international lawyers would regard as clearly unlawful. In other words, unrealistic and insufficiently legally founded international criticisms feed into domestic narratives in Israel (and some other states) that international law is loosely applied on the basis of political motivations, and that it should not be taken seriously as a principled system of legal norms and institutions.

Among the Israeli security measures that were described, in a controversial manner, as violations of international law were the imposition of a naval blockade on Gaza in 2009 after the rise to power of Hamas in Gaza, and its repetitive firing of missiles towards Israel.[14] Although belligerent parties are entitled under the laws of armed conflict to impose naval blockades and land sieges against one another, subject to certain conditions (e.g., proportionality),[15] most UN bodies that have reviewed the blockade considered it not as a legitimate act of war, but as a form of collective punishment.[16] The Israeli policy of imposing a naval blockade and land siege on the Gaza Strip also resulted in several international legal bodies maintaining that the laws of belligerent occupation continued to apply to Gaza even after the 2005 withdrawal.[17] This interpretation of the conditions for ending occupation fly, however, in the face of conventional laws of armed conflict doctrine, which requires that occupying forces maintain "boots from the grounds" in order to consider foreign territory as occupied.[18] Such sweeping claims of illegality and continued legal responsibility, as opposed to more nuanced legal criticisms which could have been raised against Israel—for example, concerning the excessive limits imposed by Israel on entry of civilian goods into the Gaza Strip—have been rejected by Israel because they were legally questionable and inattentive to its very real security concerns. In particular, the UN position ignored Israel's fears that Hamas—an internationally designated terror organization—could obtain via sea routes weapons and other materials that would facilitate its aggressive designs on Israel.

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[14] See The Public Commission to Examine the Maritime Incident of 31 May 2010 - The Turkel Commission January 2010 Report - Part one, at pp. 53-54.

[15] Indeed, one UN panel which reviewed the 2010 flotilla incident reached the conclusion that the Israeli naval blockade was legal under international law. Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), at para. 81.

[16] See e.g., Office of the High Commissioner for Human Rights - Press Release, How can Israel's blockade of Gaza be legal? – UN independent experts on the "Palmer Report", Sept. 13, 2011, https://www.ohchr.org/en/press-releases/2011/09/how-can-israels-blockade-gaza-be-legal-un-independent-experts-palmer-report.

[17] See e.g., Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, ICJ advisory opinion of July 19, 2024, at para. 93.

[18] See e.g., Michael W. Meier, Israel – Hamas 2023 Symposium – The Question of Whether Gaza Is Occupied Territory, *Articles of War*, Dec. 15, 2023.

In addition, the very use of self-defence against terror groups in Gaza and Lebanon after October 7, 2023 was questioned on the basis of the 2004 ruling of the ICJ in the Wall case[19] (and the Congo v Uganda case from 2005),[20] according to which there is no right to self-defence against a non-state actor, especially when operating from an occupied territory.[21] In the same vein, several UN rapporteurs referred to the targeting of Hamas leaders in Lebanon as arbitrary killings,[22] ignoring their potential status as members of an armed group or as civilians taking a direct part in hostilities. While such legal constructions are highly debatable, they are not baseless as a matter of legal doctrine.[23] Moreover, like I mentioned above, they were also raised vis-à-vis the US and other states military operations against Isis and Al Qaeda. Still, they do not provide aggrieved states like Israel with any legal solution for their very real need to defend themselves against lethal attacks by militant groups, other than appealing in vain to the Security Council of the UN. It is therefore not surprising that such legal claims were effectively ignored by Israel.

Finally, one can mention the following example of a questionable legal claim. During the recent war in Gaza, the ICRC opined that warnings issued by IDF to large numbers of Palestinians civilians, calling on them to evacuate areas in which intensive fighting were expected to take place, were incompatible with international humanitarian law (IHL).[24] UN rapporteurs and the UN Secretary General even referred to these measures as forms of collective punishment.[25] This is despite the existence of a legal duty under IHL to warn civilians before conducing attacks[26] and the obvious humanitarian imperative to remove civilians from the vicinity of active hostilities, in order to minimize civilian casualties. In other words, the warnings might have been legally required of Israel, or, at least, legally desirable.[27] It is therefore not

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, 194.

[20] *Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 ICJ 168, 222-223.

[21] See e.g., Kunal Purohit, Does Israel have the right to self-defence in Gaza?, *Aljazeera*, Nov. 17, 2023.

[22] See e.g., UN High Commissioner for Human Rights Press Release, Israel and Lebanon – UN experts deplore extraterritorial use of lethal drones to conduct killings in countering terrorism, January 9, 2024.

[23] For a discussion, see Marko Milanovic, Does Israel Have the Right to Defend Itself?, Nov. 14, 2023.

[24] ICRC News Release, Israel and the occupied territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences, Oct. 13, 2023.

[25] See UN High Commissioner for Human Rights Press Release, Israel must rescind evacuation order for northern Gaza and comply with international law: UN expert, Oct. 13, 2023; Security Council Meeting Coverage, Amid Increasingly Dire Humanitarian Situation in Gaza, Secretary-General Tells Security Council Hamas Attacks Cannot Justify Collective Punishment of Palestinian People, Oct. 24, 2023, UN Doc. SC/15462.

[26] ICRC Customary International Humanitarian Law Database, Rule 20, https://ihl-databases.icrc.org/en/customary-ihl/v1.

surprising that Israel ignored legal demands to rescind the warnings it had issued to Palestinian civilians of impending military operations. Arguably, a more constructive response from the ICRC and the UN to the unfolding crisis would have been to remind Israel of its duty to maintain all humanitarian protections for civilians who cannot or do not wish to evacuate, to look after the safety needs and other needs of those who did evacuate and to allow them to safely return to their homes as soon as possible. Unfortunately, offering questionable legal interpretations regarding the very issuance of evacuation warnings runs the risk of undermining the authority of the same law-applying bodies when addressing other legal aspects of the evacuations undertaken.

What is striking about these different legal claims is not so much their legal plausibility. As noted, some are legally plausible. Rather, it is the indifference with which they deal, or rather refuse to deal, with the serious security concerns of Israel, which the events of October 7 largely validated: Allowing Hamas to rearm itself—a development that was slowed down, but not fully prevented by the naval blockade—proved to have indeed disastrous consequences for both Israelis and Palestinians. In the same vein, maintaining that Israel does not have a right to self-defence against Hamas's lethal attacks is practically unsustainable, even absurd. Even more so, some legal interpretations offered represent a degree of indifference even with respect to civilian casualties on the Palestinian side. A legal position that maintains that civilians should not be encouraged to leave areas in which the guerillas entrench themselves, puts these civilians at grave risk and might encourage non-state actors to continue to use civilians as a sort of human shield. Furthermore, such a legal approach presents countries like Israel with an impossible dilemma—either to refrain using force against a dangerous terror organization embedded amongst civilians, to use force without evacuating the civilians and run the risk of significant collateral harm, or to evacuate civilians and risk international condemnation. To be sure, such artificially constructed situations of illegality, based on unrealistic legal standards, were quickly followed by calls from different actors for enforcement of this curated version of international law against Israel, and complaints of double standards against third states and international organizations that fail to do so (partly because they recognized the debatable nature of the legal claims and the real security dilemmas posed by the complex situation on the ground).[28]

[27] See e.g., Michael N. Schmitt, Israel – Hamas 2023 Symposium – The Evacuation of Northern Gaza: Practical and Legal Aspects, Articles of War, Oct. 15. 2023.

[28] See e.g., Reuters, Antony Blinken rejects suggestion of 'double standard' on Israel, *The Guardian*, April 23, 2024.

From the viewpoint of the need to preserve a rule-based international order, one can regard the embrace by certain law-appliers of dubious legal positions that appear to be agnostic to real world challenges confronting states involved in armed conflicts—especially ones confronting rogue actors that bluntly and purposefully violate international law—as potentially harmful. By detaching the content of international law from legitimate state interests that underpin international peace and security, this approach operates to undermine the authority of international law norms and institutions, and to render less credible and less popular demands to implement it. As indicated above, this complicates the ability of the international community to effectively invoke international law even in cases in which where clear-cut violations have been committed by states, including violations committed by Israel in its war in Gaza (for example, unjustified destruction of public infrastructure, lack of reasonable precautions in operations around humanitarian convoys, mistreatment of prisoners etc.).[29]

Moreover, advocating a reading of international law that cannot and would not be realistically complied with, results in the perception that both parties to asymmetric conflicts operate outside international law constraints. This is either because they have no interest in complying with international law (this is typically the case for the non-state party) or because they cannot realistically comply with it (this may be the case for the state party(. The overall picture of non-compliance with international rules that this configuration of under-effectiveness in enforcement and over-reach in normative demands generates is grim. And it perpetuates the sense that the rule-based international order is in a deep state of crisis.

Beyond reliance on dubious and unrealistic legal standards, another aspect of the crisis confronting the rule-based international order is the loose and hyperbolic use of international law as a form of lawfare.[30] We have seen a host of actors, almost always operating with strong political agendas, adopting even more radical and tendentious interpretations of international law than the debatable but plausible ones mentioned above, and loosely applying them

[29] See e.g., Ian Black, Israel is finding it harder to deny targeting Gaza infrastructure, *The Guardian*, July 29, 2024; Lorenzo Tondo, At least eight Israeli strikes on Gaza aid groups since October, says report, The Guardian, May 14, 2024; Seb Stratevic, EU, US denounce alleged sexual abuse and torture of Palestinian prisoners by Israeli troops, *Politico*, Aug. 8. 2024.

[30] The term "lawfare" has been first coined by Charlie Dunlop in 2001 to capture unrealistic legal claims used to criticize American military operations. Charles J. Dunlop, Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts (2001), https://people.duke.edu/~pfeaver/dunlap.pdf.

to the factual record at hand. The goal of these actors does not appear to be the enforcement of international law, but the infliction of a reputational harm on the targeted state, *inter alia*, by making a stronger than necessary legal claim in order to maximally stigmatize it. Arguably, the claims that genocide is taking place in Gaza (as opposed to violations of IHL and international human rights law) that were made by South African against Israel and by Nicaragua against Germany, both before the ICJ, illustrate this hyperbolic tendency.[31]

The genocide claim has been quickly adopted by several countries hostile to Israel.[32] Still, many mainstream international lawyers have expressed serious doubts whether the very high threshold established by the ICJ in past cases (requiring a showing that there exists a plan for a genocide or a pattern of acts the only possible inference from which is genocidal)[33] can be proven when the cases get to the merits stage.[34] The genocide claim draws, however, attention away from other potential claims involving other serious, yes less stigmatic violations of international law by Israel, which can be much more easily shown. It is interesting to note, in this regard, that when seeking arrest warrants against senior Israeli officials, the ICC Prosecutor has, so far, alleged war crimes and crimes against humanity, and has not claimed that the crime of genocide was committed.[35]

What makes the genocide claim potentially hyperbolic, beyond the general difficulty of establishing that military operations undertaken as part of an armed conflict are motivated by a genocidal intent, as opposed to military considerations (even if such military considerations are insensitive to humanitarian needs), and the availability of other, more suitable and provable legal

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Application instituting proceedings and request for the indication of provisional measures (Dec. 29, 2023)(ICJ); Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Application instituting proceedings and request for the indication of provisional measures (March 1, 2024)(ICJ). One may note, in this regard, that South Africa could not have brought the claim against Israel on any jurisdictional basis other than that available under the Genocide Convention. This, however, does not resolve the concern that its claim might be hyperbolic and a form of lawfare.

[32] See e.g., Susan Frazer, Turkey formally asks to join the genocide case against Israel at the UN court, *AP*, Aug. 7, 2024.

[33] See e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ 43, 196-197.

[34] See e.g., Marko Milanovic, ICJ Indicates Provisional Measures in South Africa v. Israel, *EJIL: Talk!*, Jan. 26, 2024.

[35] ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, May 20, 2024.

categories, is the limited interest of those making the claim in engaging with inconvenient facts, which do not sit well with the claim. For example, South Africa did not seriously try to explain in its submissions to the ICJ in the Genocide case how a putative intent to destroy the civilian population can be reconciled with the application of warnings and other precautions by the IDF aimed at reducing civilian harm (including the aforementioned evacuation orders),[36] the gradual opening of new border crossings in order to allow for greater quantities of humanitarian assistance,[37] the issuance of clear orders by senior IDF commanders not to harm civilians[38] and the capacity of the IDF to inflict much more harm on the civilian population that it actually has (which was, nonetheless, extensive). It also ignores the role of Hamas fighting tactics in increasing the civilian harm inflicted on the Palestinian sides.[39] Indeed, some of the judges sitting in the ICJ cases commented on the deficient manner in which the facts were presented to them by South Africa, while issuing their decisions on provisional measures.[40]

Again, to be clear, I am not claiming that Israel's prosecution of the war in Gaza has been exemplary; far from it. The harm inflicted on Gaza is massive and likely excessive, and some statements made by Israeli politicians were clearly reckless, and may even amount to incitement to genocide (even though it should be noted that almost all of them operate outside the IDF chain of

[36] See e.g., Michael N. Schmitt, Israel – Hamas 2023 Symposium – The IDF, Hamas, and the Duty to Warn, *Articles of War*, Oct. 27. 2023.

[37] See e.g., UN News, Gaza: UN welcomes Kerem Shalom border crossing announcement, Dec. 15, 2023.

[38] See e.g., Emanuel Fabian, IDF chief in missive to soldiers: 'Unlike our enemy, we maintain our humanity, *Times of Israel*, Feb. 20, 2024.

[39] See e.g., Patrick Kingsley, Natan Odenheimer, Aaron Boxerman, Adam Sella and Iyad Abuheweila, How Hamas Is Fighting in Gaza: Tunnels, Traps and Ambushes, *New York Times*, July 13, 2024.

[40] See e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Order of Jan. 26, 2024, Separate Opinion by Judge Nolte, p. 4: "I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent… The Applicant must be expected to engage not only with the stated purpose of the operation, namely to "destroy Hamas" and to liberate the hostages, but also with other manifest circumstances, such as the calls to the civilian population to evacuate, an official policy and orders to soldiers not to target civilians, the way in which the opposing forces are confronting each other on the ground, as well as the enabling of the delivery of a certain amount of humanitarian aid, all of which may give rise to other plausible inferences from an alleged "pattern of conduct" than genocidal intent. Rather, these measures by Israel, while not conclusive, make it at least plausible that its military operation is not being conducted with genocidal intent. South Africa has not called these underlying circumstances into question and has, in my view, not sufficiently engaged with their implications for the plausibility of the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention".

command).[41] Yet, the claim that the military campaign in its entirety is genocidal in nature appears to be exaggerated and lacks factual substantiation of a causal link between a special intent to destroy (which some individuals within the Israeli political system may have harbored) and the military orders and the actual policies adopted by the IDF. Such loose application of law to facts and hyperbolism paints the application of international law in deep political colors, which further erode its credibility.

What's more, radical claims about international law violations raise expectations among broad constituencies for a strong reaction by international courts and other law enforcement bodies. When such responses fail to arrive—in part, because the claims made are impossible to substantiate—such a failure generates growing disappointment with international law, and the rule-based international order that is built thereupon. The genocide case brought before the ICJ by Ukraine against Russia offers a cautionary lesson in this regard: In 2022 the Court ordered Russia to stop the war, on the basis of a controversial interpretation of the Genocide Convention, which stipulated that the Convention itself (as opposed to general international law) may bar states from using force to prevent genocide, when the genocide allegation they raise is unfounded.[42] Still, two years later, the Court backtracked from its earlier decision and held that the Genocide Convention does not address questions relating to use of force by states seeking to prevent genocide.[43] The upshot is that the Court effectively held that the order it issued to Russia to stop the war (which Russia ignored) was based on an incorrect interpretation of the Genocide Convention. This entire episode probably caused more harm than good to the credibility of the Court's provisional measures procedure, and to the rule-based order its provisional measures were designed to support.

When states make wild allegations against other states—as a form of lawfare—this is hardly surprising. After all, states are the consummate political entities, and their use of international law is often instrumental in nature. Still, even here, one may critically evaluate major inconsistencies in the application of international law by states to their political allies and political rivals. In this regard, the commitment expressed by South Africa and Nicaragua to

[41] See e.g., Natalie Merzougui and Maria Rashed, Has Israel taken enough action to prevent alleged incitement to genocide?, BBC News, Aug. 27, 2024.

[42] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), ICJ Order of March 16, 2022, at para. 45.

[43] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), ICJ Judgment of Feb. 2, 2024, at para. 146.

advancing the cause of international law and a rule-based international order in the case of Israel/Palestine rings hollow when considering their apathic or supportive positions regarding the Russian invasion of Ukraine.[44]

More serious concerns should be directed against the approach taken by other actors, who are expected to consider the systemic implications of loose and hyperbolic applications of international law. These include international law-applying bodies, such as international courts, UN officials and major NGOs, whose ability to advocate on the basis of international law, depends on the continued viability of the rule-based international order. International courts have a particular responsibility in this regard to restrain the loose and hyperbolic use of international law by states appearing before it. Arguably, in the Genocide cases relating to the war in Gaza that are pending before the ICJ, the Court played such a part: It issued relatively mild provisional measures against Israel in the case brought by South Africa and refused to issue any provisional measures against Germany in the case brought by Nicaragua.

For UN officials and major NGOs, the concern is that if they go down the same loose and hyperbolic path that some state chose to follow, and make serious allegations on genocide, starvation, collective punishment, apartheid and the like without exercising the degree of professional care and prudence that one would expect from serious law-applying bodies, they would also present themselves as using law in a predominantly instrumental way, designed to advance a partisan political agenda. This, in turn, will undercut their ability to credibly raise important issues, which could be well-substantiated as a matter of law and fact (for instance, the specific issues identified by the ICJ in its recent advisory opinion on Israeli Policies Practices in the Palestinian Occupied Territory - discrimination, settler violence, land dispossession, excessive military force etc.).[45]

Prominent illustrations of a full-fledged lawfare campaign undertaken by UN Officials can be found, unfortunately, in a series of statements issued by several UN human rights rapporteurs that criticize Israel's military operations in ways which not only represent loose and hyperbolic application of international law, but also stand out in the hostile and overtly political tone they adopt. For example, a recent press release from the UN Special Rappor-

[44] See e.g., Crystal Orderson, A 'Russian love affair': Why South Africa stays 'neutral' on war, *Aljazeera*, June 2, 2023; Ismael Lopez, Nicaragua's Ortega defends Russia's stance over Ukraine, *Reuters*, Feb. 22, 2022.

[45] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, ICJ Advisory Opinion of July 19, 2024.

teur on The Occupied Palestinian Territory runs under the following headline: *Apartheid Israel is Targeting Gaza and the West Bank simultaneously, says expert*.[46] The press release then cites the rapporteur for the proposition that "Israel's genocidal violence risks leaking out of Gaza and into the occupied Palestinian territory as a whole," and that "12,000 [Palestinians] arbitrarily detained, de facto hostages of the unlawful occupying Power."

Over and beyond the very loose and hyperbolic use of international law found in this press release, which tries to create a false symmetry between Palestinians in detention in Israel, (who are all placed under judicial control, which may be arbitrary or non-arbitrary in nature, but clearly does not constitute hostage-taking under international law)[47] and the plight of the Israeli hostages in Gaza, through creating, one is struck by the press release's open hostility, manifesting itself in gratuitous name-calling. Clearly, the special rapporteur has lost interest in maintaining even the appearance of fairness and even-handedness in law application.

Such an approach to law-application by a UN official is not just a matter of diplomatic prudence and etiquette. The special rapporteurs are experts appointed by the Human Rights Council—a political body—to exercise a mandate to faithfully monitor human rights conditions around the world in accordance with certain professional standards. They are expected, according to their Code of Conduct,[48] to hold a "professional, impartial assessment of facts based on internationally recognized human rights standards", to behave in a "a way as to maintain and reinforce the trust they enjoy of all stakeholders", to gather information on the basis of "even-handedness", to communicate with states in ways that are not "politically motivated", "to ensure that their personal political opinions are without prejudice to the execution of their mission", and "to show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate." In practice, some human rights rapporteurs have largely adhered to such standards and conducted themselves professionally and seriously. Still, some of the rapporteurs have clearly failed to meet these standards, without incurring any serious repercussion.

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[46] UN High Commissioner for Human Rights Press Release, *Apartheid Israel is Targeting Gaza and the West Bank simultaneously, says expert*, Sept. 2, 2024.

[47] See International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 UNTS 205.

[48] Human Rights Council Resolution 5/2 Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council (2007), https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/CodeOfConduct.pdf.

For our fragile rule-based international system, the perception that key actors in the system, apply international law in a manner that is highly politicized, is extremely harmful. This applies not only to special rapporteurs, but also to other UN bodies—for instance, UNRWA—which has failed to meet the principle of neutrality in carrying out its mandate, with some of its workers even being involved in the 7 October attacks against Israel.[49] Different questions of trust arise when international actors adopt hard-to-fathom decisions on the basis of non-transparent considerations. One recent example, relating to the war in Gaza, is the decision of the ICC prosecutor, to request the arrest of two Israeli leaders[50] without affording Israel a genuine possibility of conducting its own investigations on the basis of the principle of complementarity that governs ICC proceedings. This decision is difficult to grasp, since it runs contrary to the stated policy on complementarity of the ICC Office of the Prosecutor,[51] and deviates from the Prosecutor's own practice in comparable cases, where he went out of his way to allow for domestic investigations (e.g., in the case involving Venezuela).[52] The decision by the Prosecutor was particularly abrupt and lacking in transparency in that it was issued while his office was simultaneously negotiating with the Israelis the terms of a prosecutorial visit to Israel to discuss complementarity in investigations.[53]

The question before us then is how to get back to a more or less functioning rule-based international system, in which international law is credibly applied and conditions for international peace and security are maintained? There is no magic formula for getting there, but I can perhaps offer some initial thoughts and suggestions. **First**, we need to acknowledge international law is still a rather fragile system, which enjoys only partial compliance and a limited buy-in from key actors and political constituencies. It therefore needs to be handled with care. Overreaching in making legal claims that have limited support in legal doctrine and the actual facts on the ground, and which run contrary to important and legitimate state interests, around which the rule-based order is built, such as protection from acts of aggression and resorting to self-defence when necessary, will not work. It may represent a worthwhile

[49] See e.g., UN says nine employees 'may have been involved' in October 7 Hamas attack, *AlJazeera*, Aug. 5, 2005.

[50] ICC, Statement of ICC Prosecutor Karim A.A. Khan KC, *supra* note 35.

[51] ICC Office of the Prosecutor, Policy on Complementarity and Cooperation (April 2024).

[52] See e.g., ICC News, ICC Prosecutor Karim A.A. Khan KC concludes official visit to Venezuela, signing MoU on establishment of in-country office, June 13, 2023.

[53] See US Department of State – Press Release, Warrant Applications by the International Criminal Court – Anthony Blinken, May 20, 2024.

moral gesture or virtue signally, and could even point the way towards future developments of the law, but presenting deeply contested legal propositions as settled *lex lata* (existing law) would erode the credibility of international law and institutions and underscore the weakness of the international legal system. Ultimately, it would also make it much harder to enforce international law norms around which there is broad international consensus, such as the prohibitions against acquisition of territory by force, torture and discrimination.

This does not mean that there is no room for civil society and academia to push the envelope and challenge the current international legal system and rule-based international order. Still, for entities that wish to assume a central place in the rule-based international order—key states, international courts and international organizations—being on the fringe of international law is not a good posture to adopt. In the same vein, Key NGOs, who used to enjoy much international prestige and influence, would do well if they reconsider their drift towards fringe legal positions, that are often based on overly-ambitious structural change agendas and/or collapsing important distinctions between law and politics.

A **second**, related point is a recommendation to opt for incrementalism in law interpretation and application. Law-appliers should avoid adopting controversial, at times hyperbolic, legal characterizations when more simple and straight forward ones are readily available. We have seen the ICJ adopt such a cautious approach in the its recent advisory opinion on Israeli Policies Practices in the Palestinian Occupied Territory, when it refused to pronounce on whether the situation in the Occupied Territories constitutes a form of apartheid, opting instead for the broader definition of racial segregation *or* apartheid afforded under article 3 of the Convention for the Elimination of Racial Discrimination.[54] The Court was also careful in the South Africa v. Israel not to hold that the claim that Israel is committing genocide is plausible (providing instead that "at least *some of the rights* claimed by South Africa and for which it is seeking protection are plausible").[55] Unfortunately, the ICJ did not embrace the same level of prudence in those parts of the aforementioned advisory opinion dealing with the legal status of Gaza prior to October 7. It was rightly criticized by the American judge—judge Cleveland—in her sep-

[54] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, supra* note 17, at para. 229.

[55] *Application of the Genocide Convention in the Gaza Strip, supra* note 40, at para. 54. See also BBC News, Former head of ICJ explains ruling on genocide case against Israel brought by S Africa, April 26, 2024.

arate opinion for opining on the matter needlessly[56] (and I believe also erroneously).

Third, it is time that the UN and the member states gets their act together with regard to the conduct of office holders that repeatedly violate basic norms of impartiality, non-politicization and neutrality. These office holders put the whole organization in disrepute, and set in place the same dynamics that have led Kofi Annan about 20 years ago to abolish the Human Rights Commission and replace it with a Human Rights Council.[57] States that care about international law should prioritize ensuring quality and independence of office holders at the UN and international courts—and move away from the lethargic attitude that they often adopt with regard to such appointments. The fact that the Code of Conduct might be abused by states that are hostile to the human rights movement and to the work of the independent mandate holders, is not a good enough reason for supporters of the human rights movement and the institution of special rapporteurs not to employ the Code and other accountability norms against mandate holders that repeatedly fail to adequately perform their job.

In sum, the rule-based international order is a critical component of international peace and security, and international law and justice. Careless use of international law norms and institutions, and abusive resort to them could undermine what is already a weak legal and political system that is struggling to meet the basic expectations of members of the international community for enforcing international law. At these present difficult times less is sometimes more, and more is sometimes less.

[56] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, supra* note 17, spearate opinion of judge Cleveland, at para. 21.

[57] UN News, Without reform of human rights body, UN credibility at stake, Annan says, April 7, 2005.

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