

Lawfare Without Consequence:
International Humanitarian Law, the Gaza Crisis, and the Enforcement Paradox
A Discussion Paper on International Law in Light of Current Events

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Introduction

International law is structured in such a way that it is extremely exacting in defining obligations, but exceedingly lenient when it comes to enforcing them. Indeed, the ongoing struggle in Gaza, lasting nearly two years now following the Hamas assault on 7 October 2023¹ and the subsequent Israeli retaliation resulting in over 45,000 Palestinian deaths according to the UN Office for the Coordination of Humanitarian Affairs' (UN OCHA) reports,² constitutes the most serious challenge to international legality in the last decade. At stake here is none other than international humanitarian law,³ the jurisdiction of the International Court of Justice,⁴ and the legitimacy of the International Criminal Court.⁵

This is where a rather sinister attribute becomes evident regarding legal matters. In the present case of Gaza, the use of legal process is revealed as an attempt to take the place of legal obligation. This paper will make the claim that the Gaza situation constitutes not just evidence of failure of enforcement of international law, but even worse, an abuse of legal processes by attempting to substitute the international legal process for the substance of international law. The paper will be organized as follows: an introduction to international humanitarian law and relevant principles for the Gaza case; recent actions taken by South Africa against Israel in the International Court of Justice;⁶ recent actions taken by the ICC in issuing an arrest warrant; and a concluding discussion on themes from the Gaza case.

¹ United Nations, Middle East, <https://www.un.org/en/topic/middle-east> (last visited June 3, 2026).

² U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Humanitarian Situation Update #247 | Gaza Strip, <https://www.ochaopt.org/content/humanitarian-situation-update-247-gaza-strip> (last visited June 3, 2026). Note that this figure is reported by the Gaza Ministry of Health and relayed by OCHA rather than independently verified by the UN.

³ Int'l Comm. of the Red Cross (ICRC), What Is International Humanitarian Law? (2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

⁴ Int'l Court of Justice, The Court, <https://www.icj-cij.org/court> (last visited June 3, 2026).

⁵ Int'l Criminal Court, About the Court, <https://www.icc-cpi.int/about> (last visited June 3, 2026).

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (S. Afr. v. Isr.), Case No. 192, Int'l Court of Justice, <https://www.icj-cij.org/case/192>.

I. The IHL Framework and Its Application to Gaza

A. The Fundamental Precepts

International humanitarian law (IHL), as established by the Geneva Conventions of 1949⁷ and their Additional Protocols of 1977,⁸ lays out three fundamental principles in relation to the conduct of hostilities: distinction, proportionality, and precaution. The principle of distinction stipulates that belligerents must always distinguish between civilians and combatants, as well as between civilian objects and military objects. This principle was explicitly stated in Art. 48 of Additional Protocol I⁹ and declared by the ICRC in its Customary IHL Study¹⁰ to constitute the “basic rule” of IHL.

Article 51(5)(b) of Additional Protocol I¹¹ defines proportionality as requiring belligerents not to carry out attacks expected to cause incidental civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated. This rule imposes the obligation to consider proportionality in good faith and does not permit unlimited collateral damage.

Under the precautionary principle, set out in Art. 57 of Additional Protocol I,¹² parties are required to verify their targets and to choose means and methods of attack likely to spare civilian life. Parties must take all necessary precautions when launching attacks, such that they cancel or suspend any attack whenever circumstances suggest the failure to satisfy the proportionality principle. These are not mere recommendations, but obligatory rules for parties both in terms of conventional and customary international law.¹³

⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; see generally Int’l Comm. of the Red Cross (ICRC), *The Geneva Conventions of 1949 and Their Additional Protocols* (2012), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977>.

⁹ Additional Protocol I, *supra* note 8, art. 48.

¹⁰ Jean-Marie Henckaerts & Louise Doswald-Beck, *1 Customary International Humanitarian Law* r. 1 (ICRC 2005), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1>.

¹¹ Additional Protocol I, *supra* note 8, art. 51(5)(b).

¹² Additional Protocol I, *supra* note 8, art. 57.

¹³ Henckaerts & Doswald-Beck, *supra* note 10, r. 15, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule15>.

B. Evidence of IHL Violations from the Gaza Conflict

Investigative work carried out by the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory¹⁴ and by the ICRC¹⁵ has suggested patterns of activity violating the relevant rules of IHL, including the employment of non-guided missiles in civilian areas, the destruction of essential civilian infrastructure such as hospitals and water resources, and the restriction of humanitarian access, described by UN Special Rapporteurs¹⁶ as the use of starvation as a means of warfare.

A particularly noteworthy aspect of the doctrine relevant to the Gaza conflict is that according to Art. 54 of Additional Protocol I,¹⁷ the attacks on the objects that are necessary for the survival of the civilian population constitute prima facie evidence of the violation of the prohibition in cases where the object of attack destroys the food production infrastructure, including flour mills, fishing boats, and agricultural facilities, combined with the limitations imposed on humanitarian aid, as recorded by UN OCHA throughout 2024.¹⁸ The main issue and the one that will be explored during the international criminal procedure is whether or not it is possible to infer an intention to engage in starvation tactics through the above actions.

As can be seen in Israel's response to the ICJ and ICC procedures regarding the situation, it is the policy of Israel to assert that it observes all requirements of IHL, whereas the damages to the civilian population occur due to the illegal employment by Hamas of the population as a protective cover, therefore making Hamas responsible for civilian damages. While it is certainly an attempt at justifying Israeli actions, it is founded on the doctrine of employing civilians as shields, which implies that a party using them bears responsibility for any damages. Nevertheless, this does not make Israel exempt from following IHL guidelines. It has long been established by the ICRC¹⁹ that the wrongful conduct by one party does not

¹⁴ U.N. Human Rights Council, Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, <https://www.ohchr.org/en/hr-bodies/hrc/co-israel-opt/index> (last visited June 3, 2026).

¹⁵ ICRC, Hostilities in the Gaza Strip and Israel: IHL and Humanitarian Issues (2024), <https://www.icrc.org/en/document/hostilities-in-the-gaza-strip-and-israel-ihl-and-humanitarian-issues>.

¹⁶ Press Release, U.N. Off. of the High Comm'r for Hum. Rts., UN Experts Call for Ceasefire amid Famine Warnings, Denounce Use of Starvation as Weapon (Mar. 2024), <https://www.ohchr.org/en/press-releases/2024/03/un-experts-call-ceasefire-amid-famine-warnings-denounce-use-starvation-weapon>.

¹⁷ Additional Protocol I, *supra* note 8, art. 54.

¹⁸ U.N. OCHA, Humanitarian Situation Update: Israel and Occupied Palestinian Territory (2024), <https://www.ochaopt.org/content/humanitarian-situation-update-israel-and-opt>.

¹⁹ Henckaerts & Doswald-Beck, *supra* note 10, r. 97, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97>.

relieve the other from following IHL requirements; “tu quoque” is not recognized in modern international humanitarian law.

II. *South Africa v. Israel* and the Politics of Provisional Measures

A. The Genocide Convention and the Proceedings Before the ICJ

At the year-end of 2023, South Africa instituted the case *South Africa v. Israel* before the International Court of Justice based on the terms of the Genocide Convention of 1948.²⁰ The case pertains to the violation of Art. II²¹ of the said Convention by the respondent, prohibiting acts directed at the inflicting of harm on protected groups of individuals. On 26 January 2024,²² the Court decided to issue provisional measures²³ requiring the State of Israel to take all necessary measures in its power for the prevention of acts amounting to crimes under the Genocide Convention, humanitarian access, and preventing and punishing incitement to genocide.

It is important to highlight some aspects of the provisional measures adopted by the Court in the present case. Firstly, it is worth noting that the Court found certain of the alleged rights plausible and thus gave them legal significance despite the lack of a ruling on the merits of the case. Secondly, it should be noted that the ICJ rejected the objection of Israel concerning the exercise of its jurisdiction²⁴ since it recognized the *erga omnes partes* nature of obligations established under the Genocide Convention.

B. Provisional Measures and the Enforcement Vacuum

As a response to the provisional measures, Israel continued with its military operations, made no substantive progress on expanding humanitarian access, and did not put into place credible internal accountability mechanisms regarding the alleged breaches. This trajectory was subsequently confirmed by the ICJ itself, whose further orders of 28 March and 24 May 2024 explicitly noted the deteriorating

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

²¹ Genocide Convention, *supra* note 20, art. II.

²² Int'l Court of Justice, Press Release No. 2024/4, *South Africa v. Israel*: The Court Indicates Provisional Measures (Jan. 26, 2024), <https://www.icj-cij.org/case/192/press-releases>.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (S. Afr. v. Isr.), *supra* note 6 (provisional measures order).

²⁴ *Id.* (preliminary objections to jurisdiction).

humanitarian conditions on the ground and called for additional measures.²⁵ Indeed, it is fair to say that in doing so, Israel has once again brought into the fore the problem of the so-called enforcement gap in the context of ICJ provisional measures.²⁶ The Court has no enforcement powers to enforce its own order. Referral to the UN Security Council under Article 94(2) of the UN Charter²⁷ is a structural impossibility since permanent members of the Security Council may themselves be parties to the dispute.

Herein lies the significance of the Gaza case for understanding the structural flaws inherent in international law enforcement. The ICJ can issue orders and declare the duties owed. However, it cannot enforce them. The gap between pronouncements of legal duty and actual enforcement was never the kind of marginal problem that international law's historical critics imagined; quite the opposite, it is the core design element of a legal system created by states for states. Israel neither ignored the provisional measures like some of history's critics predicted nor complied with them as might be expected in response to an adverse court ruling. Instead, the measures were formally accepted and substantively defied, which is perhaps an even more destabilising form of non-compliance.

III. The ICC Arrest Warrants and the Assault on Institutional Authority

In November 2024, the ICC Pre-Trial Chamber I issued arrest warrants²⁸ for Israeli Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant in addition to Hamas military commander Mohammed Deif. The warrants charged Netanyahu and Gallant with war crimes, namely wilful killings, starvation as a method of warfare²⁹ and other inhumane acts that could be considered crimes against humanity. The simultaneous issuance of arrest warrants for both parties to the conflict served as a gesture of judicial impartiality.

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order of 28 March 2024, I.C.J.; and Order of 24 May 2024, I.C.J., <https://www.icj-cij.org/case/192>.

²⁶ The ICJ Provisional Measures in *South Africa v. Israel*: An Assessment, EJIL: Talk! (Feb. 2024), <https://www.ejiltalk.org/the-icj-provisional-measures-in-south-africa-v-israel-an-assessment/>.

²⁷ U.N. Charter art. 94, ¶ 2.

²⁸ Press Release, Int'l Criminal Court, Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects Israel's Challenge to the Court's Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-israels-challenge-court>.

²⁹ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine, Int'l Criminal Court (May 20, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

However, the responses from different states provide valuable insights into the political implications of the ICC arrest warrants. Several European countries announced that they intended to arrest Netanyahu should he enter their territory. By contrast, the United States, invoking the American Servicemembers' Protection Act,³⁰ placed sanctions on ICC officials, thereby mounting a direct attack against an international judicial institution. While this position was far from unprecedented—the United States had previously refused to ratify the Rome Statute³¹—the sanctions marked a qualitative shift and amounted to an economic attempt at deterring judicial proceedings, raising legitimate concerns that such sanctions may arguably amount to offences against the administration of justice under Art. 70 of the Rome Statute, though whether state-level sanctions can constitute such an offence remains an unsettled question.³²

The legitimacy crisis of the International Criminal Court is well-known. In addition to the critiques raised by the African Union³³ regarding the historically unbalanced number of prosecutions of cases involving African leaders, it has long faced a double standard among those who supported it in theory. Western countries, which are among the most enthusiastic supporters of the ICC, tend to view the actions of the Court as politically motivated in cases involving individuals of their own political allies. Thus, the Gaza case, while intended to rectify the reputational damage done by the Court's past actions, will likely contribute to the loss of the Court's credibility in developing countries.

IV. Multipolarity, Selective Compliance, and the Future of the Legal Order

While the Gaza crisis represents a specific set of legal issues, it cannot be understood without considering the ICJ proceedings in *Ukraine v. Russia*,³⁴ as well as the arrest warrant issued by the ICC against Vladimir Putin in March 2023.³⁵ The conclusion that follows is that the legal order is experiencing pressure from several sources at once: great power unilateralism, the use of international law for reasons unrelated to compliance and, finally, the erosion of normative consensus on which multilateral legal institutions thrive.

³⁰ American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7401–7433.

³¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

³² Rome Statute, *supra* note 30, art. 70.

³³ African Union, Decision on the International Criminal Court, Doc. Assembly/AU/Dec.622(XXVII) (Jan.–Feb. 2016), <https://au.int/en/decisions/decision-icc-withdrawal-strategy>.

³⁴ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukr. v. Russ. Fed'n), Case No. 182, Int'l Court of Justice, <https://www.icj-cij.org/case/182>.

³⁵ Press Release, Int'l Criminal Court, Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

The idea of multipolarity can be helpful here. The post-Cold War period was marked by what Martti Koskenniemi describes³⁶ as the “hegemonic” interpretation of international law, meaning that Western institutions dominated the international legal discourse. However, that period is now in the past. The Gaza crisis is only accelerating the erosion of this normative hegemony. The same states that were prepared to rely on the Responsibility to Protect³⁷ to justify action in Libya in 2011 now refuse to apply the same logic elsewhere. Similarly, the states that support the ICC now punish its judges for issuing arrest warrants.

This does not mean that international law has lost all relevance. It remains the only grammar in which to make global legal arguments. Nevertheless, the structural conditions for effective international law enforcement, including rough equality of application, enforcement capacity, and judicial independence, are now in question. The unique contribution this analysis offers is the idea that we might be witnessing not the death of international law, but rather its disaggregation: the parallel construction of separate interpretive communities using select elements of the international legal normative framework for geopolitical gain. “Multipolar legal order” is an oxymoron, but the Gaza crisis shows that it may be an apt description of contemporary international law.

How can it be saved, then? The Secretary-General’s invocation of Article 99 of the UN Charter³⁸ in December 2023 was a significant and rare step for the international legal order to take. The Gaza case itself, despite obvious limitations, creates authoritative precedents in international law. Third-state participation as *amici curiae* and co-applicants demonstrates the continued relevance of the *erga omnes* principle. All this amounts to the long-term process of normative pressure that constrains state behaviour.

Conclusion: The Necessity of Imperfect Law

By 2025, the status of international law is neither victorious nor irrelevant. Instead, the law becomes contested, politicized, and threatened by the very same states who create and enforce it. The case of Gaza shows one of the fundamental contradictions of international law—namely, the discrepancy between the universalism of the normative framework and the selectiveness of legal enforcement. Furthermore, the situation with Gaza shows something about legal practice within international politics. States cannot deny the existence of international law and their commitment to upholding it, even when they are violating international law, because the use of legal rhetoric to defend state policies has become constitutive for

³⁶ Martti Koskenniemi, *The Politics of International Law*, 17 *Eur. J. Int’l L.* 1 (2006), <https://academic.oup.com/ejil/article/17/1/1/441898>.

³⁷ G.A. Res. 60/1, *World Summit Outcome ¶¶ 138–40*, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

³⁸ U.N. Charter art. 99.

political legitimacy in ways that were not the case a century ago. Thus, while Israel invokes its commitment to IHL, Russia justifies its own acts through its defense of NATO aggression, and the US appeals to the need for security.

From the perspective of international lawyers, scholars, and practitioners, it is no longer acceptable to complain about the current lack of enforcement mechanisms. What is important is to demand legal clarity, legal institution-building, and the creation of a consistent legal record. The decision on the legal consequences of occupation issued by the International Court of Justice in July 2024,³⁹ declaring that Israel had committed unlawful occupation of Palestinian territories and demanding compensation, is not self-enforcing. Nevertheless, it is a legally authoritative declaration that the courts, other states, and arbitration commissions will have to deal with in the future. If coercive enforcement is inherently limited in a world dominated by states, the creation of legally authoritative truth may be what international institutions can do best.

The relevance of international law in 2025 goes beyond its incapacity to be self-enforced. To be sure, it is yet to be seen if international society will have the imagination and willingness to fill this vacuum before international law fails due to its own contradictions.

³⁹ *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, I.C.J. (July 19, 2024), <https://www.icj-cij.org/case/186>.