AWSCHENRÄUME



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Effects of the 7/10 attack on the international normative order

Written by our cooperation partner oiip-Österreichisches Institut für Internationale Politik:

Anya McCrimmon, Daniela Pisoiu and Laura Vendruscolo

Abstract:

The horrific attacks orchestrated by Hamas on October 7th, 2023, followed by Israel's counter-offensive in Gaza gave birth to a number of controversies in the context of world politics. Recent discussions in the international relations literature claiming a progressive weakening of the international liberal order appear suitable for further exploration in the context of this developing conflict. In particular, this policy paper sets elements of the Israeli counter-offensive in Gaza against leading principles of international humanitarian law, the Genocide Convention and the international law duty of care of occupying powers. It finds initial indications of an apparent weaking of the international liberal order due to the prioritisation of security considerations in the West.

Keywords:

international liberal order, Gaza, Israel, genocide, humanitarian law

Anya McCrimmon MA is a second year Master student on the Erasmus Mundus International Masters in Security, Intelligence, and Strategic Studies. She holds an MA in German and International Relations from the University of Aberdeen. Her topics of interest are counter-terrorism, political violence, political Islam and far-right extremism. At the oiip, she worked with Dr. Daniela Pisoiu on EU counter-terrorism policies and their impact on the international order.

Dr. Daniela Pisoiu is senior researcher at the Austrian Institute for International Affairs – oiip. Her fields of research are: terrorism, radicalisation, extremism, comparative regional security, American and European foreign and security policy.

Laura Vendruscolo BA is a student in Security, Intelligence and Strategic Studies (IMSISS). She holds a BA in International Relations at the Catholic University of Brasilia. Her topics of interest are human rights, critical security approaches, gender and conflicts and international development. At the oiip, she worked with Dr. Daniela Pisoiu on EU counter-terrorism policies and their impact on the international order.

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1 Introduction

On December 29th, 2023, South Africa filed a case with the International Court of Justice (ICJ) accusing Israel of committing genocide against the Palestinian population in Gaza, thus violating its obligations under the Genocide Convention of 1948 (Al Jazeera 2024). A number of European countries announced their intention to join the case, among which Belgium, Ireland and Spain (ibid.). At the same time, other European countries, such as Austria and Germany, along with the United States, Canada or the United Kingdom, have been rather economical with criticism towards the Israeli counter-offensive in Gaza. Notably, a number of 'Western' countries, most prominently the US, have opposed to, or abstained from requests of ceasefire on repeated occasions (see for example UN News 2023). The recognition of the state of Palestine at the international level is also a divisive issue. 139 states have already recognised Palestine as a state, some of them already during the Cold War, and overall, the world map shows a clear division between 'the West', e.g. the US, Canada, Japan, most of 'Western Europe' or Australia, and the rest, with some exceptions; Spain, Ireland and Norway have recently announced their decision to recognise Palestine, while Sweden had already done so in 2014 (Ghaedi 2024). More recently, the Security Council managed to agree on a resolution requesting a cease fire in Gaza; whereas the representative of the US mentioned the "devastating" situation in Gaza and the "sheer hell" there, she noted that "Hamas leaders are those who put civilians at risk" and merely called for Israel "to do everything possible to protect civilians" (UN 2024). In the same context, while noting that "Hamas is no longer capable of carrying out another 7 October," the US representative "reiterated Washington D.C.'s commitment to Israel's self-defence" (ibid.). At the time, the number of casualties in Gaza had raised to 37,000, as stated by the representative of Algeria, who also used the terminology "Israeli occupying forces" and furthermore referred to the Order of the ICJ (ibid.). The latter had been issued on 24 May 2024 and had requested Israel to "immediately halt its military offensive in Rafah", among others, characterising the humanitarian situation in Gaza as "disastrous" (Berg 2024). Israel rejected the Order. A few days earlier, on 20 May 2024, the prosecutor of the International Criminal Court had requested arrest warrants for the Israeli Prime Minister, the Israeli defence chief, as well as three Hamas leaders on the counts of alleged crimes against humanity and war crimes (van den Berg et al. 2024). While Benjamin Netanyahu refused to recognise the legitimacy of the request on the count of Israel being a democracy (ibid.) (sic), his case has recently received help from the UK, whose lawyers are, at the time of writing, attempting to make arguments against the jurisdiction of the ICC with respect to Israeli citizens, although a ruling confirming the ICC jurisdiction in the Palestinian territories already exists (Davies 2024).

2 The end of the liberal international order?

The above is only a sample of the recent events and positionings at the international level in relation to the conflict in Gaza pointing to a potential new trend whereby the parts of the world that had initiated and advanced what we now call the 'international liberal order', namely the 'West', appear now to be actively engaging in undermining it. As defined by Hedley Bull, the international order corresponds to "a pattern of activity; which serves to maintain 'the elementary goals of ... international society' which [are] ... 'security against violence, the sanctity of agreements, and the protection of property rights" (1997:8). More specifically, the international *liberal* order is said to entail five convictions: openness with regard to trade and exchange; rules and institutions; security cooperation; the possibility of reform as a way to restrain power politics; progress towards liberal democracy (Ikenberry 2018: 11). Important components of the international liberal order are international law, human rights, and ethical conduct in international relations. Recently, against the background of a waning US hegemony, authors have postulated the imminent possibility of the international liberal order being replaced by a realist international order, with severe consequences for human rights and the prevention of genocide, in particular. More specifically, it has been argued that:

... in a realist international order (RIO), the United States and fellow core constituent members of the liberal order will increasingly find themselves compelled to prioritize security competition over ideological concerns for common goods such as global human rights and democracy promotion. The international human rights regime relies upon liberal order, and the foundations of principled multilateralism made possible by the LIO. The prevention of genocide is an important feature of this regime. So, as the global hegemony of the LIO continues to erode, many items in the genocide prevention toolkit will be blunted. (Peak 2023: 787)

The argument above relates specifically to Western interventions meant to prevent the incidence of genocide in or by non-Western countries. The situation still unfolding in Gaza raises similar issues, this time in relation to democratic states. If the argument can be made that democratic states themselves would disregard international law and human rights based on security considerations, this would have even deeper consequences for the erosion of the international liberal order.

3 The Israeli counter-offensive vs. international law

In light of these considerations, the actions of Israel's government and those of its partners are a sign of this shift. Causing mass displacement and the death of (likely at least) more than thirty-seven thousand Gazans, as of June 2024 (OCHA 2024), Israel's counter-offensive has challenged the principles and legitimacy of International

Humanitarian Law¹ (IHL). The enduring support of third parties reveals a concerning picture and might announce a transitioning period of the international order towards realpolitik and isolationism.²

In the aftermath of the Hamas attacks on October 7th, Israel framed its counter-offensive not as a counter-terrorism operation, but as a war of self-defence with the goal of "wiping [Hamas] off the face of the earth" (All Israel News 2023 1:36). According to Article 51 of the UN Charter, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Article 51 thus merely states the right to self-defence, without regulating the way in which a party should conduct itself during the war. The latter is regulated by international humanitarian law (IHL), also known as *jus in bello*, and more specifically the Geneva Conventions. Humanitarian law lays out a number of obligations which parties in war are bound to abide by. Both Israel and Hamas have faced accusations of severe violations of norms in this field of international law. The remaining of this section discusses several principles of humanitarian law and the extent to which Israel has indeed followed them.

The principle of **proportionality** prohibits attacks which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Art 51 (5) (b) Additional Protocol to the Geneva Conventions; ICRC 1977). From a *jus in bello* view, this requires a state to consider every attack to be proportional to the military objectives and the damage it is expected to cause (Cohen and Shany 2023). Thus, the broader the scope of the military objectives, the higher the threshold for damage. The proportionality test which gauges this claim balances the "foreseeable civilian harm and anticipated military advantage, based on the knowledge available to the commander at the time" (Lattimer, 2023). Lattimer explains the equation as,

proportional = "x expected civilian harm ≤ concrete & direct military advantage anticipated"

Despite the proportionality test, there are also different considerations at play when determining the legality of acts such as those that have been carried out by Israel in Gaza. Hulsroj (2013) argues that for an attack to be permitted under the principle of

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Gesamtuniversitäre Plattform für die Förderung der Ziele
für Nachhaltige Entwicklung der Vereinten Nationen

¹ International law norms on the conduct of parties engaged in an armed conflict, also called international humanitarian law (IHL). A key part of this branch of international law is the "Geneva Conventions", a set of international treaties developed from 1864 to 1949, with two Additional Protocols from 1977 (first one amended in 1993) and a third one from 2005.

² Realpolitik means that statesmanship tends to maximise the state's interest using an opportunist approach, rather than moralistic. Isolationism is a policy that avoids economic and political engagement with other states, in particular, to multilateralism.

proportionality, it must also be necessary. He states that "necessity requires an imminent threat and an absence of other, better options to avert the loss" (Hulsroj, 2013: 1). These different interpretations of the principle of proportionality itself have created great confusion as to the legality of Israel's actions.

Israel argues that, from a *jus in bello* perspective, they have acted within the confines of international law, as they believe the measures are proportional to their military objective (Cohen and Shany 2023). They also argue that they have no other option than to eradicate Hamas, with their Prime Minister Benjamin Netanyahu stating, "If you want peace, destroy Hamas. If you want security, destroy Hamas. If you want a future for Israel, the Palestinians, the Middle East, destroy Hamas" (Aliberti and Hyman, 2023). Lattimer (2023) argues that Israel's lofty goal of eradicating Hamas indicates that the number of tolerated deaths and the amount of damage suffered in Gaza is higher than was tolerated by the U.S. and the U.K, for example, during the 'War on Terror' under the principle of proportionality.

A second principle is the **distinction between civilians and combatants**. Article 48 of the (first) "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977" dictates that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives" (ICRC 1949a). Article 52 of Protocol I furthermore defines military and civilian objectives as follows:

- "1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
- 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
- 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." (ICRC 1949b)

Israel has faced allegations of violating the principle of distinction due to their targeting of hospitals, which has left only a third of hospitals in Gaza partially functioning (World Bank 2024). Attacking health establishments and units is illegal under international humanitarian law, as they have civilian status (ICRC 2023). Discussing the Al-Shifa Hospital, Human Rights Watch accused Israel of repeatedly carrying out "apparently unlawful attacks on medical facilities, personnel, and transport" which "are further

destroying the Gaza Strip's healthcare system and should be investigated as war crimes" (Human Rights Watch 2023a). Israel responded to such allegations, claiming that they have evidence that Hamas was using these hospitals as a base, which, if true, would cause the hospital to lose its protected status and be justified as a military target under international humanitarian law (Waghorn 2023). However, Israel has failed to present sufficient evidence to support this claim (Waghorn 2023). Furthermore, in a report issued by the World Bank in February 2024, they found that the majority of residential buildings and roads in Gaza have been damaged or destroyed by Israeli attacks (2024:3).3 Under the law of distinction, Israel has the responsibility to make every effort to avoid damaging civilian infrastructure when carrying out attacks against military targets. Israel has excused the damage they have caused to civilian infrastructure, citing the "urbanised fortress" created by Hamas (Adams 2023). They argue that the dense urban landscape and position of Hamas tunnels make damage to civilian buildings unavoidable (Adams 2023). UN reports find that the Israeli army "repeatedly violated the duties of distinction, proportionality and precaution, as well as the prohibition of indiscriminate and disproportionate attacks under international humanitarian law, and to have failed in their duty to respect, protect and fulfil the right to life of the population of Gaza and the West Bank." (OHCHR 2024)

Israel has faced allegations of carrying out **collective penalties**⁴ against the people of Gaza for the actions of Hamas on October 7th, but these allegations appear to indicate a continuation of previous practices. Israel has long been accused of carrying out collective punishment through their counter-terrorism policies that allow those related to those accused of terrorism to be detained (Jansen, 2008). Israel has also been accused of carrying out **genocide**⁵ (ICJ 2023). As indicated earlier, on December 29th, 2023, South Africa brought a case against Israel at the International Court of Justice, accusing Israel of committing genocide in Gaza (ICJ 2023). Their application initiated proceedings and requests for the indication of provisional measures (ICJ 2023). In the document, South Africa alleged that "the acts in question include killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. These acts are all attributable

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³ The World Bank reports that 'approximately 62 percent of residential buildings have incurred some form of damage' and 'over 62 percent of all roads [have been] damaged or destroyed since the 7th of October.

⁴ Defined as "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise are all measures of intimidation or of terrorism are prohibited" (Article 33 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.).

⁵ Defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group" (Article II Genocide Convention).

to Israel, which has failed to prevent genocide and is commuting genocide in manifest violation of the Genocide Convention ..." (ICJ 2023:1).

The allegations that genocide is being carried out "in the wake of the attacks in Israel on 7 October 2023" have also been used as evidence for allegations of Israel carrying out collective punishment of the Palestinian people for the actions of Hamas (ICJ 2023; Human Rights Watch, 2023b). Although both these allegations are serious war crimes, they are not the same. It seems in this case, however, that the alleged campaign of collective punishment has become so extreme that it has become an alleged act of genocide.

In its Order of 24 May 2024, the ICJ states that:

"... in conformity with its obligations under the Genocide Convention, Israel must immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part." (Art. 50)

It furthermore restates the "catastrophic" situation in Gaza (Art. 52), which it had already mentioned in two previous orders (of 28 March and 26 January 2024) and requests the unimpeded access of UN missions of inquiry or fact finding to investigate allegations of Genocide (Art. 51). The previous Order of 28 March specifically referred to humanitarian assistance, while both Orders urged the Israeli military to avoid the commission of acts of genocide.

With respect to the duty of care as an occupying power, Israel stated that it ceased to be an occupying power in Gaza in 2005 when it removed troops from the region. This claim, however, was refuted by major international actors such as the UN and the International Committee of the Red Cross, among others (Kmiotek 2023). This distinction over whether Israel is still occupying Gaza is critical when discussing the legality of their actions since October 7th. Being considered an occupying power would leave Israel with a duty of care for the well-being of the Gazan population and their infrastructure under Protocol I and (Geneva) Convention (IV) relative to the Protection of Civilian Persons in Time of War (ICRC 2004). This includes providing them with protection from acts of violence, ensuring that their basic needs, such as food, water, medical care, and shelter, are met, and maintaining, as far as possible, normal living conditions (ICRC 2004). This would rule the siege in Gaza, the violence carried out in the region and the damage to their infrastructure as a violation of their duties as an occupying power and put Israel squarely on the wrong side of international law. Thus, Israel appears to be determined to maintain the narrative that they are no longer an occupying power in Gaza.

4 Conclusion and outlook

Turning back to the broader approaches on international relations, it appears that Israel's actions are better understood through a realist lens. Their use of extensive force, blockades and other measures can be interpreted as efforts to secure themselves against the perceived existential threat posed by Hamas. Even though counterproductive, these measures also serve to showcase Israeli political and military power, given the potential geopolitical implications of Hamas winning the war, i.e. a potential strengthening of other terrorist actors and their supporters.

If we are to consider Israel's actions from the perspective of the international liberal order, Israel's actions appear to represent, among other aspects, a deviation from the norms that govern conflict. The allegations of violations of the principles such as distinction and proportionality challenge the accepted liberal view of how states should behave in conflict situations. The Israel-Hamas conflict illustrates that while the international normative order exists, its influence and enforcement are inconsistent, subject to the interplay of realpolitik, national interests, and the international community's capacity and willingness to uphold these established and institutionalised norms. Similar to previous episodes where superpowers transposed the limits of what is legitimate and acceptable within wars, the duration of the War on Gaza and the invasion of Ukraine inspired the normalisation of large-scale armed conflicts and abuses. If not contested by relevant parties, they can ultimately lead to the instalment of new practices and norms and the demise of the liberal international order.

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