The International Courts: Not a Legal Problem, but a Strategic Diplomatic-Security Challenge

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Key Points:

- The international law threat against Israel stems from four main sources: The International Court of Justice (ICJ), the International Criminal Court (ICC), ad-hoc commissions of inquiry, and countries utilizing their own domestic criminal justice system against Israel (universal jurisdiction).
- The present paper will focus on the two international courts, although its rationale is relevant to a large extent to the other two types of threats as well.
- Israel makes three fundamental errors vis-à-vis the international law threat: 1. An error in its classification of the threat. 2. An error in the management of its conduct vis-à-vis the threat. 3. An error in defining Israel's goals vis-à-vis the threat.
- The international law threat aims to restrict and diminish Israel's right to self-defense, without authority or justification. As such, and in view of its implications, this threat is no different than an attempt to sabotage military supply or maneuvers. It must be viewed as a diplomatic-security threat, not a legal one.
- Israel's conduct vis-à-vis the threat should be led by the national security leadership, rather than the legal echelons.
- Even in their function as advisors, the spectrum of legal experts advising the decision-making echelon should be diversified. It is unlikely that decision-makers are currently exposed to the range of opinions available on international law and the international law threats. It is possible that the error in the classification of the threat stems from the legal worldview of the legal practitioners managing Israel's conduct vis-à-vis this threat.
- Israel should set a clear goal for its foreign and security policy: to diminish the influence of these courts.
- Israel should form an alliance with friendly states to meet this threat. A military-legal defense alliance of sorts. This friendly alliance of militaries

and defense ministries would establish shared standards for counterterrorism, actions vis-à-vis the courts, and coordinated prevention of risks to service members.
- Bilateral agreements should be initiated with friendly states to establish shared mutual commitments to protect position holders and combat troops, including the avoidance of cooperation with the international courts based on said commitments.

Background:

On 26 January 2024, the International Court of Justice (ICJ) issued provisional measures against Israel.[i] The court ruled on South Africa's request that a number of provisional measures be issued against Israel, as part of a lawsuit absurdly accusing Israel of committing the crime of genocide in Gaza. The measures that South Africa requested included, inter alia, ordering Israel to stop its war in Gaza altogether.

In actuality, the ICJ found it sufficient to primarily require that Israel do its best to refrain from committing crimes under the Convention on the Prevention and Punishment of the Crime of Genocide. Israel is required to take precautions to ensure that its forces do not commit genocidal acts. Israel is further required to prevent and punish instances of incitement to genocide with regard to the Palestinians in Gaza. Under the provisional ruling issued, Israel is also required to take immediate and effective steps to ensure the provision of basic services and humanitarian aid to civilians in Gaza. It is important to note that the last two requirements were surprisingly and regretfully supported by Justice Aharon Barak.[2] Israel is further required to avoid the destruction of evidence pertaining to South Africa's allegations against it. Moreover, within one month, Israel is required to submit a report listing the steps it had taken to give effect to the court's order.[3]

The ICJ ruling exemplifies the extent of its anti-Israel bias. It marginally and laconically addresses Hamas' attack on 7 October 2023 (but not the horrendous and monstrous aspect of it). It does not recognize the extent of the existential risk that Israel is facing and fighting against in Gaza. In contrast, large parts of the ruling are dedicated to depictions of the Gaza war's outcomes, citing Palestinian figures (which are, in fact, Hamas figures). UNRWA directors are quoted at length describing the situation in Gaza.[4] Yet the widespread use of UNRWA facilities

for military-terrorist purposes is missing from the ruling.

The lawsuit filed by South Africa is part of the trend to engage Israel in a legal battle alongside a military one. In fact, the real purpose is to use the international law arena to limit Israel's ability to use military force for defensive purposes.

The international law arena has four different focal points. The first and most dangerous one is the International Criminal Court (ICC) in The Hague. The goal in its use against Israel is to investigate, detain, indict and prosecute Israeli individuals for their actions in the line of duty as part of the conflicts in Judea and Samaria and the Gaza Strip. Such an avenue could deter senior Israeli political and military position holders on both personal and national levels.

The second avenue for international law measures against Israel is the International Court of Justice (ICJ) in The Hague. This is the court of law in which the current lawsuit filed by South Africa against Israel is being deliberated.

There are two potential modes of action against Israel at the ICJ. The first is to file a lawsuit against Israel. At the ICJ, only countries can sue one another. The main aim of such lawsuits against Israel is to try and obtain quick orders based on a short, immediate discussion that would limit Israel's military capability and room for maneuver. Another aim of such lawsuits is to obtain a ruling that would require that the ICC launch its own investigation.

The second avenue is to utilize the court's other role as an advisor on international law to the UN's authorized institutions. The aim of utilizing this avenue is to have the court issue an opinion negating the legality of Israel's military actions. One example of such a case is the matter of Israel's security barrier. In 2003, the UN General Assembly asked the ICJ for its opinion on the barrier's legality. The ICJ, in turn, issued an opinion in 2004 that contains extremely severe international law assertions from Israel's perspective. Inter alia, the opinion determined that any part of the barrier east of the 1967 borders is illegal and must be taken down immediately.[5]

The recent ICJ ruling issued following South Africa's request for provisional measures is a prime example of how absurd it would be to view this court as a fair tribunal with respect to Israel. The ruling granting provisional measures lest genocide be committed in Gaza gives credence to South Africa's unfounded blood libel. The court's ruling is a document that contains no truth or justice. It

pretentiously aims to subject Israel's war of defense to a permanent judicial oversight mechanism by demanding that Israel submit reports showing that it is following the orders issued. It is designed to limit the Israeli Cabinet and the IDF's operational freedom using ongoing and immediate legal deterrence.

The third avenue for international law attacks against Israel is via ad-hoc commissions of inquiry and fact-finding missions. Two such examples are the Goldstone Commission set up following Operation Cast Lead and the Palmer Commission that followed the Mavi Marmara flotilla incident.[6] This avenue aims to perpetuate constant deterrence by generating inquiry reports that delegitimize Israel's use of force. Another aim of these reports is to drive other political proceedings against Israel, such as UN Security Council resolutions, and to sustain an ongoing campaign of delegitimization.

The fourth avenue is taking advantage of countries' domestic doctrines and procedures for universal criminal jurisdiction. Normally, countries limit the utilization of their domestic criminal law systems to events that have taken place in their territory or to events outside their sovereign borders provided that they pertain to the judging country's interests, such as harming its citizens, its security or economy. However, there is an exception to this rule. The penal code of many countries gives them the right to prosecute severe violations of international law, such as war crimes, even in cases where the country has no direct connection to the event in question. Thus, complaints and requests for arrest warrants against Israeli officials, officers and politicians have been brought before courts in Spain, Belgium, US, UK, and New Zealand in the past.[7]

The present paper aims to shed light on the issues arising from Israel's current conduct vis-à-vis two of the four avenues mentioned, namely the two permanent courts (the ICJ and ICC). This paper will suggest a new strategy for Israel, the essence of which is to abandon the legal view of this threat and reclassify it as a diplomatic-security threat. Subsequently, elected and professional national security actors should take the lead in addressing it, rather than legal advisors. First and foremost, steps can and should be taken to form a coalition of militaries and defense ministries that would take joint action against this international law threat.

The problem:

The present paper seeks to identify three main issues arising from Israel's conduct vis-à-vis the international law threat. The first is an error in Israel's classification of the threat. The second is an error in the management of Israel's conduct vis-à-vis the threat. And the third is an error in defining Israel's goals for the actions taken to meet this threat.

An error in the classification of the threat – Israel is viewing and treating the international law threat first and foremost as a legal one. The discourse around it is law-based – for instance, questions related to each body's authoritative sources or the legal avenues of action available with respect to it. Israel's conduct vis-à-vis this challenge is led by public sector legal practitioners, such as the Attorney General and international law experts in the Ministry of Justice and IDF Military Advocate General. Yet the threat is only clad in legal clothing. In fact, it is not a legal threat at all, but rather a diplomatic-security one.

The threat is not a genuinely legal one because it is not posed by genuine legal institutions. Thus, it does not meet genuine legal standards. "Conclusive" evidence will not dissipate the threat. And a "good" litigation will not prevent it. The political bias of the International Court of Justice (ICJ) is striking. In the 1980s, it ruled against the United States in the lawsuit filed by Iran.[8] Ironically enough, this happened after the United States had exercised its right to self-defense in response to an Iranian naval terror attack against US interests. To this end, the court had made the rules of self-defense unrealistically more stringent. In 2004, the ICJ issued an advisory opinion declaring the parts of Israel's security barrier located east of the 4 June 1967 borders unlawful.[9] In this ruling, it once again distorted the rules of self-defense and limited Israel's justification to counter the heinous wave of terror it had been suffering.

The ICC is also clearly biased. Its interpretation of the IDF's conduct in the Mavi Marmara flotilla incident is consistent with the ICJ's bias. At the time, the IDF forces were contending with a deliberate breach of a legal naval siege imposed by the Israeli Navy. The forces chose to stop the advancing flotilla in a manner that placed Israeli servicemen at risk, even though they could have opened fire to stop it, thereby avoiding putting IDF troops in harm's way. Israel's naval troops who boarded the ships encountered a violent terrorist ambush. Yet the ICC ruled that in this incident, there was a cause for concern that war crimes had been committed by none other than the Israeli troops.[10]

On a separate issue, the ICC ruled in favor of the ICC Prosecutor's request to determine that it is within the jurisdiction of the court to examine alleged "crimes" committed in Judea and Samaria, and the Gaza Strip.[11} This despite the fact that the ICC's jurisdiction only pertains to incidents in the territories of states that have consented to its jurisdiction, or to those in which suspects are citizens of states that have consented to its jurisdiction.

The Palestinian Authority, which is not a state, and lacks territory and sovereignty, should not be a member state of the court. It certainly cannot grant the court jurisdiction (by virtue of sovereignty over territory) that it lacks itself. The Oslo Accords prohibit the Palestinian Authority from criminal prosecution of Israelis.[12] And, even if it could grant the court such jurisdiction, the Palestinian Authority is not a state with borders that have even been generally outlined. Yet all of the above did not stop the ICC from ruling that the PA is a member state of the court, and that its territory, for the purpose of determining the court's jurisdiction, is Judea and Samaria and the Gaza Strip in their entirety.[13] Thus, the ICC views itself as authorized to rule even on events that take place in East Jerusalem, including the Old City, the Western Wall, and even at the Israeli Ministry of Justice on Salah al-Din Street.

Cooperating with these courts is, therefore, a mistake. Expecting to get justice for Israel and Israelis in these courts is an Israeli naiveté that overlooks their clear bias. And if an intelligence-based "conception" and mistaken paradigm was adhered to in the lead-up to Hamas' October 7 attack, then this is a legal equivalent.

An error in the management of Israel's conduct vis-à-vis the threat – Given that the threat should be classified as a diplomatic-security one that is merely clad in legal clothing, legal practitioners should not be spearheading Israel's counter-campaign. Legal practitioners, by their very nature, are accustomed to analyzing events from a legal perspective. They ask questions about the boundaries of jurisdiction and the principles of law. They devise solutions based on these two foundations. They therefore suggest "jurisdiction-based" solutions such as "there is no jurisdiction in this event". And they offer arguments based on substantive principles, such as "by law, a duty was not breached in this event". However, in biased legal frameworks, such arguments are ineffective. The reason is simple. The motivation is political from the start. The impact is political. And no legal argument will change this.

A diplomatic-security threat must be dealt with using diplomatic-security instruments. And these must, therefore, be spearheaded by Israel's national security leadership at both the elected and the professional levels. Even once the legal practitioners' involvement is limited to advising the decision-makers on the threat, rather than managing the counter-campaign against it, the spectrum of advisors and legal perspectives should be diversified. In Israel and across the globe, there is a wide range of opinions with regards to international law among legal experts in general, and among international criminal law experts in particular. It appears doubtful that this diversity is currently represented around the decision-makers' table.

An error in defining Israel's goals – As a result of the legal focus and approach, Israel is erring in its definition of the objectives and goals with respect to the international law threat. For example, Israel should realize that the existence of such biased international courts, and their increasing influence, runs contrary to Israel's national interests. Israel should therefore set a goal of countering the power and influence of these courts, and exposing their deep-seated bias. Additionally, it should strive to decrease the number of countries who are members of the ICC, while seeking to diminish the ICJ and ICC's legitimacy as impartial bodies, and the willingness of countries to cooperate with them. From this perspective, the fact that Israel is participating in the proceedings initiated by South Africa creates the impression that Israel has faith in the proceedings. Likewise, appointing a judge on Israel's behalf was a terrible mistake that could be seen as legitimizing this institution. It undermines what should be Israel's objective – delegitimizing the deeply-biased court that pretends to be an impartial tribunal.

A second objective should be taking joint action to formulate an alternative normative stance, together with like-minded countries which share similar interests. International courts will find it more challenging to take action against Israel if they know that Israel is acting according to standards and norms that have been agreed upon by other friendly militaries such as those of the US, UK and Germany. To a certain extent, the militaries of like-minded countries, and of all democracies threatened by terror, will be very interested to learn the lessons of the IDF's war in Gaza. Israel's operation is writing a new chapter in the history of modern warfare, as it is being carried out against an unprecedented multidimensional and multi-arena threat. The IDF should use this valuable

bargaining chip to promote collaboration against international law threats with military advocate generals, defense ministers and other officials from friendly countries. An educated and well-informed discussion with friendly (and other) countries' militaries and defense ministries will demonstrate the extent to which the international law threat aimed at Israel at present also contradicts their own key interests.

The third objective should be formulating understandings similar to those formulated by the United States based on Article 98 of the Rome Statute, so that countries will resolve, together with Israel, to refuse to enforce arrest warrants and other ICC orders.[14] As part of these understandings, Israel would do well to make it clear to friendly and other countries that any action taken against an Israeli individual would be considered by Israel an unlawful use of force against an Israeli. This is what the United States has done using special legislation.[15} A similar message of deterrence should be conveyed by Israel as well.

Policy recommendations

1. Israel should define the international law threat as primarily a diplomatic-security threat rather than a legal one. This threat aims to disrupt Israel's ability to utilize its defense forces in order to exercise its right to self-defense. As such, this threat is no different, in effect, from an attempt to sabotage military supply or maneuvers.
2. Israel's national security leadership, on both the elected and professional levels, should spearhead Israel's counter-campaign, rather than the legal practitioners.
3. Even once the legal practitioners assume their proper role as advisors to the national security decision-makers, rather than being the ones managing the counter-campaign against the legal threat, it is important to ensure that the spectrum of legal opinions represented is sufficiently-broad. There is a wide range of opinions on international law and international law threats, yet it appears that this diverse spectrum is not currently represented around the decision-making table.
4. Israel should immediately end cooperation with the ICC and ICJ.
5. Israel should notify the ICJ that, from now on, it will no longer accept its jurisdiction regardless of statements made in any convention.
6. Israel should enter reservations into any convention that allows reservations, while rejecting the court's jurisdiction unless explicitly

consented to, notwithstanding any "jurisdiction" clause in the convention. Israel must withdraw from conventions that have clauses granting jurisdiction to the ICJ, and that do not permit reservations. Israel will have to emphasize that its withdrawal is a result of such conventions being politically-abused to attack the Jewish state in a biased manner via the international courts.

7. A goal of Israeli foreign and security policy should be to diminish the power of biased international courts, to encourage countries to pull out of the ICC, and to form coalitions of states who are not members of such courts.
8. Israel should work to form a united front – a legal-military defense alliance of sorts – between friendly countries to counter the international legal threat. The militaries and defense ministries will set shared counterterrorism standards that will make it harder for the courts to make contradictory normative assertions. Such an alliance will formulate shared action with respect to the courts, and promote the organized prevention of risks to position holders and troops. Military insights from Israel's current unique war could be used as a bargaining chip for garnering the friendly militaries' collaboration on the legal front as well.

Israel should initiate bilateral agreements with friendly states to create a shared mutual commitment to protect position holders and combat troops. These agreements should include non-cooperation with the court based on these mutual commitments.

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, (SOUTH AFRICA *v*. ISRAEL), ORDER (24 January 2024) (https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf).

[2] The main damage caused by Barak's decision is a result of several components: First, Barak does not dispute the legitimacy of the court's biased ruling. Second, under ICJ regulations, an immediate order is not issued unless the infringement of rights serving as grounds for the lawsuit filed is, at the very least, plausible. In this case, the very issuing of a provisional measure requires the

court to assume that the Convention on the Prevention and Punishment of the Crime of Genocide is possibly being or may in the future be violated by Israel and that, in the absence of such a measure, the harm caused to the Palestinians in Gaza in this context will be irrevocable. Although Barak has stated that he does not believe this to be the case, any judge who is absolutely convinced that a lawsuit is unfounded must not issue even an interim order designed to immediately ensure the rights regarding which the lawsuit has been filed. The third damage caused by Barak's decision is that it implies that Israel is engaged in incitement to genocide. And the worst damage is that, by having an Israeli signature on interim measures against Israel in an unfounded lawsuit which claims Israel is committing genocide, Barak has provided a shade of evidential and legal basis to this lawsuit. Barak's assertion whereby Israel is obligated to provide basic services and humanitarian aid to civilians in the Gaza Strip is also erroneous and harmful. It was made in accordance with his "worldview" of international law. However, this assertion was made without having engaged in a profound discussion of Israel's right to impose a legal military siege as part of its war.

[3] The measures issued against Israel are specified in section 86 of the order cited in endnote 1 above.

[4] Sections 49–50 of the order cited in endnote 1 above.

[5] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ADVISORY OPINION OF 9 JULY 2004, (https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf).

[6] Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict (15 September 2009) (file:///Users/rb-main-dir/Downloads/C363802C3F8559AB852576320070599E-Full_Report.pdf); Report of the Secretary-General Panel of Inquiry on the 31 May 2010 Flotilla Incident (July 2011).

[7] Anshel Pfeffer, Major General (res.) Doron Almog Feared Arrest – and Cancelled a Visit to London, *Ha'aretz* (31 May 2012) (https://www.haaretz.co.il/news/politics/2012-05-31/ty-article/0000017f-defe-d3ff-a7ff-fffedfdb0000) (Hebrew); A Guide for Cautious Senior Officials – Belgium,

New Zealand, Spain and Britain Have Threatened to Sue High-Ranking Israeli Officials, *Globes* (28 January 2010) (https://www.globes.co.il/news/article.aspx?did=1000534424) (Hebrew).

[8] Case Concerning Oil Platforms (ISLAMIC REPUBLIC OF IRAN *v*. UNITED STATES OF AMERICA), JUDGMENT (6 NOVEMBER 2003) (https://www.icj-cij.org/sites/default/files/case-related/90/090-20031106-JUD-01-00-EN.pdf).

[9] See endnote 5 above.

[10] It was clear from the court's position that, had the prosecution not viewed this event at the time as one that does not cross the minimal severity threshold to fall under the ICC's jurisdiction, the flotilla incident would have turned into an inquiry against the Israelis involved.

[11] ICC-01/18 SITUATION IN THE STATE OF PALESTINE, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (5 February 2021) (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF).

[12] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) (28 September 1995), Article XVII(2)(c).

[13] All while unconvincingly evading the fact that the Oslo Accords determine that permanent status agreement issues such as borders will be determined in negotiations. Exceptional in this court of law is Hungarian Judge Kovács, whose approach to the matter of jurisdiction was much fairer and topical.

[14] Rome Statute of the International Criminal Court, 17 July 1998, Article 98.

[15] American Service-Members Protection Act of 2002.