

## INTERNATIONAL LAW AND PALESTINE: DISMANTLING THE MASTER'S HOUSE?

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*Noura Erakat, in conversation with Aslı Bâli\**

*Yale Law School—On April 10, 2024, Professor Noura Erakat joined us for a conversation about Palestine and International Law. Professor Erakat is a distinguished human rights attorney and professor at Rutgers University, renowned for her seminal monograph JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE (Stanford University Press, 2019). In our engaging conversation with Erakat, we discussed the intersections of different facets of international law with the complex and enduring issue of Palestine. This exploration encompassed a historical review of how international law has shaped the Palestinian question over the past century, as well as an analysis of the opportunities and constraints presented by mobilizing international legal frameworks, engaging third-party states, and leveraging international institutions. What follows is a transcription of our conversation, lightly edited for clarity.*

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The atrocities in Gaza show no sign of abating as Israel sustains its assault by land, air, and sea. Between October 7, 2023, and the date of this conversation on April 10, 2024, Israeli forces killed over 33,482 Palestinians and injured over 75,000.<sup>1</sup> The war has displaced over 1.9 million Gazans, which constitutes over 90 percent of the Palestinian population in the territory,<sup>2</sup> and public health experts estimate that a quarter of the Gazan population could die within a year due to starvation, famine, and disease.<sup>3</sup>

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<sup>1</sup> As of this writing, the verified death toll now exceeds 40,000 with thousands more uncounted under the rubble in Gaza and the numbers injured exceeds 100,000, with the caveat that these are both very conservative estimates based on numbers that have been verifiably identified by the Gazan Ministry of Health. For updated figures on casualties and humanitarian conditions in Gaza, see U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS. (OCHA), OCCUPIED PALESTINIAN TERRITORY, <https://www.ochaopt.org>. OCHA maintains ongoing comprehensive data on the situation.

<sup>2</sup> See U.N. Off. for the Coordination of Humanitarian Affs., *Humanitarian Situation Update #187: Gaza Strip* (Apr. 10, 2024), <https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-situation-update-187-gaza-strip>.

<sup>3</sup> The Integrated Food Security Phase Classification (IPC) report warns: “The entire population in the Gaza Strip (2.23 million) is facing high levels of acute food insecurity. From mid-March to mid-July [2024], in the most likely scenario and under the assumption of an escalation of the conflict including a ground offensive in Rafah, half of the population of the Gaza Strip (1.11 million people) is expected to face catastrophic conditions (IPC Phase 5), the most severe level in the IPC Acute Food Insecurity scale.” See Integrated Food Sec. Phase Classification, *Gaza Strip: IPC Acute Food Insecurity Special Snapshot | 15 February - 15 July 2024* (March 18, 2024), [https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_Gaza\\_Strip\\_Acute\\_Food\\_Insecurity\\_Feb\\_July2024\\_Special\\_Snapshot.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Strip_Acute_Food_Insecurity_Feb_July2024_Special_Snapshot.pdf).

What does all or any of this mean for how we engage, think, litigate, teach, and write about international law in the shadow of continuing catastrophe, genocide, and ongoing Nakba?<sup>4</sup> What role can legal mechanisms play in supporting the Palestinian struggle? Can legal strategies be strategically employed to advance social and political movements?<sup>5</sup> And what can scholarship in the intellectual tradition of Third World Approaches to International Law (TWAIL),<sup>6</sup> say or do that could address and analyze a catastrophe on this scale?

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**Question:** What is your assessment of the various legal proceedings currently underway that apply international law to the situation in Palestine? We recognize that there is much ground to cover, including at least five different advocacy strategies: first, a case brought by Palestinian human rights organizations before the International Criminal Court (ICC) for Israeli war crimes;<sup>7</sup> second,

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<sup>4</sup> Al-Nakba (النكبة), meaning “catastrophe” in Arabic, has two primary temporal understandings. First, it refers to the establishment of the State of Israel in Palestine, a process that entailed the ethnic cleansing of over 750,000 Palestinians from their homes and destroying 531 Palestinian villages between 1947 to 1949. Ilan Pappé, *The Nakba and the Ethnic Cleansing of Palestine*, VERSO (May 15, 2018), <https://www.versobooks.com/blogs/news/3809-the-nakba-and-the-ethnic-cleansing-of-palestine>; *The Nakba Did Not Start or End in 1948*, AL JAZEERA (May 23, 2018), <https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948>. Second, it refers to the ongoing Nakba, describing the continuous Palestinian reality of subjugation and domination from 1948 to the present. Adel Manna, a Palestinian historian, describes Al-Nakba as “an earthquake which changed the geography, the demography, and the identity of Palestine and its inhabitants” in 1948, leading to the mass displacement of 750,000 Palestinians and shattering of Palestinian society. Rather than being “a one-time event connected to the war in Palestine,” the Nakba “refers to the accumulated Palestinian experience since the 1948 war up to the present,” with its catastrophic repercussions continuing to impact Palestinian communities today. Adel Manna, “The Palestinian Nakba and its continuous repercussions.” Adel Manna, *The Palestinian Nakba and its Continuous Repercussions*, 18 ISRAEL STUD., no. 2, 86, 91, 87 (2013).

<sup>5</sup> By “social and political movements” we refer to organized efforts by groups of people aiming for specific social, political, or economic goals, such as the movement for Palestinian liberation and the struggle against Israeli settler colonialism and systemic violence. Diala Shamas, a Palestinian lawyer, discusses the impact of legal strategies on these movements, and the ways in which Palestinian advocates interact with them and vice versa. See Diala Shamas, *Roundtable: Locating Palestine in Third World Approaches to International Law*, 52 J. PALESTINE STUD. 4, 106, 108 (2023).

<sup>6</sup> TWAIL is a decentralized movement of international law scholars oriented to the Global South, guided by Third World liberation ideas and practices. Early TWAIL scholarship primarily examined how international law played a role in colonialism and the creation of global hierarchies and systems of oppression. In doing so, the TWAIL tradition sought to challenge entrenched mainstream views that portray international law as inherently progressive and egalitarian. TWAIL has since developed to provide deeper critiques of the postcolonial state and the shortcomings of decolonization. It integrates perspectives from Marxist, and feminist theories, as well as postcolonialism, decoloniality, Indigenous studies, and critical race theory, among others. See Makau Mutua & Antony Anghie, *What Is TWAIL?*, 94 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 31 (2000); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739 (2006); James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff and Mark Pollack eds., 2019); James Thuo Gathii, *Promise of International Law: A Third World View*, 114 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 165-87 (2020); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007); Laura Betancur-Restrepo et al., *Introducing the TWAIL Review (TWAILR)*, THIRD WORLD APPROACHES TO INT’L L. REV. (Aug. 30, 2019), <https://twailr.com/introducing-the-twail-review-twailr>.

<sup>7</sup> On November 9, 2023, Palestinian human rights organizations Al-Haq, Al-Mezan, and PCHR filed a lawsuit with the ICC under Article 15 of the Rome Statute. This follows previous submissions, including an open letter from 101 associations and academics on October 19, 2023, calling for accountability for Israeli actions. See *State of*

a South African case against Israel for genocide at the International Court of Justice (ICJ);<sup>8</sup> third, a Nicaraguan case against Germany at the ICJ for complicity in genocide due to its financial and military support for Israel;<sup>9</sup> fourth, a request by the United Nations General Assembly (UNGA) for an Advisory Opinion from the ICJ on the legal consequences of Israeli practices in the occupied Palestinian territories;<sup>10</sup> and, fifth, widespread efforts in national jurisdictions—both in courts and through human rights reporting and advocacy—to hold Israeli perpetrators and complicit governments accountable, such as the case submitted by the Center for Constitutional Rights (CCR) against the Biden Administration for complicity in genocide.<sup>11</sup> In light of all that, what are your reflections on how these efforts interact with each other? Do you perceive these legal initiatives as functioning independently and in parallel, or do you see these proceedings as part of a larger, cohesive political strategy? How might their synchronization or divergence impact the broader pursuit of justice in this context?

**Noura Erakat:** Excellent. Thank you so much for these questions. These questions raise a broader issue concerning the relationship between law and power and require us to assess how the law operates when confronted with wrongdoing on this scale. There is, of course, tremendous frustration with the law for the average layperson who is not a lawyer, let alone a scholar acquainted with critical traditions in international law like TWAIL. For the layperson, the question is, how can the law not constrain actors who are engaging in such violence against civilians? What is the point of speaking about law and a rule-based order if it cannot stop the crimes being committed? The result of this frustration is a condemnation of the law as ineffective and irrelevant. But this reflects a misunderstanding of the law's function and capacity. The law is best understood as a battlefield that provides the *promise* of a set of procedural constraints within which an adversarial process to establish culpability and responsibility plays out. This adversarial process results in an interpretation of how the law applies, which then requires implementation and enforcement. Legal implementation and enforcement themselves also reflect a balance of power that is moral, political, economic, and military. To achieve a layperson's understanding of justice through this process is extraordinarily difficult.

Why do I consider it important to provide this context regarding international law? It is to address the contradiction implicit in your question: on the one hand, we see a spike in the amount of legal advocacy, and on the other hand, we see an intractable situation that in no way responds to the achievements in the legal arena. The most obvious instance of this dynamic is the passage

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*Palestine: Situation in the State of Palestine*, Case No. ICC-01/18, INT'L CRIM. CT., <https://www.icc-cpi.int/palestine>. See also *Three Rights Groups File ICC Lawsuit Against Israel Over Gaza 'Genocide'*, AL JAZEERA (Nov. 9, 2023), <https://www.aljazeera.com/news/2023/11/9/three-rights-groups-file-icc-lawsuit-against-israel-over-gaza-genocide>; *Issue Arrest Warrants, Investigate Israeli Crimes and Intervene to Deter Incitement to Commit Genocide in Gaza*, AL-HAQ (Oct. 20, 2023), [https://www.alhaq.org/cached\\_uploads/download/2023/10/20/icc-letter-1697782247.pdf](https://www.alhaq.org/cached_uploads/download/2023/10/20/icc-letter-1697782247.pdf).

<sup>8</sup> Application Instituting Proceedings and Request for the Indication of Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.) (Dec. 29, 2023), <https://www.icj-cij.org/case/192>.

<sup>9</sup> Press Release, Int'l Ct. Just., The Republic of Nicaragua Institutes Proceedings Against the Federal Republic of Germany and Requests the Court to Indicate Provisional Measures (Mar. 1, 2024), <https://www.icj-cij.org/node/203822>.

<sup>10</sup> Request for Advisory Opinion, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Int'l. Ct. Just. (Jan. 19, 2023), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230117-REQ-01-00-EN.pdf>.

<sup>11</sup> Complaint, Defense for Children International–Palestine v. Biden, No. 3:23-cv-05829 (N.D. Cal. Nov. 13, 2023).

of a United Nations Security Council (UNSC) resolution on March 25, 2024, which ordered a ceasefire until the end of Ramadan.<sup>12</sup> This resolution came after the United States finally agreed to abstain from, rather than veto, the ceasefire vote. However, it was never enforced, and Israel violated the ceasefire order within one day, with apparent impunity.<sup>13</sup> What is at work in this instance is raw power—the geopolitical context simply did not generate the political will to enforce the ceasefire, a fact that was apparent to the Israelis.<sup>14</sup> The law did not constrain, but this failure was not due to a flaw internal to the rules. Rather, the explanation lies in the political reality that there was simply no political will to exact accountability for Israeli actions and take measures to enforce the order.<sup>15</sup>

How, then, should we assess the advocacy strategies reflected by the multiple instances of international litigation currently unfolding before the ICJ, the ICC, and a variety of domestic courts? I will begin with a discussion of the ICC case because many critical international lawyers are most skeptical of this Court and its potential to yield meaningful results. Criticisms of the ICC long predate the question of arrest warrants being issued for the carnage in Gaza.<sup>16</sup> The critique is structural: the Rome Statute,<sup>17</sup> which is the treaty that established the ICC, enshrines, in the words

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<sup>12</sup> S.C. Res. 2728 (Mar. 25, 2024).

<sup>13</sup> Despite the resolution, Israeli forces continued airstrikes on Gaza. The day after the resolution was passed, Israel's military raided Al-Shifa Hospital in northern Gaza, the territory's largest medical facility, and continued its offensive in Khan Younis, the largest city in the south. This ongoing aggression indicates that the UN resolution calling for a ceasefire had not affected Israel's resolve to continue fighting. *See Fighting Continues Despite UN Security Council Resolution Calling for Ceasefire*, BBC (Mar. 26, 2024), [https://www.youtube.com/watch?v=\\_1oU1Y680ro](https://www.youtube.com/watch?v=_1oU1Y680ro); Matthew Mpoke Bigg, *Days After U.S. Cease-Fire Resolution, Has Anything Changed in Gaza?* N.Y. TIMES (March 29, 2024), <https://www.nytimes.com/2024/03/29/world/middleeast/un-ceasefire-resolution-israel-gaza.html>; Hiba Yazbek, *Israel Presses on with Strikes in Gaza After U.N. Cease-Fire Resolution*, N.Y. TIMES (March 26, 2024), <https://www.nytimes.com/2024/03/26/world/middleeast/israel-strikes-gaza-un-cease-fire-resolution.html>.

<sup>14</sup> On the limits of UN enforcement mechanisms, see Richard Falk, *Slaughter in Gaza: The Failures of International Law and Responsible Statecraft*, GLOBAL JUST. IN THE 21ST CENTURY (Nov. 5, 2023), <https://richardfalk.org/2023/11/05/slaughter-in-gaza-the-failures-of-international-law-and-responsible-statecraft> (discussing the structural limitations of international law enforcement and the UN's inability to ensure compliance with its resolutions).

<sup>15</sup> On the lack of political will to hold Israel accountable, see Nour Odeh, *As Annexation Looms, No One is Ready to Hold Israel Accountable*, NEW ARAB (June 24, 2020), <https://www.newarab.com/analysis/annexation-looms-no-one-will-hold-israel-accountable> (analyzing how international community's failure to enforce accountability enables Israeli impunity).

<sup>16</sup> Criticism of the International Criminal Court (ICC)'s inaction and biases in the context of Palestine is longstanding. *See* John Reynolds & Noura Erakat, *We Charge Apartheid? Palestine and the International Criminal Court*, 33 TWAILR REFLECTIONS 1 (2021) (suggesting that the ICC has been slow and hesitant in its approach to Palestine, taking twelve years to accept jurisdiction, and is still reluctant to investigate, despite extensive documentation and requests submitted by Palestinian human rights organizations); *see also* Ata R. Hindi, *The Lowest Expectations: The International Criminal Court's Office of Prosecutor, the Situation Palestine, and the Institutional and Individual Bias and Failure*, 71 UCLA L. REV. (forthcoming 2024); Mat Nashed & Zena Al Tahhan, 'Alarming': Palestinians Accuse ICC Prosecutor of Bias After Israel Visit, AL JAZEERA (Dec. 9, 2023), <https://www.aljazeera.com/features/2023/12/9/alarming-palestinians-accuse-icc-prosecutor-of-bias-after-israel-visit>.

<sup>17</sup> The Rome Statute of the International Criminal Court, adopted in 1998 and entered into force in 2002, established the International Criminal Court and defines the four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. *See* Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90. For a comprehensive overview of the ICC's jurisdiction and functions, see INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

of Kamari Clarke, European supremacy and dominance.<sup>18</sup> Since the establishment of the Court it has only successfully initiated prosecutions of African and Arab heads of state.<sup>19</sup> More recently, when it turned its attention to war crimes committed in Afghanistan since May 2003, it elected to limit its jurisdiction to those crimes committed by Afghan forces, excluding any analysis of U.S. and NATO actions during the two-decades-long war that those forces waged in Afghanistan.<sup>20</sup> Even after a finding by the ICJ that there are plausible grounds to worry that a genocide may be underway in Gaza, the ICC prosecutor's office, which received a request to investigate war crimes on Palestinian territories years prior to October 7, 2024, had not issued any arrest warrants as of this conversation some six months into the war with tens of thousands killed, tens of thousands maimed, and hundreds of thousands forcibly displaced.<sup>21</sup>

The Palestinians first applied to join the ICC in 2014, and in 2021, they finally succeeded in persuading the prosecutor's office to begin an investigation into war crimes in the Palestinian

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<sup>18</sup> K.M. CLARKE, *FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (2009).

<sup>19</sup> Examination of the ICC's prosecution list reveals a predominant focus on African and Arab heads of state. Notable cases include: *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (formerly President of Sudan, charged with genocide, war crimes, and crimes against humanity in Darfur); *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi*, ICC-01/11 (formerly Libyan leader, charged with crimes against humanity related to the violent suppression of the Libyan civil war); *Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08 (formerly Vice President of the Democratic Republic of the Congo, charged with war crimes and crimes against humanity); and *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11 (formerly President of Côte d'Ivoire, charged with crimes against humanity related to post-election violence).

<sup>20</sup> Karim Asad Ahmad Khan's decision to focus investigations solely on crimes committed by Afghan forces is detailed in his statements and reports on the ICC's approach to the Afghanistan situation. See *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan*, Int'l Crim. Ct. (Sept. 27, 2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>. Amnesty International has publicly urged the ICC Prosecutor to conduct a comprehensive investigation into all parties involved in Afghanistan and to reconsider his decision to deprioritize investigations into Article 5 crimes allegedly committed by Afghan National Security Forces, U.S. armed forces, and the Central Intelligence Agency. See *AFGHANISTAN: ICC PROSECUTOR'S STATEMENT ON AFGHANISTAN JEOPARDIZES HIS OFFICE'S LEGITIMACY AND FUTURE*, AMNESTY INT'L, Index No. IOR 53/4842/2021 (Oct. 5, 2021), <https://www.amnesty.org/en/documents/ior53/4842/2021/en>. See also Human Rights Watch, *ICC: Afghanistan Inquiry Can Resume* (Oct. 31, 2022), <https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>.

<sup>21</sup> The Office of the Prosecutor has faced criticism for delays and, at times, a complete halt in its actions regarding Palestine, despite ample documentation of international crimes within the Court's jurisdiction by human rights organizations and international bodies like the UN Human Rights Council. For instance, the UN Human Rights Council has established various investigative mechanisms relevant to the Court's jurisdiction, including the UN Fact-Finding Mission on the 2008-2009 Gaza conflict, the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory, and an open-ended independent international commission of inquiry on the OPT, including East Jerusalem and Israel. Each prosecutor has managed different stages of preliminary examinations, yet all have been marked by delays or terminations of investigations. Following the Pre-Trial Chamber's decision on February 5, 2021, affirming jurisdiction over Gaza, the West Bank, and East Jerusalem, the investigation officially commenced on March 3, 2021; however, it has faced persistent delays. In February 2023, 35 Palestinian civil society organizations sent a letter to ICC Prosecutor Karim Asad Ahmad Khan urging him to expedite the investigation into the situation in Palestine and to issue a preventive statement in response to rising violence and punitive measures against Palestinians. Similarly, allegations of genocide, crimes against humanity, and war crimes arose from the latest onslaught on the Gaza Strip since October 7, 2023, but no arrest warrants had been issued by the time of this interview. Subsequently, increased pressure led to the issuance of a request for arrest warrants by the prosecutor. For more on the ICC's Office of the Prosecutor and the situation in Palestine, see Hindi, *supra* note 16.

territory.<sup>22</sup> But then the prosecutor who agreed to the investigation was replaced,<sup>23</sup> and the new prosecutor allowed the file to languish.<sup>24</sup> Indeed, years ago, I wrote about how a Palestinian application to the ICC would be useless and unlikely to result in anything but a possible prosecution of Hamas militants.<sup>25</sup> The structure of the Court and the geopolitical context in which it operates made it impossible to imagine the ICC ever indicting Israelis.

So why, then, do we see Palestinian groups submit petitions to the ICC, notwithstanding the manifest obstacles to meaningful redress from the Court? I will answer for myself as part of a legal team that submitted a petition to the ICC in early November despite having no confidence in the current prosecutor, Karim Asad Ahmad Khan, changing course and meaningfully investigating the Israelis.<sup>26</sup> We made the filing to translate the demands and arguments being made by millions of protesters in the streets around the world into an international legal forum. We were trying to sound the alarm in every possible forum of a genocide in the making. We sought to articulate these warnings in the language of law and in a way that would be legible to those who disagree with us politically and morally but would have to contend with legal claims advanced in a standing international court. In effect, filing the petition gave us greater space to make our argument in spaces like mainstream media to which we were otherwise denied access. In short, the decision to file a petition to the ICC was tactical.

Turning next to the ICJ case submitted by South Africa, I consider it to be tremendously consequential. In my own view, and this is simply a personal opinion rather than something I have corroborated, I don't believe that South Africa would have brought this case without the global uprising accusing Israel of genocide that preceded the South African decision. But the South Africans were willing to step forward and take on the responsibility of translating the demands of this political movement into legal claims symbolically being advanced by the Global South in one of the classic international legal forums established by the Global North. And one immediate

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<sup>22</sup> On January 1, 2015, the State of Palestine accepted the ICC's jurisdiction over crimes in the occupied Palestinian territories, including East Jerusalem, since June 13, 2014, and formally acceded to the Rome Statute on January 2, 2015, with the statute entering into force on April 1, 2015. On January 16, 2015, the ICC Prosecutor announced the opening of a preliminary examination to assess whether an investigation met the criteria under the Rome Statute, specifically under article 53(1). On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, the State of Palestine referred to the Prosecutor the Situation since 13 June 2014, with no end date. Such a referral did not automatically lead to the opening of an investigation, since the Prosecutor still had to determine whether the statutory criteria to open an investigation were met. On December 20, 2019, the Prosecutor confirmed that the criteria for opening an investigation were met but sought clarification on the Court's jurisdictional scope. Following Pre-Trial Chamber I's decision on February 5, 2021, affirming jurisdiction over Gaza, the West Bank, and East Jerusalem, the investigation officially began on March 3, 2021. The investigation, ongoing since then, received additional referrals covering recent escalations of violence and assaults on Gaza since October 7, 2023. On May 20, 2024, the ICC Prosecutor filed applications for arrest warrants against three Hamas leaders as well as Benjamin Netanyahu and Yoav Gallant for war crimes against humanity. It is now for the judges of the Pre-Trial Chamber to decide whether the necessary standard for the issuance of warrants of arrest has been met.

<sup>23</sup> *Statement of ICC Prosecutor Fatou Bensouda Respecting an Investigation of the Situation in Palestine*, INT'L CRIM. CT. (Mar. 3, 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>.

<sup>24</sup> *Supra* note 21.

<sup>25</sup> Noura Erakat, *Who is Afraid of the International Criminal Court?*, JADALIYYA (Jan. 12, 2015), <https://www.jadaliyya.com/Details/31657>.

<sup>26</sup> *Supra* note 7.



implication of the case has been that it has further galvanized the Global South and its solidarity with the plight of the Palestinians.<sup>27</sup>

We now see the number of states that have aligned themselves with South Africa before the ICJ, intervening in the case against Israel, and we can see equally clearly the smaller number of states that have aligned themselves with the Israeli position in the case.<sup>28</sup> That has the additional benefit of providing a broader picture that exceeds the bounds of the Palestinian question. What we see is the degree to which Palestine is part of a continuing and ongoing anti-colonial struggle, one that shapes international law. The most cynical way to interpret what the ICJ case lays bare is that there are two sets of international legal rules: one for Euro-American societies and another for non-Europeans. Of course, there are instances of European countries at the periphery aligning with South Africa, and some of these countries have themselves historically faced colonization on the European continent.<sup>29</sup>

What the ICJ case has made explicit, though, is which countries are committed to a decolonized international legal order and which still actively promote a two-tiered system of racialized privilege. Indeed, this is likely among the most important elements of the case, as the Court's actual jurisprudence and interpretation of the Genocide Convention in prior cases, such as *Bosnia v. Serbia*,<sup>30</sup> has set a very high bar for proving genocidal intent. This raises the real risk that the ultimate decision at the merits stage may equivocate on the question of genocide. But, filing this case with the ICJ was an incredibly important milestone either way. It is significant not because of the faith that the Court will rule in favor of South Africa at the merits stage, but because the issuance of interim measures and the plausibility finding with respect to the empirical record submitted by South Africa in support of the provisional order request makes clear the viciousness of Israeli actions.<sup>31</sup> Moreover, by issuing provisional orders and establishing the plausibility of the claim that Palestinians' rights under the Genocide Convention are being violated, the Court triggers obligations for third-party states who must take measures to prevent genocide and to avoid

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<sup>27</sup> In this regard, it is pertinent to observe the voting patterns at the United Nations General Assembly regarding Palestine following the South African argument at the International Court of Justice. For instance, the UNGA passed a resolution calling for an "immediate humanitarian ceasefire in Gaza," which was supported by 153 countries; opposed by 10 countries, including the United States and Israel; and resulted in 23 abstentions. See G.A. Res. ES-10/12 (Dec. 12, 2024). See also *UN General Assembly Votes Overwhelmingly in Favor of Gaza Ceasefire*, AL JAZEERA (Dec. 12, 2023), <https://www.aljazeera.com/news/2023/12/12/un-general-assembly-votes-overwhelmingly-in-favour-of-gaza-ceasefire>.

<sup>28</sup> Many countries supported and welcomed the ICJ case submitted by South Africa, including the Organization of Islamic Cooperation, Malaysia, Turkey, Jordan, Bolivia, the Arab League, and Colombia, among others. Numerous civil society groups worldwide also supported South Africa's case. Conversely, some countries opposed the genocide case, notably the United States, while other Western allies of Israel, such as the European Union and the United Kingdom, remained silent on the matter. For more details, see *Which Countries Back South Africa's Genocide Case Against Israel at ICJ?*, AL JAZEERA (Jan. 9, 2024), <https://www.aljazeera.com/news/2024/6/6/which-countries-have-joined-south-africas-case-against-israel-at-the-icj>.

<sup>29</sup> For instance, among other countries, Ireland, Spain, and Belgium have each announced their intention to join South Africa's case against Israel at the ICJ. See *South Africa vs Israel: 13 Other Countries Intend to Join the ICJ Case*, U.N. REG'L INFO. CTR. FOR W. EUR. (June 10, 2024), <https://unric.org/en/south-africa-vs-israel-12-other-countries-intend-to-join-the-icj-case>.

<sup>30</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

<sup>31</sup> On January 26, 2024, the ICJ issued an important ruling on a case brought by South Africa against Israel. South Africa accused Israel of violating the Genocide Convention in its military operations in Gaza following the October 7, 2023 Hamas attacks. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Provisional Measures, Int'l. Ct. Just. (Jan. 26, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

complicity in acts that might constitute genocide.<sup>32</sup> Thus, even the initial findings of the Court with respect to plausibility provide an additional basis politically to mobilize and legally to hold other states accountable and to initiate measures to stop their provision of financial and military support to the Israeli onslaught. The mobilizations underway today, in the form of advocacy campaigns, protests, and diplomatic initiatives by civil society groups as well as the Palestinian leadership to sanction Israel, cut off weapons transfers, impose diplomatic sanctions, and reinforce demands for a ceasefire all demonstrate how a filing to the ICJ may be effective regardless of the Court's findings in the merits stage years from now.<sup>33</sup>

Next, we might consider the other initiative before the same Court, the request for an ICJ Advisory Opinion on the legal consequences of Israeli practices in the occupied Palestinian territories, including East Jerusalem.<sup>34</sup> This initiative preceded October 7, 2023, and was focused on establishing the illegality of Israel's occupation and, hence, the international law obligation to remove settlements in the West Bank and desist from the annexationist policies of the current Israeli government, among other things.<sup>35</sup> The case is in some ways in tension with movement actors because it concedes as a matter of law the legitimacy of Israel's control of territory within the 1949 Armistice Line, running the risk of normalizing the Nakba. On the other hand, establishing the incontrovertible illegality of all of Israel's policies of expropriation, dislocation, repression, and deprivation that have amounted to slow-motion ethnic cleansing of the Occupied Palestinian Territories since 1967 may also be seen as complementary to a case that Israel's current policies in Gaza are the logical culmination of its long-standing ethnic cleansing project now accelerated into a full-blown genocide. The legal team that brought the case is fully aware of this risk but is also building on the international consensus that exists, which in and of itself normalizes the Nakba.

Still, the South African case, for the first time, presented in a legal forum an account of the current conjuncture in Palestine that began with the illegality of the Nakba and has continued since 1948. The case drew into question not only Israeli actions since 1967 but also the ongoing ethnic

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<sup>32</sup> For further reading about the implications of the OCJ order on Third States, see Yussef Al Tamimi, *Implications of the ICJ Order (South Africa v. Israel) for Third States*, EJIL: TALK! (Feb. 6, 2024), <https://www.ejiltalk.org/implications-of-the-icj-order-south-africa-v-israel-for-third-states> (arguing that under Article I of the Genocide Convention, all states parties have undertaken to prevent and punish genocide and that the ICJ's order triggers third state obligations in two key ways: First, through the erga omnes partes principle confirmed in paragraph 33 of the order, which means obligations under the Convention are "owed by any State party to all the other States parties." Second, through the Court's finding of a "real and imminent risk" of irreparable prejudice, which arguably meets the "serious risk" threshold that triggers states' duty to prevent genocide as established in *Bosnia v. Serbia* (2007). This means third states must employ "all means reasonably available to them" to prevent genocide and ensure they are not complicit in its commission.).

<sup>33</sup> For example, over 600 legal experts in the UK have sent a letter to Prime Minister Rishi Sunak urging him to suspend British arms exports to Israel. The letter, signed by three retired UK Supreme Court justices, among others, emphasizes that the UK government is legally obligated to consider the International Court of Justice's conclusion that there is a "plausible risk of genocide" in Gaza. UK Judges' and Lawyers' Open Letter Concerning Gaza (Apr. 3, 2024), <https://lawyersletter.uk/wp-content/uploads/2024/04/Gaza-letter-FIN-3-April.pdf>. See also Haroon Siddique, Eleni Courea & Patrick Wintour, *Former Supreme Court Judges Say UK Arming Israel Breaches International Law*, GUARDIAN (Apr. 3, 2024), <https://www.theguardian.com/world/2024/apr/03/former-supreme-court-judges-say-uk-arming-israel-breaches-international-law>.

<sup>34</sup> *Supra* note 10.

<sup>35</sup> *Id.*



cleansing campaign that preceded the establishment of the state.<sup>36</sup> One could argue that the focus on Nakba as an ongoing project is in tension with the ICJ Advisory Opinion request's seeming acceptance of the legality of the post-1949 status quo. However, in the end, whether the cases discussed above are read as complementary or in tension with one another, neither the contradictions nor the underlying legal issues will ultimately be resolved before this Court or any other court. These are questions that will finally be resolved through a geopolitical process, albeit one partially structured by and channeled through international law.

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**Aslı Bâli:** Building on your analysis of these international litigation strategies, we also wanted to ask you how to place these legal strategies in their broader historical context. In *JUSTICE FOR SOME*,<sup>37</sup> you laid out the remarkable chronology of how the Palestinian movement has sought for decades to deploy international law as a language of resistance and an extension of their other efforts in pursuit of self-determination.<sup>38</sup> These efforts go back over a century from the Balfour Declaration<sup>39</sup> to the present. In some ways, this history might be described as a record of the tactical and strategic uses of international law, notwithstanding a deep cynicism about the potential of law to deliver liberation. How do you make sense of the current cases underway as a new chapter in the history you tell so well in the book? Is this an instance of continuity or are there divergences that you see in the legal landscape being negotiated by Palestinians today as compared to the earlier episodes you have researched?

**Noura Erakat:** The question of whether this is a moment of continuity or rupture is an important one. Perhaps it is in some ways both continuity and rupture in the way that history has famously been described as not repeating but rhyming. The central argument in *JUSTICE FOR SOME* is that to understand law, you must understand its intertwined relationship with the balance of power. So many prefer to imagine the law as somehow magically taking effect, embodying a promise that organically realizes itself through adherence and enforcement. This imagined universe places far too much faith in the law and obscures the operation of power as an intrinsic element of any application or enforcement of rules. We must always ask what the balance of power is when considering how law will be interpreted and applied.

For instance, in the contestation of the Balfour Declaration a century ago, Palestinians advanced arguments drawn from the specific language of the League of Nations' Mandates that provided the basis for regulating how European powers would administer the territories over which they were given custodial control.<sup>40</sup> The Palestinians repeatedly established that the Balfour

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<sup>36</sup> "In this resolution, the General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice to render an advisory opinion pursuant to Article 65 of the Statute of the Court, on the following questions: (1) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures? (2) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?" *Id.* at 2.

<sup>37</sup> NOURA ERAKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* (2019).

<sup>38</sup> *Id.* at 14-40.

<sup>39</sup> *Mandate for Palestine*, League of Nations Doc. C.529M.314 1922 VI (1922).

<sup>40</sup> *Id.*

Declaration contradicted Article 20 and Article 22 of the Mandate.<sup>41</sup> But these arguments could never prevail because the context in which the Mandate had been awarded to Britain was already one of legal exception to accommodate the politics and the balance of power of that moment.<sup>42</sup>

The actions of the Permanent Mandate Commission (PMC) in Palestine may have been in contradiction to the letter of the law,<sup>43</sup> but the law itself was without precedent, a novel codification that purported to legitimize a new framework, which in turn was partly designed to enable Jewish settlement in Palestine.<sup>44</sup> Thus, an argument that the PMC was acting in contradiction to the new rules was destined to fail since the PMC was, in fact, acting in line with the prerogatives of power.<sup>45</sup> In the end, what was manifestly a violation of the rules came to be redescribed as adherence to a new law. The point at which resistance to the Balfour Declaration became effective was when the contestation shifted from the legal plane to the grassroots with the Palestinian uprising, the Great Revolt from 1936 to 1939, which began with a boycott and culminated in armed revolt against the British mandatory system.<sup>46</sup> What the uprising demonstrated to the British was that achieving the goal of implementing Zionist settlement policies and establishing a Jewish state in Mandate Palestine would require more than just legal pronouncements.<sup>47</sup> Forcibly challenged on the ground, the British concluded that their goals would depend on coercion rather than legislation, which gave way to a decade of coercion until the British withdrew and well-armed Jewish militias completed the project.<sup>48</sup> In many ways, this interpretation is consistent with Professor Ardi Imseis's work on subalternity,<sup>49</sup> noting that the law on its own will never be sufficient for emancipation because the law is subject to logics of legal exception, which then produces a political condition that can only be altered by challenging the underlying balance or power.<sup>50</sup>

All of this brings us back to this moment. The legal strategies we have been discussing are taking place at a time of real challenges to the underlying balance of power. The boycotts, the

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<sup>41</sup> For more on the contradictions between the Balfour Declaration and article 20 and 22, see, for example, Shawan Jabarin & Ralph Wilde, *British Reparations Owed to the Palestinian People*, OPINIO JURIS (Sept. 29, 2023), <http://opiniojuris.org/2023/09/29/british-reparations-owed-to-the-palestinian-people>.

<sup>42</sup> Susan Pedersen, *The Impact of League Oversight on British Policy in Palestine*, in *BRITAIN, PALESTINE AND EMPIRE: THE MANDATE YEARS 39* (Rory Miller ed., 2016).

<sup>43</sup> The Palestinian people consistently documented how the PMC's actions violated the League of Nations Covenant. They argue that the PMC's support for Jewish settlement violated Article 20, which required previous international commitments (like the Balfour Declaration) to be abrogated when they contradicted League obligations, and Article 22, which mandated that administration should serve the interests of the indigenous population.

<sup>44</sup> Pedersen, *supra* note 42.

<sup>45</sup> The inherent tension between the PMC's formal obligations and its actual practices reflected broader imperial dynamics. As Susan Pedersen demonstrates, the PMC frequently prioritized imperial interests over mandate provisions, particularly in Palestine. The Commission's responses to Palestinian petitions consistently favored British policy objectives over local grievances. *Id.* at 404-407.

<sup>46</sup> For further details on the Great Revolt, see M.K. Kelly, *The Revolt of 1936: A Revision*, 44 J. PALESTINE STUD. 28 (2015).

<sup>47</sup> Charles Anderson, *The Suppression of the Great Revolt and the Destruction of Everyday Life in Palestine*, 79 JERUSALEM Q. 9 (2019).

<sup>48</sup> *Supra* note 37, at 23-60.

<sup>49</sup> Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity*, 57 STAN. J. INT'L. L. 1, 4 (2021).

<sup>50</sup> See Ardi Imseis, *The United Nations and the Question of Palestine: A Critical Analysis*, in *PALESTINE AND RULE OF POWER: LOCAL DISSENT VS. INTERNATIONAL GOVERNANCE* (Alaa Tartir & Timothy Seidel eds., 2019). Imseis argues that international law and its institutions, including the UN, have consistently failed to deliver justice for Palestinians due to power imbalances inherent in the international legal order. He analyzes how legal frameworks often serve to maintain rather than challenge existing power structures. His work demonstrates how meaningful change requires addressing fundamental power dynamics rather than merely pursuing legal remedies.

shutting down of events, and the protests on the streets and on campuses globally all reflect a direct confrontation that opposes the political context that is facilitating the carnage in Gaza.<sup>51</sup> There is far greater potential for law to serve emancipatory ends when it is being deployed on behalf of movements on the ground and offering legal articulation of their demands. Of course, the request for the Advisory Opinion mentioned earlier predates this moment and is not influenced by these movements, so it is distinct from the other cases we have discussed, such as the push for arrest warrants, the ICJ cases brought by South Africa or Nicaragua, and the cases brought before domestic courts.<sup>52</sup> On the one hand, the Advisory Opinion was the culmination of efforts by states of the Global South to resuscitate the two-state solution in the face of increasing fears of outright annexation of territory by the Israelis.<sup>53</sup> On the other hand, the failed Oslo peace process is so thoroughly discredited for Palestinians that the Advisory Opinion itself is detached from the politics on the ground.<sup>54</sup> This disconnect between the Advisory Opinion request and the politics on the ground indicates that the shift on the ground has not adequately reshaped a diplomatic and legal status quo—yet. As a result, there is some tension between the Advisory Opinion case and the other litigation strategies now underway.

To the extent that the Advisory Opinion is understood to shore up a vision for a two-state solution, it will inevitably be seen by many as an extension of the smokescreen that has enabled the current status quo and provided a liberal veneer for the subjugation of Palestinians and the denial of their right to self-determination.<sup>55</sup> In some ways, this disjuncture reflects the chasm between Palestinian grassroots and civil society mobilization and the official Palestinian leadership—the Palestine Liberation Organization (PLO)—recognized by Israel (and the world) as the representative of the Palestinian people but no longer necessarily understood as such by Palestinians.<sup>56</sup> The obvious disconnect between PLO leadership positions and those of Palestinian

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<sup>51</sup> See Daniel Wu, *Wave of Pro-Palestinian Protests Closes Bridges, Major Roads Across U.S.*, WASH. POST (Apr. 15, 2024), <https://www.washingtonpost.com/world/2024/04/15/gaza-israel-war-protests-bridges/>; see also *Pro-Palestinian Demonstrators Shut down Airport Highways and Bridges in Major Cities*, NPR (Apr. 16, 2024, 2:58 AM ET), <https://www.npr.org/2024/04/16/1244990246/pro-palestinian-demonstrators-shut-down-airport-highways-and-bridges>.

<sup>52</sup> See *supra* notes 7-11.

<sup>53</sup> On the ICJ advisory opinion's implications for the two-state solution, see Jeffrey Sachs & Sybil Fares, *A Comprehensive Peace Based on the Two-State Solution Is Still Achievable*, AL JAZEERA OPINION (Aug. 2, 2024), <https://www.aljazeera.com/opinions/2024/8/2/a-comprehensive-peace-based-on-the-two-state-solution-is-still-achievable> (arguing that the ICJ opinion provides a legal framework that could support the implementation of a two-state solution).

<sup>54</sup> The Advisory Opinion request, *supra* note 10, grows out of the diplomatic impasse that has resulted from the failed attempt to establish the so-called two-state solution and the Oslo framework, which is a peace process aimed at achieving a peace treaty based on UNSC resolutions 242 and 338, resulting in both the recognition of Israel by the PLO and the recognition by Israel of the PLO as the representative of the Palestinian people and as a partner in bilateral negotiations. A large portion of the Palestinian population opposed the Oslo Accords because the agreements failed to address key Palestinian demands, including the right of return for refugees, the status of Jerusalem, and the continued expansion of Israeli settlements. Edward Said, a Palestinian philosopher, described them as a “Palestinian Versailles.” See Edward Said, *The Morning After*, LONDON REV. OF BOOKS (Oct. 21, 1993), <https://www.lrb.co.uk/the-paper/v15/n20/edward-said/the-morning-after>.

<sup>55</sup> Tareq Baoni, *The Two-State Solution Is an Unjust, Impossible Fantasy*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/opinion/two-state-solution-israel-palestine.html>.

<sup>56</sup> In Palestine, the PLO-controlled Palestinian Authority is viewed as a ‘burden’ by 65 per cent of the population, reflecting a profound crisis of legitimacy. See Palestinian Ctr. for Pol’y & Surv Rsch., *Public Opinion Poll No. 91* (Mar. 5-10, 2024), <https://pcpsr.org/en/node/973> (confirming the long-standing scholarly analysis of the growing disconnect between Palestinian leadership and its constituents under colonial condition); see also Basem Ezbi, *Basem Ezbi*,

civil society, including Palestinian human rights organizations, speaks to the existence of parallel litigation strategies, one tied to the two-state solution and others that turn the clock back to the illegality and illegitimacy of the Nakba. Historically, particularly during the Third World revolt, the era of the anti-colonial movements in the 1960s and 1970s,<sup>57</sup> the PLO was the officially recognized representative of the Palestinian people in international forums as well as enjoying legitimacy among Palestinians as a representative organization serving as an umbrella that encompassed their organizational life. Whereas, in this moment, there is far more ambiguity, contestation, and ongoing debate about what would constitute a legitimate and representative leadership for the Palestinian movement. This, again, is something that cannot be resolved as a matter of law but rather is a question of political contestation. Thus, in answer to the question, there is continuity reflected in the resort to international law but rupture in who now speaks for the Palestinians and which of these legal strategies is seen as legitimate by Palestinians or an expression of their own aspirations and current political mobilizations. The diplomatic strata inhabited by the PLO and the states that interact with PLO members at the UNGA are increasingly at odds with Palestinian civil society, resulting in multiple tensions in the legal strategies unfolding before different courts at the moment.

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**Question:** Another question you have broached in recent work, including a co-authored publication in the JOURNAL OF PALESTINE STUDIES titled *Locating Palestine in Third World Approaches to International Law*,<sup>58</sup> has been the place of Palestine within TWAIL scholarship. You observe that attention to Palestine has been more sporadic than sustained in the TWAIL literature and that the question of Palestine was not engaged at the founding of the TWAIL intellectual movement.<sup>59</sup> What do you think are the implications of this absence? When have there been moments of presence, and what triggered these moments of presence? In what ways do you consider Palestine to be, as Professor Richard Falk argues, a “puzzle for TWAIL scholars”<sup>60</sup>?

**Noura Erakat:** The question of Palestine as a puzzle for TWAILers, which was raised by Professor Richard Falk, returns us to the question we began with about how best to assess the operation of international law. What is this legal system and whose interests does it serve, and in what way? The TWAIL tradition tries to address these questions squarely by recognizing that

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*Captured Politics Under Colonial Dominance: The Case of Palestine*, in HANDBOOK OF MIDDLE EAST POLITICS 308 (Shahram Akbarzadeh ed., 2023).

<sup>57</sup> The anti-colonial movements of the 1960s and 1970s marked a pivotal era of Third World solidarity and resistance to colonial powers. See Vijay Prashad, *THE DARKER NATIONS: A PEOPLE’S HISTORY OF THE THIRD WORLD* (2007). During this period, Palestinian liberation was closely tied to other anti-colonial struggles, particularly through the PLO’s participation in Third World conferences and forums. See Tor Krever, *From Vietnam to Palestine: People’s Tribunals and the Juridification of Resistance*, in MAKING ENDLESS WAR: THE VIETNAM AND ARAB-ISRAELI CONFLICTS IN THE HISTORY OF INTERNATIONAL LAW 233, 254 (Brian Cuddy & Victor Kattan eds, 2023). “Already in the 1960s, clear parallels could be drawn between Vietnam and Palestine. National liberation movements in both, delegates at the 1966 Tricontinental Conference in Havana urged, should be supported in their resistance against imperialism and colonial oppression. Three years later, PLO chairman Yasser Arafat praised “the alliance of the Arab and Palestinian national liberation movement with Vietnam” and other liberation movements in Asia, Africa, and Latin America.”

<sup>58</sup> Noura Erakat et al., *Roundtable: Locating Palestine in Third World Approaches to International Law*, 52 J. PALESTINE STUD. 4 (2023).

<sup>59</sup> *Id.* at 101.

<sup>60</sup> *Id.*

international law was born in the crucible of colonial domination and through the colonial encounter.<sup>61</sup> By centering the analytic lens of colonialism, the TWAIL tradition is able to explain the conundrum I alluded to earlier of international law being both a product of power relations and paradoxically also an instrument by which those who are subjugated seek to constrain power. TWAIL accounts for the counterintuitive dynamic whereby the language of international law is relied upon to advance the very rights of the natives it was designed to subdue. The right of self-determination, as one example, is asserted through international law, which is also the very framework by which two-thirds of the world was deprived of self-determination and sovereignty. In many ways, Palestine is the paradigmatic expression of this paradox: for instance, belligerent occupation<sup>62</sup> is simultaneously governed by law and styled as temporary, offering Israel a mantle of legitimacy for its practices even as international lawyers insist on the illegality of Israel's settlement enterprise in the West Bank.<sup>63</sup> The law of belligerent occupation, in short, is the permissive framework that has lent a veneer of legitimacy to Palestinian dispossession despite the constant recognition of the illegality of the settlements.

Notwithstanding the acknowledged illegality of the settlements,<sup>64</sup> Israel has continuously expanded its settlement enterprise in the West Bank and, until recently, in Gaza for over 57 years,<sup>65</sup> not despite international law and the Geneva Conventions, but precisely because the Israelis have advanced alternative interpretations of them. They dispute the meaning of UNSC Resolution 242 and its applicability to all territory occupied in 1967.<sup>66</sup> By withholding recognition of Palestinian sovereignty and asserting that there is no sovereign to whom the land would revert after occupation ends, they claim that the Geneva Conventions framework is inapplicable.<sup>67</sup> Whether it is the word-smithing of the resolution or the missing reversioner thesis, these strained interpretations of the law are only deemed plausible because geopolitical asymmetries have allowed the more powerful actor to contest the otherwise settled meaning of the law. With U.S. support, Israel has been able to press the least plausible arguments into the realm of international credibility,<sup>68</sup> turning military

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<sup>61</sup> *Supra* note 6.

<sup>62</sup> Occupation law is the body of international law governing military occupations established by the Hague Regulations of 1907 (Articles 42-56) and Geneva Convention (IV) of 1949 (Articles 27-34 and 47-78). *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>63</sup> *See* Darryl Li, *Occupation Law and the One-State Reality*, JADALIYYA (Aug. 2, 2011), <https://www.jadaliyya.com/Details/24275>.

<sup>64</sup> The settlements have been condemned as illegal in many UN Security Council and other UN resolutions. Multiple international bodies have addressed the issue of settlements. UN Security Council Resolution 465 in 1980 urged Israel to remove existing settlements and stop building new ones in territories occupied since 1967, including Jerusalem. More recently, UN Security Council Resolution 2334 in December 2016 reinforced this position. The International Committee of the Red Cross and parties to the Fourth Geneva Convention have stated that these settlements do not comply with international humanitarian law. Various international organizations and experts have also expressed concerns about human rights implications connected to settlement activities. *See* Amnesty International, *Chapter 3: Israeli Settlements and International Law* (Jan. 30, 2019), <https://www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law>.

<sup>65</sup> AMNESTY INT'L, *ISRAEL'S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY* 17, 22 (2022).

<sup>66</sup> For an analysis of the impact of the missing definite article in the English version of UNSC Resolution 242, *see* Perry Glenn, *Security Council Resolution 242: The Withdrawal Clause*, 31 MIDDLE EAST J. 413-33 (1977).

<sup>67</sup> *See, e.g.*, Ardi Imseis, *Prolonged Occupation: At the Vanishing Point of the Jus ad Bellum/Jus in Bello Distinction*, 58 TEX. INT'L L.J. 33-48 (2022).

<sup>68</sup> *See* Alex Kane, *Unpacking Israel's Legal Fictions*, JEWISH CURRENTS (July 14, 2023), <https://jewishcurrents.org/unpacking-israels-legal-fictions> (interview with Noura Erakat).



necessity into a catch-all capable of excusing all its violations of law and rights.<sup>69</sup> Legal fictions, such as the temporary character of the occupation, are passed off as a reality on paper even as the permanence of the settlements becomes more apparent with each passing day on the ground.<sup>70</sup> The very legal framework by which the illegality of Israel's actions might be measured becomes the instrument for simultaneously obscuring and legitimizing those same actions.

It is on this basis that Israel can at once claim to adhere to the laws of war to an extent unrivaled in history—per Meir Shamgar, a former chief justice of the Israeli Supreme Court, and a panoply of other Israeli jurists<sup>71</sup>—even as the number of settlements established by Israel in the Occupied Palestinian Territories has increased by 200% since the beginning of the so-called peace process in 1993.<sup>72</sup> This same dynamic is, again, at work when Israel advances myriad arguments and novel doctrinal interpretations of international humanitarian law in order to shrink to the vanishing point the distinction between combatants and civilians in the case of Palestine, turning the very idea of a Palestinian civilian into a legal oxymoron.<sup>73</sup> With no civilians among Palestinians, there can be no standard by which an attack would be deemed disproportionate or condemned for failing to distinguish civilians from military targets. In practice, by these interpretations, Israeli violence is always definitionally legitimate, and Palestinian resistance is always culpable. Since 2023, Israel has introduced a new legal argument: that proportionality between military advantage and civilian harm should be assessed based on the entire military campaign rather than individual operation.<sup>74</sup> Thus, any individual attack is, on this logic, necessarily proportionate when judged against the overall objective of defeating Hamas or freeing all Israeli captives in Gaza. Such an elastic standard would permit a strike intended to kill a single combatant that results in the deaths of hundreds of civilians since those hundreds of deaths would be balanced against the military objective of overall victory.

All of this is illustrative of the way in which the plasticity of the law and its geopolitical interpretation can be deployed against Palestinians, even at a time when genocidal violence against them is being broadcast globally through traditional social media. The paradox here is that our resistance—as legal advocates and scholars—to these legal frameworks borrows from the same

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<sup>69</sup> *Id.*

<sup>70</sup> Li, *supra* note 64.

<sup>71</sup> See e.g., Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

<sup>72</sup> See AMNESTY INT'L, *supra* note 65, at 128 (“Discriminatory allocation of expropriated Palestinian land for Jewish Settlements”).

<sup>73</sup> See Noura Erakat, *The Sovereign Right to Kill: A Critical Appraisal of Israel's Shoot-to-Kill Policy in Gaza*, 19 INT'L CRIM. L. REV. 783-818 (2019) (demonstrating how Israel has systematically developed novel legal frameworks and military doctrines since 2000 that deliberately “shrink the civilian” category, particularly through its concept of “armed conflict short of war” that allows it to use military force while evading existing legal constraints, and through expanded interpretations of “direct participation in hostilities” that transform virtually any Palestinian presence into a legitimate military target, effectively eliminating the possibility of Palestinian civilian status).

<sup>74</sup> In a recent podcast episode, Israeli news anchor Yonit Levi argued: “When the United States decided to destroy ISIS, it devastated most of Iraq. Is the world a safer place because ISIS is now defeated? Yes. Did innocent people pay with their lives tragically? Yes . . . So all of this needs to be taken into consideration when people talk about proportional response. ‘Israel needs to act with a proportional response.’ What does that mean exactly?” Wilson Fache, *Israel's War on “Proportionality,”* BRUSSELS INT'L CTR. (Oct. 27, 2023), <https://www.bic-rhr.com/research/israels-war-proportionality>. Deputy Mayor of Jerusalem Fleur Hassan-Nahoum made a similar point: “You can already fe[e]l the tide of the press beginning to turn: ‘Why are you retaliating?’ ‘Is this a proportionate response?’ Are they kidding me, proportionate response? We are not here to kill for revenge; we are there to dismantle the terrorist infrastructure that is an existential threat to our country.” *Id.*

doctrines, the same vocabulary, and the very same frameworks. How have Palestinians sought to restore the emancipatory potential of law? By moving beyond international humanitarian law and the laws of war, which only examine how Israel conducts its military operations, to instead invoke the law of genocide, which scrutinizes Israel's broader aims and the apparent ends they are pursuing. With this move, Palestinians in the streets and Palestinian legal advocates have said we will no longer talk about the laws of war and conduct of this or that operation, but instead, we will examine the illegitimacy of your conduct on the basis of its purpose: it is not designed for the extraction of captives or the decimation of Hamas but rather to depopulate the Gaza Strip as an expression of the ongoing Nakba. The shift in the legal framing of the conflict from humanitarian law to genocide, and the return of the Nakba as the frame through which to understand Israeli conduct from 1948 to the present,<sup>75</sup> has been the means by which Palestinians have redeployed international law in the service of their own aspirations even as they confront the most extreme and eliminationist expression of the Israeli political project in generations.

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**Ashl Bâli:** You have drawn our attention back to where you began, which is that movement lawyering—lawyering in conjunction with movements—is the only real path forward in order to both draw on the real political power of mobilized publics and to use legal tools in ways that have some prospect of actually shifting the balance of power in the service of Palestinian liberation. You have outlined how the shift from humanitarian law to the law of genocide emerged from the grassroots and that the litigation before international courts is a response to that shift in understanding from the ground. How do you understand this moment in terms of movement lawyering? Are lawyers more attuned to grassroots demands? Have the litigation strategies of those advocating for Palestinian liberation shifted since October 7, and if so, how?

**Noura Erakat:** The strategic deployment of law is always a fraught proposition—the risks and benefits, and the pitfalls and potential, are in tension with one another, and it is difficult to know ex-ante whether recourse to law will ever be a rewarding strategy. For one example, the application of the Genocide Convention may result in an equivocal finding in the merits stage that some will interpret as a defeat or setback. The threshold for a finding of genocidal intent is set so high. It requires so much documentary evidence demonstrating the direct causal relationship between genocidal statements and genocidal outcomes on the ground that it is all but impossible to satisfy short of the defeat of the genocidaires and access to all their military planning documents. One would have to have the proverbial smoking gun, including explicit statements of genocidal

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<sup>75</sup> For example, in South Africa's original filing, which initiated its case against Israel at the ICJ alleging that Israel is committing genocide against Palestinians in Gaza, South Africa began with the events that started in 1948. They state, "South Africa has recognized the ongoing Nakba of the Palestinian people through Israel's colonization since 1948, which has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately denying them their internationally recognized, inalienable right to self-determination, and their internationally recognized right of return as refugees to their towns and villages, in what is now the State of Israel." See Public Sitting Held on Thursday 11 January 2024, at 10 a.m., at the Peace Palace, President Donoghue Presiding, in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, INT'L CT. JUST. (Jan. 11, 2024), <https://www.icj-cij.org/node/203417>. In framing its case in this way, South Africa places Israel's genocidal acts and omissions within the broader context of Israel's seventy-five-year apartheid, fifty-six-year occupation, and sixteen-year siege imposed on the Gaza Strip—a siege which itself has been described by the Director of UNRWA Affairs in Gaza, as "a silent killer of people."

objectives. The overwhelming evidence of genocidal effect and the foreseeability of the destruction of the conditions necessary to sustain life in Gaza may simply not be sufficient to satisfy the ICJ's jurisprudential standard, as exemplified in the *Bosnia v. Serbia* case.<sup>76</sup> Moreover, Israel is very likely in the merits stage to file a counterclaim accusing Hamas of genocidal actions in a strategy of deflection and obfuscation. Was this risk worth running? Is this a strategically appropriate litigation effort? Undoubtedly, the risks of this litigation strategy are real, but so are the rewards, which include shifting away from the international humanitarian law framework and recognizing the extremity of Israeli actions and the global (at least Global South) opprobrium it has engendered.

October 7 and Israel's response in Gaza has laid bare the underlying dynamics of the conflict in ways that have scrambled the status quo. It has been harrowing on a personal level for all of us. But the other thing that it did for those of us who have been in this for a long time was to set in relief all of the work that we had done, at least for the past two decades, to try to explain why the Oslo agreement was a trap and its version of autonomy an illusion. Prior to October 7, as faith in the Oslo framework and its two-state solution began to erode,<sup>77</sup> fundamental questions about Zionism could finally be raised. This moment resurrected a racial critique of Zionist settler colonization, with the language of apartheid taken up even in mainstream venues to describe the regime of subordination under which Palestinians have been forced to live.<sup>78</sup> In many ways the groundwork for this shift in paradigm had been laid for years, but the payoff had only just begun to come into focus. For instance, if we consider the Unity Uprising of 2021,<sup>79</sup> the events reflected a very different media approach to the question of Palestine than had been the case in previous decades. When the 2021 events unfolded, mainstream venues were inviting Palestinian scholars as experts to comment on the events. They were inviting us to explain for the first time how the Palestinians of the occupied territories were interconnected with the plight of Palestinians within Israel's '48 recognized borders.<sup>80</sup> On Christiane Amanpour's show on CNN, I was asked to discuss the status of the Palestinian citizens of Israel.<sup>81</sup> Instead of referencing these Palestinians as evidence that Israel is not an apartheid state, I was given the space to disrupt that narrative and explain how their citizenship offered little protection and left them vulnerable to very similar treatment as other Palestinians in the Gaza Strip, the West Bank, and the diaspora, with the exception of the application of martial law.<sup>82</sup> Palestinians within Israel are targeted for dispossession, displacement, and removal through civil law,<sup>83</sup> yet there has rarely been scrutiny

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<sup>76</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

<sup>77</sup> *Supra* note 54.

<sup>78</sup> On the importance of restating the fundamental parameters of Zionism as both a racializing project and a colonial one, see Noura Erakat, Darryl Li & John Reynolds, *Race, Palestine, and International Law*, 117 AJIL UNBOUND 77 (2023).

<sup>79</sup> *See infra* note 91.

<sup>80</sup> "48 borders" refers to the lands that were originally part of historic Palestine before the establishment of the Israeli state in 1948 following the Nakba. Some Palestinians remained in their homes within the '48 boundaries and were granted citizenship, although Israel never treated them as equal citizens. Between 1949–1966, they were governed by military rule and subjected to travel permits, curfews, and detentions. Some were expelled from their homes and lands, which were often given to Jewish settlers or state-backed bodies.

<sup>81</sup> Noura Erakat: *Do This First to Make Peace*, CNN (May 13, 2021), <https://www.cnn.com/videos/tv/2021/05/13/amanpour-noura-erakat-israel-palestinians-gaza-hamas.cnn> (video Interview with Noura Erakat, human rights attorney).

<sup>82</sup> *Id.*

<sup>83</sup> *See* AMNESTY INT'L, *supra* note 65.

of the Israeli claim that Palestinian citizenship within that country's borders was evidence of its democratic pedigree.<sup>84</sup> But by 2021, some of that narrative had begun to unravel. The rightward shift in Israel and the faltering character of its democratic institutions, even for its Jewish citizens, had become a striking part of the public understanding of Israel in the U.S.<sup>85</sup>

In the aftermath of October 7, this history—of apartheid, settler colonization and occupation—were completely erased. Suddenly, history began on October 7, 2023—and those events on that day were to be explained without any context, and the Israeli response was to be presented as self-defense, a war against an external enemy.<sup>86</sup> Following October 7, Gaza became an island, disconnected from Palestine, disconnected from the rest of the region.<sup>87</sup> Meanwhile, Israel advanced an argument that Hamas was on par with the Nazis, and that the war was being waged not merely in self-defense but in defense of Western civilization against barbarity.<sup>88</sup>

In response to Israel's framing of the war as a defense of Western civilization against barbarity, our legal strategy shifted to focus on the genocidal character of Israel's actions. Whereas the initial reporting spoke of the "Israel-Hamas war," that needle has now moved to the "Gaza War." Our strategy is working to shift the framing further to the "Israel-Palestine War" to draw attention to the ways in which Israel is waging a war against all of Palestine. The legal work has followed movement actors here, as was the case in 2021 when the Unity Uprising insisted on the interconnections of all Palestinians in the territory under Israeli dominion.<sup>89</sup> The insistence on a framework that reflects the unity of the Palestinian experience across the entire territory of Mandate Palestine is an expression of grassroots activism, supported by legal advocacy, and it has succeeded in shifting the narrative frame not just among activists but also in the media. The opposition can no longer compete with us toe-to-toe due to the overwhelming evidence and firsthand accounts from Gaza that have been available across social media platforms. Their narrative of victimhood used to justify unfettered violence has lost credibility and they cannot adequately take us on in discussion or debate or even in competing op-eds or knowledge

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<sup>84</sup> See, e.g., Lana Tatour, *Amnesty Report: The Limits of the Apartheid Framework*, MIDDLE E. EYE (Feb. 8, 2022), <https://www.middleeasteye.net/opinion/israel-amnesty-apartheid-report-limits-framework>; Lana Tatour, *Why Calling Israel an Apartheid State Is Not Enough*, MIDDLE E. EYE (Jan. 18, 2021), <https://www.middleeasteye.net/opinion/why-calling-israel-apartheid-state-not-enough>; see also Nihal El Aasar, *Why Won't Amnesty Say 'Colonialism'?*, NOVARA MEDIA (Feb. 8, 2022), <https://novaramedia.com/2022/02/08/why-wont-amnesty-say-colonialism>.

<sup>85</sup> See, e.g., Suzanne Scheider, *How Israel's Illiberal Democracy Became a Model for the Right*, DISSENT MAG., Spring 2024, <https://www.dissentmagazine.org/article/how-israels-illiberal-democracy-became-a-model-for-the-right>.

<sup>86</sup> Dalia Hatuqa, *The War Did Not Start a Month Ago*, N.Y. TIMES (Nov. 4, 2023), <https://www.nytimes.com/2023/11/14/opinion/israel-gaza-war-history.html>.

<sup>87</sup> To learn more about Gaza, see Yasmine Salam, *Gaza Strip Explained: Who Controls It and What to Know*, NBC NEWS (Oct. 8, 2023), <https://www.nbcnews.com/news/gaza-strip-controls-s-know-rcna119405>.

<sup>88</sup> Some Israeli officials, journalists, religious leaders, and scholars have drawn explicit parallels, with Israeli Government Minister Nir Barkat claiming that "what Hamas is committing is worse than what the Nazis did." @SaulStaniforth, TWITTER (Nov. 24, 2023, 7:35 AM), <https://x.com/SaulStaniforth/status/1728029517703200945?s=20>; see also Andrew Roberts, *What Makes Hamas Worse than the Nazis*, WASH. FREE BEACON (November 24, 2023), <https://freebeacon.com/culture/what-makes-hamas-worse-than-the-nazis>.

<sup>89</sup> The Unity Intifada of 2021 follows a long tradition of Palestinian revolutionary resistance against Israeli colonization and apartheid. This youth-led uprising, centered in Jerusalem (al-Quds), operated outside traditional political structures and succeeded in uniting Palestinians across imposed geographical and political fragmentation while revitalizing global solidarity with the Palestinian cause. See Neda Elia, *Under Occupation, Palestinian Resilience Builds Unity*, YES! (May 21, 2021), <https://www.yesmagazine.org/opinion/2021/05/21/palestinian-displacement-resistance-israel>.

production. This is one reason we have seen pro-Israel actors resort to overwhelming repression on campuses and on the streets to silence protests and criminalize criticism of the actions of the state of Israel.<sup>90</sup> That repression, too, may backfire, resulting in ever-increasing resort to coercion by Israel and its supporters in order to impose a top-down narrative that is openly rejected on the ground by Palestinians and their allies and even by observers who recognize the brazen affront to speech rights.

In short, the panic and repression we are witnessing and experiencing from the pro-Israel camp serve as a barometer of the success of Palestinians in advancing their perspective, not just in the U.S. but globally. Israel is increasingly isolated and seen as a pariah.<sup>91</sup> That shift is a consequence, in part, of increasing awareness of the illegality, illegitimacy, and cruelty being visited on Palestine by Israel. That this reality has become visible and legible represents a success of both grassroots activism and legal advocacy, albeit amid unprecedented violence that constitutes an existential threat to the Palestinians of Gaza and beyond.

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<sup>90</sup> See PALESTINE LEGAL, REVERBERATIONS OF OCTOBER 7: MOBILIZATION AGAINST GENOCIDE UNDETERRED BY PEAK ANTI-PALESTINIAN REPRESSION 3-8 (2024), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/664fbc07860df7037ba81300/1716501546613/Pal+Legal+Report+Reverberations+of+Oct+7th>; Palestine Legal, *Palestine Legal Warns Against Escalating Efforts to Weaponize Terror Laws and Suppress Advocacy for Palestinian Rights* (May 28, 2024), <https://palestinelegal.org/news/2024/5/25/palestine-legal-warns-against-escalating-efforts-to-weaponize-terror-laws-and-suppress-advocacy-for-palestinian-rights>.

<sup>91</sup> Partick Wintour, *Israel Was Told ‘You Are Not Alone’—But Year of War Has Left It Isolated*, *Guardian* (Oct. 4, 2024), <https://www.theguardian.com/world/ng-interactive/2024/oct/04/israel-told-not-alone-but-year-war-isolated>.