THE INDIA FORUM
A JOURNAL-MAGAZINE ON CONTEMPORARY ISSUES

April 23, 2025

What Can We Expect of International Law?

By: Raag Yadava

International law, rather than dictate state actions, persuades states to develop publicly defensible legal and moral positions, and in the process, generates accountability.

The international order is as precarious today as it has been since the Second World War. Israel's brutal prosecution of the war in Gaza, Russian aggression in Ukraine, escalating violence in the Midde East, naked threats of American expansionism and economic coercion by the Trump administration, to name a few instances, call into question the relevance of international law in the global governance architecture. At the same time, the rhetoric of international law is today increasingly deployed by state and non-state actors to criticise offending states coupled with legal action to bring them to justice.

The prevailing global uncertainty has prompted many to raise questions about the future of international law. Some, like Michael Clarke and Gautam Chikermane, believe it to be "dead." Others take a more sanguine view of the resilience of international legal institutions. The current climate has also prompted the United Nations General Assembly to adopt its Pact for the Future in September 2024, calling for a "recommitment to international cooperation based on respect for international law." So, what role can international law play in global affairs? And how can we square simultaneous complaints of the redundancy of international law with the growing use of its rhetoric?

> What international law ensures at a minimum is that states cannot nakedly assert their power, absent justification in the language of law. Rather, they are required to (and usually do) advance interpretations of rules to legitimise their conduct.

This debate is of an old vintage. On the one hand, realists, like Jack Goldsmith and Eric Posner, have long considered international law as little more than an instrument to further national self-interest, where the behaviour of nation-states is determined by realpolitik concerns rather than the disinterested application of legal norms. On the other, idealists like Mehrdad Payandeh and Kal Raustiala have defended the normative power of international legal rules as moral constraints on state behaviour independent of calculations of state interest. What, then, can we realistically expect of the international legal regime?

I suggest a via media, adapted from the Finnish diplomat Martti Koskenniemi's influential works *The Gentle Civilizer of Nations* and *From Apology to Utopia*: international law is more accurately understood as a 'gentle rationaliser' of nations. In this view, international law embodies the ideals of universal civility, peace and harmony among states. Yet the way it furthers them is not by dictating legal rules to states as a super-sovereign authority but gently by the power of language and the mechanism of horizontal enforcement.

Realism and Idealism

The uneasy dynamic between the realist emphasis on state power and the idealist concern with legal morality is the result of a fundamental paradox in international law: that absent a 'super-sovereign' authority that can legislate and enforce rules in relation to nation-states, sovereign nation-states are simultaneously the subjects, authors, and enforcers of international law.

The United Nations is a good example of this paradox. General Assembly resolutions under Articles 10 and 11 of the UN Charter in which all member states vote are only recommendatory and not binding. The power of the Security Council under Chapter VII of the charter to enforce compliance with legal norms is subject to a politically motivated veto from the permanent members. The jurisdiction of the International Court of Justice (ICJ) under Article 40 of its statute to resolve disputes is paradoxically subject to the consent of the warring parties themselves.

For some realists, like John Austin and TE Holland, this paradox means that international legal norms are more akin to optional moral dictates than a system of the rule of law. States may choose to ignore them if they are inconvenient to their political calculi. Yet, for idealists, like Louis Henkin and Mehrdad Payandeh, evidence indicates that the absence of an overarching legal authority has not diminished the value and rise of international law. UN member states have readily agreed to binding treaties and customary laws in "more areas than ever before" since 1950 and of all rulings made by the ICJ from 1986 to 2014, 82% have been complied with.

Neither realists nor idealists capture the uniqueness of international law. They either expect too little or demand too much of it. The problem with both approaches is that they measure international law against the touchstone of domestic legal systems. The resulting search for a global legislature that can make rules (the General Assembly), an international executive that can enforce them (the Security Council) and a binding judicial system that can resolve disputes (the ICJ) leads both camps to opposite conclusions. Realists see it as hopelessly naïve, thus relegating international law to the status of disguised politics, and idealists see it as an achievable or partly achieved goal, elevating international law to moral heights.

International Law as lingua franca

States are bound by international law only by their consent, either by ratifying treaties or by accepting as binding customary rules of international law. Yet, they cannot escape international law: as a consequence of globalisation, states are required per force to enter into legal relations with each other to conduct their political, economic and cultural dealings. We thus currently stand at over 45,000 bilateral and 8,000 multilateral treaties since the Second World War and a vast catalogue of customary rules.

Over time, this growing international exchange has generated a rich collective legal grammar, a lingua franca, within which states are required to engage with others. This means, as Koskiniemmi argues, that "every aspect of the international world is […] already 'legalized', that is, amenable for description and analysis by reference to legal concepts and categories." There is, in other words, no space that is 'outside-of-law' and the "question is never whether or not to go by law but by which law or whose law."

> The via media of international law as a gentle rationaliser offers a grounded and sensitive reading of international law and suggests what we may reasonably expect of it – neither apology nor utopia, but a language of rational argumentation and justification.

International law thus reflects the ubiquitous and compulsory language of international relations: states cannot ignore international law and have to reason their political positions within and through its language. Practically speaking, after "every political decision-maker", Koskiniemmi notes, "there comes a legal advisor, an expert in the language" of international law.

What is unique about this language of international law is that it requires states to engage in an argumentative practice that " depoliticises" international relations. States are induced to reason out their conduct in logical and universal terms that can be endorsed publicly, thereby generating accountability, cohesion and shared norms of justification. What matters here is the argumentative and justificatory process by which states engage and interact with each other. In other words, the structure of legal argumentation is itself the norm.

Realists and idealists tend to see international law as a set of pre-determined legal rules issued by an independent authority that can be applied to state action, akin to how individuals are bound by rules in domestic legal systems. By contrast, this alternate approach proposes a framework that looks to international law as the language and process by which states justify their conduct in terms of mutually endorsed rules. In doing so, it responds to the fact that sovereign states are not answerable to any centralized legal authority but are required, as a matter of practical necessity, to speak the language of international law (to at least be seen) as responsible members of the community of states.

This language, like all languages that promise liberty and equality, does not guarantee moral or lawful conduct. Rather, it opens up the space to both challenge and support hegemony and the inequality of power apparent in international relations. For example, the same language of international humanitarian law that the UN General Assembly, UNICEF, UNHCR, WHO and various states used to criticize Israel for the disproportionality of its military offensive and its restriction of humanitarian assistance in Gaza was used by Israel to justify its war under Article 51 of the UN Charter that permits 'collective self-defence' against an 'armed attack'.

What international law thus ensures at a minimum is that states cannot nakedly assert their power, absent justification in the language of law. Rather, as Chayes and Chayes argue, they are required to (and usually do) advance interpretations of rules to legitimise their conduct. It is certainly true, as the Israeli example shows, that states may proffer crafty or disingenuous legal justifications that they sometimes get away with. States may elide the moral substance or spirit of legal norms, yet the point is that the *process* – the *form* of legal argumentation mandated by international law – forces reflection and moral reckoning In this way, international law gently rationalises national self-interest without dictating terms.

As Duncan Kennedy's influential work suggests, in the absence of centralised authorities, this process is – for better or for worse – the only way in which law and progress can and historically do emerge from within the community of states.

Horizontal Enforcement

What if states ignore legal norms and the requirement to justify their conduct? Here too we must depart from the model in domestic legal systems.

There are indeed effects of non-compliance, contrary to the realist position, though they do not take the form of clearly defined judicial rulings enforceable by an executive, contrary to the idealist position. Practically speaking, non-compliance comes in the form of moral or reputational, economic and retaliatory harms that come when a state is seen to be securing short-term interests through a naked and unjustified illegality that dispenses with the formal requirement to explain its actions in the moral language of law. These are *horizontal or collective* costs imposed by other state and non-state actors in their bilateral relationships with the offending state, as opposed to *vertical or institutional* costs imposed by a centralised judicial or executive authority, like in domestic legal systems, that are implausible given the structure of international law.

This "de-emphasis of formal enforcement measures," as Chayes and Chayes rightly note, "shifts attention to sources of noncompliance that … [are] managed by routine international political processes." The costs of transacting international relations rise with each act of non-compliance, particularly in today's world where economic and cultural circumstances mean that states are mutually interdependent. If reciprocity is the currency of international relations, non-compliance cannot run too high a credit account. As Anne van Aaken and Betül Simsek argue, states as rational actors are aware of these horizontal costs and, therefore, the motivations for compliance are not exogenous but in the state's own interest.

The case of Gaza

It is helpful to evaluate this position with a short case study. Let us rewind the clock to 26 January 2024, when the ICJ was asked to rule on South Africa's request for provisional measures against Israel – including an immediate ceasefire – under the 1948 Genocide Convention.

At the time, 30,000 Palestinians had been killed and 1.8 million displaced amidst the pulverisation of Gaza's civilian infrastructure. The political institutions of the UN had failed. The General Assembly voted 121-14 in favour of a ceasefire, which Israel simply ignored. Similarly, the American veto on the Security Council had blocked a ceasefire. The council's authority and responsibility to maintain peace was gridlocked in the mire of ideologically-driven great-power politics. At this point, the norms of international humanitarian law seemed irrelevant, echoing realist concerns. The scene of the battle shifted to the ICJ in the hope that the judicial body may speak reason to force, echoing idealist hopes.

> The paradox from which international law is born means that it is necessarily bound up in the uneasy dynamic between legal authority and state sovereignty.

The ICJ's order ruled that there was *prima facie* a plausible case for genocide. Yet, operatively, the court stopped short of ordering a ceasefire. It reiterated in general terms Israel's duty under the Genocide Convention – which Israel claimed to be following in any case – to abjure from the killing and injuring of civilians and to enable the provision of humanitarian assistance. Tellingly, the court trod a fine line, rendering an order that was diplomatically viable yet sensitive to the humanitarian catastrophe and a dehumanising political rhetoric.

The order was ambiguous in its wording and markedly muted when compared to its ruling on Myanmar's treatment of the Rohingyas – where the political calculus was not weighed down by the US. It allowed all sides to claim victory. South Africa argued that it implied a ceasefire; Israel and the United States argued that it affirmed the former's right to self-defence; and the Arab countries welcomed the humanitarian note.

It is difficult to explain the ICJ decision either as an apology for power or as a vindication of the rule of law. The order was certainly operationally weak – it neither ordered a ceasefire to protect Palestinian lives from the Israeli onslaught nor imposed any specific obligations on Israel to desist from bombing civilian infrastructure despite clear evidence of targeting and disproportionate use of force.

From a realist perspective, the order exemplifies the continuing irrelevance of international law to Israeli conduct in the Occupied Territories. The court's 2002 ruling calling the wall running through the West Bank illegal had earlier also been flatly ignored. From the idealist perspective, the order was symbolically potent. For a people that carry the imprint of the Holocaust in their collective memory, a finding that its actions and stated intent were plausibly genocidal carried unmistakeable moral force. What was politically impossible in the Security Council was made legally plausible by the ICJ.

A similar dynamic can be seen in the ICJ's second and lesser-known Advisory Opinion on the Israel–Palestine question issued on 19 July 2024. The ICJ ruled that all UN member states were obligated not to recognise Israeli control of territory or civic institutions outside 1967 lines as legitimate (thus rendering the Trump administration's decision to open an embassy in Jerusalem illegal), and moreover, "to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel."

These were hard-hitting legal findings that took the implications of Israeli action to their logical conclusion – non-recognition of the Zionist claim to 'Greater Israel' and disinvestment from Israel's commercial activity in the Occupied Territories. Yet, the realist concern remained because, like in its earlier order, the ICJ recognised its own limits. The "precise modalities" to implement its judgment were "a matter to be dealt with by the General Assembly", which has no binding power, "as well as the Security Council," which is politically near impossible.

The *via media* framework outlined above better explains the value of the ICJ's non-binding rulings. What made these rulings, and the consequent global dialogue they spurred, important was that they forced Israel to develop publicly defensible legal and moral positions. International law forced Israel to justify its actions in the realm of sober fact and reason, away from geopolitical backchannels that speak the language of power and interest. It also gave other states like South Africa a language and an institutional means to oppose the illegitimate use of power and translate the political rhetoric of genocide and apartheid into a legal fact.

In other words, even though the rulings were non-binding, the need for public justification in the language of international humanitarian law was itself the moral good, i.e. the gentle rationaliser.

> As the Israel-Gaza war shows, the absence of a super-sovereign authority means that international law can inform and at times shape and regulate – but not dictate – state behaviour.

Moreover, Israel and its allies have had to bear significant horizontal costs, even as they escape vertical costs. Take reputational harms. The ICJ's ruling led to increased domestic and international pressure on Israel's allies, the United States, Germany, and the United Kingdom, to re-consider arms supplies and be seen as following the letter, if not the spirit, of the ruling. For example, in a case filed by Nicaragua against Germany on 1 March 2024 accusing it of "grave breaches" under the Genocide Convention, Germany based its defence partly on the fact that it had "significant decrease[d]" the supply of military equipment to Israel. Going further, a Dutch court blocked the supply of equipment to Israel for the F35 fighter jets used to bomb Gaza.

Israel too has had to conduct a massive media operation to salvage its international reputation, given regional isolation and global cultural disillusionment among the youth, reflected in a steep drop in global soft power rankings. Similarly, it has faced significant economic and retaliatory harms, with decreased trade with Turkey, Canada, France, Albania, Malaysia, and Taiwan and disinvestment by large private banks and investors.

This is not to suggest that horizontal enforcement mechanisms are watertight. As the Israeli example shows, states often assert their sovereignty heedless of cost when it comes to intensely felt vital state interests. But the mechanisms exist and are significant.

Fragility of international law

What these rulings show us is that the ICJ is a fragile institution, much like international law itself. Its jurisdiction is found on the prior consent of the parties.Its findings are binding yet not enforceable. It has no international sheriff to police violators, yet its rulings have moral purchase and exert pressure on states to justify their conduct on the basis of legal norms.

Even as Israel and its allies were not required to cease military operations, they were forced to publicly justify the use of force, to immediately increase humanitarian assistance and to reevaluate, at least temporarily, their conduct in the face of renewed moral and economic pressure for a ceasefire from state and non-state actors, bolstered by the ICJ ruling.

This reading offers a more nuanced understanding of international law that avoids both naïve utopianism, where states are accountable for objectively determined breaches of international law, and cynical apologism, where international law is a façade for the powerful to rule by military or ideological force.

To sum up, what makes international law unique is the dual emphasis on rational justification and horizontal enforcement. As the Israel-Gaza war shows, the absence of a super-sovereign authority means that international law can *inform* and at times *shape* and *regulate* – but not *dictate* – state behaviour.

The paradox from which international law is born means that it is necessarily bound up in the uneasy dynamic between legal authority and state sovereignty. The *via media* of international law as a gentle rationaliser offers a grounded and sensitive reading of international law and suggests what we may reasonably expect of it – neither apology nor utopia, but a language of rational argumentation and justification.

Raag Yadava is an academic and lawyer.