

But the fear is that something more ominous is involved in the insistence that parties negotiate rather than waste their time in legal quarrels. To negotiate outside the law is to put everything on the table, in an act of pure political creation, as if the law could only emerge from a pre-legal encounter at arms' length between parties. On the one hand, this appeals to the imagined virtue of the *tabula rasa* as part of a realist tradition that emphasises the world-creating nature of historical compromises. On the other hand, it also represents a dramatic vote of no-confidence in the resolute power of law that is quite startling—certainly by the standard of bromides about an international rule-based order.

I wonder if those who advocate for pure negotiation realise how having everything in the open may also undermine their own (necessarily, in part, legal) standpoint. But more problematically, I wonder what lies in the radical prioritisation of negotiation over law, if not simply the raw articulation of transactional power. That, of course, may be precisely the point.

There is a certain *déjà vu* here. What this is reminiscent of is the decades during which Haiti had to 'negotiate itself into existence' in the nineteenth century, despite having the international law of state creation and sovereignty so apparently on its side.² Western states essentially blackmailed the fragile new republic into concluding a variety of treaties and making strong concessions including, infamously, paying compensation for having expropriated slave owners. Haitian sovereignty has never fully recovered since.

It is one thing to think that international law does not have all the answers. It is quite another to ask a party to a conflict to forfeit all its legal claims as a condition of being heard: to ask it to partake in its own juridical erasure, in fact, precisely in the moment it is claiming sovereignty.

FORUM SHOPPING, FEMINISM, AND FIGHTS OVER DEFINING A CONFLICT

Karen Engle and Fionnuala Ní Aoláin

Israel's ongoing military campaign in Gaza since 7 October 2023 has led many critics—state and non-state actors, international lawyers, and activists—to rely upon and support international law. The critics are not, however, the only ones to use international law; international law plays a constitutive role on all sides of the conflict. This essay takes seriously the ways that Israel and its supporters also deploy international law, not only the hard law of the UN Charter providing the US with Security Council veto power but soft law as well. This reliance on soft law may be surprising in the universe of armed conflict and use of force where hard law norms tend to dominate. Yet, as part of its effort to justify this war domestically and internationally, Israel has used soft law and institutions to achieve UN 'findings' that Hamas engaged in systematic and widespread sexual violence on 7 October. Indeed, aided by many self-proclaimed feminists in Israel and the US, it has engaged in forum shopping to select the gender-focused UN entity it believes would most likely produce the outcome it seeks.

Forum shopping plays a key role in shaping the conflict narrative, including its impact on women. States and feminists alike have moved between hard actors and hard norms (Security Council, ICC, and customary international law) and soft actors and soft norms (UN Women, the Office of the Special Representative of the Secretary General (SRSG) on Sexual Violence in Armed Conflict, and the Women, Peace and Security Agenda). Because

² See Liliana Obregón, 'Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt' (2018) 31 *Leiden Journal of International Law* 597.

institutional authority is intimately connected with competing narratives of the conflict, women's suffering has become for many a proxy not only for the war itself but for the competences and legitimacy of different international institutional bodies. And feminism has become a testing ground for the legitimacy and affirmation of Israel's military action (and vice versa).

UN Women became the first soft institutional actor to consider the gendered effects of the conflict when, a mere two weeks into Israel's attack on Gaza, it issued a report finding that 'the eruption of violence and destruction has already resulted in close to 493,000 women and girls being displaced from their homes in Gaza' and 'a surge of widows'. UN Women called for an 'immediate humanitarian ceasefire', 'sustained humanitarian access', and funding to support local women's organisations.³ This response was consistent with UN Women's long-standing practices of speaking on 'bread and butter' issues, and stayed in its wheelhouse of programming and practice where it has a field presence.

A number of self-identified feminists in Israel and the US soon began criticising UN Women for not condemning sexual violence committed by Hamas on 7 October. Toward the end of the first ceasefire in late November 2023, at the very moment that Israel needed to rally support for its continued military operations, pressure intensified—including through a letter signed by 80 members of the US Congress⁴—for the organisation to make a specific statement of condemnation. Even though UN Women had never before condemned or been expressly called upon to condemn sexual or gender-based violence in any conflict in this way, it relented.⁵ In a 1 December statement, it 'unequivocally condemn[ed] the brutal attacks by Hamas on Israel on 7 October', noting alarm at the 'numerous accounts of gender-based atrocities and sexual violence during those attacks'.⁶

This strategic targeting of UN Women has had at least two effects. First, questioning the organisation's (feminist) legitimacy diverted attention away from its calls for a humanitarian response including a ceasefire, mirroring the broader delegitimisation of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) whose primary function was to meet the population's vast conflict-affected humanitarian need. The attack on these institutions that prioritise hard humanitarian and equality norms aimed not only to limit their influence and effectiveness but also arguably to drown out the norms they champion.

Second, and related, in its condemnation of sexual violence, UN Women—and, later, even critical feminist scholars who opposed those 'weaponizing the issue of rape'⁷—centred international criminal law as the ultimate conflict arbiter. UN Women's 1 December statement called 'for all accounts of gender-based violence to be duly investigated and prosecuted', throwing its weight behind the 'rigorous investigations' of the UN Commission of Inquiry on the Occupied Palestinian Territory (OPT) established by the UN Human Rights Council in 2021, which had called for submissions on gender-based crimes committed by any armed actors in the conflict since 7 October.⁸

³ UN Women, 'UN Women Rapid Assessment and Humanitarian Response in the Occupied Palestinian Territory' (20 October 2023) <<https://www.un.org/unispal/wp-content/uploads/2023/10/un-women-rapid-assessment-and-humanitarian-response-in-the-occupied-palestinian-territory-en.pdf>>.

⁴ Letter to Sima Bahous (29 November 2023) <<https://cherfilus-mccormick.house.gov/sites/evo-subsites/cherfilus-mccormick.house.gov/files/evo-media-document/final-letter-calling-on-un-women-to-condemn-hamas-sexual-violence-against-israeli-women-1.pdf>>.

⁵ Notably, recent reports of widespread sexual violence in other conflicts, including in Sudan and Syria, have not led to similar calls.

⁶ UN Women, 'UN Women statement on the situation in Israel and Gaza' (1 December 2023) <<https://www.unwomen.org/en/news-stories/statement/2023/12/un-women-statement-on-the-situation-in-israel-and-gaza>>.

⁷ 'Open Letter to the Israeli and U.S. Governments and Others Weaponizing the Issue of Rape' (Portside, 29 February 2024) <<https://portside.org/2024-02-29/open-letter-israeli-and-us-governments-and-others-weaponizing-issue-rape>>.

⁸ OHCHR, 'Call for submissions on gender-based crimes since 7 October 2023' <<https://www.ohchr.org/en/hr-bodies/hrc/co-israel/call-submissions-gender-based-crimes-7-October-2023>>.

Though commissions of inquiry are sometimes created in lieu of criminal or other hard law responses to international conflicts or crises, this one had international criminal law in its sights early on. And as early as 10 October, the Commission issued a statement indicating that it would investigate crimes committed by both sides in the conflict, ‘intent on ensuring legal accountability, including individual criminal and command responsibility’, and that it would share information with the ICC.⁹

UN Women directed attention towards the Commission partly to respond to another UN entity that was elbowing into this charged conflict space: the office of the SRSG on Sexual Violence in Armed Conflict, led by Pramila Patten. Recognising stark political and institutional realities but also making clear in UN-speak that Patten had no investigative authority on her own, the December UN Women statement ‘welcomed’ that Patten would ‘proactively share UN-sourced and verified information on incidents, patterns, and trends of conflict-related sexual violence to aid all investigations’.

The forum shopping objectives of Israel, the US, and their (feminist) supporters became clear as Patten negotiated a visit to Israel ‘to gather information on sexual violence reportedly committed in the context of the attacks of 7 October 2023 and their aftermath’.¹⁰ Given her mandate limits, Patten’s institutional stance was neither ‘fish nor fowl’. Though her mission’s final report detailed a number of ‘findings’ of sexual violence by Hamas¹¹ (though, notably, not of the widespread and systematic accounts that had by then been recounted and contested in the media¹²), her Security Council briefing disavowed that the visit was investigative in nature.¹³ Nevertheless, it was considered by several Security Council members to be, in the words of the US representative, ‘a methodical and sobering report, which confirms what we have known for months’.¹⁴

This sequence of events demonstrates how institutional forum shopping within the UN might be used not only to find a more favourable forum to ‘adjudicate’ one’s claim but to achieve a broader desired political result. Here, it arguably delegitimised one institution (UN Women) and its humanitarian aims while elevating another (the SRSG) to support ongoing Israeli military action. In parallel, in attempting to make clear the limited mandate of the SRSG as well as Israel’s refusal to allow the Commission of Inquiry to do its work, UN Women and its feminist supporters have perhaps unwittingly deferred resolution of the conflict to an eventual arbiter of the international humanitarian law (IHL) violations committed by each side.

Among the lessons we take from our reflection on this process is that during fraught conflict, we should pay attention to which institutions are being lauded and which are being marginalised, as well as which norms are ascendent and which are in abeyance. These tell us

⁹ OHCHR, ‘Commission of Inquiry collecting evidence of war crimes committed by all sides in Israel and Occupied Palestinian Territories since 7 October 2023’ (10 October 2023) <<https://www.ohchr.org/en/press-releases/2023/10/commission-inquiry-collecting-evidence-war-crimes-committed-all-sides-israel>>.

¹⁰ Office of the SRSG-SVC, ‘UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten, to visit Israel and the occupied West Bank’ (24 January 2024) <<https://www.un.org/sexualviolenceinconflict/press-release/un-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-to-visit-israel-and-the-occupied-west-bank/>>.

¹¹ Office of the SRSG-SVC, ‘Mission report: Official visit of the Office of the SRSG-SVC to Israel and the occupied West Bank 29 January – 14 February 2024’ (4 March 2024) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/03/report/mission-report-official-visit-of-the-office-of-the-srsg-svc-to-israel-and-the-occupied-west-bank-29-january-14-february-2024/20240304-Israel-oWB-CRSV-report.pdf>>.

¹² On the controversy regarding sexual violence and 7 October, see Azadeh Moaveni, ‘What They Did to Our Women’ *London Review of Books* (9 May 2024) <<https://www.lrb.co.uk/the-paper/v46/n09/azadeh-moaveni/what-they-did-to-our-women>>.

¹³ Office of the SRSG-SVC, ‘Briefing by SRSG-SVC, Ms. Pramila Patten to the Security Council – Findings of visit to Israel and the occupied West Bank’ (11 March 2024) <<https://www.un.org/sexualviolenceinconflict/press-release/briefing-by-srsg-svc-ms-pramila-patten-to-the-security-council-findings-of-visit-to-israel-and-the-occupied-west-bank-11-march-2024/>>

¹⁴ UNSC Verbatim Record (11 March 2024) UN Doc S/PV.9572, 11.

something fundamental about the legitimacy and regulation of the conflict itself, as well as the ways in which legitimacy and regulation both affect and are affected by the presumed status and integrity of feminist responses. Thus, the stakes for both feminism and the conflict are high when the feminist shield against sexual violence is selectively turned into a sword that yields grave gendered and other forms of harm to a broad range of civilians.

HYPOCRISY, RACE AND INTERNATIONAL LAW

Robert Knox

The language of hypocrisy has abounded in response to the Israeli state's assault on Gaza.

The West. The 'rules-based order'. International law. International institutions. The responses of all of these to the Israeli state's brutal actions have been found wanting in comparison to both their legal commitments, and their response to the Russian invasion of Ukraine.

And what explains this hypocrisy? Racism. Whenever international law is called upon to protect those who are not white, or to call to account those who *are* white, it fails. Gaza has unveiled this racist hypocrisy.

At first sight this is a powerful argument.

However, there are reasons to resist this temptation.¹⁵ In this story, the problem with international law is its *inconsistent application*. Were international law to be applied fairly, were its commitment to equality maintained, there would be no hypocrisy. Ultimately, such an account is a *liberal* one, in which international law is—at worst—a neutral force that is instrumentalised for racist ends. This depiction of international law as innocent, if inept, does not capture the relationship between racism and international law and, accordingly, effaces international law's structural *complicity* in Israel's current onslaught. Instead we need to understand international law's role in buttressing racialised violence against the Palestinians, even when applied 'consistently'.

Nowhere is this clearer than in the case of IHL. The Israeli state, and its Western backers, proclaim that Hamas violates the law of war, even as hospitals and schools are levelled and civilians are killed *en masse* by the Israel Defense Forces (IDF). Surely this is an example of international legal hypocrisy?

In actuality, however, this is not a simple example of unequal application. As Chris af Jochnick and Roger Normand noted 30 years ago, IHL developed in the context of the *legitimation* of imperial violence via the rubric of 'military necessity'.¹⁶ This discourse of necessity was one linked to *technology*, whereby 'obsolete' technology was understood as wasteful in relation to military necessity, as compared to advanced, precision weapons. In the context of unequal imperial violence, this distinction entrenched the power of technologically and economically advanced states as against 'primitive' racialised subjects.

This is most evident in the context of the principle of 'distinction', which requires states to distinguish between civilians and combatants. At face value, this is noble. However, 'primitive' technologies, such as unguided rockets, will necessarily be unable to make these distinctions and thus represent 'indiscriminate attacks'. By contrast, far more destructive 'precision' weaponry—smart bombs, drone strikes etc.—will not automatically fall foul of the principle of distinction. Instead, what must be asked is whether or not the violence inflicted is *proportionate*.

¹⁵ Robert Knox, 'Imperialism, Hypocrisy and the Politics of International Law' (2022) 3 *TWAIL Review* 25.

¹⁶ Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.