

# By failing to stop the Gaza genocide, the International Court of Justice (ICJ) is working exactly as intended

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**The international legal order was built to administer colonial violence, not to end wars — and that poses serious questions for the Palestinian struggle.**

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*Israeli soldiers operating in Rafah, in the southern Gaza Strip, July 15, 2024. (Oren Cohen/Flash90)*

Millions worldwide are appalled by what they see as the total failure of the international legal order to prevent Israel's genocide in Gaza. Despite major cases before the [International Court of Justice](#) (ICJ) and the [International Criminal Court](#) (ICC), there is a growing sense of frustration that the law has [not done its job](#). While understandable, this outrage is based on a fundamental misconception that international law's objective is to eradicate violence; that may be what the UN Charter promises, but it is not what international law is expected to do nor what it actually does.

The shock and anger at these seemingly futile legal developments, as the philosopher Walter Benjamin would say about our concept of history, is largely the result of an untenable view of the international legal order itself. This order is not failing in Gaza, but is in fact yielding the very fruits it was meant to produce. The genocide of Palestinians has not stopped because all things are working exactly as intended.

Far from ending war, the international legal system has been constructed and functions to administer it. The system does not simply do this in a deterministic or blind way; the concept of administration of violence refers to the dynamics by which imperial and colonial parameters of what is legitimate and illegitimate violence are introduced into the law: what kind of violence can be supported or must be rejected or criminalized, and who can or cannot defend themselves. And at the same time, the law silences the very violence that it inflicts.

The ICJ's decisions regarding [South Africa's case of genocide](#) against Israel are a prime example of this. It was extremely surprising, sometimes even frustrating, to hear the generally uncritical welcome given to the first ICJ ruling on Jan. 26, granting provisional measures. Many people argued that, even though the decision did not order a ceasefire, we needed to use its positive dimensions to advance advocacy for Palestine — and they are absolutely right in that.

For instance, the decision triggered third states' responsibility to prevent genocide, and any doubts invoked before are no longer reasonable after Jan. 26. It also allows bringing to justice those countries complicit in genocide, and for a wide range of other legal actions, in domestic and

international jurisdictions, against public officials and individuals who are complicit or otherwise participate in war crimes in Gaza; these avenues are currently being explored and pursued in many countries including the [United States](#), the [United Kingdom](#), and [Canada](#).

*A man looks at television screens broadcasting a court hearing from the International Court of Justice in the lawsuit of South Africa against Israel, at a shop in Jerusalem, January 26, 2024. (Chaim Goldberg/Flash90)*

The positive implications of the ICJ decisions should thus certainly be put at the service of Palestinian rights advocacy and orient our actions and strategies when pertinent. But this should be done without fooling ourselves or turning a blind eye to other extremely deleterious effects of the decisions, including making a solid critique of what those legal processes do to our political claims.

In fact, the course of events in Gaza makes this critique urgent: the genocide has continued unfolding, only now obfuscated and rationalized in legal language and technical debates about whether Israel is respecting the court's decisions, whether Israel has a right to self-defense, and what this all means for third states' responsibility under international law.

### **Legally flawed and politically obscene**

We shouldn't spare the ICJ from the critiques that its decisions legitimately deserve. After all, in its first ruling, the court agreed that Israeli actions in Gaza "plausibly" constitute genocide and that the situation was so horrific that it justified provisional measures. However, and despite these incontrovertible facts, the court did not order the one measure that could stop the genocide: an immediate and permanent ceasefire.

The court only ordered Israel to "implement all measures in its power to avoid the commission of acts of genocide, to allow humanitarian aid in, and to report on all measures taken within 30 days." That decision left us trapped in the absurd position of having to sit with the perpetrators of genocide and discuss for months whether they are doing everything in their power to avoid what they have publicly declared they intended to do, and are actually doing.

In this respect, the Jan. 26 decision was legally flawed and politically obscene. The court could and should have ordered a ceasefire, but it didn't. The concrete — even if unwanted — effects of this decision were to facilitate the continuation of the genocide, now obfuscated by bureaucratic and legalistic debates.

On Feb. 12, South Africa requested that the ICJ order a halt to Israel's military operation in Rafah; the court did not consider it necessary to order new measures. On Feb. 26, Israel submitted its report on all measures taken to implement the court's first order. On March 11, South Africa responded to the Israeli report. On March 6, South Africa submitted a new request asking the court, for the third time, for further provisional measures, including the suspension of military operations. On March 28, the court, recognizing the extreme gravity of the conditions in Gaza, ordered new provisional measures but not the suspension of military operations.

*View of an UNRWA health center that was destroyed during an Israeli military operation in Rafah, July 15, 2024. (Oren Cohen/Flash90)*

In the time since that first ICJ ruling, more than 12,000 Palestinians have been savagely murdered and many thousands more injured. We have continued to witness the systematic destruction of all infrastructure in Gaza required for life: hospitals have been [repeatedly besieged and destroyed](#), their patients killed and their medical staff kidnapped; dozens have starved to death as a result of an

[intentionally calculated famine](#); and lifeless children are still being pulled from the rubble every day as a result of unceasing Israeli attacks on [homes](#), [schools](#), and [refugee camps](#).

Why, then, did the court still refuse to order a ceasefire? Among many explanations offered, a key reason has been overlooked: that the ICJ itself is driven by the same power dynamics as the rest of the international legal system and that, wittingly or unwittingly, it participates in the administration and legitimization of imperial and colonial violence.

Why are we not making this critique? Because we should act strategically and mobilize the limited decision in the advancement of Palestinian rights? Fine, agreed. We should do so, but without fooling ourselves and, while integrating the critiques into our strategies, making the court accountable for the concrete effects of its decisions. In this light, it is worth responding to some of the common reactions to the ICJ's ruling.

### **'A ceasefire order wasn't realistic, and Israel would've disobeyed it anyway'**

Many observers have said that the court's refusal to order a ceasefire was expected; I agree, precisely for the reasons mentioned above. Others argued that even if the court ordered a ceasefire, Israel, backed by its Western allies, would simply ignore it. But Israel's blatant disregard for international law does not make such an order any less necessary, nor could it possibly free the court from its legal obligation, as an organ of the UN, to do everything in its power to prevent genocide irrespective of Israel's reaction; courts are hardly shy in ordering a remedy for fear that the culprit will not abide by it.

Others claimed that a ceasefire was not what the ICJ proceedings were about. But if these proceedings were not about trying to obtain a cessation of hostilities to prevent a genocide, then what could they possibly be about? Creating an interesting example of jurisprudence for scholars and legal practitioners to debate about? Changing the international community's opinion?

*Displaced Palestinians living in destroyed homes, in the city of Rafah, southern Gaza Strip, January 31, 2024. (Abed Rahim Khatib/Flash90)*

Palestinians are beyond those things; they have painfully learned that in their struggle, among the community of states, they are virtually alone. What Palestinians wanted was simply not to be victims of an [premeditated](#) and televised genocide, and this could only be averted by a ceasefire.

### **'Ceasefires cannot be unilateral'**

Another argument is that ceasefires ordered by the court need to be reciprocal, bilateral, or multilateral, but cannot be unilateral. However, there is no legal provision in international law that supports this thesis. Indeed, Article 41 of the ICJ's Statute indicates that "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

This plain wording undoubtedly includes unilateral ceasefire orders: in its decision on the Russia/Ukraine genocide case on March 16, 2022, the ICJ resorted to Article 41 to order a unilateral Russian ceasefire, with no mention of Ukraine in the provision. Accordingly, there is no question that the court can do the same with Israel.

### **'The decision was consistent with the court's precedents'**

Others affirmed that the court's ruling was consistent with its previous decisions in cases of genocide. The truth is actually more complex than that and seems to add insult to injury: the court

did not order a ceasefire in the proceedings for provisional measures regarding the Bosnia/Serbia, Gambia/Myanmar, and South Africa/Israel cases of genocide, but it certainly did so in the case of Russia/Ukraine. What the court's decision is consistent with, however, is the treatment given to genocides targeting non-white, non-Christian nations, while departing from its refrain on an immediate ceasefire when it came to the targeting of a white, Christian population.

Some would counter that the circumstances in the Russia/Ukraine case were different because the conflict began with a Russian act of aggression and, therefore, the court ordering a Russian ceasefire was reasonable. It might well be the case, but this is also the case in Gaza.

Notwithstanding the Hamas-led October 7 attack, according to international law and the ICJ's own interpretation of it, Israel's war on Gaza should be regarded as constituting an illegal act of aggression. In its 2004 consultative opinion on the legality of Israel's separation wall, the ICJ declared that while Israel can protect its citizens in accordance with international law, it does not have the right to self-defense invoking Article 51 of the UN Charter from attacks coming from a territory that Israel occupies.

*Israeli soldiers operating in Rafah, in the southern Gaza Strip, July 15, 2024. (Oren Cohen/Flash90)*

Why did the ICJ decide this in 2004? Because the court understands that, under international law, occupation itself constitutes an act of aggression, and that what it really triggers is the right of the occupied people to resist the occupying power. Only military actions in self-defense are legal under international law and, therefore, if the months-long Israeli attack on Gaza can't be justified as such, then it is an illegal use of force. The court did not have a legal reason, on these bases, to decide differently than in the Russia/Ukraine case.

### **'The measures indicated by the court amount to a ceasefire'**

Finally, some people also argued that the Jan. 26 provisional measures in the Gaza case effectively amounted to a ceasefire, because the only way in which Israel could properly respect the order (not killing or injuring Palestinians) was by a total cessation of military operations. At first glance, it is a smart point to make. However, as well intentioned it might be, it does not hold either.

Courts do not leave their remedies open to the interpretation of the parties: if the court intended its decision to be interpreted as ordering a ceasefire, it would have explicitly said so, as South Africa demanded, and in the same way that the court did in the case of Russia/Ukraine.

### **Sacrificing law and justice**

In light of all this, the ICJ did not have any legal or factual reason not to order a ceasefire. It simply chose not to do so because, within the parameters of administering imperial and colonial violence, the court's legitimacy and authority would be seriously threatened among Western powers.

As the ICC prosecutor Karim Khan recounted to CNN, many Western governments clearly believe that international courts were created only for "Africans and thugs like Putin." In its fear of being delegitimized or even sanctioned — as happened to the ICC after suggesting it would open investigations into U.S. war crimes in Afghanistan, and now after Khan announced he was seeking arrest warrants against Israeli officials — the ICJ simply lived up to the imperial expectations.



*ICC Prosecutor Karim Khan during his visit to Kiev, Ukraine, March 2023. (ICC-CPI)*

In addition, we witnessed two extraordinary further examples of, on the one hand, the court's fears of delegitimation, sanctions, and threats of other retaliatory measures by U.S. and Israeli officials, and on the other hand, the continued participation of the court in the politics of administration of imperial and colonial violence.

First, the former president of the ICJ, Joan Donoghue from the United States, made deceptive declarations in the media in a disgraceful legal pirouette after completing her tenure in February. In its Jan. 26 decision, Donoghue alleged, the court had not found that the claim of genocide is plausible but rather that the Palestinians' right to be protected from genocide was plausible. The statement is so fallacious that it suffices to say that if the Palestinians' right to be protected from acts of genocide is plausible, it can only be so because the court considers it plausible that Israel is committing acts of genocide.

Donoghue is a renowned and experienced jurist, and she perfectly understands that this is the only sensible way of interpreting the decision. Yet, in what would appear to be a desperate attempt to preserve her reputation within the circles of power, and perhaps to protect herself and her family from retaliatory measures, she made an undignified mockery of her profession.

Second, after four successive requests by South Africa for a ceasefire order, on May 24 the ICJ finally ordered Israel to "immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part."

There is much that can be said about this ruling. It confirms that the court always had the power to order a unilateral halt to military operations, but it is also evidence of how, in these proceedings, the court has sacrificed law and justice to abide by the imperatives of the administration of violence in contemporary politics. If the court really wanted to prevent Israel's infliction of those harms, it should have ordered a total halt to military operations since this violence is not only genocidal but also an illegal use of force. In the end, Israel not only ignored the May 24 order, but the order also gave grounds to Israel to continue carrying out genocidal acts in the rest of Gaza.

Within these dominant legal parameters and the general cover-up of the genocide in Gaza by Western countries, the ICJ has aptly and tragically participated in Israel's old game: the constant resort to "strategic interpretations" of legal norms, principles, and concepts to enforce its biopolitical and territorial ambitions through a discourse of rationality. More than intending to simply operate against or outside the law, it is meant to bring imperial and colonial violence and their legitimizing mechanisms into the law.

The point of these critiques should not be misunderstood as advocating for an abandonment of international law and the international legal system. Rather, it is an invitation to continue a necessary and honest debate on the role of law in liberation struggles, to identify its paradoxes, ambiguities, and traps, and to learn how we can counter its pitfalls with a politically sound legal

strategy.

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**P.S.**

• +972 Magazine. July 16, 2024:

<https://www.972mag.com/icj-colonial-violence-gaza/>

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Our team has been devastated by the horrific events of this latest war. The world is reeling from Israel's unprecedented onslaught on Gaza, inflicting mass devastation and death upon besieged Palestinians, as well as the atrocious attack and kidnappings by Hamas in Israel on October 7. Our hearts are with all the people and communities facing this violence.

We are in an extraordinarily dangerous era in Israel-Palestine. The bloodshed has reached extreme levels of brutality and threatens to engulf the entire region. Emboldened settlers in the West Bank, backed by the army, are seizing the opportunity to intensify their attacks on Palestinians. The most far-right government in Israel's history is ramping up its policing of dissent, using the cover of war to silence Palestinian citizens and left-wing Jews who object to its policies.

This escalation has a very clear context, one that +972 has spent the past 14 years covering: Israeli society's growing racism and militarism, entrenched occupation and apartheid, and a normalized siege on Gaza.

We are well positioned to cover this perilous moment - but we need your help to do it. This terrible period will challenge the humanity of all of those working for a better future in this land. Palestinians and Israelis are already organizing and strategizing to put up the fight of their lives.

Can we count on your [support](#)? +972 Magazine is a leading media voice of this movement, a desperately needed platform where Palestinian and Israeli journalists, activists, and thinkers can report on and analyze what is happening, guided by humanism, equality, and justice. Join us.

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