



Academic Paper

The International Court of Justice Between Legal Neutrality and Political Pressure in Operation Al-Aqsa Flood



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Introduction

Accompanying the concept of settlement of dispute is another concept known as the “third party,” which is entrusted with working towards resolving the conflict. The third party can be a state, a group of states, an international or regional organization, a governmental or non-governmental entity, or even an internationally known figure. However, the role played by the third party varies between three types of dispute-resolution processes, as indicated in Article 33 of the United Nations (UN) Charter,² which are:

- ✓ 1. Mediation: The third party “plays a more active part in facilitating communications and negotiations between the parties, and is sometimes permitted or expected to advance informal and nonbinding proposals of his or her own.”
- ✓ 2. Arbitration: The disputing parties refer the dispute to an ad hoc tribunal for binding decision, usually on the basis of international law.
- ✓ 3. Judicial Settlement: “involves the reference of the dispute, by the agreement or consent of the parties, to the International Court of Justice (ICJ) or some other standing and permanent judicial body for binding decision, usually on the basis of international law.” We’ll concentrate on this method to connect it with the Gaza Strip war in 2023/2024, following Operation Al-Aqsa Flood that the Palestinian resistance executed against Israel. It’s worth noting that there are multiple international adjudicatory bodies, but our focus will be on the ICJ.



The Permanent Court of International Justice, founded by the League of Nations in 1921, marked the inception of modern international justice. Operating from 1922 to 1940, it handled 29 cases and issued 27 advisory opinions. Following the resignation of its judges in 1946, the court disbanded, transferring its records to the newly formed UN, which replaced the League of Nations in 1945. The new court commenced hearing international cases in 1947, starting with a dispute between Britain and Albania. With a panel of 15 judges serving nine-year terms, five judges are



replaced every three years (upon completion of their nine-year terms). Elections take place concurrently in the General Assembly and the Security Council, requiring an absolute majority for the winner. Judges may be reelected.³

First: How the Court Works

The court considers two types of cases: legal disputes brought by UN members who have agreed to the court's statute, or advisory opinions on legal questions requested by UN organs and specialized agencies. The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:⁴

- ✓ 1. by entering into a special agreement to submit the dispute to the Court;
- ✓ 2. by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
- ✓ 3. through the reciprocal effect of declarations made by them under the Statute, whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the UN Secretary-General, contain reservations excluding certain categories of dispute.
- ✓ 4. The written pleadings are not made available to the press and public until the opening of the oral proceedings, and only then if the parties have no objection....
- ✓ 5. The judgment is final, binding on the parties to a case and without appeal.
- ✓ 6. A State which considers that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may bring the matter before the Security Council, which is empowered to recommend or decide upon measures to be taken to give effect to the judgment. The procedure described... is the normal procedure. However, the course of the proceedings may be modified by incidental proceedings, such as:



- ▶ a. Preliminary objections, which are raised to challenge the competence of the Court to decide on the merits of the case (the respondent State may contend, for example, that the Court lacks jurisdiction or that the application is inadmissible). The matter is one for the Court itself to decide.
- ▶ b. Provisional measures, interim measures which can be requested by the applicant State if it considers that the rights that form the subject of its application are in immediate danger.
- ▶ c. State may request permission to intervene in a dispute involving other States if it considers that it has an interest of a legal nature in the case, which might be affected by the decision made.
- ▶ d. The Statute also makes provision for instances when a respondent State fails to appear before the Court, either because it totally rejects the Court’s jurisdiction or for any other reason. Failure by one party to appear does not prevent the proceedings from taking their course, although the Court must first satisfy itself that it has jurisdiction.
- ▶ e. Should the Court find that parties to separate proceedings are submitting the same arguments and submissions against a common opponent in relation to the same issue, it may order the proceedings to be joined.⁵

Second: The Genocide Issue

The ICJ records indicate that it has deliberated on 172 cases and issued 26 advisory opinions. It is noteworthy that the time frame for issuing advisory opinions in cases varied between 1-3 years, but most cases took around a year (such as the Construction of a Wall in the Occupied Palestinian Territory, where the case was introduced in 2003, and the court issued its advisory opinion in 2004), while legal matters, especially those involving UN bodies, took three years.⁶ Currently, there are 20 pending cases alongside two cases currently under consideration, both related to the conflict between Ukraine and Russia.⁷

Notably, the pending cases include three cases related to Palestine: “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem” (2023), whose public hearing to open in February 2024;⁸ “Relocation of the United States Embassy to Jerusalem (2018),⁹ and Palestinian human rights issues. It is worth mentioning that the records of the UN General Assembly contain 299 references to the ICJ advisory opinions, all related to Israel’s violations of international law.¹⁰



Third: South Africa's Genocide Case at ICJ Against Israel

On 29/12/2023, South Africa lodged a legal action against Israel, contending that Israel is engaging in acts of genocide against Palestinians. The basis of South Africa's assertion rests upon a compilation of substantiated evidence, as follows:¹¹



- ✓ 1. Israel's large-scale killing and maiming of Palestinian civilians.
- ✓ 2. Its use of "dumb" bombs against civilians.
- ✓ 3. The mass displacement and the destruction of neighborhoods.
- ✓ 4. Deprivation of access to adequate food and water, medical care, shelter, clothes, hygiene and sanitation to civilians.
- ✓ 5. Incitement to murder and destruction based on a series of statements by Israeli officials, including calls for the use of atomic bombs.

Fourth: Scenarios of Case Proceedings in the Court

The ICJ order of 26/1/2024, can be considered the culmination of a conflict between two considerations: political considerations on one hand, and judicial integrity on the other. We will attempt to delineate these two dimensions:

- ✓ **1. Political Considerations in International Judicial Rulings:**¹² The judges of the court that issued the order hail from 15 different countries; a President from the United States and a Vice President from the Russia Federation, along with 13 judges representing the following nationalities: Moroccan, Lebanese, Somali, Ugandan, Brazilian, German, French, Australian, Japanese, Slovakian, Indian, Jamaican, and Chinese. The majority of these judges have either served in their country's Ministry of Foreign Affairs or Ministry of Justice (7 of them), represented their countries at the UN (3 of them), or worked as academics within judicial bodies (5 of them).¹³



Political considerations are evident in the following aspects:¹⁴

- ▶ a. Although membership candidacy in the court's body is not confined to states, the predominance of nominations originating from states raises concerns about potential collusion between the nominating state and its candidate.
- ▶ b. The consent for a judge's appointment to the court's body is granted by the UN Security Council and the UN General Assembly in simultaneous but separate sessions. This framework offers states an opportunity to leverage their diplomatic relationships to garner support for their candidate, emphasizing the continued importance of backing from the judge's home country.
- ▶ c. The provision in the court's statute allowing members of the Court to seek re-election after a nine-year term may incline them to align with their government's policies, recognizing the necessity of securing renewed support in the General Assembly and Security Council.
- ▶ d. The alignment of a judge's political leanings with those of their home state can significantly influence their judicial decisions. This influence is exemplified in cases such as the construction of the wall by Israel in occupied territories, where the court's decision saw a majority of 14 against one, with the dissenting vote cast by an American judge. This underscores the potential impact of a judge's national affiliation,¹⁵ especially when considering his prior employment in the US Department of State.
- ▶ e. According to an academic study employing quantitative methodologies, the manifestation of bias in the voting of judges on cases presented before the court was revealed as follows:¹⁶
 - Judges who vote 90% in favor of their home state vote 10% against their home state.
 - Judges favor states whose political system, wealth level or cultural aspects, especially in language and religion, are similar to that of the judges' own state.
 - There is weak evidence that judges are influenced by regional and military alignments.



Based on the aforementioned, the vote in the General Assembly on the ceasefire resolution in Gaza can be considered an indicator of the judges' stance on the condemnation of Israel in the case filed against it by South Africa, as reflected in the following table:



The Stance of Countries Representing ICJ Judges on the General Assembly's Decision in December 2023

	The country to which the ICJ judges belong 2024 ¹⁷	General Assembly vote on the ceasefire resolution 12/12/2023 ¹⁸
1	US	Against
2	Russia	In Favour
3	Slovakia	Abstention
4	France	In Favour
5	Morocco	In Favour
6	Somalia	In Favour
7	China	In Favour
8	Uganda	In Favour
9	Jamaica	In Favour
10	Lebanon	In Favour
11	Japan	In Favour
12	Germany	Abstention
13	Australia	In Favour
14	Brazil	In Favour
15	India	In Favour
Total Vote		12 In Favour/ 2 Abstentions/ 1 Against

2. The Legal Consideration: Judicial integrity and the judge's recourse to his/ her conscience are deemed essential conditions for achieving justice at all levels of local or international judiciary. However, the results we have indicated regarding the significant statistical correlation between states' positions and those of judges suggest that the political criterion often outweighs judicial integrity but does not negate it. This renders decisions a form of legal adaptation to political considerations.



Fifth: Analysis of the ICJ's Decision on the Genocide Issue in Gaza Strip

It is imperative to note that the case brought by South Africa against Israel, accusing it of committing inhumane acts falling under the category of Genocide, holds particular significance due to South Africa's symbolism in the global consciousness. South Africa is a country that experienced settler colonialism and the harshest forms of racism. The international community played a role in supporting South Africa to overcome colonialism. Additionally, South Africa represents one of the important African powers (with a population of approximately 60 million), and the current governing elite in South Africa stores in its political memory various forms of Israeli support for the settler colonial government.¹⁹



Analyzing the ICJ decision requires balancing political and legal factors in the ruling, as evident in the following aspects:²⁰

1. Case Acceptance and the Rejection of Israel's Request to Remove the Case

The court's acceptance of the case, and its rejection of Israel's request that the case be removed from the General List, indicates its acknowledgment that Israel has engaged in actions warranting the court's consideration of the South African case. This can be drawn upon examining some articles discussing the Prima Facie Jurisdiction, which state:

As to whether the acts and omissions complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention, the Court recalls that South Africa considers Israel to be responsible for committing genocide in Gaza and for failing to prevent and punish genocidal acts. South Africa contends that Israel has also violated other obligations under the Genocide Convention, including those concerning "conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide."(.....) In the Court's view, at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.

The court's above text shows it believes there's enough evidence of genocide for the case. The court's decision suggests it still sees Israel as involved in this matter, for the court also stated:



In the Court’s view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention.

2. ICJ Orders

Based on the above, the ICJ considers that:

- ✓ a. Israel must “ensure with immediate effect,” in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, to:

take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- ▶ a. killing members of the group;
- ▶ b. causing serious bodily or mental harm to members of the group;
- ▶ c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- ▶ d. imposing measures intended to prevent births within the group.

The preceding text in the decision highlights a significant limitation on the movement of Israeli military forces. This raises questions about how Israel will proceed with its military operations within the confines outlined in adopted measure “1.” While the decision refrains from explicitly calling for a ceasefire, as urged by South Africa and others in the General Assembly’s vote on 12/12/2023,²¹ it’s evident that implementing the court’s provisions will pose challenges to Israeli military activities, despite the absence of a direct ceasefire request. Some may argue that Israel is indifferent to this situation. This prompts us to consider: Would Israel have adhered to a ceasefire request if explicitly stated in the decision? We see that the text leans towards regulating military operations. If Israel were to comply (which seems unlikely), it would alleviate pressure on the Gaza community, thereby easing some burden on the resistance. However, if Israel fails to comply, its legal standing could become increasingly complex in the eyes of the international community.

- ✓ b. “The Court is also of the view that Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.” Some Israeli

ministers, including Benjamin Netanyahu, accused the court of “blatant discrimination” and antisemitism right after its decisions were announced,²² which marks the beginning of the violation of the resolutions.

✓ c. “The Court further considers that Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.” We see that this text binds Israel and also allows Egypt, if it wishes, to open the Rafah crossing fully, citing compliance with the ICJ decisions, regardless of Israel’s stance, as the court’s decision legally supports Egypt.



✓ d. “Israel must also take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Genocide Convention against members of the Palestinian group in the Gaza Strip.” This means that Israel must not conceal its actions falling under the crime of genocide to evade accountability. Implicitly, the court acknowledges material evidence of genocide, and thus, it seeks to preserve this evidence.

✓ e. Regarding the provisional measure, “the Court recalls that it has the power... to request the parties to provide information on any matter connected with the implementation of any provisional measures it has indicated...the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order,” (on February 26th next month). This means that continuing the fighting in the manner Israel has practiced in previous months will add new violations to its list of charges, making its legal position more complicated.

✓ f. The Court stated that it “is gravely concerned about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release.” It's clear that this request represents an “Israeli gain,” which Israel may rely on to justify taking actions interpreted as “implementing the court’s decision” in this regard if resistance fails to respond to it.



Sixth: Decision Evaluation

Excluding the decision concerning the release of Israeli captives by the resistance (immediately and unconditionally), the decision, although lacking explicit terms regarding a ceasefire, accepting the case and the measures requested by the decision from Israel, especially submitting a report on the extent of Israeli compliance with the court's demands within a month, represents an important aspect of the court's order.

Recent US communications with South Africa prior to the Order's release may have been part of the "political considerations" in formulating the decisions. There are numerous specialized studies that have previously addressed the US influence on the court.²³ Closed-door discussions may also have played a role, to the extent that some international law experts find it difficult to overlook political considerations in the court's decisions.²⁴ Therefore, the report Israel must submit within a month may push the Netanyahu government to take two steps (if it submits the report requested by the court):



- ✓ 1. Israel would attempt to appear less aggressive in its military operations to sway the court from making decisions that would add new violations to Israel, especially since criticism of Israel on this front has come from some of its allies and international organizations related to the case before the court, as stated in the court's reasons for accepting the lawsuit.
- ✓ 2. Israel would exploit the court's decision to release the captives, and this requires the resistance and South Africa (and those joining them) to raise the issue of prisoners detained by Israel in Gaza during the war, at the very least (not to mention those detained before the war). Resistance can argue that the captives are dispersed in various distant areas, with risks of their transfer due to the presence of Israeli forces in the field, necessitating the withdrawal of Israeli forces from the operational theater to enable the resistance to communicate with its cells overseeing the care of these captives.



Endnotes

- ¹ An expert in futures studies, a former professor in the Department of Political Science at Yarmouk University in Jordan and a holder of Ph.D. in Political Science from Cairo University. He is also a former member of the Board of Trustees of Al-Zaytoonah University of Jordan, Irbid National University, the National Center for Human Rights, the Board of Grievances and the Supreme Council of Media. He has authored 37 books, most of which are focused on future studies in both theoretical and practical terms, and published 120 research papers in peer-reviewed academic journals.
- ² Settlement processes include multiple types, such as: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and resorting to the United Nations or others. See Pacific Settlement of Disputes (Chapter VI of UN Charter), site of United Nations Security Council, <https://www.un.org/securitycouncil/content/pacific-settlement-disputes-chapter-vi-un-charter> They include also third party roles, for details, see Richard B. Bilder, “International Third Party Dispute Settlement,” *Denver Journal of International Law & Policy*, University of Denver, vol. 17, No. 3, January 1989, p. 480.
- ³ History, site of International Court of Justice (ICJ), <https://www.icj-cij.org/index.php/history>
- ⁴ History, site of International Court of Justice (ICJ), <https://www.icj-cij.org/index.php/history>
- ⁵ Ibid.
- ⁶ List of All Cases, ICJ, <https://www.icj-cij.org/list-of-all-cases>
- ⁷ Pending cases, ICJ, <https://www.icj-cij.org/index.php/pending-cases>
- ⁸ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, ICJ, <https://www.icj-cij.org/case/186>
- ⁹ Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America), ICJ, <https://www.icj-cij.org/case/176>
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- ¹⁶ Eric A. Posner and Miguel F. P. de Figueiredo, “Is the International Court of Justice Biased?,” *The Journal of Legal Studies*, vol. 34, no. 2, June 2005, pp. 14–24.
- ¹⁷ Current Members, ICJ, <https://www.icj-cij.org/index.php/current-members>
- ¹⁸ UN General Assembly votes overwhelmingly in favour of Gaza ceasefire, site of AlJazeera, 12/12/2023, <https://www.aljazeera.com/news/2023/12/12/un-general-assembly-votes-overwhelmingly-in-favour-of-gaza-ceasefire>
- ¹⁹ Sasha Polakow-Suransky, *The Unspoken Alliance: Israel's Secret Relationship with Apartheid South Africa* (Jacana Media, 2010), pp. 39–52.
- ²⁰ See specifically pp. 75–84 in the ICJ’s decisions, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), 26 January 2024, Order, ICJ, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>
- ²¹ UN General Assembly votes by large majority for immediate humanitarian ceasefire during emergency session, site of the United Nations, 12/12/2023, <https://news.un.org/en/story/2023/12/1144717>
- ²² Israeli officials accuse international court of justice of antisemitic bias, site of *The Guardian* newspaper, 26/1/2024, <https://www.theguardian.com/world/2024/jan/26/israeli-officials-accuse-international-court-of-justice-of-antisemitic-bias>
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