Israel and the ICJ: Comparing International Court Cases During the Gaza War

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Brief Analysis

The current cycle of legal actions involving Israel is unprecedented in scope and politicization, but governments are still better off engaging with the process and lodging their objections there than dismissing it outright.

On July 19, the International Court of Justice (ICJ) will deliver an advisory opinion on the "legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem." The opinion was **requested (https://www.icj-cij.org/case/186)** by the UN General Assembly (UNGA) more than a year and a half ago—well before the Gaza war broke out—in the context of efforts to increase awareness of the Palestinian issue at various international forums, as well as more specific concerns about escalating "tensions and violence" with Israel. The timing of this week's opinion might seem incongruous given how much has taken place since it was first requested in January 2023. Yet it is in keeping with a wartime trend in which more new cases are being brought before international courts, and pending cases are being rekindled and amplified. Distinguishing between these cases is instructive.

The ICJ's Jurisdiction

This PolicyWatch deliberately focuses on ICJ cases, not those brought before the International Criminal Court. Although both bodies are based in The Hague, the ICC has jurisdiction over persons while the ICJ settles disputes between states.

On paper, ICJ rulings are legally binding. Yet if the disputant states choose not to comply with them, they can only be enforced through a decision by the UN Security Council (UNSC). The UN Charter also authorizes the UNSC and UNGA to ask the ICJ for nonbinding advisory opinions on matters of international law.

Comparing Previous Cases and Opinions

The first time the Israeli-Palestinian conflict came before the ICJ directly was in the context of the UNGA's 2003 request for an advisory opinion on the "legal consequences arising from the construction of the wall being built

by Israel…in the Occupied Palestinian Territory." Even the phrasing of the request illustrated the complex array of legal and political questions that the court had to untangle to reach a conclusion, including the status of West Bank territory, the rights of its Palestinian inhabitants, and Israel's need to protect its citizens following the second intifada. When the ICJ issued its response in 2004, it **argued (https://www.icj-cij.org/case/131)** that the barrier was being constructed illegally. Yet the opinion was nonbinding and therefore had little impact on the ground, so construction continued.

In 2018, the ICJ saw its **first contentious case (https://www.icj-cij.org/case/176)** on such matters when the Palestinian Authority—acting as the "State of Palestine," a non-member observer state at the UN—challenged the Trump administration's decision to relocate the U.S. embassy to Jerusalem. Again, the court was essentially being asked to rule on a core legal question underlying the Israeli-Palestinian conflict (sovereignty over Jerusalem) in the context of a U.S. political decision to move the embassy at that particular juncture. After setting deadlines for written pleadings in 2019, however, the ICJ did not release any public information, which usually indicates that the claimant and defendant have agreed to suspend proceedings.

As mentioned above, this week's advisory opinion stems from a 2023 UNGA request regarding Israeli activities in "Occupied Palestinian Territory," a phrase that would appear to exclude Gaza given Israel's 2005 withdrawal from the Strip. Yet Gaza was mentioned extensively throughout the UN resolution in question (77/247), indicating that the states supporting the ICJ request were seeking something broader: namely, confirmation of the alleged illegal character of all Israeli activity beyond the Green Line (i.e., the armistice line demarcated before the 1967 war), which would give them a basis for pressuring international actors to take action against the country.

Following the request, Israel, the PA, and the five permanent UNSC members **submitted (https://www.icj-cij.org/sites/default/files/case-related/186/186-20230807-pre-01-00-en.pdf)** an unusually high number of written statements (57) to the court even before the October 7 Hamas attack, reflecting a prewar atmosphere fraught with multiple rounds of violence and a new Israeli government that included far-right ministers in prominent posts. Most of these statements took one of three approaches: (1) emphasizing the alleged illegality of Israel's actions, (2) acknowledging this illegality but calling for a political process to end such actions, or (3) arguing that legal action outside a mutually agreed framework would be inappropriate and demanding direct negotiations between the parties.

Regardless of what the court concludes this week, its ability to restrain Israeli activity will likely be limited given the nonbinding nature of its advisory opinions and the purely legal framing of the UNGA's questions. In fact, the opinion might even spur the Israeli government to double down on its **controversial recent policies (https://www.washingtoninstitute.org/policy-analysis/west-bank-economics-are-key-stabilizing-palestinian-authority-or-forcing-its)** in the West Bank by extending its civil and military activity further beyond the Green Line or even instituting de jure annexations in that territory.

Despite its presumably limited impact on the ground, however, this week's opinion will have notable implications for how the ICJ handles related cases going forward. This includes the tough task of balancing its 2004 opinion (which established the illegality of certain Israeli activity in the eyes of the court) with the realities of today's political context (in which the legitimacy of Israeli security interests has become glaring post-October 7 and direct negotiations remain the best path toward resolution).

The South African and Nicaraguan Cases

The most high-profile ICJ case initiated during the Gaza war is South Africa's **December 2023 filing (https://www.icj-cij.org/case/192)** against Israel for allegedly violating the 1948 Genocide Convention—a case that **some observers (https://aijac.org.au/fact-sheets/factsheet-south-africa-hamas-and-the-icj-genocide-case-**

against-israel/) have linked to the country's close diplomatic and financial links with Iran. Besides seeking an ultimate judgment on Israeli actions in Gaza, the filing also requested that provisional measures be imposed in the meantime due to urgent humanitarian concerns. In January, the court imposed a few **such measures (https://nationalinterest.org/feature/icj-israel-ruling-politics-legal-means-209199)** on Israel related to enabling the provision of humanitarian aid, preventing and punishing domestic incitement to genocide, and similar issues. Israel also agreed to report **directly to the court (https://www.timesofisrael.com/israel-reports-to-icj-on-actions-taken-to-comply-with-court-orders-on-gaza/)** about its adherence to these orders; these reports have not been made public.

Later, South Africa submitted three more requests to impose additional provisional measures and modify existing ones, citing Israel's military campaign in Rafah and other new developments. The court dismissed these requests, however, noting that Israel had complied with the original reporting request. As for the wider question of whether Israel's actions in Gaza constitute genocide in the court's legal view, final judgment is unlikely to be delivered anytime soon.

Shortly after the South African case emerged, Nicaragua initiated similar **proceedings (https://www.icj-cij.org/case/193)** against Germany, accusing it of failing to comply with the 1948 Convention's obligation to "do everything possible to prevent the commission of genocide" during the Gaza war. The filing emphasized Germany's "political, financial, and military support to Israel" and its decision to suspend funding to the UN Relief and Works Agency (UNRWA). Nicaragua also requested provisional measures, but the court ruled in April that these were unnecessary given the measures already established in the South African case. Yet a final judgment on the merits can still be expected at some point, despite Germany's request to dismiss the case.

Law or Lawfare?

Taken together, these ICJ cases and the host of other proceedings **before the ICC (https://www.washingtoninstitute.org/policy-analysis/state-investigation-international-criminal-court-and-situation-palestine)** and various national courts represent a major increase in international legal involvement in the Israeli-Palestinian arena. These cases also seem more heavily politicized than in the past—hardly surprising given the lack of meaningful Israeli-Palestinian political negotiations for a decade, worsening conditions on the ground for Palestinians, and Israel's expanding settlement policy (facilitated in previous years by the Trump administration's proposals regarding future disposition of the West Bank). The parties bringing these cases tend to frame them with abstract legal concepts, expecting that universal opposition to practices like genocide will help garner international support. Clearly, this approach does not account for the many complexities on the ground, but the claimants seem well aware of this fact—more often than not, they appear to see ICJ proceedings as a lever for swaying global political opinion rather than a means of affecting Israel's actions in any immediate sense.

Even so, it would be unwise to dismiss these legal developments in The Hague as irrelevant or fatally politicized. Instead, officials should follow the model established by the United States and other actors: continuing to engage with international legal proceedings while simultaneously exposing their limits. If governments acknowledge the reasoning behind a given ICJ complaint or judgment and then explain their reasons for opposing it, they can boost perceptions of their policies both abroad and domestically. In contrast, simply discarding the concept of global justice is risky—not only because it could lead to an (even more) unruly world, but also because most states will likely find themselves in future situations where they need to refer cases of their own to international judges.

In this respect, Nicaragua's case against Germany is remarkable. Berlin has previously accepted the ICJ's compulsory jurisdiction as part of its post-World War II adherence to international law, yet it now finds itself being singled out and sued for discretionary foreign policy choices that other parties to the Genocide Convention have made toward Israel. Those who initiated the case may be more interested in eroding the ICJ's legitimacy than

winning a judgment against Berlin. If so, the correct reaction is to avoid the trap by participating in the case and explaining why the accusation is without merit.

Of course, efforts to address the problems facing Israelis and Palestinians on the ground are still paramount. Despite making headlines and convincing Israel to comply with certain provisional measures during the Gaza war, the ICJ's proceedings are unlikely to have much effect on this primary mission. Advisory opinions like the one issued this week are nonbinding, and the United States would presumably veto any attempt to enforce judgments against Israel through the UNSC. Yet the debate surrounding how international courts engage with the Israeli-Palestinian question could easily exacerbate polarization worldwide if governments mishandle or ignore it.

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