Impunity in times of genocide

Brenna Bhandar

For over a year, the world has been conscripted as an 'involuntary witness' to the ongoing genocide of Palestinians. With no shortage of legal rulings and academic opinions on the illegal nature of the particular and gross forms of violence the Israeli state is inflicting on the people of Palestine, and now, Lebanon, the question of impunity looms large. Attempts to grasp the juridical structures that produce impunity, and relatedly, the psychic-social entanglements with this radical state of exception from responsibility, are taking place at multiple scales. At the level of individuals and communities engaged in solidarity work, the last years have engendered a state of profound psychosomatic disorientation – and indeed, heartbreak – in the midst of relentless political organising.[1] The idea that taking political (and legal) action should in some ways make one feel hopeful that a change in course is possible – particularly as it relates to intensive lethal violence – has been challenged by the brazen performance of impunity by Israeli politicians, soldiers and citizens. How is one, literally and metaphorically, to swallow, to digest, to comprehend, the ability of Israel, the U.S. and its other imperial backers, to slaughter and destroy Palestinian life with apparent freedom, in the face of continued Palestinian resistance and mass political mobilisations against the genocide? How is one to understand the intensification and expansion of Israel's theatre of brutality in the face of repeated judgments issued by the International Court of Justice, multiple UN General Assembly resolutions, and the recently issued ICC warrants for the arrest of Netanyahu and Gallant?

At the level of the state, the enjoyment with which large swathes of people greet expressions and acts of impunity (transmitted across borders at dizzying speed via social media platforms) seems to be a major driver of recent electoral outcomes, whose consequences reverberate globally. Trump's 2016 exclamation that 'I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn't lose any voters, OK?' now seems like a quaint understatement, given his electoral victory in the aftermath of several criminal convictions and civil losses relating to fraud, bribery and sexual assault. While any sort of definitive diagnosis is beyond the scope of this short commentary, the juridical-political sphere is producing forms of impunity that have consequences for a world gripped by the conjoined forces of rising fascism and intensified climate change, both cause and effect of multiple and interlocking crises. Impunity, it seems, is becoming the psycho-juridical basis for a new world (dis)order.

Within a juridical framing of Israel's conduct, international lawyers have cautioned that the impunity with which Israel continues to act threatens the very legitimacy of the post-war international legal order. While Palestinian legal scholars have enumerated the ways in which international laws have acted as an alibi for Israel's settler colonial project,[2] the South African charge of genocide has prompted a renewed reckoning with the potential – if foundationally flawed – power of this international legal order to give meaning to its twentieth century prohibitions on genocide, the annexation of territory by force, and related forms of mass human rights violations. Steadfast critics of the international legal order have had to pause, even if only out of respect for Palestinians and others looking to the court to lend legal force to political efforts to end the genocide. Additionally, the basic fact is that there is currently no other legal-political discourse that would impel a nation state to stop arming Israel, or to assert political pressure on Israel to end its occupation. The question of the enforceability of the ICJ rulings, which are legally binding on the parties to the case, raises another set of problems and potentialities

for confronting the problem of impunity. Where and how can these forms of international law be enforced, and what is the relationship between political movements such as the BDS campaign, and mechanisms for political and economic sanction embodied in international law? How does one contend with a liberal human rights order that is designed to produce impunity for all that lies outside of its orbit, namely the political economy of the war machine and settler colonial extractivism? In what follows I outline three tentative rationales for why impunity is a central feature of the current conjuncture: i) impunity is produced by the founding violence of the colonial nation state, and remains central to its settlement project; ii) the colonial nation-state and its settler citizens are the paradigmatic subjects of a primordial and absolute right to self-defence; and iii) the excess pleasure found in the masculinist performance of impunity that is overwhelmingly present in contemporary politics.[3]

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> 'The law is haunted by impunity.'[4]
>
> Zahid R. Chaudhary

The OED defines impunity as the 'exemption from punishment or penalty'; and in a weaker sense, as 'exemption from injury or loss as a consequence of any action; security.' Israel enjoys impunity in both senses, evidenced by the fact that no meaningful sanctions have been imposed on it as a consequence of its flagrant and ongoing breaches of international law. That Israel enjoys impunity is not solely a result of its existence as a European colonial project that has the full backing of the west. As Zahid R. Chaudhary has argued, drawing on the work of Derrida, modern law itself produces impunity through the very self-authorising force that constitutes its foundations.[5] Derrida, in 'The Force of Law: Mystical Foundations of Authority' seemed to have, without referencing it as such, described the violence of the founding moments of settler colonies:

> Yet, the operation that amounts to founding, inaugurating, justifying law, to making law, would consist of a *coup de force*, of a performative and therefore interpretive violence that in itself is neither just or unjust and that no justice and no earlier and previously founding law, no pre-existing foundation, could, by definition, guarantee or contradict or invalidate.[6]

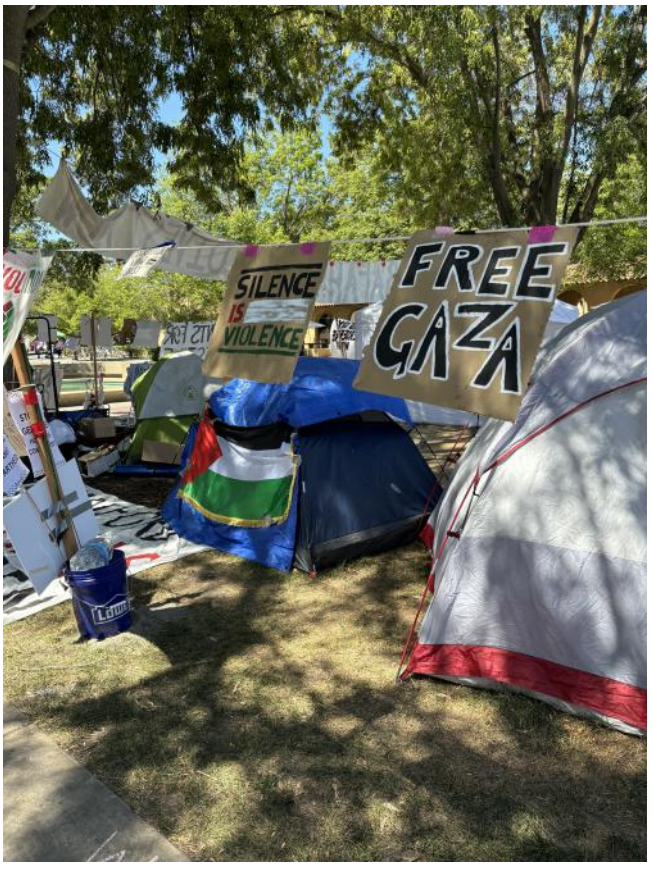
While Derrida goes onto to examine the injustice inherent to the act of rendering a judgment (as in a legal decision or ruling), this passage articulates the inauguration of the founding moment of settler colonial rule. This is embodied in proclamations of discovery and assertions of title that are built on both the interpretive violence of recognising Indigenous rights[7] – in the same moment they are subordinated to colonial rule – and the fiction that the inauguration of a colonial legal order is based on anything else but its own pronouncement. As Chaudhary writes, '[t]his prior violence that establishes the law necessarily enjoys impunity'.[8] While the founding violence of settler colonies inaugurated genocidal violence against Indigenous peoples,[9] it is also the case that juridically, this dispossession is a silence 'walled up' as Derrida writes, in the 'violent structure of the founding act'.[10]

The founding violence of the modern (colonial) legal order becomes the basis for quotidian and spectacular, individual and state-level, particular and gross forms of impunity. That much of the individual private property ownership in settler colonies is essentially founded on theft,[11] or that contemporary forms of massive accumulation of wealth by individuals are structured by the law,[12] offer evidence for this claim. Chaudhary notes that the rise of neoliberal rationality during the Cold War era also witnessed expanded forms of state violence with impunity in the name of 'stamping out impunity' (consider, for instance, the rhetoric surrounding the American 'war on drugs'). There are thus at least two forms of impunity that structure the juridical sphere: the foundational forms of impunity that inaugurate a legal order itself; and the continuous reiteration of impunity in the form of police and military power that seeks to grapple with revolt and resistance (crisis), a power that is often deputised to civilian-settler subjects.

In the international sphere, Third World Approaches to International Law (TWAIL) scholarship has excavated the colonial origins of the modern international legal system, showing how the cards are structurally overdetermined to be stacked against the perpetually 'subalternised' Global South.[13] Given contemporary international law's genealogy, it is not difficult to understand how Global South countries are routinely disadvantaged in this sphere. International economic law sedimented neocolonial trade relationships through instruments such

as the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO).[14] The particular ways in which the 'colonial present' manifests in the era of decolonisation, however, requires us to consider more carefully the specific forms of (neo)colonialism that have been prohibited by international legal instruments, as well as the meaning of their repeated violations. Israel stands indicted of the crime of genocide, has been found to be violating the prohibition of apartheid, and its occupation of Palestinian lands that extend beyond the 1967 Green Line has been found to be illegal, its intention to permanently annex them laid bare. On 21 November 2024, the International Criminal Court issued arrest warrants for Netanyahu and Gallant, 'for crimes against humanity and war crimes committed from at least 8 October 2023 until at least 20 May 2024.'[15] Significantly, in its press release, the ICC states that while arrest warrants are 'classified as secret' (in order to protect witnesses and safeguard the investigation) the Chamber decided to release the information 'since conduct similar to that addressed in the warrant of arrest appears to be ongoing …'. Several European states (Hungary and France) and of course the United States have offered Netanyahu immunity on their territorial soil. In light of the above, we can consider how foundational impunities produced by the modern legal order persist in contemporary forms, and also, in the face of explicit legal indictments and advisory opinions that have found Israel to be in violation of laws prohibiting the most grave, explicit and direct forms of violent human rights abuses.

There are at least three explanations (however partial) for why Israel continues to act with complete impunity, in the face of three rulings (two contentious cases, one advisory opinion[16]) of the International Court of Justice in 2024 alone. The first judgment of the ICJ, handed down on 26 January 2024, found that the risk of irreparable prejudice to the rights sought, and the urgency of the situation, justified provisional measures. The petitioners had established that Israel was 'committing plausible genocide' and that Israel had to take every necessary action to stop acts that were imperilling the rights of Palestinians to not be subjected to genocide under the Genocide Convention. The second ruling of 28 March 2024 provided for further provisional measures given the worsening humanitarian conditions in Gaza. The third ruling, of 19 July 2024, an advisory opinion, found Israel's occupation of the Occupied Palestinian Territories, as a contiguous territory, to be illegal. The breadth of findings is vast, with Israel in violation of the prohibition on racial apartheid, forcible transfer of Palestinians, exploitation and control of natural resources, the building of infrastructure for the purposes of settlement, and other acts of dispossession that are central to colonisation even though they are not named as such. The Court found that Israel must evacuate all settlers, allow displaced Palestinians to return to their original homes, and that Israel should return all land and property seized since the occupation began in 1967. The Court made a clear statement that Israel owes reparations to anyone who suffered material damage as a result of Israel's unlawful acts during the occupation. In effect, the Court ruled that all of Israel's colonisation activities post 1967 are illegal.[17]

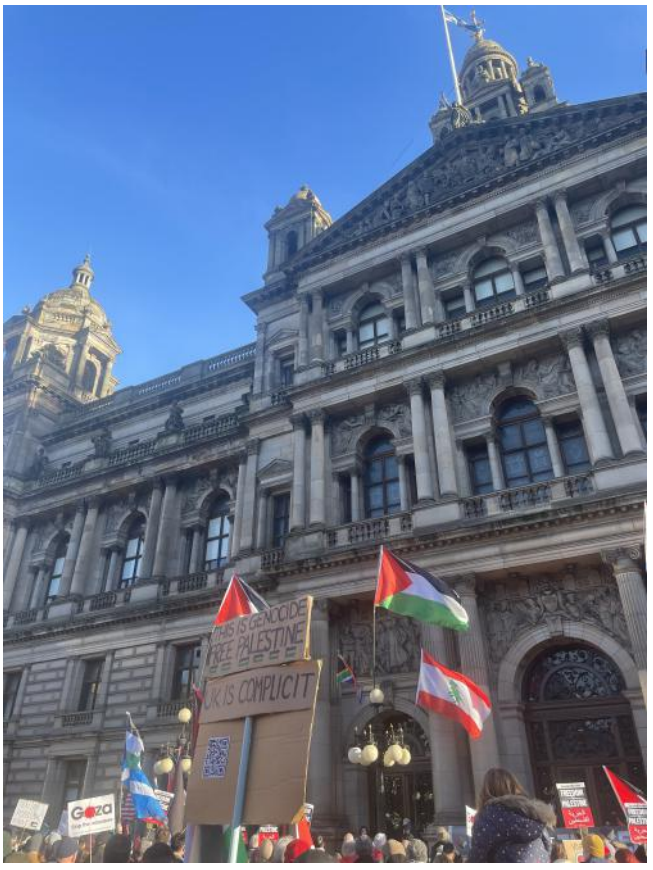


Yet, the impunities that inhere in the founding violence of the state of Israel survive in spite of repeated rulings and UN General Assembly and Security Council resolutions decrying Israel's illegal activities. Unlike the self-authorising force of colonial governments in other settler states, Israel was founded, after the colonial pro-

clamation of Balfour, by the UN Partition Resolution 181. However, as is well known, the 'legal' partitioning of Palestine was accompanied by the mass displacement of 750,000 Palestinians, the widescale destruction of Palestinian villages and communities, extrajudicial killings and what many have duly referred to as the ethnic cleansing of Palestine. This originary and founding violence, the illegal counterpart to the legality of the Partition resolution, which was the condition of its execution, has remained central to Israeli nation-building and statecraft throughout its brief history.

A painfully plain and obvious fact, but one with complex juridical and political consequences, is that the temporality of Israel's creation in 1948, the culmination of a Zionist project modelled on European settler colonialism, is temporally out of joint[18] in relation to other settler colonies that were founded in an era prior to the emergence of contemporary international legal norms that render the key characteristics of settler colonialism illegal. Whereas settler colonialism is *per se* not illegal, many of its core aspects have been prohibited from the early twentieth century onwards. Francesca Albanese, UN Special Rapporteur on human rights in the Palestinian territories occupied since 1967, attempts in her most recent report 'Genocide as Colonial Erasure' to identify Israel's settler colonial ambitions as key components of the commission of genocide. She draws on the work of Indigenous scholars Tamara Starblanket and Leanne Betasamosake Simpson and theorists of settler colonialism to contextualise the genocide as a totality, taking place across Palestine.

The genocidal violence of settler colonies such as Canada continues into the present time but is not justiciable because ultimately, and as indicated in Albanese's report, genocide is mainly conceived of as happening in a time of armed conflict or conventional warfare. The difference between the slow and eliminatory violence of settler colonialism, and the intense, murderous and lethal violence that happens in the context of conventional warfare is glossed by the distinction between 'cultural' genocide and 'physical and biological' genocide.[19] Settler colonialism as a mode of governance, now generalised across post-colonial spaces,[20] is not conceived of as a crime. The catastrophe of climate degradation and extractivism that are lethal for entire populations are part of the necropolitical drive of colonial capitalism, and can only be rendered justiciable as discrete acts that potentially cross a legislative red-line, rather than as a system. This means that while genocide may be recognised as a state crime and individuals may be held responsible for its commission, settler colonialism as a violent modality of governance and accumulation remains outside the purview of the law, embedded as it is in the very formation of many liberal democracies globally.



II

'[A]ny good defense is also an attack.'[21]

Elsa Dorlin

What persists, in the colonial present, is a form of impunity wherein some subjects and nations are entitled to act in self-defence, and those who are not, are rendered definitionally and practically defenceless, and 'killable'. This constitutes a second rationale for how Israel can continue to act with impunity in the face of legal censure. In spite of the fact that an occupying power does not have the right to self-defence in international law, Israel argues that its war on Gaza, the West Bank and Lebanon, is just and legitimate because it 'has the right to defend

itself'. Elsa Dorlin exposes the modern legal subject as one defined by his capacity to defend himself, which, as an extension of a Lockean theory of subjectivity, means the right to defend one's property. As many have argued, there is a multi-scalar bind between the proprietorial racial subject and the possessive logic of nationalism. The person who has a right to use violence in his self-defence is the proper subject of a nation that has a primordial, natural right to self-defence; and Israel's repeated mantra, parroted by every western political leader, taps into this civilisational discourse that is a hallmark of colonial modernity. But more than this, it is essential to recognise that the lines between individual, deputised settler violence of the police and the soldier, and the state, are utterly blurred in the colony, and without these forms of deputised violence the settler state could not maintain its sovereign control over Indigenous and native peoples. As settlers rampage across the West Bank, as the villages of Bedouin are repeatedly destroyed, as unimaginable violence is inflicted on Gaza, it is crucial to recall that *this is settler colonialism in its totality,* a lesson taught to the world by the Unity Intifada of 2021.

Dorlin illuminates the meaning of self-defence for people facing genocide. Texts posted by the Jewish Combat Organisation throughout the Warsaw Ghetto, in January 1943, read '[w]e are ready to die to be human'. As Dorlin notes, 'in the most tragic situation imaginable, human dignity required dying with a weapon in hand – to fight, and perhaps survive, but to become, above all, the heralds of life against death'.[22] The history of self-defense in Jewish communities, is tied, as Dorlin writes, 'to their struggles against pogroms, primarily in Russia' from the late nineteenth century.[23] Self-defence becomes the *condition sine qua non* for the assertions of one's humanity when faced with genocidal violence. The Israeli military's release of the drone footage of Yahya Sinwar's final moments, a miscalculated attempt to propagandise its killing of Sinwar, instead became widely reported as a symbol of revolutionary defiance. Sinwar is seen, alone in a bombed-out room, heavily wounded, throwing a stick at a drone moments before he is killed, resisting until the bitter end.

The affirmation of life in the face of certain death, through the forceful act of self-defence, is then, according to Dorlin, transformed in the 1940s into an offensive act by Jewish refugees who, under the auspices of right-wing nationalist Zionists, contributed to the founding of the Jewish state and its founding myths. Tracing the roots of the Israeli martial art krav maga, Dorlin writes that '[t]his new people, fully engaged in the military, celebrated the heroism represented by their shift from defense to offense … Krav maga symbolises the national ideology of offensive defense, of a war of conquest waged in a context where an army came to define itself as a nation engaged in self-defense, against everyone, in order to survive'.[24]

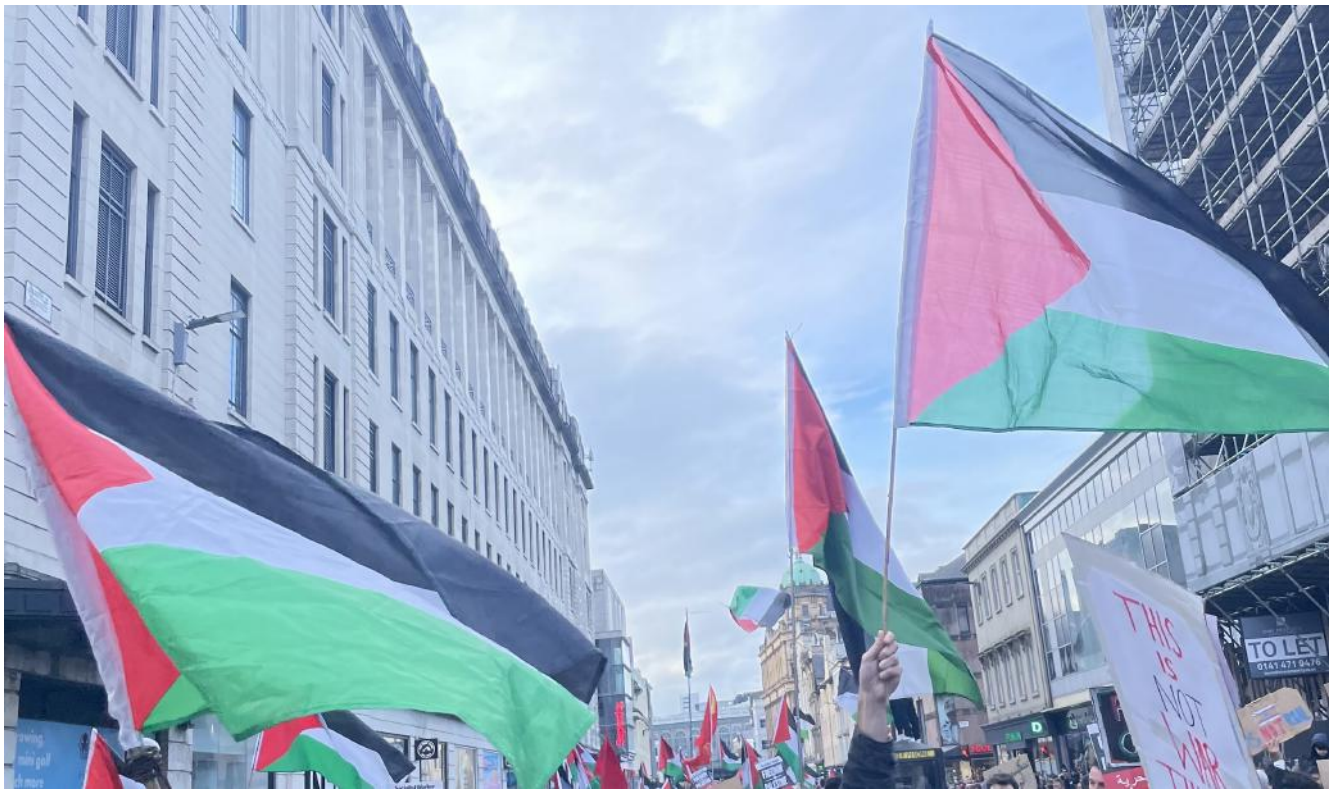
Offensive acts of violence, which in the political imaginary of the colony are represented as self-defence, not only benefit from impunity, but have taken on different meaning in the symbolic order of the current conjuncture. Illegality and the performance of impunity are a source of enjoyment and pleasure, even an excessive pleasure that bleeds into a sort of ecstasy. This excess can be seen on the faces of each Israeli soldier who has posted recordings, visual evidence, of the commission of war crimes on social media. It is seen in the unbridled laughter and joy that supporters of Trump unleash in response to his threats of criminal behaviour; or indeed, in the fact that so many could cast a vote for a man who is now a convicted felon. What I'd like to suggest here is that in addition to the bad faith and hypocrisy that characterises western denialism of Israel's status as an apartheid state[25] that is committing a genocide, we have moved into a moment where impunity itself is more than foundational to the modern legal order. More than just a shadow counterpart of legality, that which makes our modern colonial legal order viable, is impunity itself becoming the basis for a new world (dis)order?

The notion of legitimating illegal conduct through defiance of laws and legal norms is a tension and dynamic universally familiar to modern legal orders. Indeed, international law scholar Nathaniel Berman argues that appeals to a transcendent set of moral and/or political imperatives in order to justify the violation of international law has been one means of changing international law itself.[26] The Iraq War that began in 2003 is an object lesson in western powers winning support for an illegal war through defiance of international laws, based on an appeal to (offensive) self-defence, security and anti-terrorism. In this moment, it is not simply defiance of international law but the performance of impunity by all levels of the Israeli political system, state organs, settler-

citizens and by association their allies and backers, that is setting the world order on a different course. Appealing not to transcendent political values but to god himself, Israeli politicians and military leaders repeat biblical justifications for daily massacres; and Israel's near full-blown mutation into a theocratic, authoritarian state has not yet disrupted the myth of Israeli democracy for westerners. Israel's attempts at moulding international humanitarian law (IHL) to provide cover for genocide seem to have less probative value today than Netanyahu and others' blatant flaunting of the belief that they can continue on course with a blanket exemption from punishment or penalty and with complete security.

This continued performance of impunity in the time of the law runs up against a different temporality, that of anti-colonial struggle. Nasser Abourahme writes that 'there is no chance of grasping this conjuncture without reading it within a historical arc of a renewed war of national liberation that has begun to pose insurmountable challenges to the very logic of settler colonial power in Palestine'.[27] With international law being reordered by the disintegration of long-held distinctions, between 'legal' and 'illegal', 'theory' and 'practice', as Michael Fakhri has argued recently,[28] one may consider how the very foundational forms of impunity baked into the colonial legal order may also be pushed, through the formation of renewed anti-colonial resistance, to the point of collapse.

Brenna Bhandar is a member of the Radical Philosophy *editorial collective.*



Notes

1. See Hannah Proctor, *Burnout: The Emotional Experience of Political Defeat* (London: Verso, 2024).

2. See for instance the work of Noura Erakat, who argues, to take one example, that maintaining the international legal framework enables 'Israel to continue its civilian settlement under the auspices of temporality, demonstrating intent *not* to annex the land, without imposing on the state any duty to withdraw'. *Justice for Some: Law and the Question of Palestine* (Stanford: Stanford University Press, 2019), 84. See also Nimer Sultany, 'The Question of Palestine as a Litmus Test: On Human Rights and Root Causes' 23 *Palestine Yearbook of International Law* (2022), 1.

3. See Zahid R. Chaudhary, 'This Time with Feeling: Impunity and the Play of Fantasy in The Act of Killing', *boundary 2* 45:4 (2018), 82–87. In relation to the Indonesian genocide of the 1960s, Chaudhary explores the psychoanalytic aspects of the performance of impunity in Joshua

Oppenheimer's film *The Act of Killing*, including the fantasy of a masculinist will to power.

4. Zahid R. Chaudhary, 'Impunity' in *Political Concepts: a critical lexicon* (December 4 2018), https://www.politicalconcepts.org/impunity-zahid-r-chaudhary/

5. Chaudhary, 'Impunity'.

6. Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in *Act of Religion* (New York: Routledge, 2002), 241.

7. On the recursive nature of the formation of private property ownership in the colonial settlement of the United States, see Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2019).

8. Chaudhary, 'Impunity'.

9. See Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Atlanta: Clarity Press, 2018); Harry Harootunian, *The Unspoken as Heritage: the Armenian genocide and its unaccounted lives* (Durham: Durham University Press, 2019).

10. Derrida, 'Force of Law', 242.

11. Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham: Duke University Press, 2018).

12. Katharina Pistor, *The Code of Capital: how the law creates wealth and inequality* (New Jersey: Princeton University Press, 2019).

13. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); and in relation to Palestine specifically, see Ardi Imseis, *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (Cambridge: Cambridge University Press, 2023).

14. Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Portland: Hart Publishing, 2010); Sujith Xavier, Amar Bhatia & Adrian A. Smith, 'Indebted Impunity and Violence in a Lesser State: Ethno-Racial Capitalism in Sri Lanka', *Journal of International Economic Law* 25:2 (2022).

15. 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', ICC press release, 21 November 2024, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

16. Article 65 of the Charter of the United Nations and the ICJ Statute provides in section 1 that the 'Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.' Article 68 establishes that the statute also applies to contentious cases, which are cases brought by one member state against another.

17. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jersualem*, Advisory Opinion, 19 July 2024, I.C.J. Reports 2024.

18. See Nasser Abourahme, *The Time beneath the Concrete: Palestine between Camp and Colony* (Durham: Duke University Press, 2025).

19. Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Atlanta: Clarity Press, 2018).

20. Amitav Ghosh, 'European colonialism helped create a planet in crisis', *The Guardian*, 14 January 2022; see also Azad Essa, *Hostile Homelands: The New Alliance between India and Israel* (London: Pluto Press, 2023).

21. Elsa Dorlin, *Self-Defense: A Philosophy of Violence*, trans. Kieran Aarons (London: Verso, 2022), 70–71.

22. Dorlin, *Self-Defense*, 55. Subheading above from Dorlin, 70–71.

23. Ibid., 59.

24. Ibid., 67.

25. Saree Makdisi, *Tolerance is a Wasteland: Palestine and the Culture of Denial* (Oakland: University of California Press, 2022).

26. Nathaniel Berman, 'Legitimacy Through Defiance: From Goa to Iraq', *Wisconsin International Law Journal* 23:1 (2005), 93–125.

27. Nasser Abourahme, 'In tune with their time', *Radical Philosophy* 216 (Summer 2024), 16.

28. Michael Fakhri, 'What's going on?', in 'On international law and Gaza: critical reflections', *London Review of International Law* 12:2 (July 2024), 217–301.