

Stop Israel's Genocide in Gaza

David Gespass
&
Alan W. Clarke¹

Philosopher of law, David Luban, calls the word 'genocide' "a legal false friend," a word that means one thing to ordinary people, and quite another to lawyers.² People typically use the word without regard to its legal definition. Ordinarily, this causes few problems. Our cocktail party chit chat, heated discussions at the coffee shop, or even in the rarefied halls of a college classroom, are of little consequence. However, there are risks in loosening the definition. It may diminish, thereby cheapening, what is among the most serious of crimes in international law. Governmental policies need to be based upon, and compliant with, international law. To effectively argue that the U.S. must cease its complicity with Israeli genocide, one must be able to persuasively demonstrate that genocide, in its strictest legal sense, is being committed and that U.S. complicity with, and failure to prevent, genocide violates international law. This essay will sketch out a path towards effectively making that case.

It is critical, in the context of international relations generally and Gaza in particular, to start with the legal definition of genocide and apply it to the facts. We do this to determine whether Israel has violated its state obligations under international law, and whether any of its leaders are guilty of the crime of genocide. Assuming Israeli violations of international law, and specifically genocide, are established, we can turn to U.S. complicity, and its duty under the Convention to prevent genocide. Only by doing so, can we effectively argue that U.S. policy towards Israel and the Gaza genocide must change. The starting point in the analysis then, is the Convention on the Prevention and Punishment of the Crime of Genocide.³

Article One of the Convention emphasizes that genocide is a crime whether committed in peace time or in time of war or armed conflict.⁴ While many would dispute that Israel is formally engaged in a war in Gaza, that is immaterial to whether it is committing genocide.

Article Two first requires that actions taken must be "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (emphasis added). That means it is not enough to carry out the objective acts that might constitute genocide, but that the subjective intent of doing them is to destroy a protected group. However, the intended destruction need not be complete obliteration.⁵ So, for example, destroying the Palestinian population in Gaza may not mean the complete destruction of the Palestinian people writ large, but it is more than sufficient to meet the Convention's definition.

¹ David Gespass is a past president of the National Lawyers Guild, past editor-in-chief of this journal and a semi-retired civil rights and civil liberties lawyer. Alan W. Clarke, is a Guild member, Professor Emeritus at Utah Valley University, and Adjunct Professor of Political Science at Memorial University of Newfoundland.

² David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 *CHI. J. INT'L L.* 303 (2006).

³ Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951, U.S. ratification Nov. 11, 1988), https://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf [hereinafter Genocide Convention or Convention].

⁴ While the Genocide Convention uses the word "war" the Rome Statute of the International Criminal Court (ICC) uses the phrase "armed conflict." The latter is a broader term that circumvents the problem of determining whether or not a state of war exists as a matter of international law. We will continue to use the word "war" for such phrases as "war crimes" and will use the phrase "armed conflict" when referring to Israel's attacks on Gaza or the West Bank. Rome Statute, 2187 U.N.T.S. 90 (passim.)

⁵ "The International Court of Justice has observed that genocide can be committed within a geographically limited area and 'it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. The area of the perpetrator's activity and control are to be considered.' Thus, it is not necessary for the perpetrator of genocide to intend to destroy all of a group wherever it may be found. The specific intent to destroy a substantial part of a protected group combined with at least some prohibited acts suffices, even though the protected group is not in fact destroyed in whole or in substantial part." LAURELYN WHITT & ALAN CLARKE, *NORTH AMERICAN GENOCIDES: INDIGENOUS NATIONS, SETTLER COLONIALISM, AND INTERNATIONAL LAW*, 80 (2019) (citations omitted).

Article Two then details the specific acts which, if done with the requisite intent, constitute genocide:

- (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;
- (e) Forcibly transferring children of the group to another group.

With the exception of (e)⁶, it can hardly be gainsaid that Israel's actions in Gaza do not meet the objective criteria. Israel has certainly killed tens of thousands of Gazans who were not members of Hamas and who were not combatants, including thousands of children too young to fight. It has certainly caused serious bodily and mental harm, as it has herded Gazans further and further south, cramming them into an ever-shrinking part of what was already among the world's most densely populated areas.⁷ Tens of thousands have been forced to move on multiple occasions, with each move placing them in more dire circumstances. It has leveled their homes, leaving many buried under the rubble. It has prevented necessary aid to get into Gaza leading to the threat, and the reality, of mass starvation. Indeed, non-Palestinian, non-combatant aid workers have been killed by Israeli forces.⁸ It is no answer that it is now allowing more aid into the area because that does not change what it previously did and is cold comfort to those who have survived but have seen friends and family starve to death.⁹ It has destroyed hospitals, rendering care for expectant mothers impossible and causing many to lose children who should have been born alive and healthy. Nor can anyone say that these actions were not deliberate, carried out with the knowledge of their consequences.

What is left is the question of whether there is evidence of intent to destroy a protected group in whole or in part, which is essential to proof of the crime. Of course, intent can rarely be proven with direct evidence. Rather, as with proof of intent for almost any crime, one must determine the requisite intent circumstantially. We will not undertake an exhaustive catalogue of evidence of intent, but will provide a few examples. Prime Minister Netanyahu routinely refers to the Occupied Palestinian Territories as "Judea and Samaria," a term Zionist settlers use to refer to areas they want for themselves.¹⁰ Netanyahu's use of the term may be a political ploy to gain support or he may also wish to expand Israel by driving out or otherwise eliminating, in whole or in part, the Palestinian population. In any event, one could argue that there is no fundamental difference since, if he is only seeking support, he must deliver to maintain it. And his tolerance, if not encouragement, of more and more settlements, as well as appalling human rights violations and war crimes in the West Bank certainly reflects intent. Moreover, the ethnic cleansing perpetrated on the West Bank provides additional evidence of intent to commit genocide¹¹ as

6 The UN Special Rapporteur's report on Gaza found acts a, c, and d but not b to have reasonable grounds to believe that genocide has been committed in Gaza. However, her report, at paragraphs 27-33 clearly makes a plausible factual case for all the first of four of the five acts of genocide. One can only suppose that the Special Rapporteur was exercising caution in her report in omitting b (causing serious bodily or mental harm to members of the group). Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, Human Rights Council, Fifty-fifth session, 26 February–5 April 2024, Agenda item 7, Human Rights situation in Palestine and other occupied Arab territories <https://www.un.org/unispal/document/anatomy-of-a-genocide-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territory-occupied-since-1967-to-human-rights-council-advance-unedited-version-a-hrc-55/>.

7 Zionists have disputed the oft-repeated claim that Gaza, or Gaza City, is the most densely populated area in the world, but no one disputes that it is among them and lacks the high rises and parks that other cities have. The World Bank provides a reasonably reliable snapshot of Gaza and the West Bank. <https://data.worldbank.org/indicator/EN.POP.DNST?locations=PS>.

8 <https://www.nytimes.com/2024/04/25/dining/jose-andres-wck-workers-gaza.html>

9 It appears that Israel is now preventing most, if not all, aid. <https://www.nrc.no/news/2024/september/israels-siege-now-blocks-83-of-food-aid-reaching-gaza-new-data-reveals/>

10 "United with Israel," an avowedly pro-Israeli organization, happily reported one example from 2017. <https://unitedwithisrael.org/netanyahu-judea-and-samaria-will-forever-belong-to-israel/>.

11 "Acts not in themselves genocidal may be taken into account in inferring genocidal intent. In particular, ethnic cleansing, the forced removal and displacement of a protected group, the destruction of religious or cultural monuments or artifacts, destroying homes, and the preventing of a decent burial in accordance with religious customs - acts which are especially relevant to and encountered

do hypothetical plans to ethnically cleanse the Gaza strip.¹²

Benjamin Netanyahu is certainly his father's son. Benzion Netanyahu, and his Likud party, called for a "Greater Israel" that stretched across not only the West Bank but even across what is today Jordan, land regarded as promised to the Jews in the view of Revisionist Zionism, the movement behind Likud.¹³

Other members of the Israeli government have been equally, if not more, overt in their advocacy. Itamar Ben-Gvir has been convicted of incitement to racism and support of a terrorist organization. His idol was Meir Kahane who scoffed at the idea of Israel being democratic, called for the "immediate transfer of the Arabs," referred to Palestinians as "dogs" and said they "must sit quietly or get the hell out."¹⁴ On the other hand, Ben-Gvir is not a member of the "war cabinet," he is "merely" Israel's Minister of National Security.

The U.S. appears to be well aware of Israeli human rights violations and violations of international humanitarian law — violations of international criminal law that, while not in themselves constituting genocide, are evidence of the intent to commit genocide.

According to reports in the Israeli media, US state department officials have confirmed they are preparing to impose sanctions on the IDF's Netzah Yehuda battalion, which has been accused of serious human rights violations against Palestinians. The highly significant move, which would be the first time the US government has targeted an IDF unit, prompted immediate anger among Israeli political leaders who vowed to oppose it.¹⁵

Thus, the U.S. is belatedly considering sanctioning an entire unit of the Israeli Defense forces (as well as other units and individuals) for serious violations of international human rights and international humanitarian law with respect to the West Bank.¹⁶ However, this late and inadequate action raises the question as to why the U.S. is not doing more to stop the serious genocide occurring on the Gaza strip. Moreover, Israeli leadership's unqualified defense of the battalion, from Netanyahu and his chief rival, Benny Gantz, on down is striking evidence of the intent prong of the crime of genocide.

The problem then seems simple, but conceals complexities. It is clear that, in addition to war crimes and crimes against humanity,¹⁷ Israel has committed acts of genocide. However, as we noted, prosecuting the legal crime of genocide requires both a genocidal act, and proof of the additional mental element of the specific intent

in settler colonial contexts - have all been held to constitute evidence of specific intent when combined with other acts of genocide. "Although forcible transfer (ethnic cleansing) can be relied upon as evidence of intent, 'forcible transfer does not constitute in and of itself a genocidal act,' and atrocities can be widespread and remain insufficient 'to establish reasonable grounds to believe that the perpetrators acted with specific intent to destroy the targeted group.' As the ICJ put it in *Croatia v. Serbia*, 'forced displacement [can be] a significant factor in assessing whether there was an intent to destroy the group, in whole or in part.'" (citations omitted) Whitt & Clarke, *supra*. note 5 at 85.

12 Leaked Document Fuels Concern Israel Plans to Push Palestinians from Gaza, Israel says 'concept paper' isn't policy, but Palestinians fear ethnic cleansing, CBC NEWS, Nov. 1, 2023, <https://www.cbc.ca/news/world/israel-gaza-palestinians-concept-paper-1.7015576>.

13 Karl Vick, Received Wisdom, How the Ideology of Netanyahu's Late Father Influenced the Son, TIME, May 2, 2012, <https://world.time.com/2012/05/02/received-wisdom-how-the-ideology-of-netanyahus-late-father-influenced-the-son/>

14 Ruth Margalit, Itamar Ben-Gvir, Israel's Minister of Chaos, THE NEW YORKER, Feb. 27, 2023, <https://www.newyorker.com/magazine/2023/02/27/itamar-ben-gvir-israels-minister-of-chaos>

15 See, e.g., Peter Beaumont, US Poised to Impose Sanctions on IDF Unit Accused of Violations in West Bank, THE GUARDIAN, Apr. 21, 2024, <https://www.theguardian.com/world/2024/apr/21/us-poised-impose-sanctions-israel-defense-force-netzah-yehuda-battalion>.

16 Id.

17 Gaza: Israeli Strike Killing 106 Civilians an Apparent War Crime, Governments Should Suspend Arms to Israel, ICC Probe, HUMAN RIGHTS WATCH, Apr. 4, 2024, <https://www.hrw.org/news/2024/04/04/gaza-israeli-strike-killing-106-civilians-apparent-war-crime>; Damning Evidence of War Crimes as Israeli Attacks Wipe Out Entire Families in Gaza, AMNESTY INTERNATIONAL, Oct. 20, 2023, <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/>; A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution, HUMAN RIGHTS WATCH, April 27, 2021, <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>.

to destroy a protected group in whole or substantial part. If so, for purposes of individual criminal liability we can ask: does the evidence establish proof beyond a reasonable doubt? (To establish state liability, which is apart from individual liability, the issue is whether the evidence of criminal intent is fully conclusive). It's not enough for purposes of legal liability to say that someone has probably committed genocide — Israel and its leaders clearly meet this standard. One can also confidently say that Israel's leaders have committed the separate and lesser crime of inciting genocide. But to convict individuals for the crime of genocide, the issue is: does the circumstantial evidence exclude every other reasonable possibility of a non-genocidal intent? Perhaps not. However, that is not the end of the inquiry; reasonable people, acting in important and difficult matters do not wait to act until the evidence is beyond a reasonable doubt; nor do governments wait so long before acting. Proof beyond a reasonable doubt is the criterion for establishing guilt in a criminal trial. One would not expect a country to wait until after a trial conviction to act on the evidence it has.

The United Nations uses the “reasonable grounds to believe standard in reports by its Commissions of Inquiry assessing alleged genocides, crimes against humanity and violations of international humanitarian law, a standard ordinarily used in fact-finding inquiries of this sort. A standard which reasonable people are expected to act upon in serious matters seems an appropriate minimum standard for evaluating” whether or not nations should cease complicity with [Israel's genocide].”¹⁸

Thus, in assessing Israel's (and its leaders') genocidal intent, it suffices to assess the evidence using a “reasonable grounds to believe” approach .

United Nations Special Rapporteur, Francesca Albanese has found “reasonable grounds” that Israel is committing genocide in Gaza.¹⁹ She reported:

Following nearly six months of unrelenting Israeli assault on occupied Gaza, it is my solemn duty to report on the worst of what humanity is capable of, and to present my findings,”

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Specifically, Israel has committed three acts of genocide with the requisite intent: causing . . . serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent birth within the group,²⁰

South Africa has sought to invoke state responsibility for genocide by prosecuting a case before the International Court of Justice (ICJ). That court, has issued a provisional order finding plausible evidence that Israel is committing genocide in Gaza. South Africa has also gone further and obtained provisional orders from the ICJ requiring Israel to permit delivery of food, water and other supplies to the starving Palestinians in Gaza. That court's preliminary opinion, authored by Presiding Justice Joan E. Donoghue, found that “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 [Genocide] Convention.”²¹

Recently, 600 British international lawyers and jurists, including three former members of the British Supreme Court, citing grave breaches of international law, have called upon Great Britain to cease sending arms to Israel.²² They argue that the likelihood that genocide is occurring in Gaza puts the United Kingdom at risk for complicity in genocide and is also in breach of its obligation to prevent genocide. This in turn would put the UK in direct violation of the Genocide Convention. Nation States have an obligation to take steps to prevent genocide and

¹⁸ WHITT & CLARKE, *supra* note 5, at 84.

¹⁹ James Joseph, *Explainer: Why a UN Special Rapporteur Believes the Israel-Hamas Conflict Constitutes Genocide*, JURIST, Mar. 29, 2024, <https://www.jurist.org/features/2024/03/29/explainer-why-un-special-rapporteur-believes-israel-hamas-conflict-constitutes-genocide/>.

²⁰ Rights Expert finds ‘reasonable grounds’ genocide is being committed in Gaza, UN NEWS, GLOBAL PERSPECTIVE HUMAN STORIES, Mar. 26, 2024, <https://news.un.org/en/story/2024/03/1147976>.

²¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) Order (26 Jan. 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

²² UK Judges’ and Lawyers Open Letter Concerning Gaza, (Ap. 3, 2024), <https://lawyersletter.uk/>.

complicity in genocide is a mode of responsibility under the genocide convention.

In a similar vein, Nicaragua brought a case before the ICJ against Germany asserting that, as a result of its arms aid to Israel, Germany is in violation of both the Genocide and Geneva Conventions.²³ Nicaragua's suit alleges that Germany has been and is complicit with Israeli violations of international criminal law with respect to its actions against Gaza. This has implications not only for Israel and Germany but also for the United States.

International pressure to force an end to complicity in Israel's flouting of international law continues to grow, this time by targeting those nations that appear to be complicit with Israel's international crimes in Gaza. The US does not recognize the ICJ's jurisdiction in matters such as this,²⁴ and that may be the reason it was not included as a defendant in this case. Perhaps Nicaragua had the US in mind when it filed this case. A decision against Germany would have, had it gone forward,²⁵ at a minimum, been an embarrassment to the U.S. in that its posture is nearly identical to Germany's with respect to Israel's assault on Gaza. It would have placed the US in an uncomfortable position. If, in an attempt to influence the court's decision, it joined the case on Germany's behalf, it would then be bound by the decision. But, by staying out and doing nothing, it risked an embarrassing adverse decision that, by implication, would have put it on the wrong side of not only international law (no small thing in itself) but fundamentally at odds with an emerging consensus that Israel has gone far beyond the bounds of self-defense and is becoming an international pariah. To put it simply: if Germany had been declared to be complicit in Israel's international crimes, then by implication, the US would also necessarily be complicit. While the case was unsuccessful, it illustrates Israel's and the US's growing isolation.

The logic of these moves to hold nations accountable for their complicity in genocide applies to all other nations assisting Israel in its armed conflict in Gaza (are you hearing this President Biden?). Every nation supplying arms and assistance to Israel is on notice that it is at risk of complicity in genocide. The U.S. has not been brought before the ICJ for its arms deliveries to Israel since the U.S. does not automatically accept ICJ jurisdiction and thus cannot, without its consent, be brought before that court. However, it is a party to both the Genocide and Geneva Conventions and is therefore legally responsible for breaching those treaties.

The efforts of the Special Rapporteur, South Africa, Nicaragua, the ICJ and the above-mentioned British lawyers and jurists, deserve considerable respect and consideration. Cumulatively they make a powerful case that we may be seeing genocide in Gaza. Moreover, they demand action of us, and our respective governments, irrespective of whether or not evidence of the crime of genocide is presently provable.

These actions are an important first step. Serious people and serious countries can responsibly act on such "reasonable grounds." It suffices to require countries like the US and UK to cease complicity with Israel's declared "war." Genocide is not the sole reason why nation states should cease to support Israel in this. Israeli war crimes and crimes against humanity²⁶ also make a compelling moral and legal case for ending complicity with Israel's illegal war fighting.

As we write, International Criminal Court prosecutor Karim Khan is investigating war crimes and crimes against humanity with respect to both Hamas and Israel,²⁷ and he is explicitly calling on Israel to end the block-

23 Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany, Press Release, International Court of Justice, 9 April 2024, <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240409-pre-01-00-en.pdf>).

24 The fact that the US refuses to subject itself to the jurisdiction of the ICJ, as well as the ICC makes a mockery of its advocacy for a rules-based international order and its claim to be a leading force for human rights internationally, but that is beyond the scope of this essay.

25 Laura Gozzi, ICJ rules it will not halt German Arms to Israel, BBC, Ap. 30, 2024, <https://www.bbc.com/news/world-europe-68929873>.

26 Complicity in crimes against humanity is a mode of criminal responsibility under international customary law. Lafarge case, Court of Cassation, Appeal No. 19-87.367, Sept. 7, 2021 (France).

27 Karim Khan has filed an application with the ICC Pre-Trial Chamber for arrest warrants for President Benjamin Netanyahu, and Israeli Defence Minister Yoav Gallant, and Hamas officials, Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyeh. Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, May 20,

ade on water, medicines, food and electricity to the Gaza strip; thus, he implicitly sees the blockade, which is constricting the essentials of life, as potentially involving violations of international humanitarian law.²⁸ In fact, he has now sought arrest warrants against Netanyahu and Israeli defense minister, Yoav Gallant. He cannot be viewed as an anti-Israeli activist since he also sought warrants against Hamas leaders.²⁹ In addition to violations of the Genocide Convention and customary law of genocide, Israel's actions appear to seriously breach international law. Moreover, because the blockade stems directly from policies plainly attributable to Netanyahu and his government, it should be possible for legal liability to attach to the highest levels of the Israeli government.

Even though Israel is not a party to the Rome Statute creating the ICC, Palestine is. Jurisdiction under that statute, at least for war crimes, crimes against humanity and genocide (but not the crime of aggressive war) can be imposed on non-State Parties where those non-State Parties commit such crimes on the territory of State Parties. There is no statute of limitations for these crimes, they are *jus cogens* (peremptory norms) and *erga omnes* (applicable to all), and the ICC has a long memory. Israeli war crimes and crimes against humanity provide a powerful additional reason to call upon the U.S. to change course.

Israel has certainly committed crimes in Gaza and is likely committing genocide and we do not say this lightly without considering the legal definition and requirements of proof. The evidence is sufficient for reasonable people to act and for responsible governments to cease complicity with war crimes, crimes against humanity, incitement to genocide, and most importantly, probable genocide. We, as citizens, must call upon our respective governments to cease assisting genocide and to honor their duty to take measures to prevent the scourge of genocide.



2024, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

28 Statement of ICC Prosecutor Karim A.A. Khan KC from Cairo on the situation in the State of Palestine and Israel, Oct 30, 2023, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel>.

29 <https://apnews.com/article/icc-khan-netanyahu-070941d21ccd1f2b9611032b88527575>