

## **Why we as an internationally active legal human rights organization must address the allegations against Israel of genocide and war crimes.**

*The time to open up the German discourse is now. By Wolfgang Kaleck, General Secretary of ECCHR.*

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In the following brief Q&A, ECCHR outlines the legal controversies surrounding the classification of Israel's actions in the Palestinian Gaza Strip as genocide under the Genocide Convention of 1948, as well as the Statute of the International Criminal Court from 1998.

We are aware that by doing so, particularly now in Germany, we are leaving behind the comfort zone of purely legal discussion and are entering contentious terrain within the politics of memory and politics more generally. We are, however, convinced that a legal approach is well suited for rendering the debate more objective. This is because as lawyers we argue with facts, (provisionally) established by independent and reputable institutions, as well as by drawing legal conclusions. During our almost 20 years of work, we have witnessed time and again how the classification of government actions as international crimes, especially those undertaken by friendly states, has proved politically undesirable, and how Germany in particular has sought to avoid its obligations under international law that result from such designations – albeit perhaps not to such a conspicuous extent, as seen in this case. The law is not apolitical and, at the same time, politics must not superimpose itself upon the law.

Since its founding, ECCHR has contested international crimes in various ways: through publications, events and, above all, through legal interventions, which make up the core of our endeavors. The geographical spectrum of our work encompasses Asia (Sri Lanka, China, India, Japanese war crimes in the Philippines), the Near and Middle East (Iraq, Syria, Iran, Bahrain, Yemen, Israel, Palestine, Egypt), Africa (Libya, Congo), the USA, Mexico, Colombia. The military dictatorships of the 1970's in southern Latin America concern us as much as war crimes and ongoing human rights violations in Europe (Turkey, Belarus,

Russian war crimes in Ukraine, rights violations against migrants and people on the move). Many of the legal matters we have addressed were and are controversial, especially within the societies affected. Facts are questioned, amnesty laws and legally untenable justifications are put forward, legal conclusions are debated.

But probably in no other case has the application of legal categories been so incriminated as the term “Apartheid,” in the case of Israeli occupation policies in the West Bank, and the term “genocide,” in the case of the current Israeli military offensive in the Gaza Strip. While a serious and comprehensive discussion of the facts is taking place among legal experts globally, public debate in Germany specifically on state policies concerning responsibility for the state of Israel is mostly denigrated, restricted or even censored. The historical comparison between the Holocaust of the Jews committed by National Socialist Germany and other crimes has repeatedly been the subject of major controversy in the last two decades, both among lawyers and the wider German public. Nevertheless, the legal classification of historical and current events as genocide is part of everyday legal and political practice worldwide – including within Germany.

Must we remind ourselves that the German Parliament recognized the genocide of the Armenians in the Ottoman Empire in a resolution in 2016? Or that even the German government – although it still seeks to avoid the resulting legal consequences – now acknowledges that the colonial crimes of the German Empire in what was then German Southwest Africa constitute genocide against the Herero and Nama? The genocide of the Tutsi in Rwanda has remained legally and politically undisputed for 30 years. The classification of Serbian crimes against Bosnians and Croatian crimes against Serbs may be legally controversial, but no one in Germany is opposed to the fact that this debate was held in the first place and that the Yugoslavia Tribunal and the International Court of Justice classified the Srebrenica massacre as genocide. Ukrainian actors characterize the Russian war of aggression and, in particular, their conduct of war as genocide – here, too, expert opinions are not unanimous. Myanmar must answer to the allegations of genocide before the International Court of Justice in The Hague because Gambia took the initiative to bring such proceedings, and its arguments are supported by, among others, the Federal Republic of Germany. Only recently, a German higher regional court found an IS fighter guilty of genocide against the Yazidis for the enslavement of two Yazidi women, who had been

abducted during the IS attack on the Sinjar region of Iraq in August 2014, and sentenced him to life imprisonment.

Societies and groups against which international crimes are committed repeatedly insist on describing the injustices perpetrated against them as genocide. Objections, based on international criminal law, that such actions would likely be categorized more correctly in legal terms as war crimes or crimes against humanity often come to nothing – something we are also familiar within our work. We often point out that there is no hierarchy among the various categories of international crimes. We also note that in political debates around the world, attempts to gain political ground are made by using the buzzword “genocide.” Rarely, however, have political and moral discussions overshadowed serious legal debate as they have in Germany in the case of Israel's actions in the Gaza Strip since October 2023. Of course, this has to do with the German past, with the German Reich's genocide of the European Jewry.

Though the reunified Federal Republic of Germany today claims to have dealt with National Socialist injustice in an exemplary manner, the historical facts of the decades since the victory over National Socialism on 8 May 1945 tell a different story.

The Major War Criminals trials at Nuremberg held by the Allies were discredited in German legal circles as victor's justice. The continuity between Nazi jurists and those of the Federal Republic of Germany – both in terms of personnel and content – in the legal profession, in the judicial system and in legal policy led to the widespread impunity of National Socialist elites in post-war Germany. The Frankfurt Auschwitz trial, the broadcast of the television series “Holocaust” and, above all, the manifold engagement of civil society actors contributed to a gradual reevaluation – while the main perpetrators of the National Socialist injustice, which was by no means only committed against Jews, slowly died off. However, it was not until 1985, with the speech made by then President Richard von Weizsäcker, that this shift in thinking began to take place in the heart of society. And as late as the 1990s, the Wehrmacht (the armed forces of Nazi Germany) exhibition at the Hamburg Institute for Social Research was heavily criticized because it depicted the Wehrmacht's extensive involvement in Nazi crimes.

It was to Jürgen Habermas' credit that he rejected the attempts of right-wing conservative historians such as Ernst Nolte to relativize German injustice by pointing to the crimes of the Stalinist Soviet Union. This “first historians' dispute” (*Historiker-Streit*) may still be having an impact today, particularly in the minds of progressive and liberal intellectuals and publicists. This was most recently demonstrated in the so-called “second historians' dispute,” the discussion about the historical comparability of colonial crimes, especially those committed by Germans, with the Holocaust.

As lawyers, it is not imperative for us to take a position here – we are not historians. I would just like to point to a very thought-provoking statement by Jürgen Habermas. In a newspaper article from 2021, he acknowledges that by acquiring citizenship, new citizens accept Germany's political culture and historical heritage, in which “the outlawing of anti-Semitism is an indispensable core element.” At the same time, however, they also acquire “the voice of a fellow citizen that counts [...] in the public sphere” and, thus, a civic right to contribute to shaping political culture. In this sense, Habermas sees the reappraisal of German colonial history as an “important addition” to German politics of memory.

In our view, it is therefore not necessary to equate industrial mass murder with colonial crimes, even if, for example, the German Empire's campaign of extermination in what is now Namibia can be legally classified as a genocide against the Herero and Nama. It has proven to be notoriously difficult for former colonial states to acknowledge injustice, including their own injustice, and thus to acknowledge ruptures within the narrative of success of Western European civilization. A differentiation between international crimes certainly must not lead to the injustice and suffering endured by affected groups being measured against each other, downplayed or even trivialized.

These debates should be kept in mind when discussing today whether the actions of the Israelis legally qualify as genocide. Above all, however, one should not forget that the German right, and in particular the extreme right, has in no way ever, in the history of the Federal Republic of Germany, stood for the acknowledgment and punishment of National Socialist injustice against Jews and other groups. Their advocacy of state repression against Israel-related anti-Semitism thus functions as a distraction from their own position and as an instrumentalization of anti-Semitism. One can only wonder at what might have been going on in the minds of SPD, Green, Left, FDP and CDU politicians when they applauded the AfD's

resolution against anti-Semitism in the Bundestag in November 2024. The very party whose leading representatives described the Holocaust memorial in Berlin as a “disgraceful memorial” (*Denkmal der Schande*) and Hitler’s horrifying acts as “tiny blot” (*Vogelschiss*) in German history.

At ECCHR, we work with Israeli, Palestinian and international human rights organizations, most of whom have set themselves the goal of denouncing and legally prosecuting human rights violations on all sides.

In Israel, there may well be a functioning judicial system in other contexts. But the brief history since October 2023 shows that neither the clear, and thus punishable, calls for genocide by members of the Israeli government, nor the numerous crimes committed by the Israeli army have led to serious investigations, let alone sanctions by Israeli public prosecutors and courts. It is thus left to the international institutions, the various mechanisms of the United Nations, the International Court of Justice and the International Criminal Court in The Hague to fill this gap.

The German government will have to decide whether it wants to follow a course hostile to international law, as exhibited by the Israeli and (future) US governments, by standing by and watching as the institutions of international criminal law supported by Germany and the critical civil societies in Israel and the USA are sanctioned. As human rights lawyers, we advocate for the universality of human rights – in all situations for all people. And we are firmly convinced that only the application of the same (international) laws to all can ensure the legitimacy and, thus, the survival of the institutions of international criminal law in the medium term.

Read the Q&A [Gaza and the matter of genocide: Q&A on the law and recent developments](#)