

## Gaza and the matter of genocide: Q&A on the law and recent developments

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In recent months, ECCHR has been conducting independent research and analysis on the topic of genocide, and analyzing this against the available information and evidence relating to Israel's actions in Gaza (see Question 6). This process has led us to the conclusion that there is a legally sound argument that Israel is committing genocide against the Palestinians in Gaza.

### 1. What courts have jurisdiction over the crime of genocide?

The two major international courts, the International Court of Justice (ICJ) and the International Criminal Court (ICC), both have jurisdiction over cases of alleged genocide. While the ICJ deals with cases of state responsibility for genocide, the ICC deals with cases of individual criminal responsibility for genocide. However, importantly, the definition of genocide is the same at both the ICJ and ICC.

Under the principle of universal jurisdiction, states can prosecute genocide regardless of where it was committed or the nationality of the perpetrators or victims. For instance, Germany's Code of Crimes against International Law allows the prosecution of genocide even without a direct national link.

### 2. What is the ICJ case of *South Africa v. Israel* about, and what are the main arguments?

South Africa has filed a claim before the International Court of Justice (ICJ), which alleges that Israel has breached its obligations under the Genocide Convention, because of its actions against the Palestinians in Gaza.

The central claim is that Israel's military actions and policies towards Palestinians – including acts such as airstrikes, blocking humanitarian aid, and killing civilians – are actions intended to destroy the Palestinians in Gaza, in whole or in part. Because of this, South Africa claims that Israel's actions meet the legal definition of genocide (which is explained in Question 4). South Africa is asking the ICJ to hold Israel accountable for committing genocide and for failing to prevent it. It has asked the ICJ to order some specific actions, including ordering Israel to immediately stop its military operations in Gaza, and to help to get humanitarian aid to the Palestinians in Gaza.

Israel has essentially responded that its actions are legitimate military response to ongoing security threats, and that it must be allowed to defend itself from those threats.

### **3. What decisions have already been made in *South Africa v. Israel* by the ICJ?**

While the ICJ hasn't issued its final judgment, which will likely take a few years, it has already issued three sets of Provisional Measures orders. These orders give urgent instructions to the parties to ensure that they do not cause further harm to the rights that the case is trying to protect.

In the first order, issued on 26 January 2024, the ICJ preliminarily considered that the situation in Gaza was urgent, as there was a "real and imminent risk" that Israel's acts and omissions could plausibly violate the rights of the Palestinians under the Genocide Convention. The ICJ ordered Israel to take all measures within its power to prevent the commission of the prohibited acts, and to ensure that its military does not commit them either. Given the statements of several Israeli leaders and high-ranking officials which South Africa argued were incitements to genocide, the ICJ also ordered Israel to prevent and punish incitement to genocide, and to enable the provision of humanitarian aid to the Palestinians in Gaza.

The second order, issued on 28 March 2024, reaffirmed the first order, and made some additional demands of Israel. The ICJ ordered Israel to "ensure, without delay" the unhindered provision of humanitarian aid to the Palestinians in Gaza, including by opening more land crossing points. It also ordered Israel to ensure that its military does not violate the rights of the Palestinians in Gaza under the Genocide Convention.

In its third order, issued on 24 May 2024, the ICJ found that the situation of the Palestinians in Gaza had worsened immensely, calling it "disastrous." The ICJ reaffirmed its previous orders, and additionally directed that Israel must immediately stop its military offensive and any other acts that may amount to genocide against the Palestinians in Gaza; keep the Rafah crossing open for the provision of humanitarian aid; and ensure that UN fact-finders, investigative bodies and commissions of inquiry can access the Gaza Strip.

Israel has failed to comply with these orders, leading to ongoing calls for Israel to immediately implement all of the ICJ's provisional measures orders.

### **4. What is the definition of genocide in international law?**

The legal definition of genocide is set out in Article II of the Genocide Convention. There are three key elements of the definition that have to be established to fulfil the crime of genocide, under international law:

- a. There must be a specific group that is being targeted as such, based on their nationality, ethnicity, race, or religion.
- b. There must be certain acts that have been committed against that target group. These acts are killing or causing serious bodily or mental harm to members of the group; deliberately inflicting living conditions on members of the group that are calculated to destroy the group, at least in part; imposing measures that are intended to prevent births within the group; or forcibly transferring children from the target group to another group.
- c. The individuals or state that is committing the acts above, must intend to destroy the target group, partly or entirely. This element is called "specific intent", or "*dolus specialis*", and is generally the most difficult element to prove.

This specific intent can be proven either through direct evidence (such as official statements or documents made by the state), or indirect evidence (such as through a pattern of conduct). International tribunals such as the ICC consider factors such as the scope and systematic nature of the attacks; the target groups of the attacks; repetition of destructive acts; and dehumanizing language and propaganda.

The question of the threshold for establishing specific intent is subject to ongoing debate, and some states have cautioned against a narrow interpretation that is impossible to meet. The narrow approach would require that genocidal intent be the “only reasonable inference” from the situation at hand. However, many states support the broader interpretation of the ICJ in *Croatia v. Serbia*, which emphasised the importance of reasonableness in the Court’s reasoning, and highlighted that the “only reasonable inference” test should only be used when drawing an inference from a pattern of conduct, not where other methods of inference are also present.

In *The Gambia v. Myanmar*, a group of states (Germany, Canada, Denmark, Netherlands, France, the United Kingdom of Great Britain and Northern Ireland) argued in favor of a balanced approach, in line with the ICJ’s interpretation in *Croatia v. Serbia*. This aligns with South Africa’s construction of Israel’s genocidal intent before the ICJ. Yet, Germany has now indicated that it will intervene in support of Israel in the current proceedings at the ICJ. It is difficult to see how Germany could do so without arguing for a narrow interpretation of specific intent, which would mean backtracking on its previous position. If the ICJ accepts and adopts the position of the group of states construction in *The Gambia v. Myanmar*, it would become binding and preclude Germany from arguing for a narrow interpretation.

## **5. On which legal basis can a state be responsible for genocide?**

States can be responsible for genocide under international law in a few different ways. A state can be held responsible where it has committed genocide itself, or has attempted to do so. A state can also be held responsible for conspiring to commit genocide. This can occur where two or more individuals, whose actions are attributable to the state, agreed on a common plan to commit genocide.

Responsibility for genocide can also be found where a state has directly and publicly incited genocide. For example, if a state or its officials are making statements or social media posts that encourage the genocide. States can also be responsible for genocide where they have failed to prevent and punish genocide, particularly where they have the power and capacity to do so. This type of responsibility might apply where, for example, a state provides weapons to another state, which that other state then uses to commit genocide, or where a state provides funds to another state to support its military actions that amount to genocide. This form of responsibility is called “complicity in genocide”, and is one of the forms of responsibility that Nicaragua has argued in its case against Germany before the ICJ (discussed further in Question 7).

## **6. What are the legal arguments that support a finding that Israel is committing genocide in Gaza?**

A large number of reports (for example, [here](#), [here](#) and [here](#)), commentary and judgments support a conclusion that Israel is committing genocide in Gaza. For example, many United Nations experts, [Committees](#) and [Special Rapporteurs](#) have warned of the risk of

genocide by Israel, with increasing urgency over the last year. The Heads of State, state officials and representatives of many countries have publicly referred to genocide in Gaza, or the risk thereof. Additionally, reports have been published by international, Palestinian, and Israeli individuals and organisations, which posit that Israel is committing a genocide in Gaza, or at least is at risk of doing so.

The ICJ has already determined that the Palestinians are a protected group under the Genocide Convention, and that Palestinians in Gaza are a substantial part of that group. This satisfies the first element of the crime of genocide, as set out in Question 4.

There is also evidence indicating that several of the prohibited genocidal acts have been, and continue to be, committed in Gaza. Some key evidence is summarized below:

- a. **Killing members of the group:** At the latest count, over 44,249 Palestinians have been killed since 7 October 2023. The majority of these victims have been civilians, including at least 7,216 women, 13,319 children, and 3,447 elderly people. Additionally, it is estimated that more than 10,000 people are missing or under the rubble in Gaza.
- b. **Causing serious bodily or mental harm to members of the group:** At the latest count, more than 104,746 Palestinians have been injured since 7 October 2023, *in addition* to the number of those killed. Palestinians have also suffered intense psychological harm as a result of witnessing the Israeli attacks and their devastating toll on life, limb and infrastructure. Living in constant fear and uncertainty, including around the ability to secure basic necessities, has also caused psychological distress. An estimated 90% of children in Gaza are in need of mental health and psychosocial support.
- c. **Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part:** Israel has forcibly evacuated and displaced around 90 percent of Palestinians in Gaza, and has simultaneously failed to provide, and deliberately restricted, the provision of adequate shelter, clothes, hygiene or sanitation. This has caused widespread hunger, dehydration and starvation, the effect of which have been compounded by the destruction of medical infrastructure and lack of access to medicine in Gaza.
- d. **Imposing measures intended to prevent births within the group:** Israel's strikes and blockades in Gaza have resulted in a significant increase in miscarriages, stillbirths, and premature births, as well as deaths from preventable causes in both women and babies. Recently, the World Health Organization estimated that 15 percent of women giving birth in Gaza are likely to experience complications.

Lastly, numerous authoritative bodies conclude from available evidence that the necessary special intent (*dolus specialis*) is also established. Such intent has been indicated by the repeated use of dehumanizing language in statements by Israeli governmental and military officials, which can be attributed to the State of Israel under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). For example, former Israeli Defence Minister Yoav Gallant referred to the Palestinians as "human animals", and Israeli Prime Minister Benjamin Netanyahu called on Israeli armed forces to "remember what Amalek has done to you" – a reference to a Biblical story of the total destruction of the people of Amalek by the Israelites. This dehumanizing language demonstrates the sweeping brush used by Israel to paint all Palestinians in Gaza as legitimate targets, to be destroyed, and a flagrant disregard for Israel's responsibilities as the occupying power. There is also evidence that genocidal

rhetoric has spread across much of Israeli society, and is used by IDF soldiers, the Israeli media, and civilians.

In addition, certain aspects of Israel's acts and omissions have been pointed to as indicating genocidal intent towards the Palestinians in Gaza. Experts have emphasized that Israel's means and methods of warfare have shown a systematic disregard for the humanitarian principles of distinction, proportionality and precautions in attack. This has resulted in a disproportionately vast number of civilian casualties, the majority of which have been women, children, and the elderly. Other indicators of genocidal intent that have been highlighted are Israel's repeated forced displacement of the Palestinians in Gaza to Israeli-designated "safe zones", which have then been bombed; and its intentional deprivation of basic needs (including food, water, healthcare, fuel, sanitation, and communications) and destruction of social infrastructure (including homes, schools, mosques, churches, and hospitals).

## **7. Are there responsibilities for third states like Germany under the Genocide Convention?**

The Genocide Convention is not the only source of obligations under international law, regarding genocide. In addition to the obligations to prevent and punish genocide, the obligations under the Genocide Convention are also recognised as rights and obligations that are owed by all states to all other states (*erga omnes*), and the prohibition of genocide constitutes a peremptory norm of international law (*jus cogens*).

Under the Genocide Convention, states must ensure that Israel is not committing or preparing to commit violations of the Convention. States must also prevent or punish genocide. States that are engaged in any transfer or trade to Israel that contributes to Israel's military capability have even more heightened obligations in this regard. Thus, the [United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory](#) has recommended that any state engaged in such transfer or trade to Israel must cease its transfer or trade until the state is satisfied that the goods and technology subject to the transfer or trade are not contributing to the commission of genocide.

These obligations, in addition to the Genocide Convention, were used by Nicaragua to bring a case against Germany at the ICJ. Nicaragua claimed that Germany's actions in supplying weapons to Israel, and suspending funding for UNRWA, contributed to the risk of genocide against the Palestinians in Gaza. It argued that this amounted to complicity in genocide. Nicaragua therefore asked the ICJ to issue provisional measures ordering Germany to suspend aid and military assistance to Israel if there was a risk that it could be used to violate international law, and to resume funding to UNRWA.

While it did not immediately indicate provisional measures, by expressly emphasizing that the circumstances 'at present' did not require the indication of provisional measures (mainly due to the German pleading that it already ceased arms exports to Israel), the Court made clear that it could indicate such measures in the future. It effectively warned Germany that it would consider granting a new request from Nicaragua should Germany resume exporting war weapons or other military equipment to Israel, particularly if such equipment could be used to commit or support grave breaches of the Genocide Convention or the Geneva Conventions. In other words, any provision of weapons that poses a potential risk of being used to violate the Genocide Convention—essentially any

armaments likely to be deployed in active combat within the Gaza Strip—would be inconsistent with Germany's international commitments. The case is still ongoing.

## **8. Is the ICC also investigating the crime of genocide in relation to Gaza?**

While the ICJ deals with cases of state responsibility, the International Criminal Court (ICC) deals with cases of individual criminal responsibility. The Office of the Prosecutor of the ICC investigates and prosecutes the crimes within the ICC's jurisdiction. On 5 February 2021, the ICC confirmed that it has jurisdiction over acts committed in "the State of Palestine", namely the "occupied Palestinian territory" with the 1967 borders, which includes the Gaza Strip and the West Bank, including East Jerusalem. This is a determination of criminal jurisdiction over the territory, based on the ratification of the Rome Statute by Palestine in 2015. On 3 March 2021, the ICC Prosecutor announced that it was opening an investigation into the Situation in the State of Palestine. This investigation covers any of the crimes that the ICC has jurisdiction over, namely war crimes, crimes against humanity, the crime of aggression, and genocide.

While genocide has not been formally charged at the ICC in this case, that does not mean that it won't be charged in the future. In fact, the ICC press release on the issuing of warrants of arrest said that there are reasonable grounds to believe that some of Israel's actions "have created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza". This phrasing may suggest that the question of responsibility for genocide could arise also before the ICC.

## **9. What are the recent ICC warrants of arrest about?**

On 21 November 2024, the ICC Pre-Trial Chamber I issued warrants of arrest for Israeli Prime Minister Benjamin Netanyahu, former Defense Minister Yoav Gallant, and senior Hamas commander Mohammed Diab Ibrahim al-Masri (Deif).

The warrants of arrest for Netanyahu and Gallant allege that they are responsible for the war crimes of starvation as a method of warfare and intentionally directing attacks against the civilian population; as well as the crimes against humanity of murder, other inhumane acts, and persecution.

The warrant of arrest for Deif alleges that he is responsible for the crimes against humanity of murder, extermination, torture, rape, and other forms of sexual violence; as well as the war crimes of murder, cruel treatment, torture, taking hostages, outrages upon personal dignity, rape, and other form of sexual violence.

The ICC can only exercise jurisdiction if the relevant state is unwilling or unable to genuinely investigate and prosecute the crimes under investigation. This is referred to as the "principle of complementarity". Israel has argued that its civilian and military justice systems will investigate and prosecute individuals "when necessary". While Israel may challenge the jurisdiction of the ICC based on the principle of complementarity, it must demonstrate that it is conducting an independent and impartial investigation into the specific allegations made against Netanyahu and Gallant by the ICC Prosecutor. So far, it has not demonstrated this.

The ICC requires states' cooperation in order to enforce its decisions, as it does not have an in-built enforcement mechanism such as a police force. However, while there have been mixed reactions from states in response to the issuing of the warrants, the question

of whether to arrest and surrender the accused to the ICC is not a political one. The international legal obligations of States Parties are clear. It is now essential that member states of the ICC uphold their international legal obligations, by arresting and surrendering the individuals to the ICC if they enter their territory.

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