

## The Limits of Accusing Israel of Genocide

*Two recent court cases failed to stop the mass violence in Gaza, but they gave center stage to facts and historical interpretations that, in Western countries, at least, are often relegated to the margins.*

By **Masha Gessen**



Palestinians mourn relatives killed in the Israeli bombardment of the Gaza Strip outside a morgue in Khan Younis. Photograph by Mohammed Dahman / AP

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On January 26th, the International Court of Justice, in The Hague, ordered Israel to take immediate measures to reduce the number of civilian casualties in Gaza, to insure the provision of basic services and supplies to Gaza, and to otherwise prevent the genocide of Palestinians in Gaza. The ruling came in a case brought by South Africa and indicated that the court believed that genocide may indeed be occurring in Gaza, necessitating an urgent decision before a proper

trial can take place. Later the same day, a U.S. federal court in Oakland, California, heard three hours of heart-wrenching testimony in a case brought by Defense for Children International-Palestine, an international N.G.O., which claimed that the Biden Administration is violating the Genocide Convention by supplying weapons and other military equipment that the Israel Defense Forces use in Gaza.

Both cases were shocking in the accusation they levelled: that Israel, the state which was born in the aftermath of the carnage that gave the world the word “genocide”—and the Genocide Convention, unanimously adopted by the United Nations in 1948—is itself committing genocide. The trials also had this in common: they gave center stage to statements, descriptions, and interpretations of history that, outside the courtroom, in Western countries, at least, are often relegated to the margins. Whatever the final decision in the I.C.J. case, the plaintiffs will almost certainly not succeed in achieving what they demand and so desperately want—an end to the carnage in Gaza. And, in both cases, the respondent—Israel at the I.C.J., and the government of the United States in federal court—acted as though the accusation at the heart of the proceedings shouldn’t be taken seriously.

In the I.C.J. case, lawyers representing South Africa framed the current killing in Gaza as the latest chapter in a continuous history. “In our application, South Africa has recognized the ongoing Nakba of the Palestinian people through Israel’s colonization since 1948,” Vusimuzi Madonsela, the South African Ambassador to the Netherlands, said, introducing the case in court. “The application places Israel’s genocidal acts and omissions within the broader context of Israel’s seventy-five-year apartheid, fifty-six-year occupation, and sixteen-year siege imposed on the Gaza Strip.” The word “apartheid,” wielded by South Africa, a country that ended its own apartheid regime just three decades ago, was an assertion of authority: South Africans know apartheid when they see it.

The following day, representatives for the state of Israel responded that Israel knows *genocide* when it sees it. “The state of Israel is singularly aware of why the Genocide Convention, which has been invoked in these proceedings, was adopted,” Tal Becker, an Australian-Israeli international lawyer, said, in introducing Israel’s response to South Africa. “Seared in our collective memory is the systematic murder of six million Jews, as part of a premeditated and heinous program for their total annihilation.” He went on to accuse South Africa of reaching for the harshest word for its shock value, the way people do on social media.

Article II of the Genocide Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Adila Hassim, a former South African judge, argued that Israel is committing four out of five acts described in Article II: killing members of the group; 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 births within the group. “As I stand before you today, 23,210 Palestinians have been killed by Israeli forces during the sustained attacks over the last three months, at least seventy per cent of whom are believed to be women and children,” Hassim told the court, on January 11th. “Palestinians in Gaza are . . . killed in their homes, in places where they seek shelter, in hospitals, in schools, in mosques, in churches, and as they try to find food and water for their families. They have been killed if they failed to evacuate, in the places to which they have fled, and even while they attempted to flee along Israeli-declared ‘safe routes.’ ”

Israel was making life itself impossible for Gazans in four distinct ways, Hassim said. First, by displacing at least eighty-five per cent of Palestinians in Gaza. Israel’s first evacuation order, Hassim said, issued to the roughly one million inhabitants of northern Gaza, on October 13th, “itself was genocidal,” because the order “required immediate movement, taking only what could be carried, while no humanitarian assistance was permitted and fuel, water, and food, and other necessities of life had deliberately been cut off.” Second, she said, “Israel’s conduct has been deliberately calculated to cause widespread hunger, dehydration, and starvation. . . . An unprecedented ninety-three per cent of the population in Gaza is facing crisis levels of hunger.” Third, Hassim argued, Israel is depriving Palestinians in Gaza of necessities such as shelter, clothes, sanitation items, and water. Fourth, she said, Israel’s ongoing assault on the health-care infrastructure in Gaza “renders life unsustainable.” Finally, she argued, Israel violates Article II of the Genocide Convention—“imposing measures intended to prevent births within the group”—by blocking medical supplies necessary for childbirth. “In sum, Madam President,” Hassim said, addressing Judge Joan Donoghue, of the United States, who has led the I.C.J. since 2021, “all these acts, individually and collectively, form a calculated pattern of conduct by Israel indicating a genocidal intent.”

For the purposes of the hearing, South Africa didn’t need to prove that Israel is committing genocide—only that the risk of genocide is plausible enough to warrant emergency measures. Top Israeli officials have made a series of statements that seem to communicate an intent to annihilate Gaza and its inhabitants. On October 9th, two days after the Hamas attack on Israel, Defense Minister Yoav Gallant announced “a complete siege on the Gaza Strip. There will be no

electricity, no food, no fuel, everything is closed.” He added, “We are fighting human animals, and we are acting accordingly.” The following day, Major General Ghassan Alian, who heads the office of Coordinator of Government Activities in the Territories, said, “Human animals must be treated as such. There will be no electricity and no water, there will only be destruction. You wanted hell, you will get hell.” The energy minister, Israel Katz, pledged to deprive Gaza of power and water. “Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened, and no fuel truck will enter until the Israeli abductees are returned home.” Quoting this passage to the I.C.J., the South African representative Tembeka Ngcukaitobi said, “This admits of no ambiguity. It means to create the conditions of death of the Palestinian people in Gaza.”

South Africa argued that murderous rhetoric in Israel was explicit, consistent, and came not from the margins but from the very people who make state and military policy. Central to this argument is Prime Minister Benjamin Netanyahu’s use of the Biblical legend of Amalek, a mythical nation that wanted to annihilate the Hebrew people. Netanyahu invoked Amalek in a televised address on October 28th, as Israeli troops were beginning the ground invasion of the Gaza Strip. In the Biblical legend, God commands the Israelites to avenge themselves by killing every single Amalekite—to commit genocide. In December, a group of Israeli soldiers was filmed dancing in a circle, singing verses cobbled together from the statements of their state officials: “I’m coming to occupy Gaza / and beat Hezbollah. / I stick by one mitzvah / to wipe off the seed of Amalek / to wipe off the seed of Amalek. / I left home behind me, / won’t come back until victory. / We know our slogan: / there are no ‘uninvolved civilians.’ / there are no ‘uninvolved civilians.’ ”

Ngcukaitobi played the video for the court. “Soldiers obviously believe that this language and their actions are acceptable, because the destruction of Palestinian life in Gaza is articulated state policy.”

Israeli officials immediately protested that they had not meant what they said. Netanyahu’s office called the description of his use of Amalek as an incitement to genocide historically ignorant. The “reference to Amalek was not an incitement to genocide of Palestinians, but a description of the utterly evil actions perpetrated by the genocidal terrorists of Hamas on October 7th and the need to confront them,” the statement read. Here was the crux of the problem, the point of non-intersection. Israelis—not only right-wing Israelis, and certainly not only Israeli officials, but the overwhelming majority of Israelis—feel that, in the wake of October 7th, the country is responding to an existential threat. It is fighting an inevitable, necessary, and just war. The sense

of righteousness and the underlying fear are so great that Israeli officials probably speak for their country when they say, in effect, How can you call it genocide if it's waged by us?

In court, Israeli representatives argued essentially that they shouldn't have to make an argument. Malcolm Shaw, a British international lawyer who spoke for almost an hour as the first attorney representing Israel, asserted that "the real genocide" occurred on October 7th, when Hamas massacred some twelve hundred Israelis, including about eight hundred civilians. "Armed conflict, even when fully justified and conducted lawfully, is brutal and costs lives," Shaw said. "Not every conflict is genocidal. The crime of genocide . . . is a uniquely malicious manifestation. . . . It has been described, correctly, as the crime of crimes. It is the ultimate in wickedness. . . . If claims of genocide were to become the common currency of armed conflict, wherever and whenever that occurred, the essence of this crime would be diluted and lost." Shaw, who is in his seventies, thin, and impeccably adorned in a judge's robe and powdered wig, compared South Africa's claim of a dispute with Israel to "one hand clapping."

Later that day, another senior British barrister, Christopher Staker, took the lectern to call South Africa's demand for an order of ceasefire absurd. "Suppose that the Genocide Convention and the court had already been in existence during the Second World War," he said, "and that the Allied Powers were all parties to the convention without reservation while the Axis Powers were not. Suppose that a neutral state had brought proceedings against the Allied Powers alleging breaches of the Genocide Convention in their conduct of hostilities and requesting provisional measures requiring the Allies to cease hostilities immediately. . . . Such provisional measures would have required the Allies to surrender to the Axis Powers even though the case against them might later have been held to be wholly unfounded, without any consideration by the court about whether genocide was being committed by the Axis Powers."

The court appeared to recognize part of Staker's argument and stopped short of ordering a ceasefire, which, because Hamas is a terrorist organization and not a state—and so not subject to the I.C.J.'s jurisdiction—would have been unilateral. But the court recognized that the situation in Gaza was dire enough, the evidence compelling enough, that, even before the court could review all the facts, it ordered Israel to minimize casualties and report back to the I.C.J. on its progress. The only permanent member of the court who voted against all the measures was a representative of Uganda, and the country has since disavowed the dissent. Netanyahu celebrated the failure of what he called the "vile attempt" to deny Israel its right to self-defense. The bombing of Gaza continued. Since the I.C.J. ruling, the death toll has passed twenty-seven thousand.

That same day, a federal court in Oakland heard from four Palestinian Americans, among other witnesses, who claimed that bombs supplied by the U.S. had brought about the death and suffering of their family members. “My family is being killed, on my dime,” Laila El-Haddad, a writer living in Clarksville, Maryland, told the court. Five people on her father’s side of the family and eighty-four on her mother’s side have died since the beginning of the war, she said, and several dozen more are unaccounted for. She described a routine, now more than three months old, of checking her phone in the middle of the night, or first thing upon waking up in the morning, to see if family members were still alive. El-Haddad said that a cousin had been able to collect parts of his sister’s body and one half of his mother’s body.

Similar to the case brought by South Africa, the plaintiffs in the San Francisco court situated the current carnage in Gaza within a seventy-five-year history. “The majority of people in Gaza are refugees that were forcibly removed in 1948,” Waeil Elbhassi, of San Ramon, California, said. “Two of whom are my parents, who actually lived it firsthand and told us stories about it. . . . People feel that if they stay they might die or starve, and if they leave it’s not likely that they’ll be allowed to come back. . . . When I saw thousands of people in Gaza just fleeing, walking on foot, carrying all they can from their belongings, carrying children, and my brain immediately recalled images in black-and-white that I know of from 1948, when Palestinians made the same exodus, made the same journey.”

One of the eight witnesses called by the plaintiffs was the Wake Forest University professor Barry Trachtenberg, a historian of the Holocaust who wrote “The United States and the Nazi Holocaust,” which analyzes the role of racial prejudices in America’s failure to prevent the genocide of the Jews. Trachtenberg testified to a consensus opinion among historians of genocide that what is happening in Gaza can indeed be called a genocide, largely because the intent to cause death on a massive scale has been so clear in the statements of Israeli officials. “We are watching the genocide unfold as we speak,” he said. “We are in this incredibly unique position where we can intervene to stop it, using the mechanisms of international law that are available to us.”

Trachtenberg was the only witness the government, which called no witnesses of its own, chose to cross-examine. The effort to impeach his credibility went almost comically off the rails.

“Dr. Trachtenberg, you do not have a law degree, correct?” Jonathan Kossak, a lawyer for the Department of Justice, asked.

“Correct.”

“You do not have a degree in international relations, correct?”

“Correct.”

“You are not an expert on the constitutional principle of the separation of powers, correct?”

“Correct.”

“You are not an expert on U.S. national-security interests, correct?”

“Correct.”

“You are not an expert on U.S. foreign diplomacy, correct?”

“I’ve studied quite a bit of U.S. diplomacy, especially as it relates to genocide during World War Two.”

“You don’t have a degree in foreign policy, correct?”

“No, I wasn’t aware that’s a degree.”

“You’ve not written, um, um, on, eh, strike that.” After a long pause, Kossak asked for a moment and walked over to confer with his co-counsel. “No further questions, your honor.”

The U.S. government’s defense, much like Israel’s defense in the I.C.J., rested on the fundamental argument that the case itself is unthinkable. The Justice Department’s attorneys argued that the court was being asked to intervene in foreign policy and indeed undermine it, violating the principle of separation of powers. The plaintiff argued that the question was one not of policy but of law: the Genocide Convention, of which the United States was a lead author, is law, and sending bombs to the Israeli military so it can carry out genocide violates this law.

At the end of the day, the judge, Jeffrey S. White, looked stricken. “The testimony that the court heard was truly horrific, gut-wrenching,” he said. “And the government doesn’t really dispute, seriously dispute, factually, what’s going on in Gaza.” (Jean Lin, one of the two lawyers for the government, nodded.) White continued, “There is now on the record uncontradicted evidence that, at least in the opinion of scholars, one very highly regarded scholar—not from a legal standpoint but from a sociological, historical construct—they believe there is a genocide in progress. And I have to say that, in twenty-some-odd years on the bench, this is probably the

most difficult case, factually, that this court has ever had, and one of the most difficult cases legally that this court has ever had, because the court needs to decide: . . . What are the limits of the court's power within our constitutional framework?"

Before hearing witness testimony, Judge White had asked the lawyers for both sides what other remedies may be available to the Palestinian plaintiffs. They couldn't join the case in the I.C.J. because they are not a state—and, lawyers for the plaintiffs pointed out, the U.S. has veto power on the Security Council, one of the most powerful organs of the United Nations, making it almost impossible to challenge the United States within that structure. As for using domestic courts, Ling argued, the only option is to criminally prosecute individual perpetrators of genocide. "The upshot of their position is that, *after* the fact of a genocide, someone can be prosecuted, but *while* genocide is being aided and abetted, the courts in this country can do nothing to stop it," Pamela Spees, a lawyer for the Center for Constitutional Rights, a New York-based nonprofit that acted as the plaintiffs' co-counsel, said. "That cannot be the case."

Five days later, White released his decision: "This Court implores Defendants to examine the results of their unflagging support of the military siege against the Palestinians in Gaza." But that was all he found he could do. "There are rare cases in which the preferred outcome is inaccessible to the Court," he wrote. "This is one of those cases."



**Glossary:** A couple of key terms from this article that you might not know, by Prof. Cohen.

### **International Court of Justice**

An organ of the United Nations, created after World War II, which settles disputes between member states. It has no enforcement power but its decisions may be implemented by the United Nations Security Council.

### **Gaza**

One of two Palestinian Territories occupied by Israel in the 1967 Six Day War. With 2.1 million people in 141 square miles, it is among the densest populations in the world.

### **Palestinians**

The Arab population of Palestine which includes the State of Israel and Palestinian Territories. About 14 million people, half of whom live in Israel and its occupied territories, with the rest living in a global diaspora.

### **Genocide Convention**

The Convention on the Prevention and Punishment of the Crime of Genocide is an international treaty that criminalizes genocide and obligates state parties to pursue the enforcement of its prohibition. It was the first legal instrument to codify genocide as a crime, unanimously adopted by the United Nations General Assembly in 1948 [Wikipedia].

### **Nakba**

The Arabic term for “the catastrophe,” the violent displacement of Palestinians from Israel in 1948, which created the Palestinian refugee crisis and diaspora that persists today.

### **Apartheid**

The system of enforced legal racial segregation in South Africa from 1948 until the 1990s.

### **Hamas**

The Islamic Resistance Movement, a political and military organization of Palestinians which rules Gaza within the context of the Israeli blockade since 2005. Its attack against Israel on October 7, 2023, initiated the latest round of war between Israel and Gaza.