

# Israel's 'lawful' genocide

## UN definition of genocide will let Israel off the hook at ICJ

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### EXCLUSIVE PERSPECTIVE

As laudable as South Africa's attempt at charging Israel in the International Court of Justice (ICJ) is, it is destined to lose the case for charging Israel with genocide because of the unfortunate inclusion of a single word in the UN definition of genocide, which makes almost all similar cases impossible to win. The word is "intent".

Usually, when a solid case is lost, we deep down hope that it's at least for a good reason. We wouldn't mind as much if the counter-arguments were more solid, or the evidence was insufficient or shaky. We hate to lose a case, on which the very lives of thousands of people depend, before the trial is even started, but the UN settled on a toothless legal definition years ago, and people have paid for it time and time again with their precious lives.

I was going to console myself, and hopefully, you, by saying the old adage, Gazans will live to see the day when justice would be served. But the question is, will they live?

The case against Israel revolves around the Convention on the Prevention and Punishment of the Crime of Genocide (generally referred to as the Genocide Convention) that was drawn up in 1948 following World War II. Both Israel and South Africa were signatories to the convention. As another instance of political compromise between signatories to UN conventions, that final approved draft is starkly different from the initial draft.

According to Article II of the 1948 Genocide Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such: 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; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

There has been a recorded debate at the UN body surrounding the use of certain term. For example, removed from the definition was politically-motivated killing as well as acts of cultural destruction due to opposition from certain countries.

There was another troublesome term

in the definition that apparently flew under the radar, at best, or was included to make the signatories effectively agreeing to nothing, at worst, and that was "intent". More specifically, what has proven to sabotage almost any case for genocide in international courts, whether it be International Court of Justice (ICJ) or International Criminal Court (ICC), is the requirement of proving "special intent" or "dolus specialis".

Some jurisdictions classify intent into general and specific. A general intent crime is one that requires the defendant to act with a culpable intent, but not for the purpose of causing a specific consequence. This generally means that the prosecutor merely has to show, depending on the criminal statute, that a person acted with intent, knowledge, recklessness, or negligence. A special intent crime, on the other hand, has to happen with the exclusive intent for causing a specific consequence. Courts have held that, even if the actual act of the crime (or actus reus) is shown, prosecutors need to show that the criminal intent (or mens rea) of committing that crime is the only reasonable inference that can be drawn from the facts. If the crime in question was the intent, but the facts show there was also another intent behind the actions, the prosecutor will have failed to prove the crime, and the defendant will be exonerated.

Similar to common law crimes,

genocide requires the proof of both actus reus and mens rea. Specifically, in order to find someone guilty of genocide, the prosecution needs to show that the defendant actually committed the actions they are accused of, and they did so with the sole intent of destroying, in whole or in part, a national, ethnic, racial, or religious group. The actus reus of killing isn't necessarily difficult to prove; the mens rea element is difficult to prove.

As a result, genocide is difficult to prove under the current definition, and other charges are often used in its place. The dolus specialis burden has been met in the past by showing that genocide was "the only reasonable inference which can be drawn" from a pattern of conduct, the ICJ stressed in the case of Croatia v. Serbia. Some examples where it was specifically shown were in the killing of more than 800,000 Tutsis and moderate Hutus in Rwanda by Hutu extremists in 1994; the massacre of Bosnian Muslim men and boys by Bosnian Serbs in Srebrenica in 1995; and the forced displacement of and attacks on ethnic groups by Sudanese forces and militias in Darfur in the early 2000s. However, there were significantly more cases where the special intent for committing genocide was not inferred and the accused was exonerated. In fact, of the 31 currently active cases under the ICC in 2024, only former Sudanese president Omar al-Bashir faces charges of genocide. The seemingly insurmountable task of proving genocide has disheartened many prosecutors who pleaded for it in international courts and discouraged others from ever touching it. More importantly, victims and survivors of

many genocidal acts have been deprived of achieving the true justice and solace they deserve because of this extremely high standard.

As Nicholas Owens wrote, "It would be beneficial for the ICC and other Tribunals to rely on a different standard than the current dolus specialis standard they have been using, ideally one with a lower mens rea requirement; lowering the standard while still maintaining a higher level of intent than the remaining three crimes in the Rome Statute [namely, crimes against humanity, war crimes, and crimes of aggression] would make the burden of proving genocide more achievable, while still keeping the intent of the Genocide Convention and preserving the uniqueness of the crime of genocide."

In our daily lives, we seldom take on a big project with a single aim in mind. It is just as easy for a military or political leader to prove that in performing a genocidal act, he or she was pursuing another goal. You don't need a very shrewd legal counsel to remind you to insist on having exclusively other humanitarian, political or even economic goals in court or even in the media before you're ever accused. You just have to keep your intentions of genocide private and never write or express anything that would later make you liable. If you do these simple things, you're in the clear to ethnically cleanse a community and never be found guilty by international courts.

It was already expected that the Israeli legal team at ICJ will stick to what Tel Aviv has repeatedly said: That Israel is only looking to destroy Hamas, and civilian casualties are accidental or inevitable since the war is an urban area. However, Tel Aviv's declared goal shows nothing more than that Netanyahu had at least a decent legal counsel from the start of the war that kept reminding him to declare his goal of

Palestinians carry flags and banners as they gather at Nelson Mandela Square in Ramallah, West Bank, to demonstrate in support of the genocide case filed by South Africa against Israel at the International Court of Justice.  
ISSAM RIMAWI/ANADOLU AGENCY

