

THE LEGAL OBLIGATION TO PREVENT GENOCIDE IN GAZA

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Despite the International Court of Justice's order that ruled "plausible" genocide in Gaza, some governments continue to support Israel with weapons while simultaneously disrupting aid to the trapped Gazan population. These actions amount to an abrogation of the duty to prevent genocide under both international law and within national jurisdictions.

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When a genocide is underway, the international community has a moral and legal imperative to act. This is enshrined in the Genocide Convention, but it is also an **obligation erga omnes**, binding all states. Sadly, history teaches us that states are sometimes complicit in assisting regimes that commit genocide and atrocity crimes. This complicity comes in many forms: the provision of weapons, financial support, and diplomatic cover that shields perpetrators from accountability. The International Court of Justice's (ICJ) interim order on 26 January 2024 in the case brought by South Africa against Israel on the charge of violating the Genocide Convention is binding on Israel first and foremost. However, just as the same Court affirmed twenty-years earlier in an Advisory Opinion, violations by one state carry obligations for all state signatories to prevent and not be complicit in atrocity crimes. This includes the Crime of genocide, according to the **Convention**. In other words, even non-signatories to the Genocide Convention have that obligation, also thanks to peremptory principles to prevent genocide. For this reason, third parties must take note of the ICJ's order or risk facing accusations of complicity in genocide particularly if they supply Israel with the material means to carry out its military operations, as Nicaragua is arguing in **its separate case against Germany**.

In its **comprehensive written arguments**, South Africa has accused Israel of contravening the Genocide Convention, highlighting attacks on medics, hospitals, and ambulances, all of which are prohibited under International Humanitarian Law, but which have acquired an even graver character as comprising genocidal acts, accompanied by genocidal intention. South Africa's lawyers were careful to contextualize Israel's aggression on Gaza as the latest in a long history of subjugation that the Palestinians have endured under military occupation. In its order, issued two weeks after the hearings, the Court found there was plausibility in the charge of genocide and issued **six urgent provisional measures** that Israel must comply with. In their essence, the measures require the prevention of acts of genocide that fall under Article II of the Convention as well as the provision of urgently needed services and humanitarian assistance.

Far from preventing further deaths in Gaza, Israel's bombardments since the ICJ order have killed a **further 7,200** Palestinians. Between 7 October 2023 and 17 March 2024 a total of 13,000 children were killed and, as of 17 March 2024, one third of infants suffer from acute malnutrition, according to **UNICEF's Executive Director**, Catherine Russell. The **WHO and the FAO** say that hunger has reached levels that require large scale intervention to prevent imminent famine. Amnesty International decried that Israel "**failed to take even the bare minimum steps to comply**" with the ICJ ruling. **Human Rights Watch** revealed that the number of aid trucks entering Gaza after the ICJ ruling dropped by more than a third, as Israel has denied their entry at crossings and inspection points.

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European countries have responded in different ways to the initial bombshell order by the ICJ. **Spain and Ireland** formally requested that the EU revise its Association Agreement with Israel - which while falling short of sanctions would send a strong signal to Israel that its conduct has consequences. Other countries, including the US, Canada, the UK, the Netherlands, Finland, Germany, Italy and Switzerland either paused or halted their aid to UNRWA – the main provider of basic necessities and services in Gaza. By reducing this life-saving aid, the risk of starvation and death from injuries sustained during the ongoing bombardment inevitably rises. The pretext for pulling back funding had been Israel's conspicuous claim on 27 January, the day after the ICJ's order, that a handful of UNRWA employees had been implicated in the 7 October attacks on Israel. Aside from **doubts as to whether Israel's claims about 12 UNRWA employees have any merit**, the notion of stopping aid to an organization with 13,000 Gaza employees, based on the *alleged* conduct of a few individuals – all of whom are either dead, missing or dismissed from their jobs, betray the deeply **political motives** behind defunding UNRWA. Indeed, the same countries that were quick to halt aid also provide material and diplomatic support to Israel.

Governments that take actions which worsen an already catastrophic humanitarian situation in Gaza ought to be mindful of the lesser-known implications of the Genocide Convention – those of the obligation to prevent genocide and the obligation to not be complicit in it. States that continue to provide arms to Israel are failing to prevent the commission of genocidal acts by making deadly weapons available during the military onslaught. As argued by the **ICJ in its judgement on the Bosnia v. Serbia case** in 2007, responsibility to prevent genocide is "incurred if the State manifestly failed to take all measures to prevent genocide which were within its power" (para 430). In that ruling, the Court found that the

Former Republic of Yugoslavia had provided financial support to the Republic of Srpska (para. 338), whose army was responsible for the killing of thousands of Bosniak Muslims. Therefore, states that provide financial support or indeed military support to Israel, are leaving themselves open to litigation on the same grounds. This is further supported by **Article 16** of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts which outlines how states that help in the commission of a wrongful act are internationally responsible. Moreover, in the context of the South Africa v. Israel case at the ICJ, those states that have terminated or paused their commitments to UNRWA at a time of imminent famine may be directly violating the order to ensure humanitarian and medical assistance to Gazans. They may therefore be not only morally, but also legally, complicit in genocide under Article III(e) of the Genocide Convention.

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Several cases in this vein have already been filed in national courts. In the United States, **which has sent tens of thousands of bombs and munitions to Israel** after the 7 October attack, Palestinians and NGOs brought a **federal lawsuit against President Biden, Secretary of State, Antony Blinken, and Secretary of Defence, Lloyd Austin**, for their “failure to prevent and complicity in the Israeli government’s unfolding genocide” in Gaza. Although the court dismissed the case on the grounds that it lacked jurisdiction on issues of foreign policy, it was remarkable that the presiding judge, Jeffrey S. White, found Israel to be plausibly engaging in genocide. Encouraged by this finding, the plaintiffs appealed the claim that the court lacks jurisdiction over the case.

On 23 February, a similar case was brought to **a federal court against German politicians**, including Foreign Minister, Annalena Baerbock, and Chancellor, Olaf Scholz, for their role in “aiding and abetting” genocide through weapons exports to Israel. This paralleled the case brought by Nicaragua. Three Dutch **NGOs sued the Netherlands** alleging that the state’s export of arms to Israel was illegal. The plaintiffs won that case on Appeal, and on 12 February the Court ordered the Netherlands to cease the export and transfer of F-35 fighter jet parts to Israel; however, the Netherlands has been **exploring ways to legally evade** the terms of the Court order. NGOs have also launched a **lawsuit in Denmark** against the Danish National Police and Ministry of Foreign Affairs to stop their arms exports to Israel.

Complicity in genocide can hurt states on several levels, including through damage to their **reputations** and the loss of influence in international fora. A decline in moral standing can wither governments' domestic legitimacy with voters. This in turn can lead to social unrest and political instability. A recent **poll** showed a growing divide between European citizens and their governments when it came to support for Israel.

Sustained street protests and mobilization on social media are a concrete indicator of public discontent. Considering the upcoming European elections, EU states would do well to carefully examine their unconditional political, military and financial support for Israel, not only to limit their exposure to state accountability and individual criminal responsibility, but also on ethical grounds, and to acknowledge growing public revulsion at what is happening in Gaza.