Genocide in Gaza?

Some Preliminary Deliberations from an International (Criminal) Law Perspective

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"Israel is committing genocide in Gaza." This was the claim raised by South Africa before the International Court of Justice (ICJ) in The Hague just two and a half months after Hamas' large-scale terrorist attack on Israel on October 7, 2023. South Africa alleges that Israel's military counteroffensive is not (primarily) directed against Hamas, but rather aims to destroy the group of Palestinians in Gaza as such. This accusation carries significant political and legal weight. However, proving the necessary intent to destroy is difficult; it should not be accepted lightly. At any rate, as Israel's warfare continues and becomes increasingly brutal, the evidence for genocide is mounting.

General existence of the elements of the crime of genocide

Israel's military actions fulfil the *actus reus* of genocide as defined in Article II of the Genocide Convention (or Article 6 of the Rome Statute of the International Criminal Court and § 6 of the German Code of Crimes against International Law). According to these norms, the perpetrator must commit certain individual acts against members of a protected group which, at least in the abstract, generally carry the potential of destroying the group as such, in whole or in part.

The Palestinians in Gaza constitute a *protected group* within the meaning of the crime of genocide. In its Order of 26 January 2024 concerning provisional measures in the case of South Africa v. Israel regarding the genocide claim, the ICJ still left open the question of what kind of group the Palestinians might be (national, ethnical, racial or religious – para. 45). However, an increasing number of States recognise Palestine as a State. Furthermore, in its Advisory Opinion of July 2024 on Israel's policies and practices in the Occupied Palestinian Territory (OTP), the ICJ focused on the Palestinians' right to self-determination. Therefore, there is little doubt that the Palestinians are to be qualified as a national group within the meaning of the Genocide Convention.

In addition, in the current Gaza war, the first three enumerated acts of genocide pursuant to Art. II of the Convention are fulfilled: (i) killing members of the group, (ii) causing serious bodily or mental harm to members of the group, (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

When it comes to the *mental* element, it is important to distinguish between individual perpetrators and collective entities such as the State of Israel. As far as the general intent is concerned, that is the conscious (cognitive element) and/or deliberate (volitional element) realisation of the objective elements of the crime, it can be assumed that individuals involved in the military operations are aware of the realisation of the above-mentioned objective elements, i.e., the cognitive intent element exists. On the state level, the respective intent of leading politicians and military personnel can, in principle, be attributed to Israel.

The difficulty of proving the specific intent to destroy (dolus specialis)

Proving the genocidal intent to destroy is demanding and complex. As above, a distinction must be made between the intent of individual perpetrators and its attribution to the State of Israel. Further, it is necessary to differentiate between the abstract meaning of this "*intent* to destroy", the respective standard of proof and the actual (procedural) proof of this intent (see also *Ambos*, 2024, at 532 et seq., with regard to the structurally similar crime of apartheid). Regarding the meaning of intent, the objective genocidal acts must

be directed towards the destruction of the targeted national group (or a significant part of it); in other words, purposeful action is required. The downgrading of this volitional approach to a cognitive one (as apparently supported by Ireland,[1] with the consequence that it might suffice for the perpetrators to know or to be able to foresee that their actions would probably contribute to the destruction of the protected group) has so far not prevailed. This applies to international criminal law (in relation to individual criminal responsibility) as well as to public international law (in relation to Israel's state responsibility). The ICJ will have the opportunity to clarify the requirements for establishing the intent to destroy in the case South Africa v. Israel – although probably not before 2027.[2]

Based on the prevailing standard, a perpetrator of genocide – whether a natural or legal person – must purposefully intend to bring about the destruction of the protected group (see e.g. ICTR, *Akayesu*, para. 498, 518; ICTY, *Jelisić*, para. 84 et seq.; ICTY, *Krstić,* para. 571). As regards the standard of proof, the ICJ (para. 148) and the ICTY (para. 14) require the genocidal intent to be *the only reasonable inference* from the available evidence (see on that Barigye/Hendrickse/Todeschini and Ambos). According to this strict approach, genocidal intent could only be affirmed based on a combination of genocidal statements by persons belonging to the leadership level of the State and the corresponding attacks on the group. At any rate, the special intent can (at least in principle) be inferred from objective behaviour (*dolus ex re*) and thus ultimately be presumed (see therefore in general *Volk*, Festschrift A. Kaufmann, 1993, 611, 618 et seq.; for international criminal law Stuckenberg, 524, 527). Consequently, even if there are only a few relevant public statements by the state leadership, a destructive, indiscriminate manner of warfare may still indicate genocidal intent. This also corresponds with the legal view expressed by Germany and other states in the ICJ proceedings in The Gambia v. Myanmar (para. 48 et seq.).

Application to the situation in Gaza

As concerns the situation in Gaza, public statements by senior Israeli officials (see here and here) containing racist degradation and dehumanisation of Palestinians and generally denying them protection as civilians indicate a genocidal intent. This is supported by the high number of victims – at the time of writing, over 50,000 dead and 120,000 injured (see here, here, here and here) – as well as the brutalisation of Israel's warfare and the enormous destruction in Gaza. Nevertheless, it must not be ignored that, since its first statement in the genocide proceedings before the ICJ, Israel has repeatedly emphasised that it is primarily targeting members of Hamas and military objectives. It maintains that the civilian population is not the intended target of its attacks, but is merely affected by the violence as an inevitable collateral consequence.

There is much to suggest that the impact of Israeli warfare on the Palestinian population is so significant that it entails a series of violations of International Humanitarian Law (IHL, *ius in bello*). Furthermore, Israel is arguably attacking the civilian population in Gaza on a systematic and widespread scale, to the extent that crimes against humanity are also committed. The investigation of the International Criminal Court is currently heading in this direction. Thus, grave wrongs and the most serious crimes known to humanity are committed in Gaza. Anyone who, in addition, raises the genocide claim must, however, prove that the arguments put forward by Israel are a mere pretext and that the Palestinian group as such is actually the real target of Israel's military operations.

In its second Order of 28 March 2024, the ICJ indicated that a genocide can also be committed by withholding humanitarian aid. Hence, it could be considered whether the intent to destroy can be inferred

[1] See the Declaration of Intervention by Ireland in the case of South Africa v. Israel, para. 28: "Ireland construes the mental element of the crime of genocide as being satisfied where the perpetrator has acted deliberately, in a manner designed to destroy, or contribute to the destruction of, the protected group in whole or in part as his or her purpose. Furthermore, in Ireland's view, specific intent can also be inferred in any case where a reasonable person would have foreseen that the natural and probable consequence of the acts of the perpetrator was to so destroy or contribute to destruction of the protected group, and the perpetrator was reckless as to whether those acts would do so."

[2] Israel has to submit is counter memorial by 12 January 2026, then there will be a reply and rejoinder, so that proceedings (on the merits) cannot be expected before mid-2027.

from the systematic blockade of the Gaza Strip. In this regard as well, it must be taken into consideration that Israel cites security concerns as reasons for its actions, specifically the systematic deviation of aid by Hamas and its infiltration of UN humanitarian agencies, particularly UNRWA. Still, this should not change the fact that a complete exclusion of all humanitarian organisations from Gaza is contrary to international law and constitutes a violation of Israel's protective responsibilities as an occupying power (see especially Articles 55, 56 of the Fourth Geneva Convention). Nevertheless, Israel's statements raise doubts regarding its intent to destroy (if one does not want to dismiss Israel's claims as mere pretext and unfounded as well, especially since Israel does not provide any concrete evidence for its accusations against the humanitarian organisations, as recently stated e.g. by the Commissioner-General of UNRWA *Lazzarini* in a BBC interview). Furthermore, upon diplomatic pressure, Israel has now resumed aid deliveries into the Strip again (albeit on a very limited scale, bypassing the existing humanitarian structures and thus causing chaos and including killings of Palestinians, see here and here).

Even though the genocide claim should therefore be treated with caution, especially given the legitimate Israeli security concerns, the evidence for genocide has nonetheless become more compelling in recent days and weeks. The longer the military operations and the accompanying suffering of the civilian population continue, the weaker the link to the Hamas terror attack, which, after all, took place over 19 months ago, and thus to Israel's right to self-defence becomes. No reasonable observer can deny that Israel's warfare is extremely brutal and disproportionate. Consider, for example, the recent bombardment of a school being used as a shelter that killed dozens of people, including many children. According to UN figures, 180,000 people were displaced within and from Gaza between 15 and 25 May alone. In addition, the Israeli military action is accompanied by calls from senior government officials for ethnic cleansing and resettlement. The statements by Israeli Minister Bezalel Smotrich, who envisions the total destruction of Gaza and wants to concentrate the population of Gaza in a small "humanitarian zone" (see here and here), are particularly alarming. Still, Prime Minister Benjamin Netanyahu recently announced that the military campaign would be intensified and that the Palestinian population would be resettled in the process. Against this backdrop, even mainstream Israeli politicians voice criticism. Thus, former Israeli Prime Minister Ehud Olmert referred to the "monstrous proportions" that the violence in Gaza had reached. He further stated that the civilian population had been attacked in disregard of the fundamental IHL principle of distinction and that it was no longer possible to recognise a legitimate war aim.

To sum up: While it was relatively easy to dismiss (as indeed done by one of the authors here) the genocide claim in the first few months of this Gaza war invoking the high threshold of the intent to destroy, this becomes more difficult with each day this war continues in this brutal and disproportionate manner. Put differently, on the whole, the dynamics of the conflict now speak more in favour of genocide than against it. In this context, it bears noting that the intent to destroy need not be the sole motive of the perpetrator or the collective entity allegedly pursuing a genocide. Instead, a genocidal intent may well coincide with other motives, e.g. certain military objectives or security policy considerations.[3]

[3] This corresponds to the case law of the ICTY, *Jelisić,* para. 49 ("The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.").

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