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## U.S. Complicity in Israel's "Plausible" Genocide



Photograph by Nathaniel St. Clair

“Honoring our alliances does not mean facilitating mass killing,” Representative Ocasio-Cortez said on the floor of the House of Representatives on March 22. “We cannot hide from our responsibility any longer.” “Facilitating mass killing” and “responsibility” could include United States legal complicity. While eyes are on a U.N. Security Council resolution calling for an immediate ceasefire in the Gaza Strip, a court case in California (*Defense for Children International, Palestine, et al. v. Joseph R. Biden, et al.*) is worth noting; the case directly challenges the United States’ support for Israel. Although the case will not force Israel to

withdraw from Gaza, it does raise serious issues about the United States' complicity in Israel's continuous violation of human rights and humanitarian law as well as its egregious non-compliance with the provisional measures ordered by the International Court of Justice (ICJ).

The ICJ ruled on January 26 that Israel was committing "plausible genocide." In addition, in a March 25 Report to the Human Rights Council by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese wrote in the Summary: "By analyzing the patterns of violence and Israel's policies in its onslaught on Gaza, this report concludes that there are reasonable grounds to believe that the threshold indicating Israel's commission of genocide is met."

In the California case, United States leaders are accused of illegal complicity in not preventing genocide as well as contributing to Israel's genocidal actions.

Over thirty eminent legal scholars and practitioners, including Richard Falk, Philip Alston, and Andrew Clapham, presented a brief (*Amicus curiae*) supporting the case before The United States Court of Appeals for the Ninth District. Without going into all the legalese, the major points in the brief were: 1) The prohibition of genocide, complicity in genocide, and the duty to prevent genocide are fundamental norms of customary international law from which there are no exceptions. 2) Being aware of the risk of genocide obliges states to prevent genocide from occurring. If a state knows genocide is taking place, and the state continues to support the state committing genocide, the supporting state has not fulfilled its legal obligation to prevent genocide and may be held to be complicit in the genocide. 3) Historically, in previous cases before the ICJ, the United States has agreed to these fundamental principles. 4) Domestic courts may enforce fundamental customary international law such as California in this case.

The second major point merits detailed explanation since it refers to two types of violations to the Genocide Convention. The first violation is that the prevention of genocide is a legal obligation. If a state has knowledge that genocide is being committed and does nothing, if it has knowingly not prevented genocide, the state is complicit. Furthermore, as the scholars note; "The duty does not require a finding that genocide is occurring; rather, awareness of a serious risk of genocide places an obligation on all States to take whatever action possible and necessary to prevent its occurrence or continuation." The ICJ's decision on "plausible genocide" makes this point relevant for the United States as does the Report of the Special Rapporteur. There is obviously a serious risk of genocide being committed by Israel in Gaza. There can be no doubt of the United States' "awareness of a serious risk." Therefore, as the

brief argues, the United States, like all states that have ratified the Convention, is legally bound “to take whatever action possible and necessary to prevent its [genocide] occurrence or continuation.”

The second type of violation in the brief is even more damning for the United States. It describes a positive act of commission rather than the negative act of not preventing. If a state continues to support the state committing genocide, the brief points out, the supporting state may be held complicit in genocide’s commission. The United States continues to supply weapons to Israel after October 7. “The United States has quietly approved and delivered more than 100 separate foreign military sales to Israel since the Gaza war began Oct. 7, amounting to thousands of precision-guided munitions, small-diameter bombs, bunker busters, small arms and other lethal aid, U.S. officials told members of Congress in a recent classified briefing,” John Hudson wrote on March 6, 2024, in *The Washington Post*. *The Wall Street Journal* and *The New York Times* confirmed this account of the Congressional briefing in similar reports.

The United States is therefore twice guilty of violating Article IIIe of the Genocide Convention which specifically prohibits complicity.

How does the United States continue to supply weapons to Israel in violation of the Genocide Convention? The U.S. Arms Export Control Act does permit exceptions for arms sales to close allies. The United States uses this loophole to continue sending weapons to Israel. But using this loophole to continue sending weapons does not exonerate complicity in genocide. In the least, it is hypocritical. Using the Arms Export Control Act “doesn’t just seem like an attempt to avoid technical compliance with US arms export law, it’s an extremely troubling way to avoid transparency and accountability on a high-profile issue,” Ari Tolany, director of the security assistance monitor at the Centre for International Policy think tank, was quoted in *The Guardian*.

Hypocritical and secretive. According to a recent *New York Times* article: “Last December, Secretary of State Antony J. Blinken twice invoked a rarely used emergency authority to send tank ammunition and artillery shells to Israel without Congressional review. These were the only two times the administration has given public notice of government-to-government military sales to Israel since October.”

What about other countries? Have they changed their policies towards Israel following the ICJ ruling? The Canadian government, which provides about \$4 billion dollars a year in military aid to Israel, recently announced that it would halt arms sales to Israel after the Canadian Parliament passed a non-binding motion to stop the weapons sales. Canada was not

alone. “Canada joins the Netherlands, Japan, Spain, and Belgium in suspending arms sales,” *Aljazeera* reported.

In addition to countries’ stopping arms sales, *The Guardian* revealed that more than 200 members of parliaments (MPs) from 12 countries wrote a letter trying to persuade their governments to impose a ban on arms sales to Israel. The MPs, a network of socialist and activists, argued that they will not be complicit in “Israel’s grave violation of international law” in its Gaza assault. In their letter, the politicians argued that after the ICJ ruling, “an arms embargo has moved beyond a moral necessity to become a legal requirement.”

The MPs were also not alone. U.N. experts stated that “any transfer of weapons or ammunition to Israel that would be used in Gaza is likely to violate international humanitarian law...” The experts, mostly independent rapporteurs for the United Nations Human Rights Council, wrote: “The need for an arms embargo on Israel is heightened by the International Court of Justice’s ruling on 26 January 2024 that there is a plausible risk of genocide in Gaza and the continuing serious harm to civilians since then.” As the Genocide Convention requires all states who have acceded to employ all means reasonably available to them to prevent genocide in another state as far as possible, “This necessitates halting arms exports in the present circumstances,” the experts argued.

In relation to the California case, the experts were quite clear; “State officials involved in arms exports may be individually criminally liable for aiding and abetting any war crimes, crimes against humanity or acts of genocide,” they wrote. “All States under the principle of universal jurisdiction, and the International Criminal Court, may be able to investigate and prosecute such crimes.”

In full awareness of the serious risk of “plausible genocide” by Israel taking place in Gaza, the United States has not stopped Israel’s actions and continues to send weapons to Israel. The United States has been and continues to be complicit. “International law does the enforce itself,” the experts concluded. “All States must not be complicit in international crimes through arms transfers. They must do their part to urgently end the unrelenting humanitarian catastrophe in Gaza.”

The legal argument is clear. The moral argument is clearer. Will political action follow? Eight senators wrote to Mr. Biden on March 11 calling on him to require Israel’s Prime Minister Benjamin Netanyahu “to stop restricting humanitarian aid access to Gaza or forfeit U.S. military aid to Israel.” Requiring Israel to allow access to humanitarian aid would be a start. Stopping sending military equipment would be even better. But even a U.N. Security

Council ceasefire – where the U.S. meekly abstained – will not absolve the United States of complicity in Israel’s “plausible genocide.”

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