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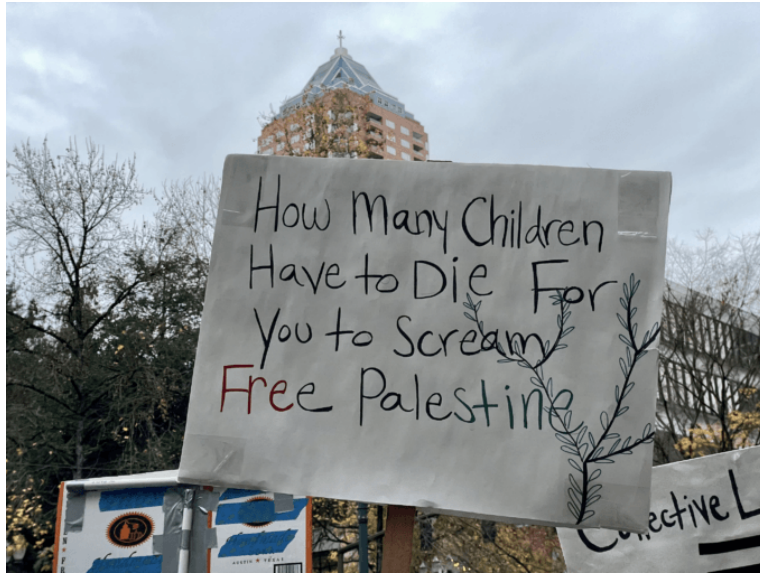
European Languages

زبانهای اروپایی

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11.06.2024

Complicity in Genocide



Photograph by Nathaniel St. Clair

With likely findings of war crimes and genocide by the International Court of Justice (ICJ) against Israel; and arrest warrants against two members of the Israeli war cabinet by the International Criminal Court (ICC), it may be time to consider the possible liabilities of the state and individual parties that have aided and abetted Israel in its war on Gaza. What are the governing laws? How have the international legal institutions addressed complicity in other cases of genocide? Could the complicity provisions apply to the United States and its leaders for assisting Israel in a war on Gaza that has cost so many thousands of civilian lives?

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as including the killing (“with intent to destroy, in whole or in part”) members of a “national, ethnical...or religious group.” The crime includes “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The ICJ’s interim judgment of last January in South Africa’s case against Israel held that the claim of genocide in Gaza was “plausible.” While the genocide law rests on “intent,” complicity in genocide has no such requirement. Article IV of the Genocide Convention provides that “persons committing genocide’ (or complicity in genocide) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” The ICC prosecutor is now seeking arrest warrants for two members of the Israel war cabinet who have allegedly committed war crimes in the Gaza war. Both the ICC and the ICJ make complicity in genocide a crime under international law. The ICC has jurisdiction over individuals, while the ICJ can accept cases against both individuals and states.

U.S. law also condemns genocide. In U.S. Code Section 1091 (“Basic Offense”) there is language similar to the Genocide Convention’s definition of genocide. Although there is no reference to “complicity,” the law contains a section entitled “Incitement Offense.” It provides that “whoever directly and publicly incites another” to commit a genocide offense “shall be fined not more than \$500,000 or imprisoned not more than five years, or both.”

The Genocide Convention, Article V requires the Contracting Parties to “provide effective penalties for persons guilty of genocide.” Article VIII allows “Any contracting party” to “call upon the competent organs of the United Nations to take such action” against states under the UN Charter “as they consider appropriate for the prevention and suppression of acts of genocide....”

How has the issue of complicity been dealt with in other genocide cases? The International Criminal Tribunal for Rwanda convicted many individuals for complicity in the 1994 genocide, including government officials and military officers. Following the Bosnian genocide of 1992-1995, a number of senior political and military leaders were convicted of complicity in genocide. The ICJ held Serbia responsible for failure to prevent the Bosnian genocide. The Cambodian genocide of 1975-1979 resulted in the conviction of senior leaders of the Khmer Rouge regime.

Individuals convicted of complicity in genocide or related cases have included top leaders. For example, former Liberian President Charles Taylor was convicted by the Special Court for Sierra Leone for aiding and abetting war crimes and crimes against humanity, but

not specifically genocide. Genocide requires proof of a specific discriminatory intent, while crimes against humanity require only proof of a general intent to attack a civilian population. In the ICJ case of *The Gambia v. Myanmar*, a state-to-state claim, the Court dismissed all of Myanmar's defenses, allowing the case to proceed to the merits stage. The question now is whether Myanmar violated the Genocide Convention in its treatment of the Rohingya people. While the case is still ongoing, the Court has reaffirmed the principle that all states have a common interest in the prevention and punishment of genocide and that any state can bring a case against another state for alleged violations of the Genocide Convention.

In March 2024, Nicaragua instituted ICJ proceedings for provisional measures against Germany for complicity in genocide through its arms sales to Israel for its war in Gaza. A month later the Court ruled against Nicaragua, finding that the legal conditions for such measures were not met. Nevertheless, the case shows the state parties that are not directly affected by the alleged harm can institute cases before the Court. The ability of such parties to stand before the Court is based on their right to act in the common interest.

In the United States, President Biden and other administration officials are named in an ongoing domestic lawsuit by the Center for Constitutional Rights for their alleged complicity in the Israeli-led genocide in Gaza. A federal district court in California dismissed the suit on technical grounds but did not rule on the merits. The case is now being appealed to a federal court of appeals. As Dr. William A. Schabas, a leading scholar of human rights law pointed out, U.S. complicity in the war on Gaza "has many parallels" with the Serbian government's complicity in the Srebrenica massacre.

In the days and months following the October 7 Hamas massacre in Israel, U.S. President Joe Biden (in close collaboration with Secretary of State Antony Blinken and Defense Secretary Lloyd Austin) pledged ongoing arms aid for Israel's war effort. The IDF has used the regular provision of U.S. bombs and missiles to level buildings and kill Palestinian civilians (mostly women and children). Although Biden has often called for more humanitarian aid and urged Israel to reduce the intensity of its attacks on population centers, he has continued to supply Israel with lethal weapons.

When the time comes for accountability, Biden, Blinken and Austin could find themselves charged with complicity to genocide under the ICC, the ICJ and/or U.S. federal jurisdiction.

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JUNE 10, 2024