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Judges Unmoved in Biden Genocide Complicity Case

The administration didn't dispute there's an ongoing genocide, writes Marjorie Cohn. But the three-judge appeals panel appeared unmoved by the plaintiffs' contentions the Biden administration is complicit in Israel's genocide.



U.S. President Joe Biden arriving at the U.S. Military Academy in West Point, New York, to deliver the commencement address on May 25. (White House /Erin Scott)

A lawsuit accusing U.S. President Joe Biden and some of his top officials of complicity in genocide had its latest hearing this month after being dismissed earlier in the year.

On June 10, the Ninth Circuit U.S. Court of Appeals in San Francisco heard arguments in the plaintiffs' appeal in *Defense for Children International – Palestine v. Biden*.

The lawsuit was filed on Nov. 13, 2023, by the Center for Constitutional Rights (CCR) on behalf of Palestinian human rights organizations Defense for Children International – Palestine (DCI-P) and Al-Haq, as well as three Palestinian individuals who live in Gaza and five Palestinian Americans who have family in Gaza.

“It is unfathomable that we are still here today,” plaintiff Waeil Elbhassi said at a press conference following the appellate argument.

Although CCR filed this lawsuit in November, “the genocide continues with the same intensity, with the same cruelty,” he noted, adding that many more of his relatives have been murdered in the last six months. “People are trying to flee because they’re fleeing death. They’re literally trapped in a killing field,” he said.

The plaintiffs allege that Biden, U.S. Secretary of State Antony Blinken and U.S. Defense Secretary Lloyd Austin are engaging in complicity in genocide and failure to prevent genocide in violation of the Genocide Convention and customary international law, which is part of federal common law.

“ ‘People are trying to flee because they’re fleeing death. They’re literally trapped in a killing field,’ ” plaintiff Waeil Elbhassi said.

Plaintiffs are asking the court to issue an injunction preventing the Biden administration from sending money and weapons to Israel and from obstructing international efforts to implement a ceasefire in Gaza.

They also want the court to order the Biden administration to exert influence over Israel to end its bombing of Gaza, lift the siege of Gaza and prevent the forcible transfer and expulsion of Palestinians from Gaza. And they seek a declaration from the court that defendants are violating their duty under customary international law that prohibits complicity in genocide and requires them to prevent Israel from committing genocide.

In an earlier hearing on Jan. 26, U.S. District Judge Judge Jeffrey White characterized the testimony he heard from the Palestinian and Palestinian American plaintiffs as “truly horrific, gut wrenching, no words to describe it.” He noted that the government did not dispute the uncontradicted evidence of a “genocide in progress.”

“The Palestinian people are living in fear and without food, medical care, clean water or sufficient humanitarian aid,” White said. “Defendants — the president of the United States and his secretaries of state and defense — have provided substantial military, financial and diplomatic support to Israel.”



Blinken, Biden and Austin at a press event in January 2023. (White House, Cameron Smith)

Nevertheless, on Jan. 31, White reluctantly dismissed the case based on the “political question” doctrine, which reserves foreign policy decisions to the political branches of government (executive and legislative), not the judiciary. That leaves the court with no jurisdiction to check the executive in this case.

At the same time, White wrote, “it is plausible that Israel’s conduct amounts to genocide” and the evidence and testimony “indicate that the ongoing military siege in Gaza is intended to eradicate a whole people.” White exhorted the Biden administration to “examine the results of their unflagging support” of Israel.

Not a ‘Political Question’

In the appeal, CCR argued the court could make a finding that the defendants are engaging in complicity to commit genocide and failure to prevent genocide without making a foreign policy decision.

The defendants have a legal duty to refrain from genocide, so the political question doctrine does not prevent the court from examining the Biden administration’s provision of military, financial and diplomatic assistance to Israel’s genocide.

“Plaintiffs reject Defendants’ suggestion that international embarrassment can come only from questioning conduct of an ally, Israel, and not instead from the U.S.’ open breach of its international law obligations to prevent, and not further, a genocide, an obligation reaffirmed by the [International Court of Justice],” CCR wrote in the appellant’s reply brief.

“Genocide can never be a legitimate foreign policy choice,” CCR Senior Staff Attorney Katherine Gallagher told Circuit Judges Jacqueline Nguyen, Daniel Bress and Consuelo

Maria Callahan during the June 10 argument. This case is about whether the judicial branch is “powerless” when the executive branch violates international law, she said.

“‘Genocide can never be a legitimate foreign policy choice,’ ” CCR Senior Staff Attorney Katherine Gallagher told the judges.”

The Genocide Convention defines genocide as acts committed “with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group,” including killing members of the group, inflicting serious bodily or mental harm on members of the group, or deliberately inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part. The International Court of Justice found a plausible case that Israel was committing genocide.

The Genocide Convention also forbids complicity in genocide and imposes a duty to prevent genocide, which is *erga omnes* — binding on all countries. Individuals can be complicit in genocide by knowingly providing assistance for its commission even if they don’t share the perpetrator’s specific intent to commit genocide.



South Africa presenting its genocide case against Israel at the International Court of Justice at the Hague on Jan. 12. (ICJ, Wikimedia Commons, CC BY-SA 4.0)

Genocide also violates customary international law and is considered a *jus cogens* prohibition, which means no country can ever legalize it.

But the three-judge panel appeared unmoved by the plaintiffs’ contentions.

Callahan, a George W. Bush appointee, asked Gallagher whether a federal court would be “second guessing” U.S. ally Israel if it opined in this case. Bress, a Trump appointee, worried that the court would be “running the U.S. military.” Nguyen, an Obama appointee, was concerned that the court would have to “condemn the foreign policy choices of the political branch.”

Gallagher replied that the judicial branch can review executive conduct to ensure it complies with the law. “Here, reviewing executive conduct — whether it is aiding and abetting the specific intent to destroy, in whole or in part — it is the responsibility of the court to review that conduct against clearly established definition of genocide, of complicity in genocide,” she said. “The Supreme Court made clear that even in moments of crisis, the executive is still bound by law.”

She cited four cases in which the Supreme Court set limits on executive actions during the George W. Bush administration’s “war on terror,” including *Hamdi v. Rumsfeld*, where the court reaffirmed that “a state of war is not a blank check for the president.”

‘Blank Check’ to Slaughter Civilian Population?



Israel forces operating in the eastern neighborhood of Rafah in Gaza, on May 8. (IDF, Wikimedia Commons, CC BY-SA 3.0)

Plaintiff Ahmed Abu Artema participated in the post-hearing press conference by audio from Gaza. In October, the Israeli military targeted his house and killed six members of his family, including his 13-year-old son Abdallah.

“I was so consumed by agony that I could scarcely feel the pain of the second-degree burns covering my own body,” he said. Israeli forces blew up Abu Artema’s apartment in Khan Yunis. “I am now, like everyone else in Gaza, homeless.... I sleep on sidewalks or what used to be sidewalks.”

Baher Azmy, CCR’s legal director, called the plaintiffs “incredibly courageous,” noting that they “collectively have lost hundreds of family members in the ongoing genocide.” Azmy said the U.S. is sending “billions of dollars of weapons of mass slaughter, starvation and destruction” that are “intentionally and knowingly used on a civilian population for the purpose of effectuating the genocidal campaign to destroy the Palestinian people in Gaza.”

The Biden administration didn't dispute that there's an ongoing genocide. "After all, how could they?" Azmy asked. "It is open and notorious." The question is whether the courts will give the government "a blank check to slaughter a civilian population." Ultimately, he said, "this administration will no doubt be condemned for their cowardice and for their complicity."

Plaintiff Ayman Nijim noted that since Gaza is among the most densely populated areas in the world — and children make up 52 percent of the population — "you know you will hit children" when Israel drops its bombs. Nijim's family members were forcibly displaced in 1948 from their home in the northern village of Asdod and have been refugees in Gaza since. They are hosting more than 120 members of their extended family who have fled northern Gaza.

Last week, plaintiff Basim Elkarra lost 10 family members in one attack. More than 90 of his relatives have been killed. Many are still missing, he said.

"Today we heard the Biden administration's lawyer say, 'We can commit genocide without any kind of accountability, there's no check on us, no law, when we decide the policy we want to support is genocidal,'" Gallagher stated. "That's a terrifying proposition."

"Last week, plaintiff Basim Elkarra lost 10 family members in one attack. More than 90 of his relatives have been killed. Many are still missing, he said."

U.S. Circuit Judge Ryan Nelson, a Trump appointee, agreed to recuse himself from this case after the plaintiffs learned he was one of 14 U.S. judges who participated in a March visit to Israel sponsored by the World Jewish Congress.

The delegation, which met with Israeli legal and military officials, "was explicitly designed to influence U.S. judicial opinion regarding the legality of ongoing Israeli military action against Palestinians — a core question on appeal of this case," plaintiffs wrote in their motion to disqualify Nelson. Callahan replaced Nelson on the three-judge panel.

CCR hopes the Ninth Circuit will issue a decision in the next couple of months. If the panel rules against the plaintiffs, CCR will likely ask the entire appeals court to hear the case *en banc*, which requires the agreement of a majority of the 30-judge court. If that petition is denied, or if it's granted and CCR loses after an *en banc* hearing, they can file a petition for certiorari in the U.S. Supreme Court.

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild, and a member of the national advisory boards of Assange Defense and Veterans For Peace, and the bureau of the International Association of Democratic Lawyers. She is founding dean of the People's Academy of

International Law and the U.S. representative to the continental advisory council of the Association of American Jurists. Her books include *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues*. She is co-host of “Law and Disorder” Radio.

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By Marjorie

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