

Complicity in Gaza: Holding US Foreign Policy Legally Accountable

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On March 15, the [next stage](#) of an intriguing legal process seeking to hold the Biden administration accountable for its failure to prevent, as well as being complicit in, alleged acts of genocide taking place in Gaza, was taken. It all stems from a lawsuit [filed](#) last November in the US District Court for the Northern District of California by the Center for Constitutional Rights, representing a number of Palestinian human rights organisations including Palestinians in Gaza and the United States.

The lawsuit sought an order from the court "requiring that the President of the United States, the Secretary of State, and the Secretary of Defense adhere to their duty to prevent, and not further, the unfolding genocide of Palestinian people in Gaza." The relevant duty arose by virtue of the UN Genocide Convention of 1948, which made obligations under it "judicially enforceable as a peremptory norm of customary international law."

The complaint further alleged that the genocidal conditions in Gaza had "so far been made possible because of unconditional support given [to Israel] by the named official-capacity defendants in this case," namely, President Joseph Biden, Secretary of State Antony Blinken and Secretary of Defense Lloyd Austin.

Such legal challenges can face challenges. Can the foreign policy of a state, which is the purview of the executive, fall within the scope of judicial review? In some countries, this has been shown to be the case – consider the Dutch appeals court decision compelling the government of the Netherlands to halt the transfer of F-35 parts to Israel for fear it would fall foul of the Genocide Convention. "The Netherlands," the court [found](#), "is obligated to prohibit the export of military goods if there is a clear risk of serious violations of international humanitarian law."

In the US, the separation of powers walls off judicial interference in matters of foreign policy. Jeffrey S. White, in [dismissing the case](#) at first instance, admitted it was the “most difficult” of his career, conceding that the factual grounds asserted by the plaintiffs seemed largely “uncontroverted”. He also acknowledged the legal noise and interest caused by South Africa’s [action](#) in the International Court of Justice against Israel, one contending that Israel’s conduct against Palestinians in the Gaza Strip satisfied the elements of genocide.

While the ICJ is unlikely to reach a conclusion on the matter any time soon, it issued an interim order of [provisional measures](#) explicitly putting Israel on notice to comply with the Genocide Convention, punish those responsible for directly and publicly inciting genocide, permit basic humanitarian assistance and essential services to the Gaza Strip, preserve relevant evidence pertaining to potential genocidal acts and report to the ICJ on its compliance within a month.

In White’s words, “the undisputed evidence before this Court comports with the finding of the ICJ and indicates that the current treatment of the Palestinians in the Gaza Strip by the Israeli military may plausibly constitute a genocide in violation of international law.” But to compel the US government to cease aid to Israel of a financial and military matter were matters “intimately related to foreign policy and national security”. The judiciary was, reasoned White, “not equipped with the intelligence or the acumen necessary to make foreign policy decisions on behalf of the government.”

On March 8, an [appeal was filed](#) by the Center for Constitutional Rights and co-counsel Van Der Hout LLP in the Court of Appeals for the Ninth Circuit arguing that aiding and abetting genocide can never be seen as a legitimate, unquestioned policy decision. The federal judiciary was duty bound to uphold the Genocide Convention, one that had taken on “an urgent, even existential dimension when the legal violation at issue is facilitating and even accelerating the destruction of an entire people.”

Within a matter of days, eight amicus briefs were submitted supporting the Palestinian plaintiffs. In one brief, eleven constitutional, federal courts and international law scholars [submit](#) in severe fashion that “affirming the district court’s decision would create serious mischief and uncertainty by contradicting this Court’s and the US Supreme Court’s political question jurisprudence and degrading the essential judicial role in interpreting and applying the law, including norms of international law, treaties, and their implementing statutes.”

While Justice White had noted the obvious proposition that foreign policy remained a matter for the political branches of government, with disputes on the subject being nonjusticiable, “that principle was not actually at issue in this case.” The Supreme Court had recognised that “legal disputes that touch on foreign affairs are not automatically policy disputes or political questions.” In this instance, the district court had “eschewed its responsibility to closely analyze the actual issues presented in favor of abstraction, generality, and already rejected misconceptions about what is and is not a political question.”

Another brief from seventeen former diplomats, service members and intelligence officers [argues](#) that “courts may decide whether an act violates a law, and that a finding that they cannot would harm US foreign policy.” The authors accepted “for present purposes that the district court’s factual finding, that the Israeli military’s conduct may plausibly constitute genocide, accurately reflects the record and controls at this juncture.” Again, White was taken to task for not appreciating the distinction between the “wisdom” of foreign policy – a

nonjusticiable issue – and “cases that question the legality of foreign policy, because applying the law to determine the legality of government action is the judiciary’s responsibility.”

Most impressive for the plaintiffs was the filing by 139 human rights organisations, bar associations and social justice movement lawyers [reiterating the point](#) that “allegations of the United States’ violations of the duties to prevent genocide and avoid complicity in its commission are clearly justiciable.” International law, by virtue of its “decentralized” nature, placed reliance upon States “to enforce the obligations to which they have consented, imposing a primary duty to the domestic courts of each State to ensure the compliance of their executive and legislative bodies with international law.”

Oral arguments will be heard in San Francisco in June 2024. By that time, the killing, starving and displacement of the Palestinian populace in Gaza will have further crystallised in its horror, leaving the legal fraternity dragging their feet. But over the cadaverous nature of this conflict, litigants in the US may be clearer about whether courts can hold the government to account for aiding and abetting the commission of alleged acts of genocide.

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