

# US Judge Admits Horror of Gaza Genocide, But Will He Dismiss Case Against Biden?

The judge noted that the US government doesn't dispute the uncontradicted evidence of a "genocide in progress."

By [Prof. Marjorie Cohn](#)

Global Research, February 01, 2024

[Truthout](#) 31 January 2024

Region: [Middle East & North Africa, USA](#)

Theme: [Law and Justice](#)

In-depth Report: [PALESTINE](#)

All Global Research articles can be read in 51 languages by activating the Translate Website button below the author's name (only available in desktop version).

To receive Global Research's Daily Newsletter (selected articles), [click here](#).

Click the share button above to email/forward this article to your friends and colleagues. Follow us on [Instagram](#) and [Twitter](#) and subscribe to our [Telegram Channel](#). Feel free to repost and share widely Global Research articles.

[New Year Donation Drive: Global Research Is Committed to the "Unspoken Truth"](#)

\*\*\*

*Mere hours after the International Court of Justice (ICJ) found [a plausible case](#) that Israel is committing genocide in Gaza, a historic hearing took place in a federal courtroom in Oakland, California. Several Palestinians who are suing President Joe Biden, Secretary of State Antony Blinken and Defense Secretary Lloyd Austin for failure to prevent genocide and complicity in genocide testified before district court Judge Jeffrey White in a [live-streamed session](#).*

"I have lost everything in this war," plaintiff Omar Al-Najjar testified from a hospital in Gaza. "I have nothing but my grief. This is what Israel and its supporters have done to us." Al-Najjar reported that conditions are so bad there is "widespread childbirth in the street."

The Center for Constitutional Rights (CCR) filed the [lawsuit](#) in the U.S. District Court of Northern California on November 13, 2023, on behalf of Palestinian human rights organizations [Defense for Children International - Palestine](#) (DCI-P) and [Al-Haq](#), three Palestinian individuals who live in Gaza and five Palestinian Americans who have family in Gaza. The complaint in *Defense for Children International - Palestine v. Biden* alleges violations of the [Genocide Convention](#) and customary international law which forbids genocide.

On November 16, plaintiffs filed [a motion](#) for preliminary injunction to immediately force Biden, Blinken and Austin to stop providing additional money, weapons, and military and diplomatic support to Israel for its genocide in Gaza.

The January 26, 2024, hearing featured [testimony](#) by Palestinian plaintiffs and a renowned

expert on genocide and the Holocaust. Plaintiffs testified from Gaza, Ramallah and in the courtroom. They described the death, devastation and displacement their families have suffered since Israel began its military assault on Gaza after the October 7 Hamas attacks.

Attorneys representing the Department of Justice (DOJ) did not challenge the fact that Israel is committing genocide or contest plaintiffs' allegations that U.S. support has furthered the genocide. They argued instead that the court doesn't have jurisdiction to hear the case because it involves a "political question" regarding foreign policy that is reserved to Congress or the president.

Judge White appeared very sympathetic to the Palestinian plaintiffs. But he signaled that he may find that the issues in dispute raise a political question which would prevent his court from hearing the case.

It is rare that a federal judge allows a hearing to be broadcast. It attests to the public interest in charging the president and two cabinet members with complicity in genocide and failure to prevent genocide. The judge approved licenses for 1,000 people to watch the proceedings via Zoom and even that didn't cover all of those who wanted to tune in.

### "The Gaza That We Knew No Longer Exists"

The witnesses included Ahmed Abofoul, a Palestinian lawyer and legal researcher at Al-Haq, one of the organizational plaintiffs, who testified that more than 60 relatives on his father's side had been killed, 15 of them in a single airstrike; many of their bodies remain buried under the rubble. For the first time in its 45-year history, Al-Haq is unable to document human rights violations throughout Gaza. "The Gaza that we knew no longer exists," he said.

Plaintiff Laila El-Haddad, a Palestinian American writer, testified that her neighborhood in Gaza was reduced to "a large pile of sand." Dozens of her relatives have been killed in Israel's assaults and some were buried in mass graves. She described a "profound feeling of not just sorrow and sadness, but injustice and helplessness," adding, "Biden could with one phone call put an end to this. He's decided to aid and abet."

Plaintiff Waeil Elbhassi is Palestinian American with extended family in Gaza. More than 100 of his relatives have been killed or injured since October 7. "Israel is making Gaza unlivable so there will be nothing for them to come back to. People don't want to leave. If they stay, they might die. If they leave, they won't be able to come back."

Plaintiff Basim Elkarra, who is Palestinian American, testified that after the temporary [humanitarian pause](#) between Israel and Hamas in November, 65 members of his family were murdered by Israeli forces. Dozens are missing. "How can children or anyone deal with the relentless bombing that shakes you to the core?" he asked.

Khaled Quzmar, general director of Defense for Children International - Palestine, an organizational plaintiff, testified that DCI-P provides legal services and psychosocial support to children. It monitors and documents human rights violations against Palestinian children. Now, he said, DCI-P is "completely unable to work."

DOJ attorneys objected to the testimony of Barry Trachtenberg, a professor of Jewish history and expert in genocide and the Holocaust, saying he was not qualified to opine on matters

of law, but the judge allowed it. Trachtenberg [said](#), “Israel’s assault on Gaza has been funded by the American people, fought with U.S.-supplied weapons, and encouraged by a complicit White House. Unlike past genocides, which were adjudicated long after they had concluded, we have an opportunity to halt this one in its tracks. Palestinians have suffered far too much and for far too long.”

## The Lawsuit Charges Biden, Blinken and Austin with Arming Israel’s Genocide

The lawsuit alleges that Biden, Blinken and Austin transferred weapons and military equipment to Israel during its unfolding genocide. The defendants have asked Congress to appropriate \$14.1 billion in military assistance to Israel — in addition to the \$3.8 billion the U.S. already provides to Israel each year. Blinken authorized a \$320 million transfer of military equipment to an Israeli manufacturer of precision bomb kits.

“As Israel’s closest ally and strongest supporter, being its biggest provider of military assistance by a large margin and with Israel being the largest cumulative recipient of U.S. foreign assistance since World War II, the United States has the means available to have a deterrent effect on Israeli officials now pursuing genocidal acts against the Palestinian people in Gaza,” the legal complaint states.

The Palestinian plaintiffs are asking the court to declare that defendants Biden, Blinken and Austin violated their duty under customary international law, as part of federal common law, to take all measures within their power to prevent Israel from committing genocidal acts against the Palestinian people in Gaza.

Plaintiffs also seek an injunction ordering the defendants to take all measures within their power to prevent Israel from committing genocidal acts against the Palestinians in Gaza. This includes ordering defendants to exert influence over Israel to: 1) end its bombing of the Palestinian people in Gaza which has caused mass killing and serious injury; 2) lift the siege on Gaza and allow all fuel, food, electricity, water and humanitarian aid into Gaza; and 3) prevent the “evacuation” or forcible transfer and expulsion of Palestinians from Gaza and guarantee their freedom of movement.

Finally, plaintiffs are asking the court to issue an injunction to prohibit defendants from: 1) providing, coordinating or facilitating military assistance and money to Israel, including the sales, transfer and delivery of weapons to Israel, and the provision of military personnel and equipment that advance Israel’s commission of genocidal acts and 2) obstructing attempts by the international community, including the UN, to implement a ceasefire and lift the siege on Gaza.

## Will the Judge Find the Case Raises a “Political Question” and Dismiss It?

Judge White began [the hearing](#) by noting the “brutal attacks by Hamas” and that Israel’s “defensive” campaign was “similarly brutal.” He noted that Israel had killed “tens of thousands of Palestinians, children” and the “destruction was widespread.” Israel, the judge said, “destroyed critical civilian infrastructure, schools, refugee camps and safe houses.” He described the U.S.’s “substantial military, financial and diplomatic support” and said it continues to “fund and proffer weapons” to Israel.

The judge then asked counsel for the plaintiffs and defendants whether the court — judicial branch — had jurisdiction to hear the case, or whether it involved foreign policy decisions

that were “quintessential political questions” reserved to the executive and legislative (political) branches.

CCR attorney Katherine Gallagher, representing the plaintiffs, told Judge White this is not a political question; it is a legal question. “These are not questions of policy,” she said. “These are questions of law.” The courts serve as a check on the political branches, she said. The executive has “no discretion to violate the law” and the United States has a “clear, unambiguous duty to punish and prevent genocide.” The U.S., she added, is making policy determinations that are contrary to international law.

Attorney Jean Lin argued for the DOJ that it is “not the role of the courts to indict Israel for violation of international law.” She said the plaintiffs were “directly challenging U.S. policy.”

Judge White cited a [2017 case](#) in which his own decision to dismiss was affirmed by the Ninth U.S. Circuit Court of Appeals. The Marshall Islands had sued the U.S. to fulfill its legal obligations under the Nuclear Non-Proliferation Treaty and customary international law to negotiate in good faith to end the nuclear arms race at an early date and for total nuclear disarmament. Judge White said the case involved [nonjusticiable](#) political questions.

Gallagher distinguished that case from the present case. In the Marshall Islands case, the plaintiffs were seeking to compel negotiations, but here, she said, there is a legal question: whether the defendants failed to prevent genocide. “It’s fundamentally different than weighing into negotiations.” She cited the ICJ’s new decision that makes clear there is an obligation to prevent and punish genocide.

Judge White also asked plaintiffs’ counsel what an injunction would look like if he issued one. Gallagher responded: “There can’t be more military support to the ongoing genocide in Gaza.” She clarified that the plaintiffs aren’t seeking to end all military support. For example, Israel’s Iron Dome anti-missile system would not be implicated. She proposed a hearing with the U.S. government and discovery to examine which weapons Israel is using in Gaza.

Lin said the court has “no jurisdiction to enjoin the president in his official duties” as commander in chief.

The judge cited the Supremacy Clause of the Constitution that says treaties are the supreme law of the land. That includes the Genocide Convention.

Lin retorted that even if the Genocide Convention is the supreme law of the land, that doesn’t mean it may be enforced by U.S. courts.

Gallagher noted that genocide also violates customary international law — which arises from the general and consistent practice of states. Customary international law is part of federal common law and must be enforced in U.S. courts, whether or not its provisions are enshrined in a ratified treaty.

Judge White characterized the testimony as “truly horrific, gut wrenching, no words to describe it.” He noted that the government doesn’t 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. Defendants — the president of the United States and his

secretaries of state and defense — have provided substantial military, financial and diplomatic support to Israel,” Judge White said.

“However, the primary concern for this court is the limitation of its own jurisdictional reach.” He said this case was one of the “the most difficult” of his career. He told the plaintiffs, “You have been seen, you have been heard by this court. I’m going to take it extremely seriously.”

Judge White may decide to play both ends against the middle. His decision could begin with a detailed recitation of the horrific facts on the ground in Gaza, the weaponry that the U.S. provides to Israel to kill large numbers of Palestinians, and his sympathy for the suffering of the plaintiffs. He will say what a difficult decision this is for him.

*But my hands are tied*, he might say, because this case raises “nonjusticiable political questions” reserved only to the executive and legislative branches of government, so he must dismiss the case.

Or he may take the high road and allow these Palestinian plaintiffs redress for the unspeakable violence perpetrated against their families and organizations by Israel, and allow them a judicial remedy.

Gallagher [reported](#) that a massive crowd of supporters convened outside Judge White’s courtroom as a huge sign reading, “Stop the Genocide Biden” hung from the federal courthouse.

Activists around the country are also demonstrating in support of the genocide lawsuits against Israel. On January 26, the day of the hearing in the Oakland case and the issuance of the ICJ’s order on provisional measures, hundreds of Palestinians, Jews, and other local community members gathered in downtown Portland for a march and rally calling for an immediate ceasefire in Gaza and an end to U.S. military aid to Israel. The action was endorsed by several civil society groups, including Jewish Voice for Peace PDX and Healthcare Workers for Palestine Portland.

Cities throughout the United States have [passed resolutions](#) calling for a ceasefire in Gaza.

Regardless of how Judge White rules in the Palestinians’ case, it represents a milestone in the struggle to stop Israel’s genocide in Gaza and will inspire people in the U.S. and around the world to demand an end to Israel’s oppression of the Palestinian people.

*UPDATE: On January 31, Judge White reluctantly dismissed the Palestinian plaintiffs’ lawsuit against Biden, Blinken and Austin. Relying on the political question doctrine, the judge found he had no jurisdiction to hear the case. He wrote that “the ongoing military siege in Gaza is intended to eradicate a whole people and therefore plausibly falls within the international prohibition against genocide.” But he concluded this case was a “rare” instance where “the preferred outcome is inaccessible to the court.” He also wrote that the “Court implores Defendants to examine the results of their unflagging support of the military siege against the Palestinians in Gaza.”*

\*

Note to readers: Please click the share button above. Follow us on Instagram and Twitter and subscribe to our Telegram Channel. Feel free to repost and share widely Global

Research articles.

Copyright © Truthout. May not be reprinted without [permission](#).

*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.*

Featured image: *I Scream, You Scream, We All Scream-* by Mr. Fish

The original source of this article is [Truthout](#)  
Copyright © [Prof. Marjorie Cohn](#), [Truthout](#), 2024

---

[Comment on Global Research Articles on our Facebook page](#)

[Become a Member of Global Research](#)

Articles by: [Prof. Marjorie Cohn](#)

**Disclaimer:** The contents of this article are of sole responsibility of the author(s). The Centre for Research on Globalization will not be responsible for any inaccurate or incorrect statement in this article. The Centre of Research on Globalization grants permission to cross-post Global Research articles on community internet sites as long the source and copyright are acknowledged together with a hyperlink to the original Global Research article. For publication of Global Research articles in print or other forms including commercial internet sites, contact: [publications@globalresearch.ca](mailto:publications@globalresearch.ca)  
[www.globalresearch.ca](http://www.globalresearch.ca) contains copyrighted material the use of which has not always been specifically authorized by the copyright owner. We are making such material available to our readers under the provisions of "fair use" in an effort to advance a better understanding of political, economic and social issues. The material on this site is distributed without profit to those who have expressed a prior interest in receiving it for research and educational purposes. If you wish to use copyrighted material for purposes other than "fair use" you must request permission from the copyright owner.

For media inquiries: [publications@globalresearch.ca](mailto:publications@globalresearch.ca)