



To: House of Representatives of the Netherlands (*Tweede Kamer der Staten Generaal*), House of Representatives Committee on Foreign Affairs (*Tweede Kamercommissie Buitenlandse Zaken*)

ENGLISH TRANSLATION

Position Paper Roundtable discussion on the situation in Gaza dated 28.05.2025

Obligations under the Genocide Convention regarding the situation of the Palestinian civilian population in Gaza

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1. Introduction

This position paper addresses the question of what the obligations of third states are under the Genocide Convention in relation to -a risk of- genocide committed by Israel against the Palestinian civilian population in Gaza. The position paper concludes that the Netherlands must have already become aware of the risk of genocide relatively soon after the start of the conflict in Gaza, which is when the obligation to prevent/end genocide arose. In addition, we explain on what basis we conclude that the risk of genocide meanwhile has turned into a genocide. Finally, we explain what consequences this has for the Netherlands in terms of concrete actions.

2. The obligation to prevent genocide

Article I of the 1948 Genocide Convention, binding on all party states, including Israel and the Netherlands, stipulates that states take it upon themselves to prevent and punish genocide. Accordingly, the official title of the treaty is the *Convention on the **Prevention** and Punishment of the Crime of*

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³ The authors are very grateful to Emma Goossens for her assistance in translating the position paper in English.

Genocide. The argument that states should wait for a court ruling that genocide has already occurred is contrary to the Genocide Convention. The most authoritative court with respect to the interpretation of international law, the International Court of Justice (ICJ), ruled in the *Bosnia v. Serbia* case in paragraph 431 that “a State’s obligation to prevent [genocide], and the corresponding obligation to act, **arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.**” A court judgment is not necessary. “From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.”⁴

3. Recognition of – serious risk of – genocide by the Government and House of Representatives (*Tweede Kamer*)

An important question for you as House of Representatives, and for the Government, is under what circumstances and with what information a state may or should form a position regarding an –imminent– genocide. It is –as previously mentioned– a misunderstanding that one must wait for a judicial verdict. In fact, there are many cases where there is no judicial body that has jurisdiction and can determine genocide. And if any court has jurisdiction to rule on a genocide –for example, in the case of Israel because South Africa has gone to the ICJ and both states have not expressed reservations about the jurisdiction of the ICJ– the judgment as to whether genocide has been committed comes well after that genocide has occurred. To wait for this would violate the obligation to prevent and/or end genocide.

The *Commissie van advies inzake volkenrechtelijke vraagstukken* (Advisory Committee on Issues of Public International Law, CAVV) explained in its advice *Het gebruik door politici van de term genocide* (The use by politicians of the term genocide) that “[i]t is inherent in the international law system that states pronounce on questions of international law” and that it is, in principle, “up to states to make pronouncements on conduct of other states or persons that is relevant to international law. This implies, too, that parliaments are not fettered by any rule prescribing that only courts are permitted to pronounce on genocide or crimes against humanity.”⁵ To this, the CAVV adds two considerations when parliament should be cautious about a determination of a –risk of– genocide. First, in the absence of sufficiently reliable established facts. In the case of Gaza this does not occur, as there is an abundance of reliable established facts by –among others– the International Court of Justice, the International Criminal Court, the United Nations and specialized NGOs. Second, the CAVV notes that “the preferred course of action is to support international determinations, but this need not be a reason to delay making national determinations.”⁶

⁴ ICJ, *Bosnia v. Serbia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007), para. 431, see [091-20070226-JUD-01-00-EN.pdf](#).

⁵ CAVV and External Adviser on Public International Law, *Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians*, p. 7, see [28. The Use of the Term ‘Genocide’ by Politicians | Advisory report | Advisory Committee on Public International Law](#).

⁶ CAVV and External Adviser on Public International Law, *Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians*, p. 8-9, see [28. The Use of the Term ‘Genocide’ by Politicians | Advisory report | Advisory Committee on Public International Law](#).

We concur with this view. Restraint is important, but when sufficiently reliable established facts indicate a –risk of– genocide, it is up to states (as well as parliaments) to implement the obligations binding on states to prevent, end and punish genocide. More on this later.

It is also evidently not the policy of the Netherlands to make the recognition of genocide depend solely on court rulings. Former Minister of Justice, Yesilgoz, said –less than two years ago– the following with regard to the recognition of the genocide against the Yezidis: *For the Dutch government, when recognizing genocides, judgments of international courts and criminal courts, unambiguous conclusions following from scientific research and determinations by the UN are leading. The government is of the opinion that sufficient facts have been established to state that ISIS is most likely guilty of genocide.*⁷ (14 juni 2023, Kamerstuk 27925, nr. 939)

A state’s recognition of genocide, in short, involves the totality of known facts and circumstances and the assessment thereof by authoritative bodies and scholars. In the case of Gaza and the treatment of the Palestinian population there, there are several relevant rulings by the ICJ and the International Criminal Court (ICC), increasingly and sufficiently unequivocal conclusions from scientific research, and also determinations by UN bodies and commissions that point to genocide. The question therefore arises as to whether the government’s premise regarding the recognition of genocides is being applied uniformly and consistently – why establish genocide with regard to ISIS-Yezidis, and -not yet- with regard to Israel-Palestinians in Gaza? The distinction made is all the more remarkable since, in the case of the genocide established against Yezidis by Minister Yesilgoz, no rulings by international courts were available from which the –risk of– genocide could be inferred, while in the case of Palestinians in Gaza this is the case. Notwithstanding, we agree with Yesilgoz that crimes against the Yezidis by ISIS should be considered genocide.

4. The moment when the risk of genocide in Gaza was determined by the Court

The moment the Dutch state became aware of the serious risk of genocide being committed in Gaza was **at its latest** on 26 January 2024, when the ICJ ruled that it was plausible that the rights of the Palestinians for which protection is sought under the Genocide Convention were being violated. In addition, Israel was then ordered by the ICJ to take all measures possible to stop and prevent the commission of genocide by the army and other state actors, punish those guilty of inciting genocide, admit humanitarian resources immediately and effectively, and prevent the destruction of evidence. In doing so, the ICJ referred to numerous sources that it considered authoritative in determining this risk of genocide. At this early point in the proceedings between South Africa and other states and Israel, the ICJ may draw only this conclusion: a judgment on whether genocide was actually committed will not take place until considerably later, after all parties have been able to argue their views at length. After the 26 January 2024 interim ruling, the ICJ issued two additional rulings (28 March 2024 and 24 May 2024), finding that Israel repeatedly violated the above-mentioned imposed provisional measures, in which it ordered Israel, in increasingly urgent terms, to comply with its obligations under the Genocide Convention.

We wish to emphasize that the 26 January 2024 ICJ ruling is a “trigger” that cannot be ignored by the Netherlands and other State Parties to the Genocide Convention; it is the last possible moment when it must have become clear to the Netherlands and other states that the serious risk of genocide in Gaza was present. The Netherlands was even reminded earlier of its obligations to prevent genocide in Gaza. Five

⁷ Translated to English.

weeks after 7 October 2023, in preparation for the Roundtable discussion dated 16 November 2023, De Hoon wrote in her position paper to the Kamercommissie Buitenlandse Zaken (House of Representatives Commission Foreign Affairs): “*Several speeches by Israeli leaders with dehumanizing language, humanitarian blockades making living conditions very dire, and the amount of attacks targeting civilian infrastructure and densely populated places are indications that there may be a legitimate concern for [genocide, MdH] here. This gives other states the obligation, under the obligation to prevent genocide defined in Article 1 of the Genocide Convention, to induce Israel not (to continue) to go down this path.*”⁸ (Attached in Appendix I)

5. Gaza and the legal characterization of genocide under international law

Much time has passed since the ICJ’s interim ruling on 26 January 2024, in which the serious risk of genocide was undeniably flagged by the most authoritative international judicial body. As good as a year and a half later, the situation in Gaza has demonstrably deteriorated, according to all the facts that have since been established by independent organizations and experts. Meanwhile, an increasing number of scholars and international organizations and NGOs have concluded, based on the available facts, that Israel’s treatment of the Palestinian civilian population in Gaza now qualifies as genocide. When exactly the situation turned from a risk of genocide to genocide is difficult to determine, but we are convinced that this change has occurred. As early as September 2024, a UN commission concluded that Israel’s policies in Gaza had the characteristics of genocide: *The developments in this report lead the Special Committee to conclude that the policies and practices of Israel during the reporting period are consistent with the characteristics of genocide.*⁹

In a thorough factual and legal analysis, Amnesty International (AI) also concluded in December 2024 that Israel is guilty of genocide in Gaza.¹⁰ In approximately 300 pages, AI provides an account of the methodology applied in their own investigation, which included hearing more than 200 witnesses and Israel was given the opportunity to respond to an initial draft, an overview of the relevant facts and a legal analysis of the content and scope of genocide. AI concludes, based on their investigation, that Israel is guilty of genocide against the Palestinian population in Gaza, drawing the following conclusions based on the legal assessment framework established by case law:

- The Palestinian group is a protected group under the Genocide Convention;
- The unlawful killing of, by now, over 50,000 Palestinian civilians and the inflicting of conditions of life calculated to bring about the destruction (withholding humanitarian aid) of the civilian population in Gaza, is more than enough to speak of a partial destruction of the Palestinians;
- Israel’s intent aimed at such destruction can be deduced from several statements by politicians, from past policies (discrimination and apartheid against Palestinians in Israel) and the policies pursued during the war in Gaza;

⁸ Translated to English.

⁹ Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UNGA Doc A/79/363, para. 69, see: <https://docs.un.org/en/A/79/363>.

¹⁰ Amnesty International, *You feel like you are subhuman – Israel’s genocide against Palestinians in Gaza*, see: <https://www.amnesty.nl/content/uploads/2024/12/Gaza-genocide-report.pdf?x17069>.

- The intent to destroy a group protected by the Genocide Convention may coexist with any other goals of Israel's military operations and policies, such as gaining military advantage or destroying Hamas.

We have not been able to find flaws in the AI report and share its analysis and conclusions. All in all, there is sufficient reason to conclude –bearing in mind the government's starting point regarding the determination of genocide, as applied to the Yezidis several years ago– that there are at least sufficient facts to establish that Israel is most likely guilty of genocide in Gaza.

Moreover, the authoritative human rights organization Human Rights Watch also concluded that Israel is guilty of genocide in Gaza.¹¹

In Appendix 2, we further explain the legal assessment of genocide and application to Gaza.

6. Crimes against humanity and war crimes

Even if we conclude that Israel is committing genocide, we would also like to express our concern about the excessive focus on genocide, because the “mere” commission of war crimes and/or crimes against humanity should not suggest that it is less serious. Even without the label of genocide, the international community has a duty to –through lawful means– prevent and end war crimes and crimes against humanity in Gaza. With regard to the latter category, crimes against humanity, we point to Article 3 of the Draft Articles on Crimes against Humanity, which also includes an explicit obligation to prevent crimes against humanity.¹² While this requires further research, it cannot be ruled out that this obligation is already part of customary international law at this time.

7. What does the obligation to prevent genocide entail for the Netherlands?

The obligations under the Genocide Convention relevant to this position paper boil down to the fact that states a) must not commit genocide (or be complicit in it), and b) must do enough to prevent or end genocide. Of particular relevance to this interpretation of the content and scope of these obligations is the ICJ's ruling in the case of *Bosnia v. Serbia*. There, the ICJ confirmed that these obligations not to commit genocide, to be complicit in it, and to prevent it, are not limited to its own territory: *The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.*¹³

¹¹ Extermination and Acts of Genocide Israel Deliberately Depriving Palestinians in Gaza of Water, 19 december 2024, available at: <https://www.hrw.org/report/2024/12/19/extermination-and-acts-genocide/israel-deliberately-depriving-palestinians-gaza>

¹² Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019, Adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10). See art. 3 lid 2: ‘Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.’

¹³ ICJ, *Bosnia v. Serbia*, para. 183.

In the *Bosnia v. Serbia* case, the ICJ further found that the obligation to prevent genocide also necessarily implies that states have an obligation not to commit or be complicit in genocide.¹⁴ Complicity in genocide requires an intentional contribution to genocide in Gaza, knowing that this contribution facilitates the commission of genocide. In our view, the delivery of weapons to Israel to be used for genocidal policies qualifies as complicity. This does not appear, as far as the Netherlands is concerned, to be the case at present.¹⁵

The ICJ's criteria on the substance of the obligation to prevent –and after any onset to end– genocide are pertinent to discuss.

The ICJ has repeatedly explained that all State Parties to the Genocide Convention are obliged, when they are (or should be) aware of a serious risk of genocide, to use “**all means reasonably available to them**” to prevent genocide as much as possible.¹⁶ This is an “obligation of conduct” that should be aimed at ending the genocide as soon as possible.¹⁷ That this is an obligation of conduct and not an obligation of result means that a failure to achieve the desired result –the preventing/ending of genocide– is not a basis for liability. Each state may differ as to what exactly the obligation of effort to take all possible and reasonable measures within its power to prevent/terminate genocide means. This depends, first, on a **state's capacity to effectively influence the action** of governments or individuals likely to commit, or already committing, genocide. Second, what is relevant is the **geographical distance** from the –imminent – genocide and the **strength of the (political) links** to the state/persons responsible for the –imminent – genocide.

Following these criteria, a country like the Netherlands –relatively close, with good political ties to Israel and Israeli leaders, and with considerable possibilities to influence Israel's behavior through existing trade relations– has more extensive obligations to prevent or end genocide against Palestinians than states with less influence over Israel.

It is also important to note that in order to answer the question of whether a state has sufficiently fulfilled its obligation of effort under Article I of the Genocide Convention, it is irrelevant, according to the ICJ, for a state to claim –or even be able to prove– that even if it had taken all possible measures, that it would never have been sufficient to prevent or end genocide; this is irrelevant because a) it is an obligation of conduct, and b) a state party can never know whether the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of one state were insufficient to produce.¹⁸

Even though there has been a serious risk of genocide in Gaza for some time, and the Netherlands became aware of this at the latest on 26 January 2024, it does not appear that the Netherlands has taken all possible and reasonable measures to prevent –and now end– this genocide. There was insufficient

¹⁴ ICJ, *Bosnia v Serbia*, para. 166-167.

¹⁵ For more information on the standard of complicity in international crimes, see Göran Sluiter, *De effectiviteit van de medeplichtigheidshandelingen bij internationale misdrijven: de zaken Van Anraat en Kouwenhoven*, *Nederlands tijdschrift voor strafrecht*, 2 (3), 138-14 (2021). For the standard of complicity in international crimes in the field of state liability, see the 2024 dissertation by Joëlle Trampert, see <https://dare.uva.nl/search?identifier=d5d8d396-216e-4a41-8471-68ebb6560f62>.

¹⁶ ICJ, *Bosnia v. Serbia*, para. 430-431. This is recently confirmed in *ICJ Nicaragua v. Germany*, para. 23 (2024).

¹⁷ ICJ, *Bosnia v. Serbia*, para. 430.

¹⁸ ICJ, *Bosnia v. Serbia*, para. 430.

due diligence in this regard, also in light of the fact that the Netherlands may be considered a state with some potential influence on Israel. Although the ICJ does not specify the measures to be taken as part of the best-efforts obligation, it is obvious that the failure of the Netherlands to take serious steps and measures toward Israel, in order to prevent genocide, is manifestly insufficient compared to what is required by Article I of the Genocide Convention. The degree of the breach of the obligation of conduct will increase in severity and extent as the risk of genocide increases and as a genocide, once initiated, becomes more deadly and destructive on a daily basis.

Although the Dutch government has since become somewhat more critical of Israel's actions in Gaza and is trying to take initiatives within the framework of the EU to influence Israel's genocidal policy, there is no hiding the fact that the obligation of conduct has been violated for quite some time –namely as of 26 January 2024 –and also the current somewhat more critical and active policy is, as far as we are concerned, far removed from what the ICJ requires of the Netherlands under Article I Genocide Convention. The call for an investigation into *whether* the EU Association Agreement would be violated and whether this would be grounds for further action, given the amount of authoritative actors that have already conducted reliable and insightful fact-finding and rulings by the ICJ and ICC, demonstrates a lack of a sense of urgency to end the genocide and does not come close to the ICJ's requirement to make every effort possible to prevent or end genocide.

We would note that the ICJ explicitly holds State Parties individually responsible for fulfilling their obligations of conduct, namely that they must independently do everything possible to prevent or end genocide. This will be because there is obviously the risk that in a situation of potential “omission liability” states might try to hide behind other states that are also not doing enough. However, the ICJ turns the collective avoidance of effort obligations on its head: it is the independent and individual responsibility of each State Party to prevent genocide, so that it is precisely the combining of those efforts that can have maximum effect.

That it can be done differently is shown by other states. For example, South Africa has initiated proceedings against Israel at the ICJ, because it believes –along with other countries– that its **own** obligation to prevent genocide requires it to do so: *South Africa is acutely aware of the particular weight of responsibility in initiating proceedings against Israel for violations of the Genocide Convention. However, South Africa is also acutely aware of its own obligation — as a State party to the Genocide Convention — to prevent genocide.*¹⁹ Several countries have joined South Africa in these proceedings, including two EU states, Spain and Ireland.

8. Consequences for the Netherlands of the legal obligations to prevent genocide

Consequently, the Netherlands is obligated to do more than it did. This follows not only from the Genocide Convention and the ICJ's interim rulings in the genocide case against Israel, in which the ICJ consistently found that Israel was not complying with the orders already imposed and the situation was worsening; but also from the ICJ's Advisory Opinions of 19 July 2024 and –twenty years earlier– on 9 July 2004. In those, the ICJ ruled that Israel's occupation is illegal, that Israel's policy qualifies as a violation of Article 3 of the Discrimination Convention which prohibits racial segregation and apartheid, and that all states are obligated to force Israel to end this.

¹⁹ ICJ, Application instituting proceedings and request for the indication of provisional measures, South Africa, para. 3, see [Application instituting proceedings and Request for provisional measures](#).

We concur with the opinion provided by the **Adviesraad Internationale Vraagstukken** (AIV, Advisory Council on International Affairs) already on **23 October 2024**, which provides that “*external international pressure is required in order to bring about de-escalation and conflict resolution, but thus far such pressure has, for the most part, been lacking.*”²⁰ The AIV moreover noted, “*a new direction is both necessary and urgent. It is the view of the AIV that the relatively low priority that is now being, and that has recently been, accorded to working towards a lasting solution to the Israeli-Palestinian conflict is not at all commensurate with the human suffering and the regional strategic as well as material interests involved, including as regards international law. Divided European policy is eroding the Union’s credibility. It would appear that double standards regarding the insistence on compliance with international law are fuelling social polarisation, both in the Netherlands and elsewhere in the world.*”²¹

To comply with legal obligations, we recommend that the Netherlands condemn Israel for the highly probable commission of genocide, crimes against humanity and war crimes. In addition, the Netherlands should announce further measures that can effectively influence Israel to urgently change course. This can be done in cooperation with other countries where possible, but as explained, the Netherlands also has an independent responsibility here.

The Netherlands could **join the genocide case** brought by South Africa before the ICJ.

In addition, it should stop arms exports to Israel. The AIV recommended in October 2024 that bilateral **military alliances and supplies to Israel** should be halted as a matter of urgency where they are used to act in violation of the law of war. To this we add that all supplies that may contribute to perpetuating Israel’s violations should be stopped. This includes reviewing all permits for the export and transit of dual use goods.²²

In addition, the Netherlands should stop **importing weapons from Israel**. According to the NRC, Dutch purchases of Israeli weapons have exploded and, especially since the outbreak of the Gaza war in 2023, the Netherlands has become one of the main customers of the Israeli arms industry.²³ This raises questions regarding how the Netherlands has fulfilled its obligation to prevent and end genocide. Converted per capita, Israel is by far the world’s largest arms exporter.²⁴ Stopping arms imports from Israel would therefore seem to be an effective message, as called for, for example, by an organization such as PAX.²⁵

The AIV recommended back in October that **sanctions** should be urgently imposed on individuals and entities involved in the expansion and maintenance of illegal Israeli settlements. The AIV also pointed to the need to discourage economic and other forms of cooperation with illegal Israeli settlements, to

²⁰ AIV, Advisory Letter: Towards a new direction for the Netherlands in the Israeli-Palestinian conflict, p.1, see [Towards a new direction for the Netherlands in the Israeli-Palestinian conflict | Publication | Advisory Council on International Affairs](#).

²¹ AIV, Advisory Letter: Towards a new direction for the Netherlands in the Israeli-Palestinian conflict, p.3, see [Towards a new direction for the Netherlands in the Israeli-Palestinian conflict | Publication | Advisory Council on International Affairs](#).

²² See for example [Welke handel in defensiematerieel drijft Nederland met Israël? | de Volkskrant](#).

²³ Steven Derix, [Nederland koopt steeds meer wapens in Israël - NRC](#)

²⁴ See [Trends in International Arms Transfers, 2024](#).

²⁵ See [Eis een volledig wapenembargo tegen Israël - PAX](#). See also [Volledig wapenembargo nu - Joop - BNNVARA](#).

exclude European companies and investors that contribute to the illegal settlement policy from procurement processes, and the denial of visas of settlers.²⁶ In addition, the Netherlands should actively explore what **sanctions and trade restrictions** they can impose on the Israeli state and companies that help perpetuate Israeli violations. Individuals and companies that are (or appear to be) involved in international crimes committed in Gaza should be prosecuted here.

9. Final reflection: the Netherlands' positioning

Especially the Netherlands, in light of its international positioning as guardian of the international legal order and in compliance with Article 90 of the Constitution –which provides that the government promotes the development of the international legal order– should condemn Israel's flagrant violations of law and take seriously the obligations of the Genocide Convention and rulings of the ICJ to force Israel to change course. If the Netherlands, as the host country of the ICJ and ICC fails to do this and continues to look away, it confirms the double standard and Western hypocrisy, which causes much unrest in the world and in our country. Above all, it is not only a legal but also a moral obligation to stop the genocide and ethnic cleansing of the Palestinians and effectively contribute to ensuring that also this people can exercise their right to self-determination in safety, and be protected from the structural injustices that have been inflicted on them for decades, as recognized by the ICJ.

²⁶ AIV, *Naar een nieuwe koers voor Nederland in het Israëlisch-Palestijnse conflict* (23 October 2024).

APPENDIX 1 (translated to English)

International Criminal Law in the Conflict between Israel and Hamas

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Roundtable discussion International Humanitarian Law, Vaste Kamercommissie Buitenlandse Zaken
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Introduction

There are a number of areas of law relevant in discussing the conflict between Israel and Hamas. These are in particular the legal basis for use of force outside one's own territory (*ius ad bellum*), international humanitarian law (*ius in bello*), law of occupation, human rights, and international criminal law.

Prof. André Nollkaemper and prof. Marten Zwanenburg have outlined the applicable legal frameworks of *ius ad bellum*, law of war and law of occupation in their position papers. In my contribution, I will elaborate on international criminal law and accountability options.

International criminal law is the area of law in which serious violations of *ius ad bellum*, international humanitarian law, law of occupation, and human rights are criminalized, and that provides legal frameworks for their prosecution. Additionally, public international law provides obligations for states to help prevent international crimes, investigate them, prosecute them or extradite them to states/institutions that are able and willing to prosecute them.

International criminal law and the conflict between Israel and Hamas

The atrocious actions of Hamas of 7 October 2023 are obvious international crimes. There can be no ambiguity about this. The killing, wounding, taking hostages and holding them under inhumane conditions, mutilating corpses and firing rockets at the Israeli civilian population are each war crimes and crimes against humanity, and potentially genocide if this pattern of violence is aimed at the destruction of part of the Jewish people. Using Palestinian civilians as human shields against Israeli attacks is also a war crime. Because it involves little ambiguity, I will leave it aside in this brief post, except by noting that the ICC has jurisdiction over these crimes and has already launched investigations. Other countries, such as the Netherlands, can also prosecute Hamas fighters under universal jurisdiction if they will enter their territory.

More complicated is the question of whether Israeli leaders also commit international crimes. The Rome Statute of the International Criminal Court (ICC) codifies the four core international crimes: war crimes, crimes against humanity, the crime of genocide and the crime of aggression.

Most of the discussion is about **war crimes**. Here I distinguish three categories. First, if it is proven that the *supply of relief goods* and other items indispensable for the survival of civilians was deliberately obstructed, this amounts to the war crime of starvation. Even when exercising the right to self-defense, and regardless of Hamas' failure to comply with the law of war itself, this method of warfare is a war crime.

Second, with respect to *combat operations*, it is more difficult to determine remotely whether war crimes are being committed because it depends on the information Israel has about the military

advantage and estimated civilian casualties per operation. They must assess for each attack that it is a military objective and that the likely military advantage is commensurate with the necessity and proportionality of the attack. Even if a civilian object becomes a military target because Hamas uses it and deploys civilians as human shields, Israel must still apply precaution, necessity and proportionality, and an attack is often not lawful if it disproportionately kills civilians. Israel will have to be able to explain those trade-offs in applicable legal proceedings. It is hard to imagine that the continuous bombing of densely populated areas and hospitals, the large size and scale of the military operations, and the amount of civilian casualties are always justified by the expected military benefits in terms of eliminating Hamas (which in itself is a very difficult military objective to achieve), necessity and proportionality, and that the Israeli army always takes the required precautions to limit unnecessary civilian casualties. On the contrary, there is every appearance here that certain military operations violate the law of war to the point of constituting war crimes.

Third, the *forced displacement of the civilian population* within Gaza or into Egypt (as described in leaked Israeli documents), also indicate potential war crimes and ethnic cleansing. Warnings and calls to relocate only meet the requirements of the law of war if civilians can actually get to safety; not if they are sick/weak in a hospital, too many civilians and too little time, the place to which they are being directed is also being bombed, or if there is insufficient water or food there.

The beforementioned potential war crimes also qualify as **crimes against humanity** insofar as they can be considered part of a widespread or systematic attack directed against (part of) the Palestinian civilian population.

Whether this also qualifies as **genocide** depends on whether these violations occur with the intent to exterminate part of the Palestinian people. Several speeches by Israeli leaders with dehumanizing language, humanitarian blockades making living conditions very dire, and the amount of attacks targeting civilian infrastructure and densely populated areas are indications that there may be a legitimate concern for this. This gives other states the obligation, under the obligation to prevent genocide defined in Article 1 of the Genocide Convention, to push Israel not (to continue) to go down this path.

Options for justice

The basic premise in international law is that states **investigate possible violations themselves** and criminally prosecute any suspects themselves. For both Israel and Palestine, this scenario is unlikely in the short term.

The **ICC** can prosecute if a nation state itself is unable or unwilling to prosecute, provided the ICC has jurisdiction. Even though Israel is not a member state of the ICC, the ICC has jurisdiction over international crimes committed in the Palestinian territories as of 2014 because The State of Palestine referred the situation to the ICC. This mandate has no end date, so the ICC also has jurisdiction over current crimes. The ICC investigates crimes committed by both Hamas fighters and Israelis and focuses on those “most responsible”: which are usually the leaders. However, the ICC can only prosecute if suspects have actually been arrested and surrendered.

The role of other states

Other states may prosecute suspects of international crimes under **universal jurisdiction** if they are on their own territory in the future. This is an important avenue of action for states, complementary

to the capabilities of the ICC, for which their own legal system also **needs adequate resources and expertise.**

Moreover, other states can and should **pressure both parties** to enforce international law, very explicitly also under the obligation to prevent genocide where it is imminent/occurs.

International law as such cannot do much itself. It does not have the enforcement capabilities that states have. It does give us a **common language** to give direction and interpretation in conflicts; to distinguish what is and is not allowed; to take a **morally much clearer course** instead of polarized partisan position-taking: **setting and enforcing basic humanitarian norms and international law.**

Failure to do so carries the high risk that from such a spiral of injustice and violence only more injustice and violence will spring. Law provides us with that language and tells us what is/is not allowed in a war for a reason, because humanity has developed those rules over many centuries based on experience of the consequences of escalations of violence and indescribable human suffering. But law requires political will and action to force parties to abide by it.

The Netherlands in particular, as the guardian of the international legal order, should actively propagate and act on this message, including in the fulfillment of the government's constitutionally enshrined obligation to promote the development of the international legal order.

APPENDIX 2 (Translated to English)

Legal characterization of genocide in Gaza

This annex serves to further substantiate the qualification of the situation in Gaza as genocide. Case law has explained that to legally characterize and prove genocide, a number of requirements must be met. First, there must be crimes recognized under the Genocide Convention: a) killing; b) inflicting serious bodily or mental harm; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) preventing births within the group; and e) forcibly transferring children of the group to another group. There is no question that the crimes referred to in (a), (b) and (c) are committed (and potentially also d), as demonstrated by the arrest warrants issued by the International Criminal Court against Prime Minister Netanyahu and former Defense Minister Gallant, rulings by the International Court of Justice and authoritative reports by the UN and NGOs.

Second, these crimes must have been committed against a group protected under the Genocide Convention. In the *South Africa v. Israel* genocide case, the ICJ ruled that the Palestinians appear to be such a group (a final judgment may not come until the final stages of this years-long process) and that Palestinians in Gaza constitute a substantial part of the Palestinian group. In addition, more than 50,000 deaths constitute more than enough to mark the violence as a substantial attack on that group as well, even though the law does not attach a numerical limit to the commission of genocide and even a single killing can qualify as such.

The third, and often most difficult criterion to prove, is that the violence against the group must be committed with the specific intent to destroy that group in whole or in part. Israeli leaders often say that the violence is intended to destroy Hamas, but that is not the same as wanting to destroy the Palestinians. The question is whether, in addition to that goal of destroying Hamas, there is also the intent to destroy the Palestinians.

In the absence of a clearly stated or written down genocidal intent, like the Nazis provided, that intent must be inferred from actions and statements. Courts and experts have identified a number of factors by which genocidal intent can be distinguished from destroying certain members of the group (Hamas fighters) and from killing with (“mere”) discriminatory intent. Beth van Schaack, former US Ambassador-at-large for Global Criminal Justice, listed those factors as follows based on the rulings of international criminal tribunals:²⁷

- The general context of the violence, including the scale of the atrocities, number of victims, the repetition of culpable acts, and gravity of the harm caused;
- The use of gratuitous violence that would be excessive in relation to military necessity or to accomplish objectives other than the destruction of the group;
- The targeting of all members of the group without distinction (to age, gender, involvement in opposition activities or ability to harm or threaten the perpetrators);
- The targeting of the group’s leadership in order to weaken the group but also remove individuals who could raise the alarm or engage with the international community;

²⁷ Beth van Schaack, *Determining the commission of genocide in Myanmar. Legal and policy considerations*, 17 *Journal of International Criminal Justice* (2019), 285-323.

- A history of other forms of discrimination or persecutory acts against members of the same protected group;
- The detrimental effect and long-term impact of the violence in terms of the future survival of the group;
- The methodical and systemic nature of the attacks;
- The implication of multiple levels of a chain of command in the attacks;
- The degree of planning and preparation behind the attacks;
- Attempts to cover up the crime and grant impunity to perpetrators;
- Attempts to bar humanitarian assistance to the victim group;
- The fact that members of other disfavoured groups are spared or subjected to less destructive forms of violence;
- The utterance of derogatory language or the issuance of propaganda, targeted to members of the group;
- Potential motives of the perpetrators in terms of competition for resources or territory;
- The existence of a political doctrine consistent with genocidal intent; and
- Attacks on cultural or religious property or symbols associated with the group.

If the above criteria are applied to the facts based on public sources, (almost) all of them are met here in the situation of Gaza. Therefore, we believe it is safe to say that the situation in Gaza qualifies as genocide.