



An Earlier Genocide Debate: Vietnam, International Law, and the Question of Gaza

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Abstract

The article examines the historical and legal complexities surrounding genocide accusations, particularly through the lens of Vietnam and Gaza. Drawing parallels between U.S. military actions in Vietnam and Israeli operations in Gaza, the article explores the challenges in applying the UN Convention on the Prevention and Punishment of Genocide (UNGC). It argues that the stringent requirement to prove genocidal intent (*dolus specialis*), shaped by the Holocaust archetype, limits the applicability of the genocide label to military conflicts. Historical debates, such as those surrounding the Vietnam War, highlighted the tension between civilian suffering from military actions and legal distinctions from genocide. The article revisits arguments made by activists and scholars like Jean-Paul Sartre, Richard Falk, and Telford Taylor to critique the exclusion of counterinsurgency violence from the genocide framework. It further interrogates Israel's current siege and military strategies in Gaza, showing how military and genocidal logics intertwine. The work highlights the limitations of international law and its racialised and colonial underpinnings, particularly regarding Palestinian suffering. Ultimately, the article calls for rethinking the binary of war and genocide.

Keywords Genocide · *Dolus Specialis* · International Law · Gaza · Vietnam · Holocaust

The extensive protests at Western universities against the Israeli military's conduct in Gaza since April 2024 recall activism against the American-led war in Vietnam in the 1960s and early 1970s. In both cases, student indignation at enormous civilian casualties, and contempt for the dissembling of the governments that enabled the destruction in the name of Western values fuelled direct action and trenchant critiques of imperialism. To indict these military excesses, the protest movements accused the US and Israeli forces respectively of genocide. There is more than a

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parallel at play here. The debate about whether the US campaign in Vietnam was genocidal sets the terms for the contention whether Israel is committing genocide in Gaza since October 2023. This article examines the dilemma and ambivalence of this term-setting: the tension between the rules of atrocity recognition that compel claimants to invoke genocide while its legal meaning places strict limits on the applicability of the United Nations Convention on the Prevention and Punishment of Genocide (UNGC).

The ambivalence inheres in the virtual impossibility of proving genocidal intent. That is by design. As I have argued elsewhere, the parties negotiating the UNGC in 1947 and 1948 strictly demarcated military and genocidal intentions even when the former caused massive civilian casualties (Moses 2021). States sought to rehabilitate ‘military necessity’ after its abuse by Germany during the Second World War so they could assimilate minorities, crush domestic revolts, and wage war without running the legal risk of genocide prosecutions. After all, the Allies had killed hundreds of thousands of Axis civilians with fire and atomic bombs with the pretext that the cities in which they lived were military targets. The Cold War was beginning, and independence movements confronted the Western colonial empires reasserting control in Asia and northern Africa. Legitimate warfare was important to define — and to distinguish from the genocide, the ‘crime of crimes’, as Raphael Lemkin called his neologism (Lemkin 1944).

They did so by making the Holocaust — increasingly seen as unprecedented and unique — the archetype or textbook case of genocide, in which Jewish victims were understood to have been persecuted and murdered solely on ideological rather than military or security grounds. Since then, war and genocide have been conceptually distinguished to the extent that it is difficult to prosecute genocidal warfare as genocide. Whereas genocide was the ultimate crime, so the argument goes, civilian casualties in war are unavoidable, if regrettable, especially if guerilla-terrorists hide among civilian populations.

The UNGC’s purpose, then, was humanitarian more in name than in effect. This and other legal innovations at the time, like the Geneva Conventions, limited the sovereign right of states to wage internal and international armed conflict against enemies far less than commonly supposed. The relative impunity with which they have done so until the two ad hoc criminal tribunals for the former Yugoslavia and Rwanda in the 1990s indicates the impotence of these conventions (Moses 2024, 2023; van Dijk 2022). Even with the advent of the International Criminal Court (ICC) in 2002, the impunity from prosecution of great powers and their allies is impossible to overlook.

Genocide’s special status is rendered positively in the theory of legal expressivism — norm setting — as Diane Marie Amann explains:

Law operates as a means for articulation and nourishment of societal values. This expressive function has special force in international criminal law, only now entering an era in which ongoing international criminal tribunals reinforce pronouncements of norm, such as the proscription against genocide in the 1948 Convention. This offense [*genocide*] — commission of a heinous act with the desire to eliminate a human group — is deemed the most serious of

crimes, in legal writings no less than in popular media. That social meaning of genocide ... imposes constraints. Tribunals must act in a manner that recognises and nurtures the status of the norm against genocide. Extending protection to too many groups could upset the *singular status* of the proscription against genocide (Amann 2002).

In response to such exceptionalism, activist-jurists naively seek to extricate genocide from what they call ‘a desiccated legalism that serves the status quo’ by ‘injecting it with an explicitly anticolonial politics instead’. That is easier said than done, and so they neglect to explain how such an injection is to be administered (Li 2024). A cursory historical survey would reveal the failure of counter-genocidal expressivist campaigns by the Igbo in Nigeria, Tamils in Sri Lanka, and Uyghurs in China. Sober and realistic is Maryam Jamshidi’s observation that South Africa’s ICJ case accurately aligns the law with the genocidal effects of military violence.

By situating the catastrophe in Gaza both within Israel’s long history of eliminationist violence towards Palestinians and finetuned legal arguments, South Africa has brought the law into line with the historical reality and lived-experiences of the victims of genocide, forcing a dialectical conversation between two, often, opposing planes — the law on genocide and the reality of genocide (Jamshidi 2024; see also Sultany 2024).

Unfortunately, this alignment has yet to receive legal certification, as other progressive jurists well know. The strict, purpose-based reading of genocidal intent — *dolus specialis* — continues to be observed by international courts. The first genocide trial was conducted at the Ad Hoc International Criminal Tribunal for Rwanda (ICTR) in the case of the *Prosecutor v. Akayesu* (1998). It established that ‘Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*’. This statement distinguishes genocidal logics from military ones related to war crimes and crimes against humanity: in the legal mind, they cannot be mixed or fused. Special intent ‘demands that the perpetrator clearly seeks to produce the act charged’, namely ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’ (ICTR 1998).

Although *dolus specialis* is not mentioned in the UNGC and despite academic criticisms that its purpose-base threshold cannot be found in the convention’s preparatory documents, the court defined genocidal intent in this way. The Ad Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICJ have followed the *Akayesu* precedent (Ambos 2009; Goldsmith 2010). The ICJ underlined the point its first case on genocide, ruling that in *Bosnia vs Serbia* that ‘for a pattern of conduct to be accepted as evidence of its [*dolus specialis*] existence, it would have to be such that it could only point to the existence of such intent (ICJ 2007, para 373). In *Croatia v. Serbia*, the Court affirmed this view, declaring that ‘to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that *this is the only inference that could reasonably be drawn from the acts in question*’ (ICJ 2015, para. 148).

This requirement can rule out the plural inferences, which are inevitable in armed conflict, that can be drawn from the facts in Gaza unless the court understands ‘only’

to mean that an inference of genocidal intent is inescapable; that is, that one cannot but infer genocidal intent from the evidence, even if it can also suggest other objectives (Gehani 2024; Becker 2025, pp. 53–54). If so, it would recognise with social scientists of war and genocide that military and genocidal logics run together (Bachman 2020, Moses 2021; Shaw 2024; Malešević & David 2025). However, the legal discussion affirming the broader view of ‘only’ rests on wishful thinking, effectively redefining it to mean ‘an’ inference, as in: it is open to the Court to reasonably infer special intent along with military aims. If so, why would the Court keep referring to ‘the only inference’ (e.g. Barigye et al. 2025). Indeed, on the basis of the restrictive interpretation, the Court ruled that other cases of mass killing and ethnic cleansing of Bosnian civilians by Bosnian Serb forces were not genocidal. Referring to cases of the International Criminal Tribunal of the Former Yugoslavia, the Court ruled that Serbian kills, camps, and deportations in Banja Luka, Prejidor, and elsewhere did not evince the requisite genocidal intention but, rather, aimed ‘to create a larger Serb State, by a war of conquest if necessary’, which ‘did not necessarily require the destruction of the Bosnia Muslims and other communities but their expulsion’ (ICJ 2007, para 372, 354). The Court explicitly rejected a corporate approach to Bosnian Serb conduct, namely that its ‘larger Serb State’ aim was tantamount to a genocidal war against Bosnian Muslims, precisely the mode of warfare Raphael Lemkin sought to outlaw with his notion of genocide (ICJ 2007, para 371; Singleterry 2010; Greenawalt 2025). What is more, accepting the determination of facts of the ICTY cases without making its own, the ICJ effectively tied its hands to the extent that, as two legal scholars put the matter, ‘it is hard to see how the Court will ever make a positive genocide determination in the absence of a criminal court having already convicted individual perpetrators of genocide. On the basis of this case, the Court’s approach seems to be that if another judicial body with jurisdiction over the events at issue has not already established genocide, the ICJ will not either’ (Goldstone and Hamilton 2008, p. 112).

There are thus limited legal options in terms of genocide against states killing masses of civilians during armed conflict. Because the ICC prosecutes individuals and not states, South Africa had to mount a case against Israel in the ICJ, as the UNGC’s legal obligation to prevent genocide is the only avenue for one state party to pressure another state party; the ICJ cannot rule on war crimes or crimes against humanity without a convention on them, a point to which I return in the conclusion. While the ICJ issued provisional measures to protect Palestinian rights under the UNGC on the grounds that it was plausible that those rights existed and were being violated, whether the court finds that the Israeli state committed genocide or failed to prevent its leaders doing so at the merits stage, remains to be seen. Judging by the court’s previous decisions, this is uncertain. And, let it not be forgotten that it demurred from ordering a ceasefire in January 2024, because Israel was entitled to engage in armed conflict with Hamas; the Court thus reminded all parties that International Humanitarian Law also obtained even though the court cannot rule on that legal domain (ICJ 2024, para 85). Moreover, the ICC prosecutor Karim Khan sought to indict Israeli leaders for war crimes and crimes against humanity rather than for genocide, although genocide is an option in the Rome Statute governing his court (ICC 2024). This caution also applies to Khan’s decision to limit the indictment of

Russian president Vladimir Putin and a senior Russian official to war crimes for kidnapping Ukrainian children despite Ukrainian urging to charge them with genocide (Ioffe 2023). While armed conflict is underway, as it is in Gaza and Ukraine, proving special intent appears to be an almost insuperable hurdle.

The source for the stringency, I suggest here, is the Holocaust-paradigm of genocide that the Vietnam-genocide debate crystallised in popular and legal consciousness. In addition to contemporaneous debates about genocide in secessionist conflicts in Nigeria (1967–1970) and East Pakistan (1971), it set the standard for genocidal intent that was clinically distinguished from military necessity (Moses & Heerten 2018). This article thus reconstructs this debate before returning to the Gaza discussion and the question of a convention for crimes against humanity.

Genocide in Vietnam?

During the debate in the late 1960s and 1970s, as now, the genocide accusation came from the left, couched in anti-imperial rhetoric traceable back decades. This rhetoric was apparent, for example, in the *We Charge Genocide* petition against US treatment of African Americans launched in 1951 by the small communist Civil Rights Congress, led by African American lawyer William Patterson (Patterson 1971). Less a petition than a 239-page closely reasoned and exhaustively documented indictment of racial violence and discrimination in the US, *We Charge Genocide* stated that its authors ‘speak of progressive mankind because a policy of discrimination at home must inevitably create racist commodities for export abroad — must inevitably tend toward war’ (Patterson 1951). They also compared Nazi Germany and the US, urging the Nuremberg precedent,

Shocked by the Nazis’ barbaric murder of millions of Jews and millions of Poles, Russians, Czechs and other nationals on the sole basis of ‘race’ under Hitler’s law — just as Negroes are murdered on the basis of ‘race’ in the United State under Mississippi, Virginia, and Georgia law.

The petition then cited Justice Jackson’s statement at the Nuremberg Trials that the persecution of a domestic minority could be a sign of war preparations in order to impugn US foreign policy in the early years of the Cold War (Patterson 1951).

This rhetorical pattern was repeated sixteen years later when the ‘International War Crimes Tribunal’ met in two sessions in Sweden and Denmark in 1967. Initiated by the English philosopher Bertrand Russell, the ‘Russell Tribunal’, as it came to be called, utilised the continuing prestige of the Nuremberg Trials as a normative standard with which to condemn the US. The tribunal duly invoked the laws of war, listing its first complaint as aggressive warfare and its final, fifth one, as genocide (The Russell Tribunal 1968; Krever 2023). The publicity surrounding the tribunal fixated on the genocide charge, in part because French Marxist philosopher, Jean-Paul Sartre, addressed it in his famous essay, ‘On Genocide’ (Sartre 1968).

The extent of US military violence shocked liberals and leftists, leading some to accuse the US of genocide. In his best-selling book, *The Pursuit of Loneliness*

(1970), the sociologist Philip Slater (1927–2013) discerned ‘genocidal patterns of thought’ in the Vietnam War.

Official policy was expressed in more restrained language, but the euphemisms could not entirely hide the same genocidal assumptions. ‘Rooting out the infrastructure,’ for example, meant that you no longer killed only soldiers carrying weapons but every civilian who might be related to or sympathetic to these soldiers. Since there is no way of telling this at a glance in a civil war, it simply meant killing every civilian around (Slater 1970, p. 32).

In the same year, the Democratic Senator, Don Edwards, who promoted civil and voter rights, declared that the US was committing genocide in Vietnam while it had condemned Germany and Japan for genocide after the Second World War (L.A. Times 1970).

Leftist intellectuals tended to draw less on outraged liberal morality than on long-standing critiques of capitalist imperialism, while invoking outright parallels between the Holocaust and American war in Vietnam. The Russell Tribunal was their vehicle. Its most well-known participant, the French philosopher Jean-Paul Sartre, made many telling points about warfare in modern conditions in general, and in national liberal struggles in particular. Industrial society blurred the combatant–non-combatant distinction because disabling the enemy’s economic capacity necessitated total war, namely attacking its factories and their workers. The same dilemma applied in the wars of national liberation at this stage of capitalism when the US replaced conventional occupiers. Whereas the violent repression of, say, the French in Indochina, had been limited by the need to retain native labour to serve their settlers, the US was not thus constrained. It did not seek to exploit the population but aimed to stop socialist revolutions. Because such revolutions in peasant nations were the product of people’s wars with their guerilla tactics, exterminating an insurgent people was a neo-imperial imperative: ‘In effect, genocide presents itself as the only possible reaction to the insurrection of a whole people against its oppressors’ (Sartre 1968, p. 625). What is more, the American strategy was intended to warn national liberation movements in Latin America in particular and the Third World in general about the consequences of challenging Western-backed regimes: ‘submit or face extermination’ — at least partially (Sartre 1968, p. 619). Many commentators agreed that these points were borne out by the evidence that journalists and witnesses assembled in the 1960s, and by the secret Pentagon Papers about the US’s Vietnam policy when they were leaked in 1971 (Fall 1964).

On this telling, US permanent security entailed exterminatory violence against civilians until insurgents submitted to US-backed governments. But did ‘genocide’ capture this logic? Only a few agreed. One of them was the Swedish politician and lawyer, Hans Göran Frank, who advanced a similar argument in his role as General Secretary of the Citizens Commission of Inquiry on US War Crimes in Vietnam, which succeeded the Russell Tribunal (Keys 2014, p. 59; Weiss-Wendt 2018, p. 59; Kelly 2018, pp. 120–121). The question turned on genocidal intent: did the US intend genocide in Vietnam? Frank and Sartre argued in the affirmative because thwarting Vietnamese self-determination was tantamount to national destruction, whether by destroying the socialist project or by enclosing the population in

‘strategic hamlets’ (whose conditions were akin to concentration camps). Moreover, being national in nature, the killing met the stipulations of the Genocide Convention (Frank 1972). The Vietnamese were attacked simply for being Vietnamese just as a Jew was attacked ‘*because he was a Jew*’, as Sartre declared, that is, ‘not for having been caught carrying a weapon or for having joined a resistance movement’ (Sartre 1968, p. 612). He and Frank tried to obscure the obvious factual difference between the cases — Jews were not engaged in an insurgency against Germans — by pointing to American soldiers’ racism and the logical tendency of US policy to keep killing until victory was achieved.

Against Genocide

It was not difficult for reviewers to point out the argumentative flaws: the Americans had not escalated the war to total destruction, desisting from nuclear weapons and saturation bombing of the North because they were restrained by the prospect of Chinese and Soviet intervention. Neither did Sartre hold the Soviets to the same standard: the Russell Tribunal and Citizens Committee participants tended to be partisans for the Viet Cong and the North (D’Amata 1968; Sartre 1968, p. 1037). By adhering to the Holocaust archetype, Sartre and Frank made it easy for critics to distinguish the cases. The philosopher Hugo Adam Bedau’s detailed assessment of Sartre’s address in 1973 began by reminding readers of the Holocaust archetype:

Genocide is not just another crime, not even another ‘war crime’ or ‘crime against humanity’. For many, it is the ultimate offense. Moreover, accusations of genocide in our time are coloured by the paradigm case still very much within living memory, the treatment of European Jews and other ‘undesirables’ by the Nazi government until its defeat in 1945. The very term ‘genocide’ entered our language as the designation of that holocaust.

As a consequence, he continued, ‘there is a strong temptation to assert that injuries that fail to measure up to the fury of “the final solution” the Nazis designed for the Jews do not fit under the genocidal rubric’ (Bedau 1973, p. 577). The inevitable, and familiar conclusion, was that Jews were killed ‘not as a means to some further end but simply for its own sake’. So, while American tactics ‘tended towards genocide results’, the ‘requisite intent was missing’ (Bedau 1973, p. 602).

A hostile critic, the German-born political scientist at the University of Massachusetts Amherst, Guenter Lewy, also commenced his reply in this manner: ‘The prototype of genocide which inspired the convention was, of course, Hitler’s attempted extermination of the Jews of Europe, designed to bring about the “final solution” of the Jewish question’ (Lewy 1978; 2000; 2005).¹ The American campaign did not resemble this prototype. There could be no question of genocide. What is more, the Vietnamese population was increasing (Lewy 1978, pp. 302–303; Podhoretz 1982). Non-partisan international lawyers also quibbled whether taking sides

¹ Lewy built a career by denying the applicability of genocide to cases other than the Holocaust.

in the Vietnamese civil war counted as a genocidal situation (Bassiouni 1979). The genocide argument did not stick.

The legal defenders of the American war effort cleaved closely to international law because it supported their case (see generally Heller & Moyn 2024). They did not regard the Nuremberg legacy as a dynamic precedent that pointed to a reformation of the international system by setting new standards of accountability. Rather, as Justice Jackson and his team in Nuremberg intended, the trials ensured that the notion of military necessity, embodied in the Hague Conventions and military handbooks, was rehabilitated for use by the US in making the world safe for democracy. The American neoconservative intellectual and long-time editor of *Commentary* magazine, Norman Podhoretz (b. 1930), made plain the political stakes. In *Why We Were in Vietnam* (1982), he drew on Hannah Arendt's *Origins of Totalitarianism* to argue that the struggle against Nazism needed to be continued in the 'moral crusade against Communism' as effectively the same enemy. This meant that containing communism in Vietnam 'was therefore on the same moral plane as going to war as Nazism had been' (Podhoretz 1982, pp. 177–178). Given the greater cause and imperative to save American lives, he tolerated Vietnamese civilian casualties by applying disproportionate power as entirely legitimate. 'That was the American way of war' (Podhoretz 1982, p. 176). Guenter Lewy concurred:

For all but the pacifist, the decision as to whether any particular military conflict is justified therefore has to be made not on the basis of whether innocent civilians are likely to be killed but in terms of a country's national interest (Lewy 1978, p. 304).

Podhoretz otherwise repeated the legal arguments of lawyers and political scientists who had taken on Taylor, Falk, and Sartre in the 1970s. Their arguments had cut to the bone, leading to complaints about their 'war crimes industry' and 'left-wing McCarthyism' (Lewy 1978, p. 168). Even so sober a figure as Waldemar A. Solf from the Judge Advocate General Department of the US Army quoted a sympathetic academic to the effect that 'antimilitarism has become the anti-Semitism of the intellectual community' (Solf 1972). Despite such rhetorical exaggerations, he and others got down to the business of a black-letter legal exculpation of the military. This was not difficult. Even liberals like Nuremberg prosecutor, Benjamin Ferencz, noted — and seemed to approve — the legal probity of the US bombing of North Vietnam despite his own misgivings about the war in general (Ferencz 1971, pp. 630–633). Lewy, though not a lawyer, proceeded in a legalistic fashion with help from military lawyers whose arguments he repeated.² He saw no legal problem with collective punishment because the North Vietnamese strategy explicitly militarised the civilian population:

If guerrillas live and operate among the people like fish in water, then, legally the entire school of fish may become a legitimate military target. In such a

² See the devastating review by Kevin Buckley, 'Vietnam: The Defence's Case', *New York Review of Books*, December 7, 1978.

case, the moral blame, too, would appear to fall on those who have enlarged the potential area of civilian death and damage (Lewy 1978, p. 299).

Besides, he continued, claims about the American violence were exaggerated. The bombing was no worse than in Korea where it had 'levelled practically all major population centers' (Lewy 1978, p. 304). What is more, citing Hersch Lauterpacht's commentary on international law and the Hostages Case at Nuremberg, the Hague Convention allowed 'general devastation' on an area in 'exceptional cases', although he did not ask whether the 1949 Geneva Conventions superseded this 'concession to military necessity' (Lewy 1978, pp. 228–229; Oppenheim 1952).³ No doubt, some of the shelling was 'lavish', he conceded, but civilian casualties were 'an inevitable part of modern war and modern military technology' (Lewy 1978, p. 230). Solf made the same noises: 'Unquestionably there have been cases when air power or artillery fire was deliberately misused. Such incidents inevitably occur in war' (Solf 1972).

True, concluded Lewy, regrettable incidents had occurred even if they were not illegal: 'There was much in the American military effort in Vietnam that was legal but should probably not have happened' (Lewy 1978, p. 306). The case was clear, then: civilian casualties were unfortunate but predictable though not criminal; excesses were accidents and could be prosecuted on an ad hoc basis. Lewy encapsulated the logic of permanent liberal security in a single sentence: 'While the American way of war undoubtedly took the life of many non-combatants, these casualties were never inflicted as a matter of policy' (Lewy 1978, p. 301).

Solf mounted the most rigorous defence of military necessity by using the Nuremberg trials to his advantage. The doctrine, he accurately explained, extended 'only rudimentary protection to civilians who get caught in the crossfire of military operations on the battlefield' (Solf 1972, p. 45–46). Its application was limited by the rules of proportionality, which prevents foreseeable civilian casualties from not outweighing the military advantage gained. But it was up to field commanders on the spot to assess the relationship between the value of a military target and the likely civilian casualties — allowing them a large leeway. Moreover, as others also pointed out, the Viet Cong did not regard itself as bound by the Geneva Conventions, and its mode of warfare violated the distinction between combatants and non-combatants. Those who fought without markings violated the laws of war and could be punished with death (Solf 1972, p. 51). That said, Solf also saw that the Viet Cong mode of warfare required the Americans to innovate if they were to respect the law's 'basic principles' (Solf 1972, p. 54). This innovation was the creation of 'free-fire zones' by evacuating civilians from battle areas — a policy that liberals like Telford Taylor, discussed below, regarded as violating the Geneva Conventions prohibition of transferring populations. That prohibition applied only in conditions of belligerent occupation, however, so the Americans had a free hand, argued Solf.

³ Hersch Lauterpacht referred to Article 23G of the 1907 Hague Convention in *International Law, A Treatise*, 2 Vols.

That Solf led the defence of the military campaign and military necessity is significant because he worked closely with the International Committee of the Red Cross and advocated for international humanitarian law within the army. He defended the 1977 Additional Protocols against the Reagan Administration's criticisms. For him, law and the ability of the military to fulfill its mission were compatible: war could be problematically 'humane', as Sam Moyn argued (Moyn 2021). When Solf died in 1987, academic colleagues remembered him as a champion of 'the principle of humanity' (Goldman 1987).

A Liberal Alternative

Another approach was taken by left-liberal academics who agreed with some of Sartre's points but rejected his argument about genocide. Many of them gathered at the Congressional Conference on War and National Responsibility, sponsored by ten House of Representative Democrats, in February 1970. Besides politicians, its participants featured liberal academics and journalists with links to power and prestigious institutions: like the former Nuremberg prosecutor and Columbia law professor, Telford Taylor, the Yale psychiatry professor, Robert Jay Lifton, the University of Pennsylvania historian of American foreign policy, Gabriel Kolko, Princeton law professor, Richard Falk, former government advisor and now critic, Marcus Raskin, the University of Chicago international relations expert, Hans J. Morgenthau, and *The New Yorker* journalist and author of books on US atrocities in Vietnam, Jonathan Schell. Taylor initially supported American involvement in Vietnam, and Morgenthau had acted as a foreign policy consultant to the Kennedy administration, leaving government service when he dissented from the Johnson administration's military escalation. Even so, their concern mirrored that of Sartre and the unofficial tribunals: 'We are not fighting an army', Morgenthau told the meeting.

We are not even fighting a group of partisans, as the Germans did in Yugoslavia. We are fighting an entire people. And since everyone in the countryside of Vietnam is to a lesser or greater degree our potential enemy, it is perfectly logical to kill everyone in sight (Knoll 1970).

Unlike the non-government tribunals and citizens commissions that invoked the laws of war for rhetorical purposes, this heterogeneous group truly believed in them. Accordingly, they were faithful to Nuremberg's hierarchy of crimes, with aggressive warfare as the supreme crime. It was not only *how* the US waged war that violated international law, but also *that* it waged war at all. Although Falk thought that the American way of war tended in a genocidal direction that Sartre and Morgenthau indicated — the entire population as a military target — clinching the legal case for genocide was not his aim. He and Taylor were interested in applying the Nuremberg legacy to the current war. In his much-discussed *Nuremberg and Vietnam*, Taylor stuck closely to the original judgments to convict the American campaign of war crimes in its population displacement policies and use of disproportionate force:

[T]he by now voluminous reportorial literature on the Vietnamese war leaves little doubt that air strikes are routinely directed against hamlets and even single habitations ... in reliance on information of varying reliability. Obviously, these tactics are a response to the nature of guerrilla warfare, and the difficulty of sifting out the 'enemy' in a society where there are many shades of inimical activity (Taylor 1971, pp. 143, 144–145).

Certainly, then, the Viet Cong tactics were legally dubious, but that did not excuse the American response, Taylor thought. Fidelity to Nuremberg meant that not only soldiers on the spot should be convicted but also those who formulated strategy and gave the orders. Regarding massacres by US soldiers, he went so far as to suggest that American leaders could find themselves in the same situation as Japanese General Yamashita who the Allies hanged after the war for crimes committed by his troops despite his lack of knowledge or approval of them (Taylor 1971, pp. 52, 174, 188). At the same time, fidelity to Nuremberg also meant that Taylor did not object to the aerial bombing campaign because it was not indicted at Nuremberg (Taylor 1971, pp. 142, 181–191).

Falk did not think that liberals like Taylor went far enough, in part because they wished to retain proximity to power, in part because of their static view of Nuremberg, which did not take account of geopolitical developments, and forgot that the Tribunal charter was itself contested by legal literalists at the time. Rather than see Nuremberg as a fixed template, Falk urged contemporaries to take it as a flawed breakthrough in taming the leviathan. In other words, this legacy needed to be regarded dynamically as embodying possibilities that transcended its own compromised findings. 'Nuremberg has reached beyond itself when applied to Vietnam, and this moral growth, so to speak, was implicit within its initial historical dimension' (Falk 1971, p. 1510; Moyn 2004). Accordingly, it was shortsighted to cleave literally to the Nuremberg judgment, which was silent about bombing civilians because the Allies had also bombed civilians: clearly, that practice violated the spirit, if not the letter of international law.

The anti-war movement, he believed hopefully, signalled a transition in the international system between the 'Westphalian statism' that invested the right of war and peace in sovereign states on the one hand, and the 'UN Charter communitarianism' that qualified it 'through rules of restraint and creation of international institutions of review', on the other (Falk 1971, pp. 1508–1509). He thus urged the development of supranational institutions, the renewal of international law, and the education of national elites. Although he was pessimistic about the prospect of such institutional change, he hoped international law could prevent the worse by holding national leaders to account for aggressive warfare, as at Nuremberg. Because the US was not in fact like Nazi Germany, a peace movement could press the case for accountability. 'The question before all of us, at this time', he wrote in 1971, 'is whether we who originally lit the Nuremberg torch can keep it afflicker in these times of barbarism' (Falk 1971, p. 1528).

The genocide accusation was unhelpful in meeting this challenge unless it was interpreted metaphorically, Falk continued, rather than as a strictly legal undertaking that was unlikely to satisfy a court. By contrast, using the adjective

‘genocidal’ was appropriate as a tool of political mobilisation if based on accurate information regarding ‘massive indiscriminate destruction of civilian populations as a central feature of war strategy designed to defeat a popularly based revolutionary movement’ (Falk 1974, pp. 127–129). In that case, US citizens were confronted with a stark choice: ‘pacifism or genocide’ (Falk 1974, pp. 127–129). Although Falk did not see realistic prospects for prosecutions of the war’s architects, Dean Rusk or Richard Nixon, he thought their possibility could be a valuable regulative norm for policy makers in the future. If citizens of countries elsewhere held their leaders to account on the Nuremberg principles of individual responsibility, they could, together, develop a ‘global populism’ and ‘build a new world order based on curtailed role of government bureaucracies and other corporate actors with wealth and power at their disposal’. The ‘international conscience’, he declared, resided in these popular forces rather than with states (Falk 1974, p. 132). Falk thus opposed a ‘neo-Wilsonian’ that invested with the US with ‘a unilateral responsibility and prerogative to establish ideologically self-serving global rules of order as part of its mission to bring into being a peaceful world’ (Falk 1968, p. 257). Interventionism smacked of aggression, Nuremberg’s supreme crimes.

Reflecting on the war in 1974, Falk was less optimistic, because international law seemed helpless in the face of the realities on the ground in Vietnam. There was no question that the Northern strategy violated the laws of war by intermingling fighters with the civilian population. To that extent, communist permanent security risked massive civilian destruction, as conservative defenders of the US military never tired of pointing out (Falk 1974, p. 8; Falk 1969, pp. 216–259). Yet they missed the bigger point, he continued, which was that the radical asymmetry of the firepower and the fact that the population clearly supported the Viet Cong made a nonsense of a legalistic approach. In such conditions, the US military’s strategy was necessarily indiscriminate and thus illegal. Moreover, it stood on the wrong side of a just cause, because supporting South Vietnam entailed entrenching a regime based on an exploitative landlord class. A new Hague Convention was required to criminalise externally orchestrated insurgencies and counterinsurgencies that plagued the global system. But because other countries faced such insurgencies, Falk predicted that they would not press to hold military strategists accountable for the consequences of their policies, still less to insist on the principles of proportionality in domestic conflict (Falk 1974, p. 10).

As it happened, the year in which Falk wrote this essay, 1974, saw the beginning of the international negotiations that led to the two Protocols Additional to the Geneva Conventions in 1977. National liberation movements participated in their formulation and successfully demanded that ‘people’s wars’ be recognised as international conflicts, with the consequent subjection of guerrilla fighters to the protections of international law. The International Committee of the Red Cross and many Western states, however, would not accept the elision of the combatant/non-combatant distinction, nor was a supervisory mechanism established. To this extent, the Protocols did not materially change the requirement that insurgents distinguish themselves from civilians. The US and Israel did not sign the Protocols (Davey 2020; Whyte 2018).

Gaza 2024

The question now is whether the UNGC addresses the plight of Palestinians in Gaza. Six days after Hamas's attack on 7 October 2023, some scholars in Genocide Studies were writing that Israel was committing genocide, or could soon do so (Shaw 2023; Segal 2023). In response, many scholars in Holocaust Studies thought this claim was 'inflammatory and dangerous' (Patt et al. 2023). The view among most historians of the Holocaust was consistent in this respect: this was a war of self-defence, not a genocide (see e.g. Goda 2024; Klein 2024). In keeping with this rejection of the genocide label, IHL jurists and some commentators have tended to eschew it. Alex De Waal, the noted scholar of mass famine, declined to use the term when observing the catastrophic famine conditions in Gaza. 'Gaza is already the most intense starvation catastrophe of recent decades', he wrote in March 2024 (de Waal 2024). A year later, he noted that the UN High Commissioner for Human Rights was hinting at genocide while observing that 'Israel has done its sums, tested its policies and made clear that its permanent security overrides all other obligations' (de Waal 2025). Unlike his earlier propensity to attach the genocide label to famines in Africa in order to gain international recognition, he is now more cautious, adhering to the theory of legal expressivism (de Waal 2016). Tom Dannenbaum's 2022 prize-winning law review article on sieges and starvation cites Diane Amann on this point. This 75-page study mentions genocide only a handful of times because the focus is 'encirclement sieges' motivated by military goals, not the genocidal ones of destruction, there by reproducing the binary logic of 'war or genocide' without considering the reality that these logics are fused on the battlefield (Dannenbaum 2022). In an article written with Janina Dill a year after the beginning of Israel's siege of Gaza, he began to explore the possibility that the military and genocidal logics could be mixed or run together:

If the destruction of Palestinians in Gaza as a protected group in whole or in part were the means by which Israel sought to achieve its ultimate goal of security, group destruction would be the predicate purpose, pursued with direct intent.

Operating within the parameters set by law and jurisprudence, however, they are forced to accept their strictures regarding the proof of intent, and thus the expressivist doctrine: 'Purposive intent is held in the first instance by individuals, is exceedingly difficult to detect, and can often only be established, if at all, *ex post*' (Dannenbaum & Dill 2024, p. 673).

The limits of this theory can be seen on closer inspection. Amann bases the theory of legal expressivism on the notion of 'international society' as a fictional but regulative entity that embodies universal conscience.

International criminal justice institutions will not enjoy legitimacy unless they are seen to operate according to the values of the expressivist, Everyone, both the society directly affected by a tragedy and the amorphous, sometimes legalistic audience known as 'international society' (Amann 2002, p. 132).

Her invocation of ‘international society’ is understandable in light of the fact that she was writing in the aftermath of the NATO operation in Kosovo and Serbia when the humanitarian intervention euphoria was at its height, and prior to the US-led invasion of Iraq in 2003. Even before then, and especially since the Russian invasion of Ukraine, it has been difficult to speak of ‘international society’ as a unified subject. Multi-polarity is the prevailing discourse and reality, despite the successive UN general assembly resolutions condemning Russia’s invasion in 2022. South Africa’s case in the ICJ and the support it has received from the states in the Global South, as well as many Western states’ support of Israel and criticism of the proposed ICC warrants reflects this multipolarity. Much of the world’s population looks aghast upon the West’s hypocritical stance to Palestine compared to the Russian invasion of Ukraine, valorising international law and institutions in the latter, while undermining it in the former. For the Global South, it is an established fact that that Israel is committing genocide in Gaza. In an essay published in November 2023, I argued that anti-war protestors expressed the conceptual if not legal truth of the genocide claim along the lines that Maryam Jamshidi maintained about the conceptual alignment of law and reality (Moses 2023).

Unfortunately, this alignment is not the law — at least not yet. To fill the gap left by genocide’s singular status, Leila Sadat has led a campaign for a convention on the punishment and prevention of crimes against humanity. With such a convention, South Africa, or another state, could initiate proceedings against Israel with a higher chance of success, because crimes against humanity does not possess the stringent intent requirement modelled on the Holocaust. States would not need to wait for the ICC prosecutor to proceed, with the political and financial considerations that go into their decision-making. Jurists and state parties are debating such a convention (Sadat 2011). However, even this convention, if passed, could well be limited in scope like the UNGC, because many states, including in the Global South, do not want to sign treaties that limit their sovereign rights to pursue permanent security policies, as the preliminary debates reveal.⁴

For now, advocates for Palestine are left with the UNGC and the ICJ. What if ICJ does not recognise genocide when it comes to the merits stage of the case? The danger is real. Consider the Report of the International Commission of Inquiry on Darfur to the United Nations in 2005. The Commission rejected the genocide claim commonly made in in Western states by distinguishing between genocide and counterinsurgency (i.e. internal armed conflict).

One crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would

⁴ Sixth Committee, Continuing Resumed Session, Discusses Balancing Precision, Flexibility in National, International Measures to Address Crimes against Humanity, 78th Session, 42nd and 43rd meetings, GA/L/3710, 3 April 2024, https://estatemts.unmeetings.org/estatemts/11.0060/20240310000000/N5NvJHclcwXo/616bMu6jY7pg_en.pdf.

seem that those who planned and organised attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.⁵

There are eerie parallels with Israeli conduct in Gaza, with the report concluding that:

This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population.⁶

On these grounds, the African Union (AU), Arab League, China, and Russia absolved Sudan's leader, Omar Bashir, of genocide for his government's bloody suppression of a rebellion in the Darfur region of his country. According to the AU chair, Nigerian president Olusegun Obasanjo, 'What we know is that there was an uprising, rebellion, and the government armed another group of people to stop that rebellion', adding, 'That does not amount to genocide from our own reckoning' (Quoted in Mamdani 2007). The binary reasoning, so convenient for states, is not confined to the Global North. That is why I am less certain that Palestine is a 'litmus test' for international law and its racist and colonial entailments (Sirleaf 2024). There have been many before.

The attempt to conscript genocide for decolonial purposes buys into the artificial and misleading binary between war and genocide. Rather than engage in the yes or no calculus that the law of genocide demands, the novel nature of the Israeli campaign can call for a rethinking of the artificial binary between war or genocide (Becker 2025, pp. 55–66). It fuses their logics in various ways that international courts could register in reconsidering how they deduce the *mens rea* of genocide. The first aspect is the Israeli military is using an AI technology called Lavender that identified 37,000 male targets in Gaza. The human operators spent 20 seconds per target to verify they are male, they said. The settings allowed 15–20 civilian deaths for low-level targets who were killed with 2000-pound dumb bombs that flattened buildings with the occupants inside. Another software, called 'Where's Daddy?', determined when the target entered their home, where the IDF preferred to bomb them, meaning that entire buildings with their mainly women and children — that is, civilian — inhabitants were killed along with the low-level target. Leaving aside the cavalier, that is, imprecise manner in which these targets were determined, this practice puts paid to the stock defence of the high casualty rate, namely that they were human shields caused by Hamas hiding among civilians and making them legitimate military targets. In fact, missile operators waited until targets were among civilians to launch their ordnance (Abraham 2024a; 2024b). These are very likely to be war

⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of September 18, 2004 (Geneva, 25 January 2005), para 518. Henceforth Darfur 2004.

⁶ Darfur 2004, para 514.

crimes and crimes against humanity, for which a widespread or systematic attack on a civilian population is required. And yet the targeting is quite deliberate, the civilian deaths not incidental but calculated — and cumulatively, with the infrastructural destruction, the result, genocidal. As Ireland is arguing, systematic IHL violations can be taken as evidence of genocidal intent (Becker 2025, p. 57).

Then there is the use of so-called ‘dumb bombs’ that destroy structures hundreds of meters from their impact. Between 7 October and 17 November 2023 alone, Israel dropped almost 600 2000 lb bombs, a third of them ‘within dangerous proximity of hospitals across the Gaza Strip’ (Harvard University 2024). By their nature, such bombs inflict disproportionate damage, and their cumulative deployment over many months has inflicted untold death and destruction that cannot be regarded as incidental or collateral: it is calculated and intended (Forensic Architecture 2024).

This messy fusion of military and genocidal logics is also evident in the siege-starvation of Gaza. Whereas UN officials and academics have been warning about genocidal famine in Gaza for months (Tanielian 2024), Israeli officials, their Western supporters, and the Israeli ad hoc judge at the ICJ, Aharon Barak, disavow a genocidal intention by insisting on the military context and its tragic by-products. Meanwhile senior Israeli figures claim the siege is not intended to starve the population but to incentivise Hamas to end its resistance, to ensure it does not benefit from aid deliveries, and to release the Israeli hostages, as well as to induce the population to leave, if possible. ‘This is not about cruelty for cruelty’s sake’, wrote Giora Eiland, an advisor to the defence minister and the former head of the Israeli National Security Council, ‘since we don’t support the suffering of the other side as a goal but as a means’ (Whyte 2024).

Clearly, the policy is to use starvation as a weapon of war, despite its prohibition by the Geneva Conventions and their requirement that Israel as the occupying power (Articles 55 and 59) supply the population with basic necessities. As Jessica Whyte points out, ‘By advocating for starvation and epidemics as a means to military victory, while simultaneously denying an intent to starve, Eiland pushes to the limit a strategy that privileges intentions over actions and their utterly predicable consequences’ (Whyte 2024). Combined with statements about making Gaza uninhabitable, indeed to destroy it, the effects on the Palestinian population in no way can be seen as incidental: they are intended, they are genocidal in effect, and their vehicle is military necessity. Again, the military and genocidal logics are fused, as they were in Vietnam.

Finally, there is the cynical use of humanitarian rhetoric about ‘safe’ and ‘sterile’ zones and passages, ostensibly to remove civilians from combat areas, only to kill them as well as aid workers through bombings, a practice that Francesca Albanese, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, calls genocide via ‘humanitarian camouflage’ (Albanese 2024, pp. 14–15; Green 1968; Human Rights Watch 2024; Care 2024). Taken together, these ostensibly legal and humanitarian gestures have genocidal effect as well. Combined with statements from Israeli leaders to depopulate Gaza along with the destruction of schools, universities, mosques, hospitals, agricultural land, as well as buildings in general (the rubble of which could take until 2040 to remove), including the gratuitous destruction of medical equipment and

reported sniper killing of Palestinian children, it is impossible to avoid the conclusion that the effect, if not the point, of the Israeli military action is not solely to defeat or destroy Hamas, as claimed by Israeli lawyers and leaders in their more cautious moments, but also the possibility of Palestinian life in Gaza. Or, as Lemkin put it in 1944, genocide was ‘a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves’ (1944, p. 79).

And yet, the ICJ rules in *Bosnia vs. Serbia* that much of such destruction did not evince a genocidal intention. The question will be how the Court analogises with the Serbian conduct in Bosnia and the Israel campaign in Gaza. Prosecutors are by nature cautious, choosing their indictments mostly like to meet success. Karim Khan sought a warrant for Israeli leaders for the crime against humanity of extermination, not genocide — and the Pre-Trial Chamber did not approve the extermination charge. When it approved the warrant for the arrest of Israeli prime minister Benjamin Netanyahu and former defence minister Yoav Gallant for war crimes and crimes against humanity on 21 November 2024, it still did so by distinguishing genocidal intent and military necessity: ‘the Chamber found reasonable grounds to believe that no clear military need or other justification under international humanitarian law could be identified for the restrictions placed on access for humanitarian relief operations’ (ICC 2024). This kind of reasoning continues to provide a loophole for Israeli advocates to argue that legitimate security concerns rather than a criminal intention to destroy drive the state’s policies by emphasising the framework of armed conflict and international humanitarian law.

However, as the months pass and the Israeli campaign intensifies, the jurists are setting the stage for a genocide indictment. The Pre-Trial Chamber included language that mirrors Article II(c) of the Genocide Convention (‘Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’): the Israeli authorities, said the ICC on the basis of the situation in May 2024, ‘created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children due to malnutrition and dehydration’ (ICC 2024). Since the renewed blockade after the breaking of the ceasefire by Israel in early 2025, UN experts have repeated such calls (United Nations 2025).

International lawyers are beginning to understand that military and genocidal logics can run together in fact if not in law. ‘But what if the definition of military necessity is — unbeknownst to the military that is actually undertaking the IHL analysis for each attack — premised on political leadership’s genocidal intent?’, ask two scholars in relation to Gaza. ‘IHL does not provide a clear answer’, they conclude (Rona & Orpett 2024). The distinctive modalities of the Israel campaign afford the ICJ judges an opportunity to provide a clear answer. The world awaits their determination with great anticipation (Becker 2025).

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