

The anatomy of a genocide – a watershed moment as international law and our common humanity hangs by a thread

For more than 217 days, the State of Israel has been at war with Hamas. A response triggered by the Hamas attack on Israel on 7 October 2023, the military assault on Gaza has exceeded all justifications for the use of force under international law. To date, over 35 000 Palestinians have been killed, including approximately 15 000 children, and 71 000 have been injured. The actual death toll has likely exceeded this as more than 12 000 people are missing, presumed dead under the ruins of Gaza's infrastructure.^[1] The Israeli military response has resulted in the destruction of Gaza's universities, schools, hospitals, places of worship, apartments and homes. These 'civilian objects' are protected under international law, and while Israel has maintained that it is targeting Hamas militants, the complete siege on Gaza and disproportionate civilian deaths and destruction has increasingly revealed indiscriminate attacks and collective punishment of the population. This is expressly prohibited under the principles of international humanitarian law.^[2] Since the 8 October 2023, the Israeli Defence Force (IDF) has progressively forced the civilian population to evacuate their homes and move from Northern Gaza to the South. Many people who remained were killed during military operations, which obliterated infrastructure in its wake. On 10 May 2024, the population, now concentrated in the city of Rafah, were asked to evacuate to Al-Mawasi as the IDF ground operation to eradicate Hamas in its final stronghold, was about to begin.^[3] Forced displacement of a people is also expressly prohibited by international humanitarian law. Despite the support that Israel has retained throughout these 8 months, humanity now stands at a final precipice. This submission considers the immediate situation in Gaza, where the provisions of law and the limits of ethics and morality have been excruciatingly stretched to their absolute limit. International law now hangs by a thread, and states must now act with courage and humanity to turn away from a final plunge into an abyss of moral ruin. 'Genocide' refers to any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group,
- (b) Causing serious bodily or mental harm to members of the group,
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,
- (d) Imposing measures intended to prevent births within the group,
- (e) Forcibly transferring children of the group to another group.^[4]

When we consider the events of the past 8 months, we are alerted to several of these categories being triggered. The civilian death toll establishes the killing of Palestinians, which the International Court of Justice has confirmed constitutes a national group for the purposes of the Genocide Convention.^[5] In her report 'Anatomy of a Genocide',^[6] the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese concluded that the collective trauma experienced by Palestinians, which will affect generations to come, is incalculable. In addition to those killed in the bombings, thousands have been detained and subjected to inhuman

and degrading treatment, which is also recognised as the crime of torture under treaty and customary international law. When a complete siege on Gaza was announced in October last year, all services to Gaza were cut off, including sanitation, fuel, telephone service and electricity. This, coupled with the destruction of homes, hospitals, schools, places of worship and universities, as well as events like the flooding of the tunnels with seawater, has created an uninhabitable environment that is inhospitable to life. Civilian objects may only ever be considered legitimate military targets that may be targeted if they are shown to be linked to a military purpose. To date, no evidence has been provided to establish that any of the destruction has resulted in the fulfilment of such military purpose. The consistently disproportionate deaths of women and children have also been of extreme concern to the global community. More than 50 000 women in Gaza are pregnant, and every day approximately 180 women give birth under unspeakable conditions. The only two entry points in Gaza are controlled by military personnel, and it is pregnant women and young mothers who are experiencing some of the worst consequences of the siege. Many young mothers are chronically malnourished and experience difficulties breastfeeding. Infant formula is scarce, and many newborns are starving. There are not enough incubators to house premature infants, and many mothers have had to deliver their babies via caesarean sections performed without any aesthetic. The healthcare catastrophe in Gaza has been condemned by many healthcare associations worldwide, who have expressed outrage at both the targeting of healthcare professionals and facilities, and the impossibility of maintaining acceptable standards of medical care in Gaza. Further, there have also been reports of Palestinian children being relocated by the IDF. These are all possible violations of the Genocide Convention. Albanese also analysed the patterns of violence and observed the distortion of the principles of international humanitarian law to legitimise violence against Palestinian people. She concluded that the threshold for the commission of genocide has already been met. Genocidal intent is particularly difficult to establish, and in its application to the International Court of Justice, South Africa (SA) argued that the statements of numerous government officials as well as IDF soldiers are demonstrative of such intent.^[7]

In March 2024, the IDF laid siege to the Al Shifa medical complex, where thousands of Palestinians sought shelter and medical care. Two weeks later the IDF withdrew, and what was revealed could only be described as a massacre of innocent human life. To date, two mass graves have been found in the grounds of the medical complex, revealing the bodies of men, women and children. Many of these bodies had their hands zip-tied behind their back and are unidentifiable since they were beheaded and had missing limbs, with some still in their patient gowns. It is estimated that more than 1 500 civilians were killed in Al Shifa, with women and children being half of the casualties.^[8] Similar mass graves have been discovered at Nasser Hospital. A CNN report based on the testimony of whistle-blowers and released detainees revealed that many Palestinian detainees have had to have limbs amputated due to

over-cuffing.^[9] It is reported that many of these detainees were kept restrained in beds, forced to wear diapers and fed through straws. These acts constitute international crimes, and responsibility for these rests not only on their perpetrators but also on those who facilitated forced disappearances and secret detentions. In its reckless new form, Israel's freshly amended Detention of Unlawful Combatants Law allows for the detention of civilians only on suspicion and without evidence or the protection of the right to a fair trial.^[10]

These are the events of the past 8 months. Where we stand now is at a turning point in the history of this conflict, the legitimacy of international law and our humanity. The civilian population in Gaza, forced to travel south under the orders of the military and feeling from the bombs which destroyed all which they knew, are now penned within the city of Rafah. Rafah, which is approximately the size of London's Heathrow Airport. In Rafah, more than 1.4 million Palestinians, including 610 000 children are seeking shelter here with nowhere to go. The Israeli government has instructed the population to evacuate Rafah. Many people, including the elderly and children, are simply too weak, injured and malnourished to move further. At this point, there have been numerous calls for a ceasefire. States have consistently demanded compliance with the principles of international law and the cessation of the conflict for the sake of humanity. The Security Council of the United Nations has voted on resolutions calling for a ceasefire between all parties several times, only to have the veto of its permanent members systematically cause the passing of the resolutions to fail. For many of the states that have provided Israel with political and military support, the invasion of Rafah and forced displacement of civilians is a red line that they have warned against crossing. The latest attempt at a ceasefire proposal between the state of Israel and Hamas, which would inter alia have resulted in the release of all hostages and retreat of military presence in Gaza was accepted by Hamas but rejected by Israel.^[11]

UNICEF reports that Israel has taken control of the Rafah border, virtually no humanitarian aid is entering the area, there are only days of food and fuel left, and the roads to the newly allocated 'safe zones' are congested to a standstill.^[12] There are also no proper sanitation facilities left. According to reports, Israel has begun to surround Rafah with 'military checkpoints' and has expressed that men who are 'of military age' would be required to remain in Rafah. This in particular has led many to believe that an invasion of Rafah will set in motion the final stages of a genocide, drawing parallels to the actions of the Bosnian Serb Army in the Srebrenica massacre, which resulted in the killing of more than 8 000 Bosniak Muslim men and boys.^[13] The UN Secretary-General Antonio Guterres has issued a regular plea that a ground attack in Rafah would lead to an epic humanitarian disaster, and has called on Israeli and Hamas leadership to demonstrate political courage and end the bloodshed and free the hostages.^[14]

However, the steadfastness to proceed with a ground invasion has created a swift change in the tide. The USA indicated that it would pause the shipment of military weapons to Israel. There has been a surge in student protests around the world against the killing of Palestinian civilians and to call for divestment from Israel. The spread of these student 'Gaza encampments' and the difficulty police have had to try to disperse them has placed political pressure on states in their own right to take steps to end the conflict and secure the release of the hostages. Hundreds of students, and faculty who have supported their right to peaceful protest, have been arrested. Some universities have already set down meetings to vote on divestment. These activities

have spread across the world and have also reached SA shores, which poetically was the first state to take Israel to the International Court of Justice on a charge of Genocide in 2023. Since then, several states have joined this case. The International Criminal Court has stirred, with the Office of the Prosecutor applying for arrest warrants for Israeli Prime Minister Benjamin Netanyahu and Israel's Defence Minister Yoav Gallant, as well as Yahya Sinwar, the head of Hamas in the Gaza Strip, Mohammed Diab Ibrahim Al-Masri, the Commander-in-Chief of the military wing of Hamas, known as the Al-Qassam Brigades, and Ismail Haniyeh, the head of Hamas' political bureau, for the commission of war crimes and crimes against humanity. The issue of these warrants would limit the ability of those charged to travel, as States which are party to the Rome Statute of the International Criminal Court would be under a legal obligation to arrest them if they physically enter their territories. In late April 2024, whispers spread of possible arrest warrants against high-level officials involved in the conflict causing the Court to be placed under pressure to refrain from issuing any such warrants against Israeli officials. This caused the Office of the Prosecutor to issue an unprecedented statement, denouncing statements that 'threaten to retaliate against the Court or against Court personnel' for actions taken by the Prosecutor.^[15] Such threats may amount to an offence against the administration of justice under Article 70 of the Rome Statute. On 10 May 2024, SA approached the International Court of Justice once more, for an urgent order for Israel to immediately withdraw from Rafah and to relinquish control of the border and allow the entry of humanitarian aid. In its application, SA describes Rafah as 'the final stand', and that any assault would result in 'the killing of the Palestinian people of Gaza while simultaneously starving them, and denying them humanitarian aid and the basic necessities of life', and would mark the final stage of a genocide.^[16]

We stand on the precipice where humanity faces a point of no return. It now falls upon states to collectively act to protect humanity and a people from the furtherance of the tragedy of our time. Amidst worsening conditions of life, a rising death toll in Gaza and a worldwide surge in anti-Semitism and Islamophobia, the global community has an opportunity to act with its collective conscience and declare that none of this is acceptable. It is time for the global community to embrace its collective power and the role it played in the ending of apartheid in SA. It is time to remember the words of Dag Hammarskjöld, the second Secretary-General of the United Nations, who more than half a century ago said that 'the United Nations was not created to take mankind to heaven, but to save humanity from hell'. These words will be the benchmark against which its actions are judged.

It is a time for all people to recall their own histories, recognise clear violations of law and ethics and make a concerted effort to preserve the principles of international law applicable to all participants. It is time to remember the harm done to populations in history and affirm that the words 'never again' mean never again for anyone. It is time to choose peace.

S Soni, PhD

School of Law, University of KwaZulu-Natal, Pietermaritzburg, South Africa

sonish@ukzn.ac.za

S Afr J Bioethics Law 2024;17(2):e2218. <https://doi.org/10.7196/SAJBL.2024.v17i2.2218>

1. United Nations Office for the Coordination of Humanitarian Affairs. <https://www.ochaopt.org/data/casualties> (accessed on 11 May 2024).
2. Article 52 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, also a rule of customary international humanitarian law as clarified by Rule 10 of the International Committee of the Red Cross.
3. <https://www.aljazeera.com/news/liveblog/2024/5/11/israels-war-on-gaza-live-battles-rage-in-rafah-as-tanks-troops-advance> (accessed 11 May 2024).
4. The Convention on the Prevention and Punishment of the Crime of Genocide 1948.
5. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of the Court, International Court of Justice (26 January 2024 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>) (accessed 11 May 2024).
6. Anatomy of a Genocide, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese (A/HRC/55/73) <http://www.ohchr.org/a-hrc-55-73-auv> (accessed 11 May 2024).
7. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Verbatim Record, International Court of Justice (11 January 2024).
8. United Nations Security Council Statement on Mass Graves in Gaza (SC/15692), 11 May 2024 <http://www.press.un.org/> (accessed 11 May 2024).
9. CNN, 'Strapped down, blindfolded, held in diapers: Israeli whistleblowers detail abuse of Palestinians in shadowy detention center' <https://edition.cnn.com/2024/05/10/middleeast/israel-sde-teiman-detention-whistleblowers-intl-cmd/index.html> (accessed 11 May 2024).
10. Detention of Unlawful Combatants Law, 5762-2002, as amended.
11. Al Jazeera, Text of the Gaza ceasefire proposal approved by Hamas <https://www.aljazeera.com/news/2024/5/6/text-of-the-ceasefire-proposal-approved-by-hamas> (accessed 11 May 2024).
12. UNICEF <https://www.unicef.org/press-releases/rafah-needs-rise-humanitarian-response-forced-scrape-bottom-barrel> (accessed 11 May 2024).
13. International Criminal Tribunal for the former Yugoslavia <https://www.icty.org> (accessed 11 May 2024).
14. United Nations, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, 10 May 2024 <http://www.press.un.org> (accessed 11 May 2024).
15. Statement of the Office of the Prosecutor of the International Criminal Court, 3 May 2024 Official account of the International Criminal Court <http://twitter.com> (accessed 11 May 2024).
16. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request by South Africa for the indication of provisional measures and modification of the Court's previous provisional measures, International Court of Justice, 10 May 2024 (accessed at on 11 May 2024).

Accepted 24 May 2024.