Why is a finding of genocide by the ICJ highly unlikely? I in the following discussion of this point I will look to include an unpacking of the Travaux Preparatoires (TP) of the Genocide Convention because it is so little known or studied and because it is critical in interpreting the Convention, as prescribed by the Vienna Convention on the Law of Treaties (1969) Article 32.

Before launching into this analysis it is worth bearing in mind the statement made by Professor Rosalyn Higgins, the first female President of the ICJ in the foreword to the first published consolidation of the TP in 2008. She said, "There is undoubtedly a degradation of the concept of genocide in its all too easy invocation by politicians who have not troubled to learn the distinction between (other areas of law) and genocide. Lawyers have not been immune from contributing to this degradation". Hirad Abtahi and Philipa Webb, the compilers of the published TP added in the preface, "Bearing in mind that genocide is a complex crime (many have opined that it has a subjective surplus and an objective deficit)..."

Let's begin with the current ICJ process initiated by South Africa and what the Judges have had to say so far. There are three steps in the process. The first hearing was purely procedural to determine issues such as is there a dispute between states, has the initiating state correctly cited the convention, do the Palestinians qualify as a "national, ethnical, racial or religious group" and evaluating provisional orders sought or what they might need to make on their own initiative etc. The second step is to determine whether there is sufficient evidence to justify proceeding to a full trial on the substantive question (the so-called *merits of the case*) and then finally a possible trial itself if the first two hurdles are navigated. There have and will likely be further procedural deliberations along the way. As the President of the Court at the time of the procedural hearing, Joan Donoghue, has since explained, the court found that there was a dispute and that the Palestinians met the definition of a protected group but this did not mean that Israel was "plausibly committing a genocide" simply that Palestinians had a plausible right to be protected from genocide and that South Africa had the right to present its claim to the court. That is all.

The ICJ deliberated on the provisional orders sought by South Africa, which included an order for the immediate cessation of operations in Gaza. The Court rejected every one of the South African provisional orders sought, including the cessation of operations. It instead made a few orders of its own including the requirement on Israel to prevent the possibility of genocide in accordance with the convention (a standard statement), prevent and punish acts of incitement, enable the provision of services and relief, preserve evidence to facilitate later hearings, submit regular reports, and a demand that Hamas immediately and unconditionally release all hostages. This is in contrast to the Ukraine v Russia case where the Court did order the cessation of operations. The Russian invasion was also very clearly an act of aggression, which is a crime against peace. That they did not make such an order against Israel was a clear signal that they accepted Israel was operating in accord with Article 51 of the UN Charter under the inherent right of self-defence.

So let's consider some of the comments in the separate judicial statements. Noting that the merits of the case were not up for determination in the procedural hearing some judges felt compelled to manage expectations by reference to the standard of

proof required to establish genocide. The current Vice President of the ICJ, Julia Sebutinde from Uganda was dismissive of the entire case stating,

> "Unfortunately, the failure, reluctance or inability of States to resolve political controversies such as this one through effective diplomacy or negotiations may sometimes lead them to resort to a pretextual invocation of treaties like the Genocide Convention, in a desperate bid to force a case into the context of such a treaty, in order to foster its judicial settlement: rather like the proverbial 'Cinderella's glass slipper'".

Judge Nolte of Germany directly commenting on the special level of intent required to establish genocide stated:

> "I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent. The information provided by South Africa regarding Israel's military operation is not comparable to the evidence before the Court in The Gambia v. Myanmar in 2020."
>
> "The Applicant must be expected to engage not only with the stated purpose of the operation, namely to "destroy Hamas" and to liberate the hostages, but also with other manifest circumstances, such as the calls to the civilian population to evacuate, an official policy, and orders to soldiers not to target civilians, the way in which the opposing forces are confronting each other on the ground, as well as the enabling of the delivery of a certain amount of humanitarian aid, all of which may give rise to other plausible inferences from an alleged "pattern of conduct" than genocidal intent."

Judge Bhandari of India noted, on the question of the relevant intent, the ruling of the IJC in another matter, "in order to infer the existence of *dolus specialis* (special intent) 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" Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), p. 67, para. 148.

Let's look at cases brought to the ICJ alleging violation of the Genocide Convention as the most immediately relevant jurisprudence:

> •1993 Bosnia against Serbia. Only Srebrenica (1995) was declared as a genocide incident in its 2007 decision. The ICJ ruled Serbia had not committed, conspired to commit, or been complicit in the genocide. Serbia was only ordered to cooperate with ICTY (ad hoc tribunal for former Yugoslavia) and transfer accused individuals. No financial compensation was required. The case took 14 years to complete. In relation to Srebrenica there was overwhelmingly conclusive evidence derived from the communications

passing amongst the Serb actors, video evidence, the extensive testimony of witnesses and the physical evidence.

•1999 Croatia against Serbia. (See the quote from this case by Judge Bhandari above indicating that genocide has to be the **ONLY** inference that can be drawn from the conflict circumstances to prove the allegation). Dismissed in 2015.

•2019 The Gambia against Myanmar. Still underway.

•2022 Ukraine against Russia. Still underway. ICJ ordered an immediate halt to Russian military operations.

•2023 South Africa against Israel. Still underway. No order to halt IDF military operations. Possible completion by 2027 or 2028.

In following the deliberations of the ICJ in these previous cases and considering the *obiter dicter* (said in passing) of some of the judges, a very high bar will be set for establishing genocide in the context of an active war zone.

Moving to the Convention itself, it is critically important to note that this document was drafted in a process that stretched from 1946-1948 in the shadow of WWII and the Holocaust, and following the establishment of Nuremberg trial process. The design of the convention such as relates to the scope of the crime, the required intent and as revealed in the extensive deliberations of the process, was shaped by deconfliction with modern war realities, the laws of armed conflict and the general category of crimes against humanity.

It began with a General Assembly Resolution and was processed through ECOSOC and the UN “Sixth Committee” (which deals with legal issues). The drafters were aware that fully defining a new crime of this nature under international law was too challenging to be properly and fully detailed in the Convention. They therefore kept to a simple formula in Articles II & III, trusting to the supporting body of material in their Travaux Preparatoires (TP, preparatory work) of the drafting process and judicial deliberations that would advert to it in the years ahead. The Vienna Convention on the Law of Treaties (1969) Article 32 codified the customary law that the TP is to be used in interpreting treaties in these circumstances. The other aid to interpretation is Jurisprudence, found in State Courts and International Tribunals.

The primary distinction of the crime of genocide relates to the *dolus specialis* or special intent. It is necessary to establish certain acts happened (*actus reus*), that there was an intent not only to commit the actions (*mens rea*) claimed but conclusively establish the act was done with the intent to destroy a group. As noted previously this has to be the “only conclusion” that can be drawn, supported by a clear and substantial body of evidence. What the drafters had in mind were the examples of the transcript of the Nazi Wannsee Conference of Jan 1942 and the

vast documentation, physical evidence (ie death camps, gas chambers, rail heads, round up processes and ghettoes) and witness testimony of the Holocaust. They were highly conscious that they were defining this crime for the first time and that it was on higher level of turpitude than all other crimes under international law. They were therefore at pains to divorce genocide from large scale casualties of war, with the experience of the scale of conflict required to subdue the fanaticism of the Nazis and Japanese militarists in mind. They also wanted to clearly separate it from war crimes and crimes against humanity.

The following extracts underline this point. They made it clear for example that:

> "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide."
>
> "Genocide is the deliberate destruction of a human group. This literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights".
>
> "The destruction of the human group is the actual aim in view. In the case of foreign or civil war, one side may inflict extremely heavy losses on the other but its purpose is to impose its will on the other side and not to destroy it."

The point they were making in these prescriptions was that other bodies of law would be relevant to assessing things like war crimes, general crimes against humanity and civil rights as distinct from genocide.

The Russian delegation through the drafting process reinforced the distinction between the laws of armed conflict and genocide by referring to the latter as actions "entirely independent of the conduct of military operations". They did not in the TP process, for example, cite the siege of Leningrad or the battle for Stalingrad as situations of genocide despite the tremendous civilian death tolls. They and the other delegates were well aware of the scale of the civilian casualties in the battles for Berlin, Cherbourg, Dresden and other urban battles in WWII. The Chairman in this respect stated that:

> "in times of war, the motive for the act was not to destroy a group as such, but to impair the military strength of the enemy. The report should make clear that

> the Committee had not contemplated the case of war, since the codification of the laws of war was not within its competence."
>
> In relation to genocide he added, "The intention was the important factor and the destruction of a fraction of the group would constitute genocide provided that the intention was to destroy the group totally."

The Nazis, for example, in the Wannsee transcript detailed the intent to kill all 11 million Jews in Europe but fell short at 6 million.

In the case of the Palestinians in contrast, it is therefore relevant to consider that in relation to Arabs under Israeli jurisdiction the population dynamic has been as follows:

Aabs in Israel:

1948 = 156,000

2023 = 2,100,000

Arabs in the West Bank:

1967 = 661,000

2023 = 2,747,943

Arabs in Gaza:

1967 = 354,700

2005 = 1,300,000

2023 = 2,100,000

The reason for the 2005 marker is that this is when Israel withdrew completely from Gaza. The population in Gaza grew significantly before and after being under Israeli jurisdiction.

From these figures we can see that beyond the combat zone of Gaza where deaths have resulted from an armed conflict there has been no attempt to kill all Palestinians. This is a serious blow to claims that Israel has the requisite intent to kill the entire group given the clear views of the drafters of the Convention.

The drafters commented further on the theme of the distinction with armed conflict:

> "Take the example of a defensive war… Modern war was total, and there might be bombing which might destroy whole groups. If the motives for genocide were not listed in the Convention, such bombing might be called a crime of genocide; but that would obviously be untrue."

> “Under international law any State had the right to defend itself against elements which committed certain acts against the Government. If the rebellious group were destroyed, it would be because of its activities, and not because of its political views.”

Again, they are not saying in this case that other bodies of law might not be relevant to the conduct of the hostilities but simply that the Genocide Convention would not be. The shorthand indicator that makes clear the distinction is the quote in the TP that the Nazi genocide, with the well documented plan to exterminate all Jews:

> **“had been committed systematically and as a government plan, diabolically conceived and cold-bloodedly executed”.**

That is what a Court will be looking for, as clearly already flagged by some of the Judges in the ICJ South African case.

With regard to the issue of incitement the drafters set a similarly high bar. They did this because, as they stated, during war there will be speech by leaders that will be intended to motivate the armed forces and rally the home front. There are endless examples of this in WWII, including in Australia. The drafters stated, therefore, that:

> “The propagation of hatred alone would not constitute sufficient grounds for conviction… it would be necessary for the propaganda to have been carried out systematically and with intent to instigate the crime. In practice the clause would only apply to the most extreme cases.”
>
> “…the inclusion of incitement might undoubtedly give rise to abuses, for any criticism of one group by another, whether in good or bad faith, (could) be represented by certain countries as an incitement to genocide”.

Let us now turn to some of the objective facts that will also mitigate against a finding of genocide. Starting with relief activities in Gaza since the war began until the ceasefire, we know for certain that a total of 2,174,489 tons of humanitarian aid crossed into Gaza since October 7. Per the UN World Food Programme (WFP), the standard emergency ration is 0.7 kg per person per day, providing the minimum 2100 kcal (standard human caloric need). For Gaza’s 2.2 million people, that would be enough to feed everyone for more than 3 years. So if people were going hungry, it’s not because aid wasn't getting in, it is because of what happens after it does. The reality is the relief was subject to systematic looting by Hamas in particular. When financial resources to Hamas were cut off, they adopted a new business model that revolved around earning money from selling material on the black market and as a means of rewarding operatives and their families and punishing opponents. The UN's own data shows 87% of aid trucks over the months leading up to the ceasefire were "intercepted" before reaching their destination, looted by Hamas, raided by gangs, or mobbed by desperate civilians.

There can be no doubt that the evidence shows an effort to support relief activity into Gaza by Israel's COGAT organisation and the other NGO actors permitted to operate in the strip. The main allegation against Israel that is cited in support of the claim of genocide is, therefore, the period during which aid was paused from 2 Mar-26 May 2025.

This action was taken to come up with a new distribution system that would prevent the looting and the relief supplies being diverted by Hamas to support its ongoing operations. We will look at whether it is lawful to take such action under the laws of armed conflict shortly.

The question is, was the pause intended to inflict genocide under the provision of the Genocide Convention that cites "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" as a genocidal act if done with that specific intent. We know from the TP that the drafters had in mind the conditions intentionally created in the ghettoes, death and labour camps by the Nazis in WWII.

To assess this it must be understood that 338,767 tons of food entered Gaza between 19 Jan-18 Mar 2025, amounting to over a trillion kcal (unit of energy used to measure the energy in food). Given the population in Gaza of 2.2m, and given the above cited WFP criteria of the requirement of 2100 kcal per day to sustain a person, this amount of food should have lasted 220 days. Using that calculus of 220 days commenced from 18 Mar takes you to 24 Oct, well after the relief activity was resumed on 26 May. There is no way Gaza could have run out of food during the relief reorganisation unless it was being deliberately withheld and exploited by Hamas.

Another issue that would seriously impede proving the intent that this was a deliberate effort of genocide, is the specific provision for managing relief under the laws of armed conflict. Recall that it must be shown that genocide is the only possible explanation. Under Article 43 of the Fourth Geneva Convention the obligation to allow the free passage of the consignments is subject to the condition that the High Contracting Party (ie the State of Israel) must be satisfied that:

> "there are no serious reasons for fearing:
>
> (a) that the consignments may be diverted from their destination,
>
> (b) that the control may not be effective, or
>
> (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods."

> “The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers (if any are in place)."
>
> “Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage **shall have the right to prescribe the technical arrangements under which such passage is allowed**."

In this case Israel was perfectly within its rights to attempt to put relief activity on a more secure footing. At the very least this amounts to a valid and obvious explanation for the pause.

It will be recalled that the measures that Israel in partnership with the US attempted to put in place following the pause was to use the Gaza Humanitarian Foundation (GHF). There are a number of legitimate criticisms that can be made of the initial operation of the GHF. The manner in which Secure Distribution Sites (SDS) were established provided too much opportunity for disruption by Hamas who predictably responded with extreme violence against their own people to prevent their business model being broken. They did this by attacking civilians along routes to and from the SDS, placing disruptive elements around the SDS, disseminating false information about these actions placing the blame on the IDF and stealing food from those bringing food away.

The sites themselves were not designed effectively to ensure an orderly process of distribution. The Australian troops deployed to Somalia in 1993, in which I served, had the same issue in their first attempt at a food distribution point. The point is that the GHF effort to distribute food makes it strong probative evidence against a genocidal intent, even though initial efforts were flawed.

In any event GHF subsequently remedied these issues. GHF boxes could feed 5.5 people for 3.5 days. The redesigned SDS could feed 300k per day, with continuous delivery enabled through more sites and a chambered system for a more orderly process, using biometrics and T walls to ensure less abled people would also be properly catered for.

GHF also provided employment to 45 local workers per site where they were provided accommodation for their safety from Hamas retaliation. Ultimately the expanded plans were not proceeded with after the ceasefire agreement came into effect and relief proceeded under a different regime. This new relief regime and the ceasefire also mitigates against proving genocidal intent.

Next we come to the provision of medical support to the population. There have been a number of assertions that all the hospitals in Gaza were destroyed by the IDF. What we know is that Hamas certainly compromised the protection of hospitals

through utilizing them to conduct operations and to provide shields for their military facilities. They also damaged the Al Ahli hospital with one of their many rocket misfires.

Notwithstanding these issues the facts are that 17 of the 36 hospitals in Gaza remain operational even though struggling to operate to full capacity due to their location in the middle of an active war zone. The remainder are unserviceable or damaged at present but not destroyed.

To compensate for the unavailability of some hospitals or the reduced capability, Israel has facilitated the establishment of 15 Field hospitals including 6 of their own and others provided by Jordan, the UAE, 2 by Medecins Sans Frontieres (MSF), the Red Crescent, 2 by the International Medical Corps (IMC), and the UK. The UAE, France and Italy also provided three hospital ships. In addition, Israel facilitated the operation of nine mobile clinics and the introduction of 34 ambulances. Over the last two years more than 95,000 babies have been born in Gaza. This strongly mitigates against proving genocide.

The 15th Field Hospital recently established, opened in coordination with the IMC, is designed to expand essential medical services in the areas of prenatal care, mental health, physiotherapy, and inpatient care for the civilian population. The hospital includes 150 beds, 200 medical staff, and has been treating over 1,000 patients a day.

See the below photo:



In addition to these measures in February 2025, the World Health Organisation (WHO), with Israel's cooperation, completed a mass polio vaccination campaign for over 600,000 Gazan children under age 10, about 95 percent of that age group (more than existed of this age group pre-war). This was the third round of vaccinations that began in September 2024.

There were 1300 medical staff rotated in and out of Gaza to administer the vaccines. It would be very hard to prove genocide in the face of that level of action.

We should now turn to the question of the conduct of hostilities by the IDF and Hamas in terms of assessing whether the intent to commit genocide is clearly proven by the method and actions of the operation and is the only explanation for those operations. One independent and authoritative commentator in this respect is former Air Chief Marshall Mark Binskin, who was asked to examine the World Central Kitchen (WCK) incident where seven aid workers were killed, including one Australian.

In his report Binskin concluded that:

> "The IDF's view of the material issues in respect of targeting law relevant to this incident – particularly precautions in attack, including identification criteria and classification of people in terms of liability to lethal targeting – are the same as the Australian Defence Force (ADF) would likewise be concerned with in such a situation."
>
> "Similarly, the IDF's view of the role of Rules of Engagement and Standard Operating Procedures in respect of where delegations to engage are held, also appears similar to that of the ADF."
>
> "This is not dissimilar to situations that other Western militaries have faced, such as in relation to the Kunduz hospital attack in Afghanistan, which killed many civilians and destroyed a hospital, but where the underlying conduct – while culpable – was not assessed as meeting the requirements for a charge of unlawful killing. In this case the sanctions applied were administrative and disciplinary including suspension and removal from command, letters of reprimand and formal counselling."

The Kunduz incident he is referring to occurred on 3 October 2015. A United States Air Force AC-130U gunship attacked the Kunduz Trauma Centre operated by MSF in the city of Kunduz, in the province of the same name in northern Afghanistan. There were 42 people killed and over 30 were injured.

Binskin noted that in the case of the WCK incident the IDF Brigade Fire Support Commander, at the rank of Major, who guided the strikes, was dismissed from his position. The Brigade Chief of Staff, a Reserve Colonel, was dismissed from his position. The Brigade Commander, a Colonel, was formally reprimanded. The

Division Commander, a Brigadier General, was formally reprimanded. The IDF Southern Command Commander, a Major General, was formally reprimanded.

Binskin was describing a framework and response no different from how western militaries operate and therefore the operations were being conducted in an unremarkable way from other urban battles. The disciplinary action sent a clear signal that such outcomes were not acceptable, further indication that genocide was not the policy or aim of the operation.

It is important in this analysis to note the context of the military operations that have been conducted by the IDF in the Gaza War. We have already highlighted that it was a war of self-defence against a large-scale attack initiated by Hamas, the culmination of 17 years of armed attacks on Israel and compounded by assaults from seven other directions.

The other critical context to note is the urban terrain in which the Gaza specific operations have been fought. It has often been overlooked that Hamas continued to prosecute the war and retain hostages until the ceasefire.

Urban warfare has always been highly casualty intensive for combatants and civilians alike. Consider these two examples from WWII:

Stalingrad:

Axis Overall = 800,000 Killed in Action (KIA), wounded, missing or captured (around 300,000 Germans KIA).

Soviet = around 1m KIA, missing or captured.

Civilians = 40,000 dead (out of roughly 100,000).

Berlin:

Soviets = 70,000 KIA.

German = 92,000 KIA. (45,000 total regular troops engaged and supplemented by Volkssturm & Hitler Youth).

Civilians = 125,000 dead (out of approximately 2.7m at the time).

A more contemporary and like comparison to Gaza is the international and Iraqi siege of Mosul during the fight against ISIS from Oct 2016- Jul 1017. The scale was similar to Gaza in that over 1.5m people were displaced. In the course of the 9 month siege coalition forces, including RAAF strikes and air battle space

management, flattened over 40,000 buildings. This included 47 compromised mosques and hospitals.

The ISIS forces numbered only 12,000 and the civilian casualties amounted to around 10,000. ISIS had no underground military infrastructure or rocket launch sites.

Here are some images from the Mosul and the Cherbourg and Berlin WWII battles.












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The Gaza battle space was perhaps the most challenging any armed force has ever faced including the characteristics of:

Terrain and intensity of civilian population

HAMAS use of human shields, compromise of protected places

Channelising and kill zones (requiring breach manoeuvre through buildings to circumvent).

IED, reserve demolitions, spider holes, snipers, rocket & mortar launch sites, widespread tactical Command and Control (C2) locations, countless tunnel shafts, mobile and underground manoeuvre operations by Hamas.

Over 1000 km of underground military infrastructure.

A 360 degree and multi-dimensional battle space.

Hamas had spent 17 years and well over a billion dollars to militarise every square inch of the Gaza strip to draw in, trap and kill the IDF and to secrete hostages. The Israeli stated war aims were the destruction of the Hamas war making and regime capability and the recovery of the hostages. These were legitimate war aims under the law of armed conflict.

In addition to the physical challenges of the environment was the fact that the only times Hamas wore distinct uniforms was for media propaganda opportunities and not during combat. In addition, the Hamas regime had a program that took boys from the age of 12 and giave them military training, deploying them as combatants from age 15. This is in violation of the Convention of the Rights of the Child but also meant as armed assailants they became legitimate targets. This must be factored in to the casualty statistics when deaths of children are cited (classified as those under 18).

Another relevant factor in evaluating the nature of the conflict and the damage is to understand the scale. I have given examples of WWII battles and Mosul. The Gaza War was on an equivalent scale to the WWII battles. For example When the allies landed at Normandy they faced around 50,000 Nazi troops. There were approximately 156,000 allied troops landed or air dropped to assault them. We have seen the consequent damage to places like Cherbourg in the photo above and Caen during the Normandy battles.

In Gaza there were over a dozen armed groups that were coordinated under a "joint operation room" with the largest force belonging to Hamas. Hamas Qassam Brigades were organised into 24-30 Battalions (around 40,000). They could mobilise additional support from youth cadres equivalent to the Hitlerjugend (eg the 12th SS Division).

Islamic Jihad Al-Quds Brigades could add around a further 10-20,000. These forces were equipped with tens of thousands of rockets and sophisticated weapons. The over 1,000km of underground military infrastructure included widespread assault shafts, weapons factories, munitions storage, and multiple command sites for tactical combat as the formation and unit level operations became unsustainable and the forces disaggregated into terrorist cells.

The mobile operations of Hamas combat teams using this system meant that while they may not have been in every building at one time they would utilise almost every structure above and below them in the course of the war. Their own rockets are also notoriously unreliable and up to 40% of them malfunctioned during the war causing great damage in Gaza, including the casualties caused at the Al Ahli hospital. Similar damage was done to many buildings where reserve demolitions were emplaced to trap groups of IDF present in them.

An example of one engagement was the fighting in and around the buildings of the Al-Shifa Hospital sparked by the deployment of an augmented mainly Hamas Battalion force of around 1,000 into the hospital in a pitched battle in March 2024. The hospital suffered damage in this fighting but is still partially functioning.

Let's now turn to the question of casualties. Firstly the point should be made that there is no organisation or person that can definitively specify what the number or break down of the casualties have been. It is not plausible to rely on Hamas for

these figures. As a terrorist organisation one of their primary lines of operation is propaganda. Israel has not commented on the casualties other than to estimate the number of Hamas and its allied operatives killed in battle.

One organisation that has done a detailed examination of the available information on the ground is the Henry Jackson Society. This study found as follows:

> "We have identified distortion of statistics, misreporting of natural deaths, deaths from before the war started and a high likelihood of combatant deaths being included on the list. This report also challenges the assumption that (Hamas) Ministry of Health (MoH) fatality reports from previous conflicts are reliable and reveals evidence of efforts to hide militant fatalities. We also identify critical differences in the demographic breakdowns reported by the MoH and the Hamas Government Media Office."

The primary and obvious missing delineation is from Hamas statistics is combatant deaths. We have seen according to Hamas' own claims that their armed strength combined with Palestinian Islamic Jihad (PIJ) and what can be mobilised is somewhere between 50-60,000. We know these forces have been comprehensively and actively engaged in fighting as their own video material demonstrates. Israel estimates that there have been around 25,000 militants killed. We know that the average natural death rate for Gaza is around 7,000 and that these have been included in the statistics. It is estimated that the Gazan deaths caused by Hamas and PIJ rocket misfires, combat activity, executions and clashes with Gazan clans amounts to around 3,000. Hamas is estimated to have executed another 6,000 Gazans since the ceasefire.

If the Hamas figure of 70,000 killed is taken at face value this would mean that around half of that number would be civilian collateral casualties. That would be the best ratio of civilian deaths to combatant deaths ever achieved in the history of urban warfare. In the context of an armed conflict and in the middle of an active combat zone it would not of itself provide evidence of a genocide. The numbers of children included in the casualty figures makes no distinction between non-combatant deaths and the active combatant role performed by the Hamas youth force, which includes thousands of children from the age of 15-17. There is further reason to doubt the accuracy of the Hamas figures given the unprecedented precautions in attack that the IDF employed in this conflict. We will look at those next.

There is no doubt the IDF has pioneered new methods of precautions in attack in the Gaza campaign. These were beyond, for example, what the Coalition force used in the siege of Mosul that Australia was a part of. The array of measures utilised included:

> 1. Phone calls, of which tens of thousands have been made to Gazans during the conflict, warning residents of IDF strikes in an area.

2. Leaflets which the Israel Air Force (IAF) dropped over Gaza warning civilians to stay clear of Hamas.

The leaflets read in Arabic:

“Important announcement for the residents of the Gaza Strip: For your own safety, take responsibility for yourselves and avoid being present in the vicinity of Hamas operatives and facilities and those of other terror organizations that pose a risk to your safety."

3. Diverting missiles in mid-flight, aborting many missions seconds before they were to be carried out, due to civilians being present at the site of the target.

4. Roof Knocking where the IAF targeted a building with loud but non-lethal ordnance that warned civilians they were in the vicinity of a weapons cache or other target. This method was used to allow all residents to leave the area before the IDF targeted the site with live ordnance.

5. Whenever possible the IDF used precision and lower yield munitions to single out terrorists and target them in a way intended to endanger few or no bystanders.

6. The use of drones with loudspeakers warning of more immediate attacks or threats.

7. The sending millions of texts and prerecorded voicemails, which was a measure adopted for the first time in the history of warfare, in a warning regime.

8. Equipping units with doctors and humanitarian supplies to reduce noncombatant deaths during urban operations.

9. The issuing of instructions to vacate a tactical area of operations and move to designated safe zones. These instructions were followed by residents despite Hamas attempts to force non-compliance by firing on civilians attempting to move. This measure alone undoubtedly saved thousands of lives and contradicts a genocidal intent.

The government and the IDF issued several directives to the IDF to ensure the avoidance of civilian casualties prior to the invasion of Gaza. These included:

1. The government and IDF directed that all military actions were conducted strictly in accordance with international humanitarian law.

2. The government and IDF implemented measures to enhance oversight and monitoring of military operations to prevent civilian casualties.

3. Military personnel were trained and educated on the importance of avoiding civilian casualties and the proper procedures to follow during military operations.

There were also regular reviews and updates such as following the World Central Kitchen targeting error referred to above. There is no doubt even higher levels of caution were applied at times in an effort to try and avoid killing hostages.

There have been allegations that protocols were occasionally relaxed or not properly applied. There have also been allegations of the lowering of standards through the comments made to troops by lower-level military leaders in a few instances and of some breaches of the law of armed conflict at the tactical level.

The point here is that whatever allegations there are regarding individual instances, the settings for and overall conduct of the operation in no way support the allegation that there was an intent to systematically and totally annihilate all Palestinians in Gaza, as would be required to be proven under the Genocide Convention.

This is underlined by recent admissions by Hamas that its claim that 70 per cent of its casualties were women and children was false. They now concede that 72 per cent of fatalities were men between the ages of 13-55, the demographic category aligning with Hamas combatants.

Another important point to note is that if a genocide were official policy, then there would be no disciplinary action being taken into alleged breaches of the laws of armed conflict. The IDF has a process that is fully independent of the chain of command in this respect. The Operational Compliance – International Law Division Legal Officers are not subject to chain of command and have their own separate Military Advocate General (MAG) chain. There are around 350 MAG officers. The advice of these officers on targeting is binding on the operators. In relation to the Gaza operations the MAG teams have initiated around 2,000 fact finding reviews into all allegations. There are around 100 open criminal investigations with 52 of these relating to death or mistreatment.

This indicates a rigour to the system but also indicates the message being sent to the troops and the contraindication against a policy of genocide. To put this in perspective, altogether over the 20 years of ADF involvement in Afghanistan we had a total of around 40,000 troops serve there, of whom a much smaller number saw combat. There have been allegations of around 39 lethal crimes against ADF members. It has taken 13 years for the first of these allegations to reach trial. The IDF has had hundreds of thousands of troops passing through Gaza, both regular and reserve, in a WWII scale battle. This is not to excuse any proven actions of crimes, but it certainly underlines that allegations of a genocidal policy in the ADF or IDF cases would be ludicrous.

Let us now turn to the reliance on assertions made by so-called "expert" claims that a genocide has been proven. Firstly nothing is "proven" until a court says it's proven so any group, association, individual or UN body other than the ICJ, ICC or a national court, are not in a position to make a legal declaration in this respect. For example let's go to the UN Human Rights Council (HRC) Commission of Inquiry Report of 16 September 2025.

It has been cited as an "independent authority" and therefore its finding that “Israeli authorities and Israeli security forces have committed and are continuing to commit genocide against the Palestinians in the Gaza Strip” constitutes conclusive proof of that allegation. It is nothing of the kind. What they have delivered is a partisan brief recycling unsubstantiated Hamas and activist claims and falsifications. This is unsurprising given the state of many UN institutions at the moment, which have become clearing houses for the propaganda of the world's autocracies and the worst human rights violators, acting as a whitewashing vehicle for their regimes.

The appointees to the Commission had lengthy records of open hostility to Israel and no attempt was made to appoint more neutral authorities and legal scholars on the subject of genocide.

An example of how the UN made an intentional effort to amplify the genocide propaganda is that Alice Wairimu Nderitu, the UN Special Advisor on the Prevention of Genocide, was dismissed from the United Nations due to her refusal to label Israel's military actions in Gaza as genocide. This sacking by UN Secretary-General António Guterres followed the issuing of guidance by Nderitu on the correct usage of the term genocide, emphasizing the legal requirements for its classification. Ms Nderitu stated after her sacking that:

> “This push that I should say that there’s a genocide going on in Gaza, they knew that I’m not a court of law, and it’s only a court of law that can determine whether a genocide has happened. But I was hounded, day in, day out. Bullied, hounded, with protection from nobody.”
>
> “It’s instructive that this never happened for any other war. Not for Ukraine, not for Sudan, not for DRC [Democratic Republic of the Congo], not for Myanmar,” she said. “The focus was always Israel.”
>
> “This was a war. Palestinians were killing Israelis, Israelis were killing Palestinians. It needs to be treated like other wars. In other wars, we don’t run and take one side and then keep going on and on about that one side… By taking one side, condemning it every day, you completely lose the essence of what the UN was created for.”

The September 2025 Report very clearly did not set out to deal systematically and objectively with the legal tests and issues such as I have set out above in the quote

from Judge Nolte in the case currently before the ICJ. It instead produced deliberately falsified or irrelevant material utterly insufficient to meet the legal tests.

For example, one quote relied on in the report was purportedly from an Israeli official stating Israel is "focused on what causes maximum damage" in Gaza instead of the longer actual quote which is "maximum damage to Hamas military capabilities".

In another example the HRC pointed to the exhortation by Prime Minister Netanyahu to "remember Amalek". This is a call reminiscent of the US historical cry of "remember the Alamo". It was in the vein of many other historical examples designed to inspire and steel a nation for the fight confronting them in an existential struggle. The drafters of the Convention reflected on those situations in wake of WWII and made it clear that such comments would not reach the threshold for incitement to genocide. In fact the Amalek were a people described in the bible as having attacked the Israelites after they left Egypt, targeting the weakest and weary stragglers. Jewish commentators interpret this biblical exhortation to "remember Amalek" as a call to rid the world of evil.

What the authors of the HRC report have done is bizarrely use quotes from the bible in the absence of a specific statement of a genocidal policy by Netanyahu, as required by the Genocide Convention. I refer to the test for proving incitement to genocide spelled out in the TP. Nothing cited in the report satisfies that test. This is also contrary to all the actual official directives to the IDF.

The report uses unverified casualty figures and makes no allowance for the fact that the area was a war zone with Hamas conducting operations throughout. There is no mention of casualties caused by Hamas through its rocket misfires, executions, their killings to prevent evacuation or civilian resort to GHF relief sites, by their cross fire, reserve demolitions in buildings, booby traps and IED. It makes no reference to the issue of what proportion of the deaths are combatants from the ranks of Hamas and its allies.

In relation to the numbers of children killed there is no mention of the deployment by Hamas of 15-17 year olds. There is no consideration of the scale of conflict, the extent of Hamas militarisation of Gaza, the comparison to other urban wars or the tactics of Hamas in the exploitation of civilians as human shields and compromise of otherwise protected facilities and safe zones.

There is no consideration of the casualties caused by the secondary detonation of Hamas concealed ordnance within civilian locations and its accidents in handling this ordnance and explosives. The report dismisses a claim by Israel that a Hamas tunnel complex was under the European Gaza Hospital by claiming this complex was actually under the Jenin Secondary School 100m away, without being aware of the irony that this would be an admission of an example of Hamas war crimes in compromising such a protected facility.

The report ignores the scale of medical support rendered in Gaza, including the vaccine operations and the fact that there were over 95,000 babies delivered during the war, instead making the patently absurd claim that damage to the Al-Basma fertility clinic proves genocidal intent. Seven paragraphs in the HRC report are devoted to this incident in an indication of how much they pinned their findings on it. Only two facts are clearly known about the clinic. There was some non-structural combat damage, and embryos were lost. There is no established account of the events and combat action around the building or proof that the minimal damage evident was caused by the IDF. To underscore this deficiency there is no confirmation of what weapons caused that damage, no known witnesses, and no evidence of intent.

It is utterly ludicrous to assert that damage to one fertility clinic was an attempt to stop Gazans from reproducing, particularly given the vaccination campaign and the large numbers of births cited above. This part of the report shows most clearly that it was not an exercise in the objective gathering of information but intended only to attempt to prove a claim of genocide against Israel.

The looting of relief supplies by Hamas and their business model of exploiting these supplies is completely disregarded, and there is no mention of the proven scale of the quantity of food that Israel facilitated going into Gaza.

There is no reference to Hamas ceasefire violations and that their only use of uniforms was in propaganda parades, making no effort to distinguish themselves from the civilian population in the fighting. They totally disregard the statements and information available in interviews given by Hamas and their own video material, including the clear evidence of their own genocidal objectives and actions. There is no reference to IDF orders, directives, training or precautions in attack. The Report ignores the investigations and processes in train within the IDF in relation to all allegations of crimes or misconduct, which is clear evidence against a claim of an official policy of genocide.

They present no evidence of the specific intent of a plan to destroy the Palestinian group as such. Mitigating against such a claim they neglect to mention that Israel did not initiate the war and that they were fighting in self-defence against the actual war crime of war of aggression under Article 8bis(g) of the Rome Statute, committed by Iran and its proxies. They do not consider the context that there has been no IDF presence in Gaza since 2005 and that Hamas continuously engaged in armed attack against Israel, particularly with the launching of over 52,000 rockets over 19 years. There is also no reference to the fact that Egypt flatly refused to provide temporary shelter for the civilian population to keep them safely out of the combat zone, forcing Israel to use other less sure measures. They neglect to consider the recent example of the fight against ISIS in Mosul from 2016-2017 where the same number of people

were displaced and the same extremist tactics employed as were replicated by Hamas.

The report also ignores the evidence that the population of Palestinians in Gaza, the West Bank and the Israeli Arabs has grown significantly under Israeli jurisdiction.



Above is a photo of the Al-Basma fertility clinic, which the UN HRC Report said was totally destroyed by the explosion of its nitrogen tanks after an IDF tank round was fired at the building. It is still standing with no evidence of a massive internal explosion or the said tank round.

In conclusion, if the world were intent on widening the scope of the Genocide Convention to the extent the activists have tried to bend it, completely reversing the intent of the drafters and the international process that generated it, then it would be obliged to convene a new diplomatic process to re-write it. In that event, as noted by the drafters of the existing Convention, participants would be obliged to commit themselves to avoiding absolutely all civilian casualties in an otherwise lawful defensive war lest they be found guilty of genocide. They would be at the mercy of the sort of tactics employed by Hamas and ISIS ruthlessly exploiting their own people and be obliged to engage in a reverse onus of proof to show that combatants who made themselves indistinguishable from civilians were not in fact civilians.