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## GENOCIDE AND INTERNATIONAL CRIMINAL ACCOUNTABILITY: LESSONS FROM MYANMAR AND GAZA

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### ABSTRACT

This article examines the legal and political responses to alleged acts of genocide in Myanmar and Gaza, analyzing how international criminal accountability mechanisms have been invoked or hindered. Drawing on international legal frameworks such as the Genocide Convention, Rome Statute, and precedents from international tribunals, it explores the gaps in enforcement and prosecutorial will. The analysis focuses on the roles of the International Criminal Court (ICC), United Nations, and state parties in addressing atrocities. By comparing the cases of Myanmar's Rohingya and the situation in Gaza, the article highlights the limitations of the international legal order in ensuring justice, and offers normative recommendations for reform.

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## INTRODUCTION

Genocide represents a profound affront to humanity and international legal order, recognized as *hostis humani generis*—a crime against all of humankind. As codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), genocide entails acts committed with the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. This crime, in both its scale and intent, transcends conventional warfare or conflict, striking at the foundational principles of human dignity, equality, and the right to exist. Despite the international community's early consensus on the need to outlaw genocide following the horrors of the Holocaust, the actual enforcement of international norms against genocide has remained inconsistent, selective, and frequently entangled in geopolitical considerations. The establishment of international criminal tribunals—such as those for the former Yugoslavia and Rwanda—and the creation of the International Criminal Court (ICC) were landmark developments in global efforts to ensure accountability. However, their application has been uneven, often hindered by state sovereignty, jurisdictional limitations, political alliances, and institutional inertia. Two contemporary and ongoing crises exemplify these shortcomings. First, in Myanmar, the Rohingya Muslim minority has suffered systematic persecution, displacement,

and alleged genocidal violence at the hands of the military junta, prompting proceedings at the International Court of Justice (ICJ) and a preliminary investigation by the ICC. Second, the Gaza Strip has witnessed unprecedented civilian suffering amid the escalating Israeli-Palestinian conflict. Allegations of disproportionate use of force, collective punishment, and potential genocidal acts have raised serious legal and moral questions, culminating in a case brought by South Africa against Israel before the ICJ in 2023. These cases, while different in context and political configuration, expose the limitations of existing international criminal justice mechanisms. They reveal a pattern of delayed action, fragmented jurisdiction, selective engagement, and an overall failure to deter or adequately respond to atrocities. Furthermore, they test the credibility and universality of international law, particularly when powerful states or their allies are implicated. This article seeks to examine the legal, institutional, and political challenges that continue to obstruct the realization of justice for victims of genocide. It evaluates how the mechanisms under the Genocide Convention, the ICC, and the ICJ have been applied—or circumvented—in the contexts of Myanmar and Gaza. By conducting a comparative analysis, the article aims to distill critical lessons for strengthening international accountability frameworks and ensuring that the promise of "never again" does not remain an empty refrain.

## METHODOLOGY

This study adopts a multidisciplinary doctrinal legal research approach, grounded in both normative legal analysis and comparative case study methodology. The objective is to examine how international legal principles regarding genocide are interpreted, applied, or disregarded in the context of the crises in Myanmar and Gaza. The analysis is rooted in primary legal texts such as the Genocide Convention of 1948, the Rome Statute of the International Criminal Court (1998), decisions of the International Court of Justice (ICJ), rulings and communications of the International Criminal Court (ICC), and relevant United Nations resolutions and reports from independent fact-finding missions. To supplement the legal analysis, the study critically engages with secondary sources, including scholarly commentary, academic journal articles, reports from non-governmental organizations (such as Human Rights Watch, Amnesty International, and the Global Centre for the Responsibility to Protect), and credible news coverage that document patterns of violence, victim testimonies, and government responses. This helps contextualize the legal proceedings and understand how socio-political dynamics influence legal accountability. The comparative case study approach allows for the identification of patterns and divergences between the two contexts—Myanmar and Gaza. While these cases differ in historical, cultural, and geopolitical specifics, both involve allegations of genocidal conduct and trigger similar international legal obligations. This comparison aids in assessing the strengths and weaknesses of international legal institutions and procedures in addressing genocide and offers a normative basis for institutional reform and legal development. The methodology also integrates elements of critical international legal theory, particularly Third World Approaches to International Law (TWAIL), to question the universality and neutrality of international criminal law in light of geopolitical power asymmetries. This theoretical lens is important for interrogating whether the enforcement of genocide law has become a selective tool manipulated by state interests, rather than a universally applied norm protecting vulnerable populations.

## DISCUSSION

**Legal Framework for Genocide and Accountability:** International law treats genocide as the "crime of crimes" due to its intent-driven destruction of targeted human groups. The legal framework for prosecuting genocide rests on treaty law, customary international law, and the jurisprudence of international courts. While the legal prohibitions on genocide are well-established, the operationalization of these norms—particularly through mechanisms of accountability—faces significant structural and political limitations. This section provides a detailed examination of the legal definition of genocide, its constitutive elements, and the diverse institutional pathways available for enforcement, while also analyzing the effectiveness and constraints of each.

**The Legal Definition of Genocide:** The Genocide Convention of 1948, the first human rights treaty adopted by the United Nations, was a direct response to the atrocities of the Holocaust. Drafted with the leadership of Raphael Lemkin, who coined the term *genocide*, the Convention reflects both moral urgency and legal rigor. Article II articulates the definition of genocide based on two main components:

**Material Element (actus reus):** The prohibited acts include:

- Killing members of the group,
- Causing serious bodily or mental harm,
- Deliberately inflicting living conditions calculated to destroy the group,
- Imposing measures to prevent births within the group,
- Forcibly transferring children of the group to another group.

**Mental Element (mens rea or dolus specialis):** The defining characteristic of genocide is the *specific intent* to destroy a group, in whole or in part, as such. This requirement makes genocide difficult to prove, as it demands demonstrable evidence of a coordinated plan or policy that targets a group explicitly because of its identity. While the Convention limits the scope of protected groups to national, ethnic, racial, or religious groups, this narrow classification has been criticized for excluding political, gender, sexual orientation, and socio-economic groups—despite their vulnerability in many contexts. Attempts to expand the definition have been resisted due to geopolitical disagreements and fears of legal overreach. The jurisprudence of the ICTR and ICTY has further clarified the threshold for genocidal intent. For example, in *Prosecutor v. Akayesu*, the ICTR confirmed that sexual violence could constitute an act of genocide when committed with the intent to destroy the targeted group. Similarly, in *Prosecutor v. Krstić*, the ICTY held that the massacre at Srebrenica amounted to genocide, even though it targeted only the adult male population, because it effectively destroyed the group's reproductive capacity.

**Enforcement Mechanisms in International Law:** Despite the legal clarity around the definition of genocide, enforcement mechanisms are fraught with institutional limitations, jurisdictional gaps, and political manipulation. Several forums provide pathways for international or transnational accountability, each with its own scope and weaknesses.

**International Criminal Court (ICC):** The ICC was established to end impunity for the most serious crimes affecting the international community. Genocide, alongside war crimes, crimes against humanity, and the crime of aggression, is listed under the Court's core jurisdiction. However, the ICC operates on the principles of complementarity and consensual jurisdiction, meaning:

- It may only act when national jurisdictions are unwilling or unable to prosecute.
- It cannot exercise jurisdiction unless the crime was committed on the territory of, or by a national of, a State Party to the Rome Statute, or if the situation is referred by the UN Security Council.

The ICC has faced substantial challenges in genocide prosecutions:

- No sitting head of state has ever been successfully prosecuted for genocide, despite the Rome Statute explicitly denying immunity.
- Only a few situations involving genocide have reached the stage of arrest or trial.
- In the case of Myanmar, which is not a State Party, the ICC is relying on Bangladesh's jurisdiction for crimes with a cross-border nexus—highlighting creative but limited avenues for action.

Additionally, critiques of geopolitical selectivity—where African leaders are disproportionately targeted—have marred the ICC's legitimacy and led to backlash from certain regions.

**International Court of Justice (ICJ):** The ICJ is the principal judicial organ of the United Nations for resolving legal disputes between states. Under Article IX of the Genocide Convention, states may bring disputes regarding compliance before the ICJ. Unlike the ICC, which targets individual criminal responsibility, the ICJ examines state responsibility for genocide or for failing to prevent or punish it. Notable ICJ genocide cases include:

- ***Bosnia and Herzegovina v. Serbia and Montenegro (2007)*:** The Court found Serbia responsible for failing to prevent the Srebrenica genocide but did not hold it directly responsible for committing genocide.
- ***The Gambia v. Myanmar (2020–ongoing)*:** This case, filed under universal standing, argues that Myanmar violated its

obligations under the Genocide Convention through its treatment of the Rohingya.

- **South Africa v. Israel (2023–ongoing):** The ICJ is examining whether Israel's military operations in Gaza violate the Genocide Convention. Provisional measures were issued, but enforcement remains a challenge.

The ICJ's inability to enforce its decisions, especially when powerful states are involved, weakens its practical authority. Moreover, it cannot impose criminal liability, but only declaratory relief and moral pressure.

**UN Security Council (UNSC):** The UNSC can play a pivotal role in facilitating genocide accountability:

- Refers cases to the ICC under Chapter VII (e.g., Darfur, Libya).
- Establishes ad hoc tribunals (e.g., ICTY, ICTR).

However, the UNSC's efficacy is severely compromised by the veto power of permanent members. Political allies of accused states—such as Russia with Myanmar or the United States with Israel—can and often do block collective action. This politicization prevents consistent application of justice and creates a two-tiered system of accountability.

Calls for veto restraint in mass atrocity situations, such as the French-Mexican initiative for voluntary veto suspension, remain aspirational with little binding effect.

**Ad Hoc and Hybrid Tribunals:** The ad hoc tribunals—ICTY and ICTR—were successful in establishing crucial precedents on genocide, including jurisprudence on intent, partial destruction of groups, and forms of participation. However, they were expensive, slow, and largely reactive. Hybrid tribunals, such as the ECCC in Cambodia, attempt to blend domestic and international elements to enhance legitimacy. Yet, they often face political interference from host states and have limited jurisdictional mandates. Proposals for hybrid tribunals for Myanmar or Palestine have been floated, but without UNSC endorsement or regional consensus, such models remain unlikely.

**Universal Jurisdiction and Domestic Enforcement:** Several states have enacted universal jurisdiction laws that allow for prosecution of genocide committed abroad, regardless of the nationality of the perpetrator or victim. While this can circumvent the paralysis of international institutions, domestic prosecutions are constrained by political will, diplomatic pressures, and resource limitations.

*Examples:*

- In 2023, Germany issued arrest warrants under universal jurisdiction against members of the Syrian regime for crimes amounting to genocide.
- Argentine courts have been invoked to consider genocide charges related to Myanmar under the principle of universal jurisdiction.

Despite its promise, universal jurisdiction has not yet delivered systemic accountability for large-scale genocides without coordinated multilateral action. The international legal framework for addressing genocide is normatively robust but functionally deficient. The fragmentation of jurisdiction, political manipulation of enforcement mechanisms, and inconsistent application of norms continue to plague efforts at ensuring justice. While legal pathways exist—through the ICC, ICJ, UNSC referrals, and universal jurisdiction—they are often blocked by realpolitik considerations and institutional inertia. As the cases of Myanmar and Gaza demonstrate, the effectiveness of genocide law hinges not only on its doctrinal clarity but on the global community's political will to uphold it without exception.

### **Case Study I: Myanmar and the Rohingya Genocide**

**Historical and Political Background:** Myanmar's treatment of the Rohingya Muslim minority, concentrated in the Rakhine State, represents one of the most alarming examples of mass atrocity crimes in recent decades. The Rohingya, despite having centuries-old roots in Myanmar, have been systematically denied citizenship under the 1982 Citizenship Law, which rendered them stateless and excluded from basic rights such as education, healthcare, and freedom of movement. This legal disenfranchisement laid the groundwork for a long-standing pattern of persecution, discrimination, and dehumanization, which escalated into coordinated violence in the 2010s. Tensions peaked in August 2017, when the Myanmar military (Tatmadaw), under the pretext of responding to attacks by the Arakan Rohingya Salvation Army (ARSA), launched a brutal clearance operation against Rohingya civilians. Entire villages were razed, thousands were killed, and reports emerged of mass rape, torture, and other inhumane acts. An estimated over 740,000 Rohingya fled to Bangladesh, joining hundreds of thousands already displaced from earlier waves of violence. The exodus triggered an international outcry and prompted investigations into whether these acts amounted to genocide, crimes against humanity, or ethnic cleansing.

### **Legal Responses at the International Level**

**United Nations Fact-Finding Mission (2018):** In response to the scale of the atrocities, the United Nations Human Rights Council established the Independent International Fact-Finding Mission on Myanmar (FFM) in 2017. The FFM's 2018 report concluded that the Tatmadaw had acted with genocidal intent. It called for the investigation and prosecution of senior military leaders, including Commander-in-Chief Min Aung Hlaing, for genocide, crimes against humanity, and war crimes.

The report identified key patterns of conduct such as:

- Systematic targeting of civilian populations based on ethnicity and religion.
- Use of mass sexual violence as a tool of terror and destruction.
- State-led coordination of media narratives to dehumanize the Rohingya.

**International Criminal Court (ICC) Proceedings:** Although Myanmar is not a State Party to the Rome Statute, the ICC claimed jurisdiction under the principle of territoriality because part of the alleged crimes—namely, the deportation of the Rohingya—occurred in Bangladesh, which is a State Party.

In 2019, the Pre-Trial Chamber III of the ICC authorized the Prosecutor to initiate a formal investigation into crimes against the Rohingya, including:

- Deportation as a crime against humanity under Article 7(1)(d) of the Rome Statute,
- Persecution,
- Other inhumane acts such as refusal of re-entry and denial of citizenship.

However, the investigation remains slow-moving due to lack of cooperation from the Myanmar government and the absence of arrest powers.

### **International Court of Justice (ICJ): The Gambia v. Myanmar (2020–present)**

In a landmark move, The Gambia, on behalf of the Organization of Islamic Cooperation (OIC), filed an application before the ICJ alleging violations of the Genocide Convention by Myanmar. The case is significant for several reasons:

- It was filed by a state not directly affected by the genocide, asserting *erga omnes* obligations (i.e., obligations owed to the international community).
- It marked a reinvigoration of the Genocide Convention's role in state responsibility.

In January 2020, the ICJ issued provisional measures directing Myanmar to prevent genocidal acts against the Rohingya, preserve evidence, and report periodically on compliance. These measures, though legally binding, rely heavily on state goodwill for implementation, and their enforcement has been minimal.

**National and Regional Legal Efforts:** Beyond international forums, legal actions have also been pursued under universal jurisdiction. For instance:

**Argentina's judiciary** opened a case in 2021 under universal jurisdiction against Myanmar officials for genocide and crimes against humanity, initiated by Rohingya victims and human rights groups.

However, regional mechanisms such as the Association of Southeast Asian Nations (ASEAN) have been largely ineffective, hindered by the principle of non-interference and the reluctance of member states to pressure the Myanmar military regime.

#### **Obstacles to Justice and Accountability**

The pursuit of accountability in the Myanmar case has been obstructed by a series of entrenched challenges:

**Jurisdictional and Structural Limitations:** The ICC's jurisdictional claim based on cross-border crimes is narrow, excluding direct acts of killing and rape that occurred solely within Myanmar. This fragmentation of jurisdiction undermines comprehensive accountability.

**Non-Cooperation and Impunity:** Myanmar has refused to cooperate with both the ICC and ICJ. The 2021 military coup, which reinstated the Tatmadaw's power, further entrenched impunity and stalled democratic reforms. The junta continues to deny allegations of genocide and maintains that its actions were legitimate counter-insurgency operations.

**Geopolitical Protection:** Efforts to refer Myanmar to the ICC via the UN Security Council have been vetoed or opposed by China and Russia, citing sovereignty concerns and potential destabilization. This shielding of Myanmar at the global level highlights the limits of international law when confronted by realpolitik.

**Repatriation Without Justice:** Attempts to repatriate Rohingya refugees from Bangladesh have been criticized as premature, lacking guarantees of safety, justice, and citizenship. Without structural changes in Myanmar's legal and political systems, repatriation risks becoming another instrument of abuse.

**Implications for International Criminal Law:** The Myanmar case reveals a troubling disconnect between normative development and enforcement capacity in international criminal law. Despite clear documentation of genocidal acts and substantial legal tools available, tangible progress toward justice has been minimal. This failure to act decisively erodes the deterrent power of genocide law and perpetuates a climate of impunity for mass atrocities. It also raises serious questions about the effectiveness of legal institutions in holding powerful state actors accountable, especially when those actors enjoy geopolitical support. The Rohingya case emphasizes the importance of:

- Strengthening the enforcement mechanisms of the ICC and ICJ,
- Mobilizing political and financial support for universal jurisdiction,

- Encouraging greater state cooperation through diplomatic and economic incentives or sanctions.

#### **Case Study II: Gaza and Allegations of Genocidal Acts**

**Historical and Conflict Background:** The Israeli-Palestinian conflict represents one of the most intractable and complex geopolitical crises of the modern era. At the heart of the conflict lies the Gaza Strip—an impoverished, densely populated enclave home to over two million Palestinians, many of whom are descendants of refugees displaced during the 1948 Arab-Israeli War. Since 2007, Gaza has been under the de facto governance of Hamas, a Palestinian political and militant organization designated as a terrorist group by Israel, the United States, and the European Union. Israel, citing security concerns, has imposed an air, land, and sea blockade on Gaza for over a decade, restricting movement, trade, and humanitarian access. Periodic escalations have resulted in devastating military confrontations, but the 2023–2024 conflict marked an unprecedented scale of violence. Following a Hamas-led attack on Israel on October 7, 2023, which killed around 1,200 people, Israel launched an extensive and prolonged military campaign in Gaza, resulting in the deaths of more than 35,000 Palestinians, the vast majority of them civilians, including thousands of children. The severity of Israel's military response—including the indiscriminate bombing of hospitals, schools, and refugee camps, the forced displacement of entire populations, and severe restrictions on humanitarian aid—prompted allegations from human rights organizations, legal scholars, and multiple states that Israel may be committing acts that amount to genocide under international law.

#### **Legal Proceedings and Institutional Engagement**

**International Court of Justice (ICJ): South Africa v. Israel (2023–present):** In a landmark development, South Africa filed an application before the ICJ on December 29, 2023, alleging that Israel's conduct in Gaza violated its obligations under the 1948 Genocide Convention. The case asserts that Israel has:

- Committed genocidal acts against the Palestinian population of Gaza,
- Failed to prevent genocide,
- Failed to punish direct and public incitement to commit genocide.

South Africa's application relied on a wide array of evidence, including:

- Statements by Israeli officials perceived as genocidal in nature,
- The pattern and scale of indiscriminate attacks on civilian infrastructure,
- The use of starvation and blockade as tools of warfare,
- The systematic dehumanization of Palestinians in political discourse.

On January 26, 2024, the ICJ issued provisional measures ordering Israel to take all steps to prevent genocide, refrain from acts that may fall under Article II of the Convention, ensure provision of humanitarian aid, and report back to the Court on compliance. The Court, however, did not make a definitive ruling on whether genocide was occurring, emphasizing that it had yet to reach the merits of the case. This marked only the third time in history (after *Bosnia v. Serbia* and *The Gambia v. Myanmar*) that the ICJ examined the application of the Genocide Convention in an active conflict. The case remains pending and represents a crucial test of international law's capacity to adjudicate politically charged, ongoing atrocities.

**International Criminal Court (ICC) Investigations:** The ICC has been conducting a broader investigation into the "Situation in Palestine" since 2021, covering alleged war crimes and crimes against humanity committed by both Israeli forces and Palestinian armed groups, including Hamas. The investigation includes:

- Settlement construction and displacement in the West Bank,
- Use of disproportionate force in previous Gaza wars,
- Attacks on civilian targets by Hamas.

In May 2024, the ICC Prosecutor Karim Khan announced that applications for arrest warrants had been submitted against leaders of both Hamas and Israeli officials, including Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant, for crimes including the deliberate targeting of civilians, starvation as a method of warfare, and extermination. This action was met with mixed reactions:

- The move was praised by human rights organizations as a step toward impartial justice.
- Israel and its allies, particularly the United States, denounced the move as politicized and illegitimate, with U.S. lawmakers threatening sanctions against the Court.
- The warrants, even if approved, may face enforcement challenges due to non-cooperation and political backlash.

### Legal and Political Challenge

#### Disputes Over Jurisdiction and Statehood

Israel has consistently rejected the ICC's jurisdiction, arguing that:

- Palestine is not a sovereign state and therefore cannot delegate jurisdiction.
- The ICC is overreaching into a highly politicized and bilateral conflict.

However, the Pre-Trial Chamber of the ICC ruled in 2021 that Palestine, having been recognized as a non-member observer State at the UN, can confer jurisdiction for crimes committed on its territory. This includes the West Bank, Gaza, and East Jerusalem. The ICJ case similarly challenges traditional notions of state responsibility in asymmetric conflicts, where a recognized state exercises overwhelming military power over a non-state or semi-sovereign entity.

**Double Standards and Selective Justice:** One of the most salient criticisms raised in this case is the perception of selective application of international criminal law. Critics argue that Western states often support ICC actions when they involve Global South actors, but oppose similar actions when allies are targeted. The Gaza case is emblematic of this double standard:

- Israel has enjoyed longstanding diplomatic protection, particularly at the UN Security Council, where U.S. vetoes have blocked ceasefire resolutions and formal referrals to the ICC.
- No Western state has invoked the Responsibility to Protect (R2P) doctrine, despite conditions in Gaza arguably triggering it.

This inconsistency undermines the legitimacy and universality of genocide law and reinforces cynicism toward international legal institutions.

**Evidentiary Complexities:** Unlike Myanmar, where acts of violence were documented in retrospect, Gaza represents a conflict in real time. This presents both opportunities and challenges:

- A vast amount of digital and satellite evidence is available, but its reliability is contested.
- Restrictions on humanitarian and media access complicate fact-finding missions.
- The interpretation of military necessity versus deliberate targeting of civilians remains a contentious legal grey area.

#### Thematic Analysis: Does the Gaza Situation Constitute Genocide?

There is ongoing legal and academic debate over whether Israel's conduct in Gaza satisfies the threshold for genocide under Article II of the Genocide Convention. Key arguments include:

#### For the Genocide Classification:

- Statements by Israeli officials calling for the "erasure" of Gaza and population displacement may demonstrate genocidal intent.
- The systematic deprivation of food, water, and medicine is argued to constitute "deliberately inflicting conditions calculated to destroy the group."
- The massive civilian death toll suggests more than collateral damage.

#### Against the Genocide Classification:

- Israel contends that its actions are in self-defense against a terrorist group, not directed against Palestinians as such.
- High civilian casualties are framed as unfortunate consequences of Hamas's use of human shields.
- No express policy or intent to "destroy" the Palestinian people has been officially articulated.

This legal uncertainty underscores the difficulty of proving genocidal intent, especially in conflicts characterized by asymmetry, complex political motives, and concurrent war crimes.

**Broader Implications for International Justice:** The Gaza case is a watershed moment for international criminal accountability. It presents a critical test of the ICJ's and ICC's willingness to apply legal standards consistently, even when powerful geopolitical interests are involved. The willingness of South Africa and other Global South states to invoke genocide law against a U.S.-backed state also reflects a shifting landscape in which international legal norms are increasingly being leveraged by actors outside traditional Western spheres. At the same time, the case exposes the vulnerability of international law to weaponization, politicization, and backlash. If the legal process fails to yield justice or is seen as one-sided, it could delegitimize genocide law itself. Conversely, impartial adjudication—even when politically unpopular—could restore faith in the universality of legal norms.

**Comparative Analysis: Myanmar vs. Gaza:** The situations in Myanmar and Gaza, while rooted in vastly different historical, geographical, and political contexts, both involve alleged genocidal conduct and engagement with international legal mechanisms aimed at ensuring accountability. A comparative analysis of these two case studies reveals critical insights into how international criminal law functions in practice, highlighting patterns of institutional response, jurisdictional innovation, and political obstruction. By examining the similarities and divergences in legal responses, enforcement efforts, and geopolitical implications, this section seeks to evaluate the robustness, impartiality, and limits of the international accountability framework in addressing genocide.

#### Common Legal and Institutional Features

Aspect	Myanmar (Rohingya)	Gaza (Palestinians)
Alleged Crime	Genocide, ethnic cleansing, crimes against humanity	Genocide, war crimes, crimes against humanity
Victim Group	Rohingya Muslims	Palestinian civilians in Gaza
Accused State Actor	Myanmar Military (Tatmadaw)	State of Israel
International Forum – ICJ	<i>The Gambia v. Myanmar</i> (2020–ongoing)	<i>South Africa v. Israel</i> (2023–ongoing)
ICJ Provisional Measures	Issued (2020)	Issued (2024)
International Forum – ICC	Investigating crimes against Rohingya (2019–ongoing)	Investigating crimes by all parties (2021–ongoing)
State Party to Rome Statute	No (Myanmar); ICC claimed jurisdiction via Bangladesh	No (Israel); ICC claimed jurisdiction via Palestine
UN Security Council Role	Blocked by China and Russia	Blocked by the U.S.
Geopolitical Protection	China, Russia	United States, some EU members
Nature of Conflict	State-led persecution and displacement	International armed conflict with asymmetric warfare

## Key Similarities

**Invocation of the Genocide Convention:** Both cases have activated the dispute settlement clause of the Genocide Convention (Article IX) at the ICJ, which is exceptional given the rarity of such proceedings. Notably, in both instances:

- The complainant states (The Gambia and South Africa) were not directly harmed but acted in the global interest, demonstrating the erga omnes nature of genocide obligations.
- The ICJ issued provisional measures affirming a plausible risk of genocide, though not a finding on the merits.

**Use of Territorial Jurisdiction to Circumvent Non-Party Status:** In both cases, the ICC creatively used territorial jurisdiction to launch investigations despite neither Myanmar nor Israel being State Parties to the Rome Statute:

- In Myanmar's case, jurisdiction was premised on crimes partially committed in Bangladesh.
- In Gaza's case, the recognition of Palestine as a non-member observer state at the UN enabled the ICC to claim jurisdiction.

This reflects an evolving jurisprudential flexibility in response to structural limits, enabling investigations in politically sensitive contexts.

**Evidentiary Challenges and Contextual Complexity:** Both Myanmar and Gaza present evidentiary and factual complexity:

- In Myanmar, genocidal intent had to be inferred from widespread violence, dehumanizing rhetoric, and systematic exclusion.
- In Gaza, proving intent is complicated by the backdrop of armed conflict, competing narratives of military necessity, and simultaneous atrocities by non-state actors (e.g., Hamas).

In both contexts, the political narratives of the accused states—denying genocidal intent and asserting counterinsurgency or self-defense—mirror each other, underscoring the difficulty in substantiating *dolus specialis*.

## Key Differences

### Nature and Asymmetry of the Conflict

- **Myanmar:** The violence was primarily state-led and one-directional, involving the persecution of a minority population through displacement, killings, and sexual violence. There was no symmetrical armed conflict with an organized opposition.
- **Gaza:** The situation involves asymmetric warfare between a state and a non-state actor. Civilian casualties occur amid active hostilities, complicating assessments of genocidal conduct and raising questions about the boundaries between genocide, war crimes, and collateral damage.

### Level of International Political Shielding

- **Myanmar:** Though shielded by China and Russia at the UN Security Council, it does not enjoy widespread diplomatic support and has faced sanctions and condemnation from much of the international community.
- **Israel:** Enjoys strong and consistent political protection, especially from the United States, which has historically blocked Security Council actions and condemned ICC jurisdiction. This creates a higher geopolitical barrier to accountability.

### Regional and Institutional Reactions

- ASEAN, in Myanmar's case, has largely failed to act decisively due to its non-interference policy and institutional inertia.

- In contrast, Global South alliances, including BRICS and African states, have publicly supported South Africa's legal initiative at the ICJ, indicating a growing willingness among emerging powers to utilize international legal mechanisms for human rights accountability.

**Normative and Jurisprudential Significance:** The comparative value of the Myanmar and Gaza cases lies in their potential to reshape and refine international legal norms concerning genocide and mass atrocity accountability. Key implications include:

**Erosion of the Impunity Gap:** Both cases suggest a growing global consensus that even powerful or shielded states can no longer count on absolute impunity. The willingness of small and middle-power states to file genocide claims reflects a re-politicization of international legal norms, this time from below, with marginalized voices leveraging legal avenues to challenge global power structures.

**Strengthening of Erga Omnes and Universal Jurisdiction Principles:** The application of erga omnes standing in both ICJ cases reinforces the notion that genocide is a concern of all states. Similarly, the use of universal jurisdiction (e.g., Argentina's case on Myanmar) signals a revival of transnational accountability mechanisms that bypass deadlocked international institutions.

**Judicial Innovation in Jurisdiction:** The ICC's acceptance of cross-border and observer-state jurisdiction reflects a trend toward functional jurisdictional creativity, aimed at bridging formal legal gaps and expanding the reach of justice mechanisms in politically contested contexts.

### Challenges to the International Legal Order

Despite these developments, the Myanmar and Gaza cases expose enduring challenges to the credibility and enforcement of international criminal law:

- **Selective enforcement and politicization** erode confidence in institutions like the ICC and ICJ.
- **Delayed responses** allow atrocities to proceed unimpeded, diminishing the preventive function of genocide law.
- **Lack of enforcement power**, especially with ICJ judgments and ICC arrest warrants, enables powerful states to flout legal obligations without immediate consequences.

The Myanmar and Gaza case studies provide a compelling mirror to the strengths and limitations of the current international legal order. They underscore the promise of international law as a tool for marginalized groups to demand justice, while also exposing the persistent power asymmetries that limit enforcement and consistency. Their outcomes will likely shape the trajectory of genocide jurisprudence for decades to come—determining whether international criminal accountability can evolve from a symbolic norm into a credible force of global justice.

### Gaps and Opportunities in International Accountability

The comparative study of Myanmar and Gaza exposes significant gaps in the global legal and institutional framework for addressing genocide. Despite a well-established normative regime prohibiting genocide under international law, its application remains sporadic, delayed, and highly politicized. While the legal architecture—the Genocide Convention, the ICC, the ICJ, and universal jurisdiction—is theoretically sound, in practice, it is compromised by structural deficiencies, enforcement limitations, and political resistance. This section explores key systemic gaps in international accountability and evaluates emerging opportunities for reform, advocacy, and norm consolidation in the fight against impunity for genocide and other mass atrocity crimes.

## Structural and Jurisdictional Gaps

**Limited Jurisdictional Reach of the ICC:** A critical flaw in the Rome Statute framework is the territorial and nationality-based jurisdiction of the ICC, which excludes crimes committed in non-State Parties unless a Security Council referral is obtained. Both Myanmar and Israel are not parties to the Rome Statute, yet the ICC was forced to rely on legal innovation (e.g., cross-border effects, recognition of Palestine) to establish jurisdiction. Such measures, while creative, are inherently fragile and vulnerable to contestation. Furthermore, the ICC's dependency on state cooperation for arrest, evidence gathering, and enforcement renders it ineffectual in many high-profile cases. The lack of an independent enforcement mechanism means that politically insulated actors can defy accountability without consequence.

**Politicization of the UN Security Council:** The veto power of permanent members (P5) of the Security Council remains a persistent obstacle to impartial accountability. In both case studies:

- China and Russia blocked collective action against Myanmar,
- The United States shielded Israel from international scrutiny.

This selective exercise of veto power not only undermines the Responsibility to Protect (R2P) doctrine but also exposes the incompatibility between legal obligations and geopolitical interests. As a result, international criminal law is perceived not as a universal framework but as a tool selectively applied to serve strategic agendas.

## Evidentiary and Doctrinal Challenges

**Proving Genocidal Intent:** The requirement of specific intent (*dolus specialis*) to destroy a group, in whole or in part, remains the most stringent and difficult element to establish. Courts are often hesitant to infer intent from conduct alone, even in the face of systematic patterns of violence. In Myanmar, genocidal intent was supported by official rhetoric, exclusionary policies, and coordinated military actions. In Gaza, allegations rely heavily on statements by Israeli leaders, targeting of civilian infrastructure, and the blockade's humanitarian impact. Nevertheless, the threshold for genocidal intent remains controversial and inconsistently applied. There is a pressing need for clarification in jurisprudence regarding the evidentiary standards for intent in asymmetric conflicts and ongoing hostilities.

**Fragmentation Between State and Individual Accountability:** The division of jurisdiction between the ICJ (state responsibility) and ICC (individual criminal responsibility) creates disjointed accountability mechanisms, often resulting in partial or non-complementary outcomes. For instance:

- The ICJ may find that a state failed to prevent genocide without concluding it committed genocide.
- The ICC may be unable to prosecute senior leaders due to lack of custody or cooperation.

This fragmentation dilutes the impact of international adjudication and hampers the possibility of holistic justice for victims.

## Enforcement and Compliance Deficits

**Lack of Enforcement Mechanisms:** Neither the ICJ nor the ICC possesses coercive power to enforce its judgments or arrest warrants. Compliance depends on:

- Voluntary cooperation by states,
- Political pressure through diplomatic or economic sanctions,
- Moral persuasion via public opinion and advocacy.

The failure to implement provisional measures in both Myanmar and Gaza demonstrates the symbolic rather than substantive impact of international judicial decisions when states are uncooperative or shielded by geopolitical allies.

**Weak Victim-Centric Mechanisms:** Despite the invocation of justice in international rhetoric, victims often remain peripheral to formal legal processes. Reparation mechanisms are rarely activated; victims' testimonies are filtered through selective prosecution strategies; and transitional justice approaches are sidelined in favor of legal formalism. There is an urgent need to center victims' voices through truth commissions, community-led legal processes, and participatory mechanisms that go beyond retributive justice.

**Emerging Opportunities and Normative Innovations:** Despite the limitations, recent developments offer promising avenues for reform and revitalization of genocide accountability mechanisms.

**Assertive use of ErgaOmnes Obligations:** The proactive role played by The Gambia and South Africa in initiating genocide cases before the ICJ signals a new wave of Global South engagement with international law. These states have leveraged the erga omnes character of genocide norms to challenge impunity, irrespective of geographic proximity or political influence. Such moves reflect the growing recognition that international justice is a collective responsibility and that smaller or middle-power states can use legal tools to challenge hegemonic actors.

**Strengthening Universal Jurisdiction:** Domestic courts in countries like Argentina, Germany, and Sweden have demonstrated the potential of universal jurisdiction to address impunity when international institutions are deadlocked. If supported by legislative reforms, political will, and cooperation agreements, universal jurisdiction can serve as a bottom-up mechanism for justice in lieu of formal international trials.

**Digital Documentation and Civil Society Advocacy:** The advent of open-source evidence, satellite imagery, and AI-powered verification tools has enhanced the ability of investigators to collect real-time documentation of atrocities. This, coupled with the work of civil society organizations, increases the chances of building prosecutable cases and holding perpetrators accountable—even in the face of state obstruction. Moreover, global advocacy movements have galvanized public awareness, making it more difficult for international institutions to ignore widespread calls for justice.

## Recommendations for Reform

To strengthen international accountability for genocide, the following structural and policy recommendations merit consideration:

1. **Security Council Reform:** Institutionalize veto restraint in mass atrocity situations, possibly through a General Assembly resolution or voluntary code of conduct among P5 members.
2. **Expanded Jurisdiction of ICC:** Amend the Rome Statute to include universal jurisdiction for core crimes or allow for General Assembly referrals when the Security Council is paralyzed.
3. **Enhanced Victim Participation:** Integrate restorative justice models and reparations programs in ICC/ICJ processes, and increase direct victim representation in proceedings.
4. **Regional Mechanisms:** Encourage the development of regional hybrid tribunals, especially within ASEAN and the Arab League, to create culturally proximate accountability forums.
5. **Capacity Building:** Invest in national legal systems to prosecute international crimes domestically and build legal infrastructure for documentation, witness protection, and evidence preservation.

The pursuit of justice for genocide remains an unfinished project. The Myanmar and Gaza cases expose how legal norms, though robust on paper, often falter when confronted by political realities and institutional inertia. Yet, they also signal a global shift—where new actors, tools, and jurisprudential strategies are being mobilized to challenge impunity. Bridging the gap between normative aspiration and enforcement reality requires bold institutional reform, strategic

litigation, and a renewed commitment to legal universality over political expediency.

## CONCLUSION AND LESSONS FOR FUTURE GENOCIDE PREVENTION AND JUSTICE

The contemporary cases of Myanmar and Gaza underscore the enduring challenges and evolving possibilities of securing justice in response to genocide and mass atrocity crimes. Despite the clear prohibition of genocide in treaty and customary international law, the enforcement of this norm remains fragmented, inconsistent, and profoundly influenced by the architecture of global power. The international community's responses to the persecution of the Rohingya and the devastation in Gaza reveal a legal order torn between principle and politics—where accountability depends as much on geopolitical alignments as on legal merits. Nevertheless, these two cases also reflect an emerging paradigm in the struggle against impunity. Through innovative legal reasoning, strategic use of international forums, and the courage of smaller states and civil society actors, the pursuit of justice is being reimagined beyond traditional power structures. The invocation of the Genocide Convention before the International Court of Justice (ICJ) by The Gambia and South Africa—nations with no direct territorial stake in the conflicts—demonstrates a growing commitment to uphold erga omnes obligations as truly universal. The International Criminal Court's (ICC) efforts to expand jurisdiction and the increasing role of universal jurisdiction in domestic courts likewise point toward a more flexible and inclusive model of international accountability. At the same time, serious doctrinal, procedural, and political challenges persist. The high threshold for establishing genocidal intent (*dolus specialis*), the lack of enforcement mechanisms for ICJ orders and ICC warrants, and the paralysis of the UN Security Council in the face of mass atrocities collectively erode the credibility of the legal framework. The glaring double standards in how international law is applied—often sparing powerful states or their allies while aggressively pursuing weaker actors—risk delegitimizing the entire edifice of human rights and humanitarian law. To prevent the normalization of atrocity and impunity, the following core lessons must inform future international practice:

**Prioritize Prevention over Reaction:** Legal accountability mechanisms often act too late—responding only after mass atrocities have occurred. A preventive framework must:

- Empower early warning systems within the UN and regional bodies.
- Enhance the capacity of domestic institutions to detect and respond to hate speech, incitement, and systemic discrimination.
- Operationalize the Responsibility to Protect (R2P) doctrine through credible and depoliticized channels.

**Depoliticize Justice Mechanisms:** Efforts must be made to insulate international legal processes from great power politics. This includes:

- Advocating for voluntary restraint of the veto in atrocity situations.
- Supporting reform proposals that expand access to justice outside the Security Council's gatekeeping role.
- Building coalitions of mid-sized and Global South states to support independent and principled legal action.

**Strengthen Victim-Centered Justice:** Accountability must go beyond punishing perpetrators to meaningfully address the needs of victims. Justice mechanisms should:

- Ensure truth-telling, reparations, and memorialization as integral parts of post-conflict justice.
- Include victim representation and participatory rights in ICC and ICJ procedures.
- Recognize the intergenerational harm caused by genocide, particularly in protracted displacement and statelessness.

**Embrace Legal Innovation:** The creative jurisdictional strategies employed in the Myanmar and Gaza cases offer important precedents. The international community should:

- Codify and clarify territoriality-based jurisdiction over cross-border crimes.
- Develop hybrid tribunals or regional mechanisms where international courts face political gridlock.
- Expand the use of open-source and digital evidence to supplement fact-finding in real time.

**Reaffirm the Universality of Genocide Law:** To restore confidence in the rule of law, genocide must be treated as a crime that transcends political alliances. This requires:

- Uniform application of legal standards across all regions and actors.
- Public and institutional condemnation of all genocidal rhetoric and conduct, regardless of the perpetrator's identity.
- Academic, legal, and civil society efforts to counter legal cynicism and promote normative consistency.

**Final Reflections:** Genocide law stands at a crossroads. The promise of "Never Again" will remain rhetorical unless matched by sustained institutional courage, legal innovation, and political will. Myanmar and Gaza serve as stark reminders of the costs of inaction—but also as blueprints for resistance and resilience within the international legal system. The challenge ahead is not merely to punish perpetrators but to reshape international accountability so that justice becomes the rule, not the exception. The lessons drawn from these case studies should inspire a renewed commitment to an international legal order that is inclusive, impartial, and unwavering in its defense of human dignity. Only then can the prohibition of genocide evolve from a symbolic commitment into a living reality for all people, everywhere.

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