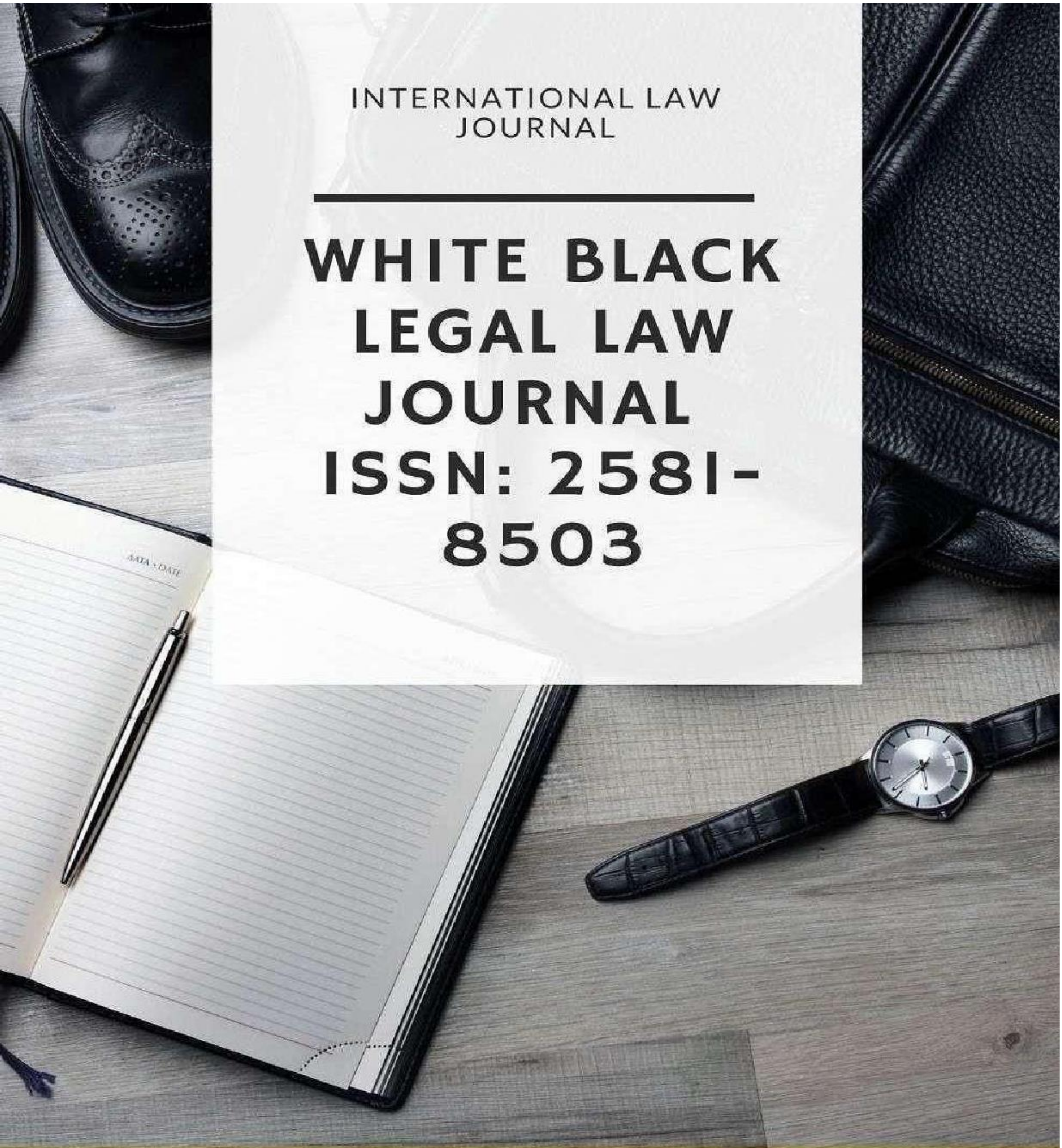

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GENOCIDAL JURISPRUDENCE: A COMPARATIVE AND LEGAL ANALYSIS OF DARFUR, THE ROHINGYA, AND PALESTINE

AUTHORED BY - INDRAKSHI SAHA[1]

Abstract

This paper critically examines the evolution and contemporary legal critiques and solutions of genocidal jurisprudence through the comparative and legal analysis of three emblematic cases spanning the last quarter century: The Darfur Genocide (2002 – Present), The persecution of Rohingyas (2017 – Present), and the ongoing hostility of the occupied Palestinian territory. Despite the 1948 Convention of Prevention and Punishment of the Crime of Genocide, establishing a clear legal framework, it's deployment has been largely constrained by geopolitical considerations and stringent evidentary thresholds of proving *dolus specialis*, in a politicized global order. This analysis, grounded in humanitarian perspective, explores how United Nations and its principal legal organs, the ICC and ICJ, have been recurrently hampered by the principle of State sovereignty and security council votes limiting their ability to prevent and punish mass atrocities. This paper employs the case studies to scrutinize legal strategies employed to infer genocidal intent from circumstantial evidence, including patterns of systemic violence, dehumanizing rhetoric, and adhoc military actions highlighting tensions between universal imperative to protect populations and fragmented realities of international authorities. For genocidal jurisprudence to become an effective deterrent, it must not only rely on meticulous legal analysis but also overcome profound political and structural impediments that have left the legal machinery of international justice structurally deficient to date.

1, Introduction

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide was a significant moment in international law. It defined genocide as the "crime of crimes" and stated that certain acts go against humanity regardless of state boundaries. However, over 75 years later, we still have not effectively prevented or punished genocide. The current situation in

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genocidal law shows a troubling contradiction. While the legal framework for dealing with genocide has become more complex, we often fail to use these tools because of political factors, strict evidence requirements, and limitations within the international legal system.

This analysis looks at how genocidal law has developed and the challenges it faces today. It compares three notable cases from the last 25 years: the Darfur Genocide (2002–Present), the persecution of the Rohingya (2017–Present), and the ongoing violence in the occupied Palestinian territory. These cases are not just examples of mass violence, they illustrate how the international community's response to genocide has often been weakened by political shortcuts and the failures of institutions. By critically examining these tensions/cases, the paper addresses the urgent need for legal innovation and institutional reform to ensure that the promise of genocide prevention is fulfilled beyond formal legal frameworks.

2. Evolution and Key Cases

The legal architecture that governs genocide today was not built in a single moment. It emerged incrementally, out of the failures of earlier attempts to regulate State conduct through international law, and was shaped decisively by the atrocities of the two World Wars. This section traces that evolution, from the collapse of the League of Nations' collective security model, through the foundational trials of the mid-twentieth century, to the *ad hoc* tribunals of the 1990s whose jurisprudence continues to inform how genocide is prosecuted today. It then briefly situates the three case studies – Darfur, the Rohingya, and Palestine – within this trajectory, before each is examined in full later in the paper.

2.1 The First World War and the Downfall of the League of Nations

The First World War (1914–1918) exposed the absence of any binding international mechanism capable of preventing State violence on a mass scale, and the postwar settlement attempted, for the first time, to institutionalise collective security through law. The Treaty of Versailles of 1919 established the League of Nations, whose Covenant obliged member States to respect and preserve the territorial integrity and political independence of one another and empowered the League Council to respond to threats of war.[2] However, the League possessed no independent enforcement machinery of its own; it relied entirely on the willingness of member States to impose collective sanctions, and its founding members deliberately withheld it of any standing military force. This structural weakness became apparent within little over a

[2] Covenant of the League of Nations, 28 April 1919, Arts. 10–16.

decade. Japan's invasion of Manchuria in 1931 and Italy's invasion of Abyssinia in 1935–36 were both condemned by the League, yet in neither case did condemnation translate into effective sanction, and both aggressor States simply withdrew from the organisation rather than comply.[3] The League's inability to prevent, or even meaningfully punish, acts of territorial aggression by its own members fatally undermined confidence in the collective security model and left the international order without a functioning check when Germany began its own campaign of expansion later in the decade. The downfall of the League is, in this sense, the first cautionary lesson of genocidal jurisprudence: a legal framework without enforcement capacity is, at best, a moral statement, and this tension between normative ambition and institutional power would recur throughout the twentieth and twenty-first centuries.

2.2 The Second World War and the Emergence of the Concept of Genocide

The Second World War (1939–1945), and in particular the Holocaust – the systematic extermination of approximately six million European Jews alongside Roma, disabled persons, political dissidents, and other targeted groups by Nazi Germany – represented an atrocity of a scale and character that existing international law had no vocabulary to describe. It was in direct response to these events that the Polish-Jewish jurist Raphael Lemkin coined the term "genocide" in his 1944 work *Axis Rule in Occupied Europe*, combining the Greek *genos* (race, tribe) with the Latin *-cide* (killing) to describe the coordinated destruction of a group's essential foundations.[4] Lemkin's conceptual innovation did not immediately translate into binding law, but it supplied the vocabulary and the moral urgency that would shape the postwar legal settlement.

2.3 Post-War Jurisprudence: Nuremberg, Tokyo, and the 1948 Genocide Convention

The Allied powers' response to Axis atrocities produced the first international criminal trials in history. The International Military Tribunal at Nuremberg, established under the London Charter of 8 August 1945, tried senior Nazi leadership for crimes against peace, war crimes, and crimes against humanity.[5] Although the word "genocide" appeared in the indictment, it was not yet a standalone crime under the Tribunal's Charter; the destruction of European Jewry was prosecuted principally as a crime against humanity. A parallel tribunal, the International Military Tribunal for the Far East, sat in Tokyo between 1946 and 1948 and tried Japanese

[3] See generally F.P. Walters, *A History of the League of Nations* (Oxford University Press, 1952).
[4] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944), ch. IX.
[5] Charter of the International Military Tribunal, annexed to the London Agreement, 8 August 1945.

leadership for comparable offences, including atrocities such as the Nanjing Massacre.[6] Together, Nuremberg and Tokyo established the foundational principle that individuals, not merely States, bear criminal responsibility under international law, and that "following orders" does not extinguish that responsibility.

Building directly on Lemkin's advocacy, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948, and it entered into force in January 1951.[7] For the first time, genocide was codified as a distinct international crime, defined by the combination of specified physical acts (the *actus reus*) and the specific intent to destroy a national, ethnical, racial, or religious group, in whole or in part (*dolus specialis*), discussed further in Section 4 below. Notably, the Convention deliberately excluded political and social groups from its protected categories, a compromise reached under pressure from the Soviet Union and other States, and one that continues to generate criticism of the Convention's scope to this day.

2.4 The *Ad Hoc* Tribunals: ICTY and ICTR

For nearly half a century after 1948, the Genocide Convention remained largely dormant as an instrument of prosecution, a period frequently described in the literature as an era of "never again" rhetoric without corresponding enforcement. This changed with the atrocities of the 1990s. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by United Nations Security Council Resolution 827 of 25 May 1993 to prosecute crimes committed during the Balkan conflicts, including the 1995 massacre of over 8,000 Bosnian Muslim men and boys at Srebrenica.[8] In *Prosecutor v. Krstić*, the ICTY became the first international tribunal to hold that a genocide had occurred in Europe since the Second World War, finding that the killings at Srebrenica were carried out with the specific intent to destroy the Bosnian Muslim population of that enclave.[9]

The following year, the International Criminal Tribunal for Rwanda (ICTR) was established under Security Council Resolution 955 of 8 November 1994, in response to the 1994 genocide in which an estimated 800,000 Tutsi and moderate Hutu were killed within approximately one hundred days.[10] The ICTR's judgment in *Prosecutor v. Akayesu* is regarded as a landmark in

[6] Charter of the International Military Tribunal for the Far East, 19 January 1946.
[7] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
[8] UNSC Res 827, UN Doc S/RES/827 (25 May 1993).
[9] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (2 August 2001); affirmed in relevant part, Case No. IT-98-33-A, Judgment (19 April 2004).
[10] UNSC Res 955, UN Doc S/RES/955 (8 November 1994).

genocidal jurisprudence: it produced the first conviction for genocide by an international tribunal, and it was the first international judgment to recognise that rape and sexual violence, when committed with the requisite intent, can themselves constitute acts of genocide.[11] Together, the ICTY and ICTR jurisprudence supplied the interpretive tools – particularly on the inference of *dolus specialis* from circumstantial evidence – that continue to structure genocide prosecutions, including at the International Criminal Court (ICC) and the International Court of Justice (ICJ), and that inform the analysis of Darfur, the Rohingya, and Palestine undertaken in this paper.

2.5 Positioning the Case Studies

The three case studies examined in this paper each engage this inherited legal architecture in different ways, illustrating both its reach and its limits. The situation in Darfur (2002–present) was the subject of a UN Commission of Inquiry and a subsequent ICC referral and indictment of a sitting head of State, yet the Commission itself declined to make a definitive finding of genocidal intent at the State level, illustrating the evidentiary difficulty of proving *dolus specialis* even where the underlying atrocities are not seriously disputed.[12] The persecution of the Rohingya in Myanmar (2017–present) proceeded through a different institutional route, with The Gambia invoking the Genocide Convention's compromissory clause to bring a case against Myanmar before the ICJ – a rare instance of a State, rather than a prosecutorial body, initiating genocide litigation on behalf of a persecuted group.[13] The situation in the occupied Palestinian territory (discussed in Section 4 below) engages both the ICJ, through South Africa's genocide case against Israel and a series of advisory proceedings, and the political organs of the United Nations, and remains, as of the date of this paper, unresolved. Read together, these three cases demonstrate that the pathway from atrocity to legal accountability is neither uniform nor guaranteed, and that the outcome in each instance has been shaped as much by geopolitical alignment as by the strength of the underlying evidence – a theme returned to in the Challenges and Critiques section of this paper.

3. Conceptual Framework and Definition

3.1 The Crime of Genocide and the Primacy of Dolus Specialis

The legal definition of genocide is enshrined in Article II of the UN's Convention on the

[11] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).
[12] See Section 6 below for a full retrospective analysis of the Darfur Genocide.
[13] See Section 5 below for a full retrospective analysis of the persecution of the Rohingya.

Prevention and Punishment of the Crime of Genocide. Unlike other crimes against humanity, genocide is characterized by its unique mental element: dolus specialis. The term dolus specialis meaning 'specific intent' refers to the deliberate or specific intention of the perpetrators to destroy, in whole or in part, a national, ethnical, racial or religious group, rather than merely harming them. The actus reus of genocide, which is the commission of the physical acts themselves, includes any or more of the acts specified under Article II of the UN's Genocide Convention.

The jurisprudence of international crime tribunals, ICTR and ICTY, have consistently affirmed that the *dolus specialis* is the cornerstone of the crime. Proving *dolus specialis* however is exceptionally difficult as it involves seeing beyond general intent or mere discriminatory motive or the commission of mass killings to establish a clear or overarching genocidal plan. Courts have recognized that the presence of clear genocidal intent is difficult to establish, thus it is most commonly inferred from a pattern of conduct and scale and speed of atrocities, or the methods used or the rhetoric surrounding the act.

3.2 Ethnic Cleansing – The Term

Even though the term 'ethnic cleansing' has no standalone definition in international criminal law, the UN Commission of Experts on the erstwhile Yugoslavia defines ethnic cleansing as "rendering an area ethnically homogenous using force or intimidation to remove persons of the given groups from the area." The term is crucial because its underlying acts involving mass murder, forced displacements and persecutions are prosecuted under crimes against humanity or war crimes under the Rome Statute of the ICC.

While the primary objective of ethnic cleansing are forcible displacement and territorial homogenization, genocide aims to a partial or complete destruction of a specific group. However, in certain situations, the line between the two concepts get so blurred due to the extreme and systemic circumstances of ethnic cleansing, that they provide circumstantial evidence which are powerful enough to be proof of genocidal intent.

3.3 Genocidal Jurisprudence: An Analytical Framework

Genocidal jurisprudence is not merely viewed as a static body of law but rather as an ever evolving and highly contested field of judicial interpretation. The analytics seek for a multifaceted enquiry on how crime of genocide is defined, prosecuted and ultimately limited by institutional and geopolitical constraints.

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4. Retrospective Overview of the Occupied Palestinian Territory

4.1 Balfour Declaration

The systematic dispossession of Palestinians started with the Balfour Declaration on November 2, 1917. Britain promised a "national home for the Jewish people" in Palestine without consulting the Arab majority living there. This colonial declaration changed the course of Palestinian history based on wartime strategies rather than humanitarian needs.

During the British Mandate period (1920–1948), violence escalated between Palestinians and Zionists. Organized paramilitary groups, such as the Haganah (established in 1920), militarized the Zionist movement. This period saw numerous massacres, including the 1920 Jerusalem riots and the 1921 violence in Jaffa, establishing a pattern of violence that would result in mass ethnic cleansing (University of Central Arkansas).

4.2 The Nakba – Systemic Ethnic Cleansing 1947–49

The Nakba, or "catastrophe," began with Plan Dalet months before Israel's establishment. Between November 1947 and May 1948, Zionist militias expelled 250,000–350,000 Palestinians through coordinated campaigns involving the following:[14]

- Systematic massacres such as the Deir Yassin massacre on April 9, 1948, where Irgun and Stern Gang forces killed over 100 Palestinians, including women, children, and elderly civilians.
- Biological warfare through deliberate poisoning of village wells.
- Psychological warfare with loudspeaker campaigns and radio broadcasts to instill fear in communities.
- Targeted destruction of over 500 Palestinian villages to prevent refugees from returning.

By the end of the war, 750,000–1 million Palestinians had been expelled, making up about 75% of the Arab population.[15] Approximately 78% of historic Palestine was under Israeli control, accompanied by widespread looting of Palestinian properties, businesses, and cultural archives. After 1948, the situation continued to evolve, especially during the 1967 War. The Six-Day War (June 5–10, 1967) led to Israeli occupation of the remainder of Palestine, including the West Bank, Gaza Strip, and East Jerusalem. Israel began expelling Palestinians from these newly occupied areas, forcing 12,000 individuals from three villages on the first day and

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[14] Hind Rajab Foundation, documentation on the 1947–49 Nakba.

[15] Institute for Palestine Studies and UNRWA historical records on the 1948 exodus; figures also cited in Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oneworld Publications, 2006).

subsequently destroying those villages to create Canada Park. During and after the war, many Palestinian nationals were forced to be displaced including the refugees. This "Second Nakba" displaced 280,000–325,000 Palestinians, with 120,000–170,000 becoming "two-time refugees."

Settlement construction began right after 1967, breaching Article 49 of the Fourth Geneva Convention.[16] By 2025, more than 700,000 Israeli settlers lived in illegal settlements across the West Bank and East Jerusalem.[17] Israel established a dual legal system where Jewish settlers enjoyed full rights under Israeli civil law, while Palestinians lived under strict military law. The International Court of Justice confirmed in 2024 that Israeli settlements violate international law and amount to annexation.[18] Land seizure occurs through various methods, including administrative demolitions, military declarations of land as "state property," expansion of settlement outposts, and construction of bypass roads that fragment Palestinian communities.

4.3 The First Intifada

The First Palestinian Intifada erupted on December 9, 1987, evolving into ongoing popular resistance marked by civil disobedience and stone-throwing by Palestinian youth. Defense Minister Yitzhak Rabin enforced the "iron fist" policy, instructing soldiers to break the bones of protesters.[19] Israeli repression involved live ammunition against unarmed demonstrators, mass arrests of 18,000 Palestinians in the first year, administrative detention of nearly 3,000 individuals in 1988, and systematic torture. The First Intifada led to nearly 2,000 deaths, with a Palestinian-to-Israeli death ratio slightly exceeding 3:1.

4.4 The Second Intifada

The Second Intifada began on September 28, 2000, after Ariel Sharon's provocative visit to Al-Aqsa Mosque. The immediate trigger was the killing of 12-year-old Muhammad al-Durrah by Israeli forces. This period saw unprecedented violence, with 3,000–5,000 Palestinians and about 1,000 Israelis killed over five years.[20] Israeli actions included targeted assassinations of

[16] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 49.

[17] UN OCHA and B'Tselem settlement-population monitoring data.

[18] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion), ICJ Reports 2024, paras. 78–79, 173.

[19] B'Tselem, *Data on Fatalities and the First Intifada (1987–1993)*.

[20] B'Tselem and Israeli Ministry of Foreign Affairs casualty figures for the Second Intifada, 2000–2005.

Palestinian leaders, collective punishment through closures and sieges, destruction of Palestinian infrastructure, and increased settlement expansion during the conflict.

From 2005 to 2023, Gaza suffered under siege and repeated assaults. After Hamas's 2006 election win and 2007 takeover of Gaza, Israel imposed a total blockade. Human rights organizations have referred to it as the world's largest "open-air prison." The blockade allows Israel to control Gaza's borders, airspace, and waters, while imposing severe restrictions on the movement of people and goods. It also prohibits "dual-use" items like construction materials and medical supplies, limiting food imports to minimum survival levels.

The International Committee of the Red Cross condemned the blockade as collective punishment that violates the Fourth Geneva Convention.[21] Human Rights Watch noted that the blockade denies civilians the food, fuel, and medicine they need to live.[22]

4.5 Operation Cast Lead 2008–9

Israel's Operation Cast Lead (December 27, 2008 – January 18, 2009) marked the first major assault on blockaded Gaza. The operation resulted in 1,383–1,417 Palestinian deaths, including 333–344 children and 111–115 women, with civilian casualties making up 83% of the total, according to Al-Haq.[23] Amnesty International highlighted systematic war crimes, including indiscriminate attacks using imprecise weapons in crowded areas, targeting of civilian infrastructure such as hospitals and schools, obstruction of medical care, and widespread destruction of homes.[24]

4.6 Operation Protective Edge 2014

The 2014 Gaza War (July 8 – August 26, 2014) showed Israel's increasing willingness to cause mass civilian casualties. This operation resulted in 2,125–2,310 Palestinian deaths, with UN estimates indicating that 65–70% were civilians, including 551 children and 299 women.[25] UN investigators reported targeted attacks on UN schools sheltering displaced civilians, assaults on medical facilities and ambulances, excessive force in densely populated areas, and deliberate targeting of civilian infrastructure.[26]

[21] ICRC, statement on the Gaza blockade (2010).
[22] Human Rights Watch, *World Report* (annual editions, 2008–2023), chapters on Israel/Palestine.
[23] Al-Haq, *casualty documentation, Operation Cast Lead* (2009).
[24] Amnesty International, *Israel/Gaza: Operation 'Cast Lead': 22 Days of Death and Destruction* (2 July 2009).
[25] UN Office for the Coordination of Humanitarian Affairs (OCHA), *Gaza Emergency Situation Report* (2014).
[26] UN Human Rights Council, *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, UN Doc A/HRC/29/52 (2015).

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4.7 Current Crisis

In the current crisis from October 2023 to the present, Hamas-led militants launched "Operation Al-Aqsa Flood" on October 7, 2023. This attack killed approximately 1,195 Israelis and took 251 hostages.[27] Israel's response has been marked by unprecedented scale and brutality. This includes a total blockade that cuts off food, water, medicine, fuel, and electricity, alongside genocidal rhetoric from Israeli officials and destruction of Gaza's civilian infrastructure, displacing 90% of its population.

4.8 Documented Genocide and International Legal Response

As of July 2025, over 60,000 Palestinians have died in Gaza, with independent estimates suggesting that up to 84,000 deaths may arise from indirect causes. Around 80% of those killed are civilians, including 18,500 children.[28]

4.8.1 Independent Commission of Inquiry

The UN Independent International Commission of Inquiry published reports in June 2024, stating that both Hamas and Israel committed war crimes, with Israel's actions also amounting to crimes against humanity.[29]

The Commission found that Hamas and other Palestinian armed groups were responsible for war crimes, including intentional attacks against civilians, murder, torture, and taking hostages, including children. It recognized patterns of sexual violence that were repeated across multiple locations.

The Commission also held Israeli authorities responsible for war crimes and crimes against humanity during their military operations from October 7, 2023 to December 31, 2023. This included systemic targeting of civilians, widespread killings, and the use of starvation as a method of warfare. The findings showed that Israel's actions had weaponized essential supplies for strategic and political gains.

UN Special Rapporteur Francesca Albanese issued several reports highlighting the situation. In "Anatomy of a Genocide" (March 2024), she noted that there are "reasonable grounds to believe that the threshold for genocide has been reached" in Gaza, citing deliberate destruction and starvation.[30] Her "Genocide as Colonial Erasure" report (October 2024) linked the post-

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[27] Israeli Ministry of Foreign Affairs, casualty and hostage figures for the 7 October 2023 attack.
[28] Gaza Ministry of Health casualty figures, as compiled and cross-checked by the UN OCHA *Humanitarian Situation Update* series (2023–2025); indirect-mortality estimate per *The Lancet* correspondence (July 2024).
[29] UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, *Report*, UN Doc A/HRC/56/26 (June 2024).
[30] Francesca Albanese, *Anatomy of a Genocide*, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN Doc A/HRC/55/73 (25 March 2024).

October 7 violence to a long history of territorial expansion and ethnic cleansing aimed at removing as many Palestinians as possible.[31] In "From Occupation Economy to Genocide Economy" (July 2025), she identified 48 companies, including major technology firms Microsoft, Google, and Amazon, as complicit in Israel's violations of international law by supporting military actions against Palestinians.[32]

The International Court of Justice issued provisional measures orders in *South Africa v. Israel*. On January 26, 2024, the ICJ directed Israel to prevent acts potentially constituting genocide and facilitate humanitarian relief.[33] On May 24, 2024, the Court reaffirmed these actions and ordered Israel to halt any military activity in the Rafah Governorate to avoid inflicting harm on the Palestinian population while also ensuring unhindered access for UN investigative teams.[34]

The UN Human Rights Council has condemned Israeli actions in multiple resolutions, describing the Gaza war as a widespread attack on Palestinians since 1948. The UN General Assembly passed a resolution in September 2024 backing the ICJ ruling and demanded Israel halt its "unlawful presence" in Occupied Palestinian Territories.[35]

UN experts have urged an end to ongoing genocide, called for dismantling apartheid, and stressed compliance with international law. They warned that continuing arms transfers to Israel could lead to complicity in genocide.

The UN identified violations against children, indicating that Israeli forces have killed and harmed tens of thousands of children, with many more possibly trapped under rubble. Investigations also found that Israeli forces intentionally targeted medical facilities, leading to the deaths and mistreatment of medical personnel while restricting their access for treatment.

The UN Special Rapporteur's recent research pointed to systemic corporate involvement in Israeli violations. Key sectors, including the military and technology industries, have become deeply entangled with the occupation. The occupation has served as an optimal testing ground for weapons manufacturers and tech companies, driven by demand, lack of oversight, and impunity.

United Nations reports and legal findings have thoroughly documented systematic war crimes, crimes against humanity, and evidence of genocide in Palestine. Consistent conclusions from

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[31] Francesca Albanese, *Genocide as Colonial Erasure*, Report of the Special Rapporteur, UN Doc A/79/384 (October 2024).

[32] Francesca Albanese, *From Economy of Occupation to Economy of Genocide*, Report of the Special Rapporteur, UN Doc A/HRC/59/23 (July 2025).

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, ICJ Reports 2024.

[34] *South Africa v. Israel*, Provisional Measures, Order of 24 May 2024, ICJ Reports 2024.

[35] UNGA Res ES-10/24, UN Doc A/RES/ES-10/24 (18 September 2024).

various UN bodies establish a clear record of Israeli violations of international law. These findings show patterns of violence aimed at destroying Palestinian existence, fitting legal definitions of genocide under international law.

The international legal consensus from UN mechanisms makes clear that the situation in Palestine involves not just armed conflict but systematic crimes against humanity and genocide that demand immediate international intervention and accountability.

5. The Persecution of the Rohingya: A Retrospective Analysis of Engineered Statelessness

The persecution of the Rohingya, an overwhelmingly Muslim ethnic minority historically concentrated in Rakhine State (formerly Arakan) in western Myanmar, represents one of the clearest contemporary illustrations of how decades of incremental legal and administrative exclusion can culminate in mass atrocity. Unlike Darfur, where the precipitating logic was framed in counter-insurgency terms, or Palestine, where the precipitating logic is framed in terms of occupation and territorial control, the Rohingya case is distinguished by the central role played by law itself – specifically, the deliberate use of nationality legislation – as an instrument for constructing a population's vulnerability to genocide over the course of a generation. This section traces that process from its colonial and postcolonial roots through the 2016–2017 "clearance operations" that precipitated the present crisis, to the ongoing, and so far unresolved, proceedings before the ICC and the ICJ.

5.1 Historical Roots: From the 1982 Citizenship Law to Institutionalised Statelessness

Rohingya Muslims trace their presence in Arakan to at least the period of British colonial rule, during which substantial migration from Bengal into the region was encouraged as part of colonial agricultural policy, a history that successive Burmese governments have since invoked to characterise the Rohingya as recent Bengali migrants rather than an indigenous community.[36] Following Burmese independence in 1948, Rohingya were initially able to obtain citizenship and even limited political representation, but their position deteriorated sharply after General Ne Win's 1962 military coup, which inaugurated decades of exclusionary rule under the "Burmese Way to Socialism."

In 1978, the military government launched Operation Naga Min ("Dragon King"), a nationwide

[36] Human Rights Watch, *Burma/Bangladesh: Burmese Refugees in Bangladesh – Discrimination in Arakan* (May 2000).

citizenship-scrutiny campaign that in Rakhine State was accompanied by widespread violence, arbitrary arrest, and the destruction of Rohingya property, driving some 250,000–280,000 Rohingya across the border into Bangladesh within a few months.[37] Although most were subsequently repatriated under bilateral arrangements with Bangladesh, their legal status was never restored. Three years later, the government enacted the Burma Citizenship Law of 1982, which replaced residence-based citizenship with a race-based framework recognising 135 "national races," a list from which the Rohingya were pointedly excluded.[38] The 1982 Law created three tiers of citizenship – full, associate, and naturalised – each requiring documentary proof of ancestral settlement in the country before 1823, a threshold the Rohingya were, by design, structurally unable to satisfy given the destruction and confiscation of identity documents during Naga Min. The result, as human rights organisations and legal scholars have consistently observed, was to render several hundred thousand Rohingya stateless at a single legislative stroke, stripping them of the right to vote, to hold public office, to access higher education, to travel freely, and, in later decades, to register births or marriages without official permission.[39] This engineered statelessness is not incidental background to the events of 2016–2017; it is, on the analysis advanced in this paper, a precondition for them, since a population defined out of the national community by law is correspondingly easier to displace, dispossess, and, ultimately, destroy without triggering the ordinary legal protections owed to citizens.

5.2 The 2012 Communal Violence and the Consolidation of Segregation

Intercommunal violence between Rakhine Buddhists and Rohingya Muslims erupted in June 2012, triggered by the rape and murder of a Rakhine woman and a subsequent revenge killing of ten Muslims on a bus, and recurred in a second wave in October of that year. Human Rights Watch documented that the violence, particularly in its October phase, involved coordinated attacks by Rakhine mobs – in several instances accompanied or facilitated by state security forces – that amounted to a campaign of ethnic cleansing against Rohingya and Kaman Muslim communities.[40] Approximately 200 people were killed and some 140,000 people, overwhelmingly Rohingya, were displaced into squalid, military-guarded internment camps

[37] Pulitzer Center, *Between Burma and Bangladesh: Rohingya, a Stateless People* (2015); New Lines Institute, *Statelessness – the Root Cause of the Rohingya Crisis* (2023).
[38] Citizenship Law, Pyithu Hluttaw Law No. 4 of 1982 (Myanmar), ss. 3–4; Human Rights Watch, above n. 30, pt. II.
[39] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report* (24 August 2017) [hereinafter "Annan Commission Report"], pp. 26–29.
[40] Human Rights Watch, *"All You Can Do is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (April 2013).

around Sittwe and elsewhere in Rakhine State, where several hundred thousand remained confined for the following decade, denied freedom of movement and adequate access to healthcare, education, and livelihoods. The 2012 violence thus marks the point at which segregation was formalised on the ground, converting a legally stateless population into a physically confined one, and it produced the demographic and administrative map – Rohingya concentrated in isolated townships of northern Rakhine State – along which the 2016–2017 clearance operations would later be conducted.

5.3 The 2016 and August 2017 "Clearance Operations"

On 9 October 2016, a newly formed Rohingya militant group, the Arakan Rohingya Salvation Army (ARSA, then operating under the name Harakah al-Yaqin), attacked three border guard posts in northern Rakhine State, killing nine officers. The Myanmar military (the Tatmadaw) responded with a four-month campaign of so-called "clearance operations" that human rights investigators later found to have involved mass killings, gang rape, and the burning of Rohingya villages, displacing approximately 87,000 people into Bangladesh by the time the operation was declared complete in February 2017.[41]

The far larger and more consequential wave began on 25 August 2017, when ARSA launched coordinated attacks on some thirty police posts and an army base. The Tatmadaw, together with allied Rakhine militias, responded with a campaign that the UN Independent International Fact-Finding Mission on Myanmar later concluded bore "the hallmarks of a genocide": soldiers and civilian militia swept through hundreds of Rohingya villages, killing residents indiscriminately, burning homes to the ground, and driving survivors toward the Bangladesh border.[42] Médecins Sans Frontières later estimated, on the basis of retrospective mortality surveys of refugees in Bangladesh, that at least 6,700 Rohingya, including at least 730 children under the age of five, were killed by violence in the month following 25 August 2017 alone, a figure the organisation described as a conservative floor rather than a comprehensive count.[43] Within weeks, more than 700,000 Rohingya had crossed into Bangladesh, joining earlier refugee populations to make the Kutupalong-Balukhali settlement near Cox's Bazar the largest refugee camp in the world.

[41] OHCHR, *"Mission Report of OHCHR Rapid Response Mission to Cox's Bazar, Bangladesh"*, UN Doc A/HRC/34/CRP.3 (3 February 2017).
[42] Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/39/64 (12 September 2018) [hereinafter "IIFFMM Report"], paras. 85–87, 1440–1441.
[43] Médecins Sans Frontières, *"No One Was Left": Death and Violence Against the Rohingya in Rakhine State, Myanmar* (9 December 2017).

5.3.1 Modalities of Atrocity

The Fact-Finding Mission's 2018 report, based on 875 interviews conducted primarily with refugees in Bangladesh together with satellite imagery analysis, documented a highly consistent pattern of violence across northern Rakhine State that closely mirrors the modalities later observed in Darfur: mass killings carried out during coordinated dawn raids, the deliberate rounding-up and execution of men and boys of fighting age, and the systematic, village-by-village burning of Rohingya-populated areas while adjoining ethnic Rakhine settlements were left untouched – a pattern the Mission found could only be explained by deliberate targeting rather than the incidental consequences of counter-insurgency operations.[44] The Mission further documented widespread and often public mass gang rape of Rohingya women and girls, frequently accompanied by mutilation or killing of the survivors, and concluded that sexual violence had been used as "a deliberate strategy" to humiliate, terrorise, and drive out the Rohingya population as a group.[45] Mission member Radhika Coomaraswamy observed that the crimes documented were "similar in nature, gravity and scope to those that have allowed for genocidal intent to be established in other contexts," a direct echo of the ICTY and ICTR jurisprudence discussed in Section 2 above.[46] On the basis of these findings, the Mission recommended that Commander-in-Chief Senior General Min Aung Hlaing and five other senior military commanders be investigated and prosecuted for genocide, crimes against humanity, and war crimes, and that the UN Security Council either refer the situation to the ICC or establish an *ad hoc* tribunal.

5.4 The Annan Commission and the Question of Genocidal Intent

Notably, the Advisory Commission on Rakhine State, chaired by former UN Secretary-General Kofi Annan at the invitation of Aung San Suu Kyi's government and reporting on 24 August 2017 – the day before the ARSA attacks that triggered the clearance operations – had already warned that continued denial of citizenship and freedom of movement risked entrenching radicalisation and violence, and had recommended a pathway to citizenship, the closure of the internment camps, and the repeal of discriminatory restrictions.[47] The government's response to its own commission's recommendations was, within twenty-four hours, superseded entirely

[44] IIFFMM Report, above n. 34, paras. 748–759, 890–898.
[45] IIFFMM Report, above n. 34, paras. 936–957; UN Fact-Finding Mission on Myanmar, *Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts*, UN Doc A/HRC/42/CRP.4 (22 August 2019).
[46] OHCHR, press release, *"Myanmar: Tatmadaw Leaders Must be Investigated for Genocide, Crimes Against Humanity, War Crimes – UN Report"* (27 August 2018).
[47] Annan Commission Report, above n. 32, pp. 8–10, 57–62.

by the military crackdown, a sequence of events frequently cited by commentators as circumstantial evidence bearing on intent: the state possessed detailed, contemporaneous knowledge of the structural drivers of the crisis and the humanitarian consequences of a heavy-handed response, yet proceeded with a campaign whose scale, coordination, and consistent targeting of the Rohingya *qua* Rohingya – rather than of ARSA fighters specifically – the Fact-Finding Mission found difficult to reconcile with a purely counter-insurgency rationale.[48] As in Darfur, this is precisely the terrain on which *dolus specialis* is contested: Myanmar has consistently characterised the operations as a proportionate response to an armed insurgency, while the Fact-Finding Mission and subsequent litigants have pointed to the pattern, scale, and disproportion of the violence as circumstantial proof of an intent to destroy the group.

5.5 International Legal Response: The ICC and the ICJ

The Rohingya case is distinctive among the three examined in this paper for having generated simultaneous proceedings before both principal international courts, pursued on different legal theories precisely because Myanmar, unlike Sudan (subject to a Security Council referral) or Israel and Palestine (both ICJ parties on other grounds), is not a party to the Rome Statute.

5.5.1 The ICC: Jurisdiction Through Bangladesh

Because Myanmar has not ratified the Rome Statute, the ICC ordinarily could not exercise jurisdiction over crimes committed on Myanmar's territory. The Prosecutor overcame this obstacle by characterising the expulsion of the Rohingya as the crime against humanity of deportation, an offence that is not completed until the victim crosses an international border – in this case, into Bangladesh, which is a State Party to the Rome Statute. On 6 September 2018, Pre-Trial Chamber I accepted this reasoning by majority, ruling that the Court could exercise jurisdiction over the alleged deportation because an element of the crime occurred on the territory of a State Party.[49] On 4 July 2019, the Prosecutor requested authorisation to open a full investigation, and on 14 November 2019, Pre-Trial Chamber III granted that authorisation, permitting the Prosecutor to investigate crimes against humanity – including deportation, persecution, and other inhumane acts – committed against the Rohingya population on or after 1 June 2010.[50] This jurisdictional innovation – inferring territorial jurisdiction from the cross-border element of an otherwise extraterritorial crime – has since been cited as a potential model

[48] IIFFMM Report, above n. 34, paras. 1410–1441.

[49] ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18 (6 September 2018).

[50] ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute, ICC-01/19 (14 November 2019).

for pursuing accountability in other situations involving non-States Parties, though the investigation itself has proceeded slowly, constrained by the absence of Myanmar's cooperation and, since February 2021, by the additional complexity of a military coup that has entangled the Rohingya case with a broader crisis of Tatmadaw impunity across the country.

5.5.2 The ICJ: *The Gambia v. Myanmar*

In a rare instance of third-party State litigation under the Genocide Convention's compromissory clause, the Republic of The Gambia – acting with the backing of the 57-member Organisation of Islamic Cooperation, on whose behalf it filed the case – instituted proceedings against Myanmar before the ICJ on 11 November 2019, alleging breaches of the Genocide Convention arising from the 2017 clearance operations.[51] On 23 January 2020, the Court unanimously indicated provisional measures, ordering Myanmar to take all measures within its power to prevent genocidal acts against the Rohingya, to ensure that its military and any irregular armed units under its control refrain from such acts, to preserve evidence relating to the allegations, and to report periodically to the Court on its compliance.[52] As in *Bosnia v. Serbia*, discussed in Section 6 below, the Court's order addressed only the urgent question of provisional protection and did not determine, at that stage, whether genocide had in fact occurred. Myanmar's preliminary objection that The Gambia lacked standing because the OIC, not a State, was the "real applicant" was rejected by the Court in its judgment of 22 July 2022, clearing the way for the case to proceed to the merits.[53] Several States, including Canada, Germany, the Netherlands, and the United Kingdom, have since filed declarations of intervention in support of The Gambia's application, and the case remains pending as of the date of this paper, with written pleadings on the merits still in progress.

5.6 Geopolitical Interests and the Limits of Regional Diplomacy

As in Darfur, the international response to the Rohingya crisis has been shaped decisively by the economic and strategic interests of powerful neighbours rather than by the strength of the underlying evidence. China, Myanmar's principal arms supplier and the leading investor in strategically significant infrastructure such as the China-Myanmar Economic Corridor and the deep-water port at Kyaukphyu in Rakhine State itself, has consistently shielded Myanmar from binding UN Security Council action, framing the crisis as an internal matter to be resolved bilaterally with Bangladesh. India, balancing its own strategic and counter-insurgency interests

[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings (11 November 2019).
[52] *The Gambia v. Myanmar*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, para. 86.
[53] *The Gambia v. Myanmar*, Preliminary Objections, Judgment of 22 July 2022, ICJ Reports 2022.

along its northeastern border against its stated aspiration for closer ties with Naypyidaw, likewise avoided substantive criticism of the Tatmadaw during the height of the crisis. The Association of Southeast Asian Nations (ASEAN), bound by its foundational principle of non-interference in members' internal affairs, confined itself to expressions of concern and humanitarian coordination rather than any mechanism capable of exerting real pressure on Myanmar, a pattern that mirrors the diplomatic shielding provided to Sudan by the Arab League and African Union discussed in Section 6 below. This confluence of great-power economic interest and regional non-interference norms left the UN Security Council – where China's veto power foreclosed any prospect of a Chapter VII referral of the kind that ultimately reached the ICC in the Darfur situation – structurally incapable of compelling Myanmar's cooperation, forcing accountability efforts onto the comparatively narrower and slower tracks of third-party ICJ litigation and Bangladesh-anchored ICC jurisdiction described above.

5.7 The Unresolved Refugee Crisis and the 2021 Coup

More than 700,000 Rohingya who fled in 2017 remain in the sprawling refugee settlements of Cox's Bazar, Bangladesh, alongside earlier waves of refugees, together comprising the largest and most densely populated refugee camp complex in the world. Repeated attempts at repatriation, brokered bilaterally between Myanmar and Bangladesh, have collapsed amid the refugees' well-founded fears of renewed violence and Myanmar's refusal to guarantee citizenship or safe return. Inside Myanmar itself, the roughly 600,000 Rohingya who remained in Rakhine State after 2017 continued, according to the Fact-Finding Mission's 2019 follow-up report, to live under conditions the Mission characterised as posing a continuing "threat of genocide," including entrenched segregation, restricted movement, and denial of citizenship.[54] The military coup of 1 February 2021, which removed Aung San Suu Kyi's civilian government and installed the same Tatmadaw leadership implicated in the 2017 clearance operations, has further complicated the accountability landscape: Myanmar's post-coup military junta continues to appear before the ICJ as the State party in *The Gambia v. Myanmar*, even as the same institution stands separately accused, in the years since the coup, of committing crimes against humanity and war crimes against the broader Myanmar population, extending the pattern of Tatmadaw impunity documented in the Rohingya case to the country as a whole.

[54] UN Fact-Finding Mission on Myanmar, media statement, *"Myanmar's Rohingya Persecuted, Living under Threat of Genocide, UN Experts Say"* (16 September 2019).

6. The Darfur Genocide: A Retrospective Analysis of a Systemic Failure

The Darfur conflict, which escalated dramatically in 2003, represents a profound and multifaceted case study in modern atrocities, humanitarian intervention, and the failures of international diplomacy. What began as a regional rebellion against long-standing marginalization quickly devolved into a genocidal campaign, orchestrated by the Sudanese government and its allied militias, leaving an indelible mark on global jurisprudence and the principle of state sovereignty. This retrospective overview, drawing from a synthesis of primary investigative reports, academic papers, and historical analyses, seeks to delineate the complex genesis of the conflict, the modalities of violence employed, and the deeply flawed international response.

6.1 Historical Antecedents and Proximal Triggers

The roots of the Darfur conflict are buried in a complex interplay of environmental, social, and political factors that long predated the 2003 insurgency. The region itself, approximately the size of France, has a history of inter-tribal tensions between nomadic and sedentary communities over land and water resources, exacerbated by periods of severe drought and desertification that began in the 1970s and 80s.[55] This ecological stress effectively dissolved traditional conflict-resolution mechanisms, setting the stage for a zero-sum competition over diminishing resources.

Politically, the 1989 military coup of General Omar al-Bashir proved to be a critical inflection point. His regime in Khartoum systematically pursued an ideology of Arab nationalism and "Arabisation," marginalizing Darfur and concentrating national development in the capital. This policy consciously stoked ethnic divisions by favoring Arab tribes in land disputes and providing a political framework for the dehumanization of non-Arab groups. The a priori violence of this policy was a continuation of a pattern of counterinsurgency tactics refined during Sudan's decades-long civil war with the South. These campaigns often utilized proxy militias, such as the murahaleen (Arab cavalry), to carry out atrocities and terrorize civilian populations.

The conflict's immediate trigger was the formation of two rebel movements in 2003, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), composed primarily of black African Darfuris. Their initial military successes, notably the attack on the El Fasher airfield in April 2003, threatened Khartoum's authority and prompted a brutal and

[55] Holocaust Memorial Day Trust, *Darfur: Genocide Today – Information and Education Guide* (n.d.).

disproportionate response. Unable to trust its conscripted army in the region, the government armed and deployed the Arab militias known as the Janjaweed ("devils on horseback") with a clear mandate to neutralize the rebellion by terrorizing its civilian base.

6.2 The Modalities of Atrocity and the Legal Case for Genocide

The violence perpetrated by the Janjaweed and the Sudanese Armed Forces (SAF) was not random; it was a systematic, coordinated campaign that bore the hallmarks of a state-sponsored atrocity. The tactics, documented extensively by the International Commission of Inquiry on Darfur (ICID) in its January 2005 report, were designed to destroy the social and physical infrastructure of the targeted communities, thereby ensuring their permanent displacement. The ICID, in its detailed investigations across North, South, and West Darfur, established incontrovertible facts about the scale of the atrocities: over 1.65 million individuals displaced and "large-scale destruction of villages throughout the three states of Darfur".[56]

6.2.1 Systematic Killing and Forced Displacement

The ICID documented a consistent pattern of mass killings and summary executions. These atrocities were often committed during joint attacks by government forces and Janjaweed militias, frequently beginning in the early hours of the morning. Eyewitness accounts, as detailed in the ICID report, describe the military firing mortars at unarmed civilians while the Janjaweed entered homes, killing men and capturing women. In one particularly egregious case, in the village of Surra, over 250 people were killed, including women and children. A chilling detail from the report recounts attackers finding men hiding among women and children in a mosque, killing them, and then forcing women to strip naked to ensure they were not concealing young boys, who would also be killed.[57]

The deliberate destruction of villages served as a mechanism for forced displacement. Attackers systematically burned down homes, schools, and essential infrastructure, and destroyed water pumps, wells, and crops. This was not a collateral effect of combat but a calculated strategy to make the land uninhabitable and prevent any future return. This pattern led the ICID to conclude that these actions constituted "crimes against humanity" and that the forced displacement was a "widespread and systematic" act, driven by a government policy to drive people from their homes for counter-insurgency purposes.[58] This strategy was highly

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[56] International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Geneva, 25 January 2005) [hereinafter "ICID Report"], para. 3.
[57] ICID Report, above, paras. 241–245.
[58] ICID Report, above, paras. 331–335.

effective, with the displaced populations primarily belonging to the Fur, Masaalit, and Zaghawa tribes, the same groups that formed the core of the rebel movements.

6.2.2 Rape and Sexual Violence as a Weapon of War

The use of sexual violence was a key modality of the genocidal campaign. The ICID and other human rights organizations documented widespread and systematic use of rape as a deliberate instrument of war. The report highlights that women and girls were subjected to gang rapes during village attacks, abducted and held in captivity for protracted periods, and repeatedly targeted while foraging for firewood outside IDP camps. The ICID's findings are stark, describing cases of women being held for weeks, repeatedly raped by multiple men, and being subjected to severe beatings. The psychological and physical harm inflicted was profound. The report details an instance where a woman who was raped by nine men was told, "You are the women of Tora Bora and we will not stop this".[59] This discriminatory intent, linking sexual violence to ethnic identity, led the commission to conclude that these acts constituted persecution amounting to a crime against humanity. The Janjaweed were overwhelmingly identified by victims as the perpetrators of these crimes, often with the complicity and presence of government soldiers.

6.2.3 The Legal Determination of Genocide

The central legal question investigated by the ICID was whether the events constituted genocide. According to the 1948 Convention, genocide requires two primary elements: the commission of specific acts (e.g., killing, causing serious bodily or mental harm) and the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." While the ICID found that the acts committed by the government and Janjaweed met the criteria for crimes against humanity and war crimes, it determined that the crucial element of "genocidal intent" was not definitively proven at the government level. The commission argued that the primary intent appeared to be for "counter-insurgency warfare," rather than the complete annihilation of a group. However, the report acknowledged the possibility that individuals could have acted with genocidal intent on a case-by-case basis. This legal distinction, while controversial, did not diminish the ICID's assertion that the crimes were "no less serious and heinous than genocide".[60] The ICC's later indictments for genocide against al-Bashir underscored the ongoing debate and different legal interpretations.

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[59] ICID Report, above, paras. 359–362.
[60] ICID Report, above, para. 522.

6.3 The International Response: Diplomatic Paralysis and Limited Peacekeeping

The international response to the Darfur crisis was a masterclass in diplomatic maneuvering and a tragic example of the constraints of multilateralism. The initial inaction, rooted in a desire to not jeopardize the North-South peace process, ceded a critical window for intervention. As detailed in the Unwilling and Unable report, early warnings from officials like Mukesh Kapila in 2003 were not taken seriously, a failure that allowed the government to unleash its "deadly and totally disproportionate counter-insurgency strategy".[61]

6.3.1 UN Security Council Resolutions and the Pursuit of Accountability

In September 2004, the UN Security Council (UNSC) adopted Resolution 1564, which established the ICID and threatened sanctions. However, the resolution was weakened by abstentions from permanent members like China and Russia, who, along with others, were reluctant to take a strong stance against a sovereign state. This diplomatic paralysis, driven by a fierce defense of state sovereignty and a reluctance to intervene in "internal affairs," became a recurring theme. The ICID's recommendation for ICC referral was a game-changer, and in March 2005, the UNSC, through Resolution 1593, referred the situation to the ICC. This was a historic move, but its effectiveness was immediately challenged by Khartoum's non-cooperation and a refusal to hand over indicted individuals. The ICC's pursuit of justice culminated in the 2009 arrest warrant for President Omar al-Bashir for war crimes and crimes against humanity, later expanded to include genocide in 2010. While a momentous legal development, it proved to be a double-edged sword. Al-Bashir used the indictment to consolidate domestic support and, in a retaliatory move, expelled 13 international aid organizations from Darfur, placing millions of civilians at risk.

6.3.2 The Failures of Peacekeeping Missions

The peacekeeping effort in Darfur was marked by a series of ad-hoc and ultimately inadequate missions. The initial African Union Mission in Sudan (AMIS), deployed in 2004, was a "shoestring affair".[62] It was chronically underfunded, under-equipped, and lacked a robust mandate to protect civilians. Its successor, the United Nations-African Union Mission in Darfur (UNAMID), approved in 2007, was conceived as a more robust, Chapter VII-mandated force with 26,000 personnel. However, its deployment was repeatedly obstructed by the Sudanese government, which refused to grant visas to non-African troops and denied vital air assets, such as tactical helicopters. This bureaucratic and logistical sabotage, combined with a lack of

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[61] J. Traub, *Unwilling and Unable: The Failed Response to the Atrocities in Darfur* (Global Centre for the Responsibility to Protect, 2010) [hereinafter "Traub Report"], p. 4.
[62] Traub Report, above, p. 9.

political will from troop-contributing countries, rendered UNAMID a shadow of its intended self.

6.4 The Inadequacy of Sudanese National Accountability

A central finding of the ICID was that the Sudanese justice system was "unwilling and unable" to prosecute the perpetrators of the atrocities in Darfur. This was not merely a matter of capacity but a systemic failure rooted in the country's legal and political framework.[63]

6.4.1 Systemic Legal Barriers

The Sudanese legal system, despite having some provisions for war crimes, was deeply flawed and ill-equipped to handle the scale and nature of the crimes in Darfur. The ICID identified several key deficiencies:

- **Lack of Proscription:** Sudanese criminal laws did not adequately proscribe war crimes and crimes against humanity, with the ICID noting that the definitions were often narrower than in international law. This made it difficult to frame charges against perpetrators in a way that reflected the gravity of their crimes.
- **Impunity and Immunities:** The National Security Force Act of 1999 granted wide immunities from prosecution to security agents for acts committed in the course of their duty. This provision, in effect, provided a legal shield for perpetrators. The ICID report highlights that while government officials often assured the international community that these immunities could be lifted, there was little evidence that this actually occurred, leading to a climate of near-total impunity.[64]
- **Specialized Courts:** In response to international pressure, the Sudanese government established "Specialized Courts" for Darfur. However, these courts were a "charade," operating with fundamental flaws. They often relied on confessions extracted under torture, denied the right to legal representation, and conducted trials summarily, with one report noting that death penalty cases could be heard in as little as one hour. The ICID found that these courts were not impartial and served to create a false impression of accountability rather than deliver justice.

6.4.2 Failure to Investigate and Prosecute

The failure of the national justice system was also evident in its complete inability to investigate and prosecute the vast majority of crimes committed. Despite receiving numerous reports of killings, rapes, and mass displacement, local police and judicial officials took little to no action.

[63] ICID Report, above, paras. 427–440.
[64] ICID Report, above, paras. 458–460.

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Victims often feared reprisals and lacked confidence in the system, and many complaints were simply not registered or pursued. In the few cases that did proceed, they were often against low-level perpetrators, while high-ranking officials and militia leaders, like Ahmad Harun and Ali Kushayb (who were later indicted by the ICC), remained at large or were even promoted.

6.5 Geopolitical Interests: The Silent Enablers of Atrocity

The international community's paralysis was not accidental; it was a direct consequence of the divergent and often competing interests of global powers.

6.5.1 China and the Oil Economy

China's role in the Darfur conflict was particularly significant. As Sudan's largest trading partner and a major investor in its oil industry, China was deeply intertwined with the Khartoum regime. The China National Petroleum Corporation (CNPC) held a 40 percent stake in Sudan's oil consortium, and China supplied a substantial portion of Sudan's weapons and military hardware. This economic relationship created a powerful disincentive for China to support punitive measures against Khartoum. As a permanent member of the UN Security Council, China repeatedly used its leverage, either through abstentions or the threat of a veto, to water down resolutions that would have imposed an arms embargo or oil sanctions. This dynamic allowed Khartoum to skillfully play its allies against its critics, effectively neutralizing the threat of a united international front.[65]

6.5.2 Russia and Arms Proliferation

Russia, another permanent member of the UNSC, also played a complicit role. Russia was a major arms supplier to the Sudanese government, a relationship that directly fueled the conflict. Moscow's diplomatic stance in the UNSC mirrored that of Beijing, consistently opposing measures that would have held the Khartoum regime accountable.

6.5.3 The Arab League and African Union

Many African and Arab nations were also reluctant to take a hard line against Sudan, a fellow member of the African Union (AU) and the Arab League. This position was often framed in terms of respecting sovereignty and avoiding "neocolonial" interventions. While the AU did field a peacekeeping mission (AMIS), it was widely seen as a diplomatic compromise that lacked the capacity, mandate, and political backing to be effective. This regional stance provided a crucial diplomatic firewall for Khartoum, allowing it to portray international criticism as a Western crusade against an Islamic and African state.

[65] Traub Report, above, pp. 14–16.

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6.6 The Legacy of Impunity and the "Second Genocide"

The failure to decisively intervene in Darfur has left a legacy of immense suffering and intractable challenges. By the time international attention waned and forces like UNAMID began to withdraw in 2020, the original conflict had metastasized into a complex, fragmented web of inter-communal violence, banditry, and a new power struggle between the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF), the direct successor to the Janjaweed militia.[66] The initial genocidal campaign gave way to a state of perpetual chaos, leaving millions of internally displaced persons (IDPs) and refugees trapped in camps and unable to return home.

The current civil war, which erupted in April 2023, has brought a chilling return to the tactics of the past. The RSF has been accused of committing a "second genocide" in Darfur, targeting ethnic groups like the Masalit with killings and other atrocities. This new wave of violence, compounded by the premature withdrawal of UNAMID and the humanitarian and security vacuum it created, tragically repeats the cycle of violence and impunity that defined the original conflict. The ongoing crisis stands as a stark reminder that without a determined, unified, and consistent international commitment to justice, the legacy of a past genocide can become the prelude to a new one.

7. Challenges and Critiques

The three case studies examined above – Darfur, the Rohingya, and Palestine – are not isolated failures of individual institutions but symptoms of structural weaknesses that run through the entire field of genocidal jurisprudence. This section draws together the recurring critiques that emerge from the comparative analysis.

7.1 International Courts' Jurisdiction versus Actual Power

Both the ICC and the ICJ possess extensive jurisdictional reach on paper, yet neither commands an independent enforcement mechanism of its own. The ICC has no police force and depends entirely on State cooperation to execute arrest warrants; the outstanding warrant against Omar al-Bashir, discussed in Section 6 above, went unexecuted for over a decade while he continued to travel to and be received by fellow African Union member States.[67] Similarly, ICJ judgments and provisional-measures orders are binding under Article 94 of the UN Charter, but

[66] K. Iliopoulos, *Darfur's Second Genocide: Breaking the Cycle of Violence and Impunity in Sudan* (Torkel Opsahl Academic EPublisher, 2025).

[67] See ICC, *Situation in Darfur, Sudan*, Case No. ICC-02/05-01/09, Decisions on non-cooperation (2010–2017).

enforcement ultimately requires a UN Security Council resolution – a body in which the very permanent members most likely to be implicated, or to shield an ally, hold a veto.[68] The result, visible across all three case studies, is a persistent gap between the moral and legal authority of international judgments and the practical capacity to compel compliance. Myanmar's continued appearance before the ICJ while its ruling junta remains internationally isolated, discussed in Section 5 above, illustrates the same gap from another angle: a State can participate in proceedings, and even nominally comply with reporting obligations, without altering the underlying conduct the case was brought to address.

7.2 Addressing the Root Cause

Prosecutorial and adjudicatory bodies are, by design, retrospective: they establish individual or State responsibility after atrocities have occurred, but they possess no mandate to address the underlying political, economic, or ideological conditions – land scarcity and Arabisation policy in Darfur, statelessness and majoritarian nationalism for the Rohingya, prolonged occupation and blockade in Palestine – that generate the violence in the first place. Legal accountability, however successfully pursued, therefore tends to arrive after the fact and does little on its own to prevent recurrence, a limitation starkly illustrated by the reappearance of mass violence in Darfur under the Rapid Support Forces two decades after the original ICID investigation, and, in the Rohingya case, by the Annan Commission's unheeded warnings, delivered the day before the 2017 clearance operations began, that the very conditions the Commission had documented for months were about to erupt into precisely the violence that followed.

7.3 The Impossibility of Proving Intent

As discussed in Section 4 above, *dolus specialis* is widely regarded as the single greatest evidentiary obstacle in genocide prosecutions. Because perpetrators rarely leave direct documentary proof of an intent to destroy a group *as such*, courts must infer intent circumstantially from the scale, pattern, and coordination of atrocities.[69] This is precisely the threshold that the ICID found unmet in Darfur, where the Commission concluded that the government's dominant motive was counter-insurgency rather than group destruction, despite evidence of atrocities that it itself described as no less severe than genocide. The Rohingya case presents the same difficulty in a different posture: the Fact-Finding Mission was willing to say that the crimes it documented were of a nature, gravity, and scope "similar" to situations

[68] Charter of the United Nations, Arts. 25, 94(2).
[69] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (19 April 2004), paras. 33–35.

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where genocidal intent had been established, without itself making a final determination of genocide – a determination now left to the ICJ in *The Gambia v. Myanmar*, discussed in Section 5 above, and to the ICC investigation, both of which remain pending years after the underlying events. The same evidentiary difficulty confronts the ICJ in *South Africa v. Israel*, where the ultimate merits determination will turn on whether the pattern of conduct in Gaza permits no reasonable inference other than genocidal intent.

7.4 Media Framing and Selective Attention

The volume, tone, and duration of international media coverage differ markedly across comparable atrocities, and this disparity shapes public pressure on governments and, in turn, the political will available for Security Council or ICC action. Sustained, well-resourced coverage of one crisis can coexist with comparatively muted attention to another of similar or greater severity, a pattern that critics argue reflects the geopolitical alignments and economic interests of major media markets rather than the relative scale of suffering involved.

7.5 Selective Political Will: Rwanda 1994 as a Cautionary Precedent

The 1994 Rwandan genocide remains the starkest illustration of selective political engagement: despite explicit early warnings, including a January 1994 cable from Force Commander Roméo Dallaire describing plans for mass killing, the UN Security Council instead reduced the peacekeeping force (UNAMIR) in the opening days of the genocide.[70] The United States and other Council members avoided use of the word "genocide" in official statements for weeks, reportedly out of concern that the term would trigger an obligation to act under the Genocide Convention. This precedent of selective terminology and delayed recognition recurs in each of the three case studies examined in this paper, where the timing and content of official designations of "genocide" have tracked geopolitical alignment as much as the underlying facts.

7.6 Limited Authoritative Capacity

Beyond enforcement, international bodies frequently lack the on-the-ground authority needed even to investigate effectively: UNAMID's obstruction by Khartoum, discussed in Section 6 above, is one example, as is the practical difficulty UN Commissions of Inquiry face in obtaining access to Gaza, Rakhine State, or comparable conflict zones – the Fact-Finding

[70] Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc S/1999/1257 (15 December 1999).

Mission on Myanmar was denied access to the country entirely and was forced to base its 2018 findings on refugee testimony gathered in Bangladesh together with satellite imagery. Investigations conducted without full access necessarily rely on remote testimony, satellite imagery, and open-source material, which is often robust but is also more easily contested by the accused State as incomplete or unverifiable.

7.7 Trauma and Mental Harm

Article II(b) of the Genocide Convention recognises "causing serious bodily or mental harm to members of the group" as an act capable of constituting genocide, yet mental harm is inherently more difficult to document and quantify than physical destruction.[71] The long-term psychological consequences for survivors, including displaced populations living for decades in IDP or refugee camps, as in Darfur, in the Cox's Bazar settlements housing Rohingya refugees, or under prolonged blockade, as in Gaza, are rarely captured in prosecutorial records, which tend to prioritise evidence that is legally probative of intent over the broader, harder-to-litigate harm inflicted on survivor communities.

7.8 Prevention versus Punishment

Finally, the architecture built after 1948 is overwhelmingly oriented toward punishment after the fact rather than prevention beforehand. The Genocide Convention's Article I obligation to "prevent" genocide has, in practice, been interpreted narrowly and invoked rarely as a basis for anticipatory action, most notably in the ICJ's 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, which found that a State's duty to prevent arises only once it has, or should have, become aware of a serious risk of genocide.[72] As the three case studies in this paper demonstrate, by the time sufficient evidence accumulates to support a prevention claim, the atrocities in question are typically already well underway, leaving international law to function, in practice, chiefly as an instrument of retrospective accountability rather than as the deterrent it was originally conceived to be.

8. Conclusion

Seventy-five years after the adoption of the Genocide Convention, the crime it defines remains, in Raphael Lemkin's own phrase, "a crime without a name" in one crucial respect: the

[71] Convention on the Prevention and Punishment of the Crime of Genocide (n. above), Art. II(b); see also *Prosecutor v. Akayesu* (n. above), paras. 502–504, recognising rape as a cause of serious mental harm.
[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, paras. 430–438.

international community continues to struggle to name it in real time, while atrocities are unfolding, rather than in retrospect once the evidentiary record has settled. The comparative analysis undertaken in this paper – spanning the League of Nations' collapse, the foundational Nuremberg and Tokyo trials, the codification of 1948, and the *ad hoc* tribunal jurisprudence of the 1990s – shows that each generation of legal reform has expanded the doctrinal sophistication of genocidal jurisprudence without correspondingly strengthening its enforcement capacity.

Darfur, the Rohingya, and Palestine each illustrate a different facet of this gap. In Darfur, a UN Commission of Inquiry documented atrocities that it itself described as no less severe than genocide, yet declined to make a definitive finding of State-level genocidal intent, and the ICC indictment that followed went unenforced for over a decade – only for a strikingly similar pattern of ethnically targeted violence to recur under the Rapid Support Forces two decades later. The persecution of the Rohingya shows how decades of engineered statelessness under the 1982 Citizenship Law can lay the legal groundwork for mass atrocity, and prompted a rare instance of third-party State litigation before the ICJ alongside an unprecedented, cross-border theory of ICC jurisdiction, demonstrating that avenues for accountability exist beyond the Security Council and the ICC's ordinary reach, even as enforcement of any eventual judgment would still depend on political will that has historically proven scarce. The situation in Palestine, still unresolved as of the date of this paper, shows the same evidentiary and institutional pattern under contemporary conditions: authoritative UN findings, ICJ provisional measures, and repeated General Assembly resolutions, running alongside continued military operations and civilian harm on the ground.

Across all three, the recurring obstacles identified in Section 7 – the gap between jurisdiction and enforceable power, the near-impossible evidentiary burden of proving *dolus specialis*, the selectivity of political and media attention, and a legal architecture built to punish rather than to prevent – are not incidental defects but structural features of the current system. Addressing them will require more than further doctrinal refinement of the definition of genocide; it will require closing the gap between the Security Council's veto power and the Genocide Convention's universal aspiration, strengthening independent investigative access for international bodies, and developing legal mechanisms capable of triggering preventive action before, rather than only after, the threshold of irreversible harm has been crossed. Until that gap is closed, genocidal jurisprudence risks remaining what its harshest critics allege: a body of law capable of naming atrocity with great precision, but consistently arriving too late to stop it.

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