After Myanmar

Genocide Beyond the Shoah and the Case Against Israel

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20.11.2026 doi: 10.59704/d9f2c449f7a0bf78

On 19 November 2026, the International Court of Justice found by a 9-6 vote in *The Gambia v. Myanmar* that Myanmar committed genocide against the Rohingya in northern Rakhine State. For the first time in history, the Court held a state responsible for committing genocide, and not only for failing to prevent or punish it.

What does this mean for *South Africa v. Israel*? I want to look at the judgment with two pairs of lenses. Through a formalist/legal lens, it makes the case against Israel considerably stronger. Through a realist/political lens, it may make the Court more cautious when Israel's turn comes.

The imagination of genocide as a "crime of crimes" modeled on the Holocaust runs through my readings. Dirk Moses has shown how the Holocaust came to serve as the template of genocide, against which all other mass violence is measured. As he explains in *The Problems of Genocide* (2021), against that template, violence justified by security tends to appear as secondary. To be sure, this cultural imagination never reflected where the law stood. But it has been central to Israeli as well as German public discourse, and influential far beyond the two countries. It's worth noting how *Gambia v. Myanmar* moves the law further away from it.

The Legal Lens: Multiple Intents

The Court reiterates a point that is not new to those who know the case law. Destruction of a group "is not confined to the death or biological destruction of its individual members, or even their physical harm" (para. 289). Serious bodily or mental harm can "impact the ability of the group, as such, to maintain its existence as a group" (ibid.). The Court found that some 10,000 Rohingya were killed, "1.2 per cent of the targeted population" (para. 429). This did not stand in the way of a finding of genocide. For many of us, this may be the hardest point to accept since, as I further discuss below, the Shoah is seen as the paradigm for genocide.

The finding revolves around intent. Where intent is inferred from conduct, it must be the only reasonable inference. After the *Bosnia* (2007) and *Croatia* (2015) cases, many read this test as an implicit Shoah standard. The Court now clarifies that "genocidal intent may exist alongside other intentions, provided that such intentions are not incompatible with the existence of genocidal intent" (para. 443). The test is met when "the totality of the evidence can only be explained by the perpetrator's genocidal intent" (ibid.).

Myanmar put forward three alternative intentions: counterterrorism, displacement, and punishment. The Court rejected each of them. Each has a clear analogue in Israel's defence.

Counterterrorism

Myanmar described its 2017 "clearance operations" as a response to attacks by the Arakan Rohingya Salvation Army (ARSA). The Court held that "Myanmar's assessment of ARSA as a terrorist threat does not preclude the possibility that Myanmar acted with genocidal intent" (para. 451). There was no evidence that Myanmar "distinguished between civilians and alleged ARSA fighters" (para. 453). Drawing on *Croatia*, the Court gave weight to casualties and damage "far in excess of what was justified by military necessity" (ibid.). The "targeting of children and babies, the methodical burning of villages and attacks on fleeing civilians" were inconsistent with counter-insurgency (ibid.).

Here the Court builds a bridge between international humanitarian law and genocide law. Gross

disproportion is not genocide. But, as commentators have also noted, it becomes evidence from which genocidal intent can be inferred. This is also a doctrinal answer to Moses's critique. The Shoah template imagines genocide as destruction for its own sake, and violence in the name of security as something else. The Court refuses to let a security rationale do this work. Israel's framing of its campaign as a war against Hamas now faces the same reasoning.

Displacement

In *Bosnia* and *Croatia*, an intent to expel a population counted against an inference of genocide. Myanmar invited the Court to follow that line. The Court instead held that "[t]he intent to commit forcible displacement and the intent to commit genocide may thus co-exist" (para. 456). The earlier cases, it noted, involved "an affirmative practice of transfer and evacuation" (para. 458). Here, security forces fired on fleeing Rohingya, "sinking or overturning boats they were in" (para. 460). Some were ordered "to return to their point of origin, despite their villages having been destroyed by burning" (para. 459).

The parallel to Gaza should be clear. Gazans were displaced again and again, and many were killed while displaced. Unlike the Rohingya, they had nowhere to go. The crossing to Egypt stayed closed, and the sea offered no exit. As time passed, a claim that the aim was merely displacement became less and less plausible. Even the dissent supports this point. Its displacement inference rests on flight to Bangladesh as "an available (and, as will be seen, perhaps even intended) route to safety" (Joint Dissent, para. 24). In Gaza, no such route existed.

Punishment

The Court read Myanmar as suggesting that its forces "might have intended to punish the Rohingya civilian population in retaliation for the activities of ARSA" (para. 463). Its answer is, in my view, the passage that matters most for Gaza:

> *"In the Court's view, genocidal intent is likely to be accompanied by an intent to punish, particularly in the context of collective punishment. Genocidal and punitive intentions may often be entwined in the sense that the destruction of a protected group is an extreme form of punishment, and the two intentions may not always be capable of meaningful separation for the purpose of drawing alternative inferences." (para. 464)*

The six dissenters "do not disagree with the proposition that an intent to punish may coexist with genocidal intent" (Joint Dissent, para. 91).

Despite structural racism in Israel's history, Israel's special intent in Gaza was not primarily based on race. Here too, the departure from the Shoah paradigm is significant. Racism against Gazans, and against Palestinians and Arabs generally, plainly exists in Israel. But the strongest trigger for the destruction of the Strip was the wish to avenge the victims of the horrendous acts of 7 October. That vengeance took the form of the collective destruction of Gazans. After this judgment, it is abundantly clear that an intent to punish does not, in itself, exclude genocidal intent. The two may coexist, and it may be impossible to separate them.

All three hypotheses amount to the contention: this cannot be genocide, because there was another reason. The Court's answer is that genocide usually comes with other reasons.

The Political Lens: Prediction

Oliver Wendell Holmes taught us that law is "[t]he prophecies of what the courts will do in fact, and nothing more pretentious" (*The Path of the Law*, 1897). From this angle, the takeaway from *Gambia v. Myanmar* is not as clear-cut.

The Court has long guarded genocide as the crime of crimes. Having found a state responsible for the first time, it may hesitate to do so again soon. The dissenters suggest why: "Few determinations entrusted to this Court carry consequences as grave as a finding that a State has committed genocide" (Joint Dissent, para. 97). The Court must be "equally careful not to attach the distinctive legal and moral stigma associated with genocide" to conduct falling short of the Convention (ibid.). In their view, the majority has "substantially lower[ed] the standard for indirectly proving genocidal intent" while "purporting to remain faithful to those precedents" (Joint Dissent, para. 96).

A future bench could treat this dissent as a blueprint and cabin Myanmar as an extreme case. The dissent even supplies the alternative inference. It reads the violence as "collective punishment" designed "above all, to intimidate the wider Rohingya population and to deter it from supporting ARSA" (Joint Dissent, para. 94). Israeli strategic discourse has long spoken this language of deterrence (including, e.g., in the context of house demolitions). A court looking for a way out will find one here.

Through a realist lens, whether the Court will apply that test again may depend less on its legal merits than on which States argued for it. In November 2023, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom filed a joint declaration of intervention in *Gambia v. Myanmar*. In embracing multiple intents, the Court preferred one of their arguments: "the test applies only between alternative explanations that have been found to be reasonably supported by the evidence" (para. 441, see also para. 443).

The Court admitted the joint declaration only "in so far as [it] concerned the construction of provisions of the Genocide Convention" (para. 34). From a legal point of view, such a construction cannot change with the identity of the respondent. But the realist point of view is possibly more salient here. The coalition that made a finding against Myanmar politically sustainable will not necessarily stand behind a finding against Israel. A court attentive to its own authority may be sensitive to that, even if it does not say so.

Here the Shoah paradigm returns. Germany's position in The Hague, as reflected also in *Nicaragua v. Germany*, is bound up with its memory of the Holocaust, and with so-called *Staatsräson*. To use the words of Tania von Uslar-Gleichen, Legal Adviser and Director-General for Legal Affairs, and counsel for Germany, in oral argument in *Nicaragua*: "Our history is the reason why Israel's security has been at the core of German foreign policy" (para. 7). The paradigm the Court has set aside in law may still operate inasmuch as the Court relies on German political support.

Integrating Legal, Political and Moral Lenses

Through a legal lens, then, the judgment weakens Israel's position. It brings closer the day on which the Court could find Israel responsible for genocide. Through a political lens, such weakening is not as certain. Any future decision, and especially whatever it comes to mean, can only be understood in the geostrategic context of its time.

The Israeli policy of revenge following 7 October may have been a necessary condition for the genocide. However, as political theorist Hagar Kotef has pointed out to me, within the larger historical context, it was not a sufficient one. The objection is that the destruction would not have happened without a priming by long and systematic dehumanization of Palestinians in Israeli society, which is itself a manifestation of racism. Some have indeed argued that Israel started perpetrating the genocide against Palestinians long before 7 October.

This objection does not return to a familiar story, in which genocide is the *inevitable* expression of a racism at the base of Zionism. Nor does it rely on a pre-ordained eliminatory logic of settler colonialism, which in any case has many different historical versions. It accepts that the outcomes of 7 October were historically contingent. It only insists that attention to this contingency should accompany the analysis of the racist background and not replace it. What I'm trying to highlight with my emphasis on revenge is the *condition sine qua non* not for "a genocide" but for this particular genocide. Without 7 October, there might have been no genocide against the Palestinian people. Or there might have been one, but not this genocide.

The Myanmar judgment shows how the law can hold both elements together. The Court found that "decades of discriminatory legislation and a military-sponsored hate speech campaign" created an atmosphere conducive to the violence (para. 436). That context, it held, "formed the basis of Myanmar's intention to destroy part of the Rohingya group" (ibid.). The trigger was the ARSA attacks of August 2017. The Court did not have to decide whether "structure" or

"agency" came first. It was enough that both were entwined with an ultimate intent to destroy a substantial part of the Rohingya.

The South Africa case will be decided in the gap between the law's changing imagination of genocide and the politics around the Court. But to legal and political lenses, we must add a moral one.

There will be some readers, both in Germany and in Israel, who will say that, from a moral point of view, it is desirable that there is a crime that captures the added heinousness of the Holocaust when compared to the atrocities both in Myanmar and in Gaza. The Holocaust surely has a magnitude and scope above and beyond both. But – whether one agrees with the argument or not – it is also necessary to acknowledge that the law as it stands today does not support that exceptionalism.

Moreover, when we look back both at Myanmar and at Gaza, one must acknowledge that from a moral perspective, the grave stain remains even without a legal determination of genocide. This stain arises from the facts, which are known to whoever tries to know them, and whatever their opinion on the legal question of genocide.

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SUGGESTED CITATION

Mann, Itamar: After Myanmar: Genocide Beyond the Shoah and the Case Against Israel, Verfassungsblog, 20.11.2026, doi: 10.59704/d9f2c449f7a0bf78.

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