



Exploring State Values and Interests in Pursuit of International Justice in Asia: MALAYSIA



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About the Exploring State Values and Interests in Pursuit of International Justice in Asia Report Series

At time of writing, it has been more than 7 years since the so-called ‘clearance operations’ conducted against the Rohingya people of Myanmar. Since 2017, the situation in Myanmar has deteriorated further, marked by the military coup in 2021, widespread human rights violations, and escalating armed conflict across the country. Impunity, it appears, begets instability and further impunity.

Legal accountability¹ is one part of addressing the permissiveness that enables ongoing violations.

The situation in Myanmar is representative of an ‘accountability gap’ for international crimes.² Despite ongoing proceedings in the International Court of Justice and the International Criminal Court, accountability for non-State actors for harms committed in Myanmar are limited. Universal criminal jurisdiction matters³ assist in bridging this gap, but proceedings in, for example, Argentina are geographically and culturally distant.⁴

In an Asia Justice Coalition (AJC) closed-door expert convening on universal jurisdiction in Asia, participants discussed why there are not more opportunities to pursue international justice matters in Asian domestic courts. It was acknowledged that Asia has the lowest regional uptake of the Rome Statute of the International Criminal Court and few States have incorporated international crimes into their domestic criminal codes. However, discussing why the legal avenues that do exist are not used more often, participants discussed the issue of absent political will.

Participants stated that, particularly throughout Asia, the principles of ‘sovereignty and non-interference act as practical and manufactured hurdles to bringing’ crimes committed in other States’ jurisdictions in domestic courts. Participants also pointed out that the geographical distance of international justice mechanisms from Asia ‘lends itself to States making stronger rhetorical arguments regarding violations of sovereignty and non-interference [when] the mechanisms were created not ‘by the region, for the region’.

To understand political will, participants recommended considering States’ ‘values’ and ‘interests’. The two concepts are interconnected. ‘Values’ reflect decision-makers’ understanding of a shared identity and appeal to preferences such as ‘consultation and cooperation’ and ‘adherence to the rule of law’. ‘Interests’, on the other hand, may relate to a State’s diplomacy, security concerns, or economic opportunities.

This project examines the concept of political will through the lens of values and interests in three States—Bangladesh, Indonesia, and Malaysia. While each case study addresses distinct political dynamics, all are anchored in policy responses related to crimes experienced by the Rohingya.

To inform the project, AJC and the Centre for Peace and Justice, BRAC University (CPJ) held two, two-hour closed-door discussions in February 2023 with humanitarians, academics, and lawyers from across ASEAN Regional Forum members and South Asia whose work addresses the protracted refugee situation in Bangladesh and crisis in Myanmar or related issues. Among other questions, participants were asked whether they could identify particular State ‘interests’ in or ‘values’ related to preventing or addressing impunity concerning Myanmar and where these ranked in domestic priorities. These discussions resulted in a scoping paper, upon which this report series builds. The research team is indebted to those who shared their thoughts and expertise.

The three resulting reports provide differing perspectives and approaches to understanding political will in relation to accountability for the Rohingya crisis. The Bangladesh report explores how accountability is framed in relation to the country’s primary policy objective: repatriation of the Rohingya. The Indonesia report uses an analysis based on the Narrative Policy Framework to examine how the Indonesian government’s narrative on the Rohingya crisis shifted from an initial focus on international and regional cooperation for restoring stability and humanitarian aid (2017, 2021) to prioritising national security interests (2022, 2023). The Malaysia report takes a comparative approach, examining the country’s significant engagement with the International Court of Justice in relation to crimes committed in Palestine, and assessing whether—and how—this political will might extend to accountability for crimes against the Rohingya.

Across the case studies, we identify opportunities for advocacy by reframing the pursuit of international accountability not only as a matter of values, but also as one aligned with national interests. This framing could open greater political space to promote all available accountability mechanisms—including the exercise of universal jurisdiction where available—as both a principled and pragmatic policy objective.

Papers produced within this project should not be taken to reflect the views or positions of all AJC members.

¹ Although ‘justice’ and ‘accountability’ are interlinked concepts addressing impunity, these reports adopt a distinction identified in the Asia Justice Coalition’s (AJC) Women in International Justice and Accountability consultations. For this project, ‘justice’ is broader than ‘accountability’—it is systemic, structural, holistic, and expansive. What constitutes achieving ‘justice’ is specific to the lived experience, preferences, and needs of affected individuals and communities. In contrast, ‘accountability’ is narrower—pursuing ‘accountability’ is about holding a specific individual or group responsible, including through formal legal processes. Making this distinction recognises that ‘accountability’ is a necessary, but not sufficient condition for ‘justice’. For more about AJC and its resources, please visit www.asiajusticecoalition.org.

² ‘International crimes’, here, includes the core offences found in the Rome Statute of the International Criminal Court such as genocide, crimes against humanity, and war crimes, as well as ‘torture’ defined by the United Nations Convention against Torture.

³ ‘Universal criminal jurisdiction’ refers to the capacity and competence of a State’s domestic courts to prosecute foreigners committing crimes against other foreigners and committed outside of the State. See also AJC’s primer on Domestic Justice for International Crimes. https://www.asiajusticecoalition.org/_files/ugd/811bc6_9d465765ba8848b1a980c56b9ebf50c2.pdf.

⁴ See, e.g., Global Justice Center and Burmese Rohingya Organisation UK (BROUK), ‘Update: The Universal Jurisdiction Case Against Myanmar Officials’ (February 2025) https://www.globaljusticecenter.net/wp-content/uploads/2025/02/ArgentinaMyanmarUJ_QA_UPDATE.pdf (accessed 1 April 2025).

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Introduction

This study seeks to identify the ‘values’ and ‘interests’ that underlie Malaysian decision-making⁵ in the arena of international justice to determine strategies for pursuing legal and political accountability for atrocity crimes committed, in particular, against the Rohingyas.

To do so, it first provides the methodology of the study and context regarding Malaysia’s demographics, politics, foreign policy, and relationship with international law.

It then examines Malaysia’s engagement with the International Court of Justice (ICJ), comparing Malaysia’s written statements to the Court in advisory opinions on Palestine with Malaysia’s indirect engagement with The Gambia’s contentious case against Myanmar.

Synthesising the context and case studies, the paper argues that Malaysia prioritises several values or interests namely: the value of being opposed to colonialism and its remnants; an interest in consensus-seeking and adhering to the legal international order; and the value of protecting its racial and religious identity. Notably, all these values are underpinned by one core interest which Malaysia’s engagement with international justice is ultimately conditional upon: the protection of its territorial and political sovereignty.

It finds that Malaysia adopts a pragmatic approach: while demonstrating a growing willingness to support international justice, Malaysia’s engagement is carefully calibrated to ensure it does not contravene or undermine Malaysia’s core values and interests.

⁵ Hereafter, we use terms such as ‘Malaysia’s engagement’ to mean Malaysian decision-makers’ engagement.

Methodology

As identified in this project's scoping paper, we define 'State values' as being factors which concern the identity of a State while 'State interests' are concerned primarily with more practical factors that affect decision-making. There is no doubt the line between the two concepts is blurry—dependent on their characterisation, State 'values' and State 'interests' intersect and interact. Nevertheless, the concepts are one way to categorise or distinguish between relevant factors that underlie State decision-making on accountability.

This study primarily examines Malaysia's written submissions related to two advisory opinions at the ICJ on Palestine. Examining these written submissions are important for two reasons: (1) the legal questions addressed by the advisory opinions relate to current and ongoing alleged violations of international law that relate to this project's broader theme of international accountability for atrocities; and (2) they provide detailed insight into the legal reasoning persuasive to the Malaysian government on the relevant international law and legal principles engaged in such situations—insight that is more difficult to glean from public government statements or actions.

By examining the political, cultural, and historical context, the themes emerging from these two submissions are analysed in relation to Malaysia's stance on accountability for the alleged genocide of the Rohingya people in its ASEAN neighbour, Myanmar. This example is significant because it reflects Malaysia's willingness—albeit indirectly—to address atrocity crimes in neighbouring countries, despite the ASEAN Charter's principles of respect for sovereignty and non-interference.⁶

It is conceded that examining Malaysia's engagement with these proceedings, and the arguments made in doing so, cannot provide the 'whole picture' of Malaysia's policy approach towards international accountability for atrocity crimes; indeed, the submissions are only the outcome of the myriad of influences on a complex decision-making process. Nevertheless, it is posited that the recurrent themes in these examples, informed by historical, cultural, and political context, suggest interesting patterns in Malaysia's engagement with international accountability.

In this regard, it is also apposite to note that the following study is not meant to be a normative assessment of the correctness of the values Malaysia holds nor is it meant to evaluate the fairness of Malaysia's approach to international justice; our goal is instead to illuminate some values and interests that guide the Malaysian decision-making process.

⁶ Charter of the Association of Southeast Asian Nations, (adopted 20 November 2007, entered into force 15 December 2008) (hereafter, ASEAN Charter).

Context

Themes arising in Malaysia's written submissions and indirect engagement reflect the broader context of Malaysia's demographics, politics, foreign policy, and relationship with international law.

Multi-Ethnic Demography With A 'Special Position' for Malay and Islam

Malaysia is a diverse, multi-ethnic country with a population of approximately 34 million people.⁷ The largest ethnic group is the Malay, who constitute approximately 70% of the population.⁸ Malay identity is deeply connected to Islam; Article 160 of the Malaysian Constitution partially defines 'Malay' as 'one who professes the religion of Islam' and Article 3 declares that Islam is the official religion of Malaysia (though other religions may be practiced).

Other significant ethnic groups include the Chinese Malaysians (approximately 22% of the population) and Indian Malaysians (approximately 6.5% of the population).⁹ However, Article 153 of the Malaysian Constitution enshrines a 'special position' for the Bumiputera (a designation that includes the Malay population and various indigenous peoples of Malaysia), acting as a form of affirmative action in education, employment, and land ownership.¹⁰

Constitutional Monarchy & Parliamentary Democracy Led, Until Recently, By One Coalition

Malaysia is a constitutional monarchy with a parliamentary democracy. It is also a federation consisting of 13 states and 3 federal territories. Malaysia maintains a monarchy at both the federal and state levels who play a ceremonial role in governance and are integral to the country's cultural and traditional fabric.¹¹ Federal executive power is vested in the Cabinet, led by the Prime Minister, who is the head of government and typically the leader of the majority party or coalition in Parliament.¹²

Politically, Malaysia was governed by one political coalition—Barisan Nasional—from independence until 2018. Following widespread anti-corruption sentiments,¹³ a new coalition (Pakatan Harapan) won power in 2018 led by Mahathir Mohamad, who also served as Prime Minister from 1981 to 2003. However, in 2020, several MPs defected from Pakatan Harapan to the Perikatan Nasional coalition—a newer coalition composed primarily of far-right parties with a focus on Malay nationalism—which governed until 2022. In 2022, Pakatan Harapan reclaimed victory in the general election and has remained in power at time of writing.

⁷ Department of Statistics Malaysia, 'Current Population Estimates, 2024', <<https://www.dosm.gov.my/portal-main/release-content/current-population-estimates-2024>> accessed 25 March 2025.

⁸ *ibid*, infographic available https://www.dosm.gov.my/uploads/release-content/file_20240731111621.pdf.

⁹ *ibid*.

¹⁰ Regarding the construction and justification of art 153, see the Report of the Federation of Malaya Constitutional Commission 1957 (the Reid Commission), with some relevant excerpts available <https://krisispraxis.com/Constitutional%20Commission%201957.pdf>.

¹¹ The country's monarch, known as the Yang di-Pertuan Agong or King, serves as the Head of State within the framework of the Federal Constitution (see Federal Constitution art 32). Each state has its own hereditary rules for their monarchs (see Federal Constitution art 70).

¹² Parliament consists of two houses: the Dewan Rakyat (House of Representatives) and the Dewan Negara (Senate) (see Federal Constitution Article 44). Members of the Dewan Rakyat are elected by the people, while members of the Dewan Negara are appointed by the King based on the advice of the Prime Minister and state governments.

¹³ See, e.g., Hannah Ellis-Petersen, '1MDB Scandal Explained: A Tale of Malaysia's Missing Billions' (The Guardian, 28 July 2020) <https://www.theguardian.com/world/2018/oct/25/1mdb-scandal-explained-a-tale-of-malysias-missing-billions>.

Non-Aligned, Anti-Colonial Foreign Policy

Malaysia gained independence in 1957. While largely pro-Western in its foreign policy in the 1950s and early 1960s, Malaysia shifted to an approach of neutrality from the late 1960s onwards.¹⁴ This shift continued into the next decade with Malaysia joining the Non-Alignment Movement, a coalition of States not formally aligned with or against any major power bloc, in 1970.¹⁵

Malaysia's neutral foreign policy stance shifted decisively against the West under the leadership of Prime Minister Tun Dr Mahathir. Serving from 1981 to late 2003, and then again in 2018 to 2020, Mahathir publicly denounced what he characterised as the condescending and manipulative actions of 'First World' nations.¹⁶ He also voiced intense disdain for what he viewed to be Western or European principles, asserting that Europeans sought to colonise the rest of the world "directly or indirectly" and to impose "sodomy as a right", "forc[ing]" Malaysians to accept "hedonism, unlimited quest for pleasure, [and] the satisfaction of base desires, particularly sexual desires."¹⁷ The former statement suggests a policy approach stronger than 'neutrality', but rather could be characterised as decidedly anti-colonial. The latter statement's tone of moral judgment reflects an appeal to Islamic values, reinforcing Malay-Muslim identity in an era of rising political Islam.

Malaysia is an active and founding member of the Organisation for Islamic Cooperation (OIC).¹⁸ The OIC was created in the wake of a fire started in the Al-Aqsa Mosque in Jerusalem. It is on behalf of the OIC that The Gambia initiated its case in the ICJ regarding Myanmar's alleged violations of the Genocide Convention.

¹⁴ Bilveer Singh, ZOPFAN and the New Security Order in the Asia-Pacific Region. (Pelanduk Publications, 1992) 25-26, as cited in Mitsuomi Ito, 'The Path to Malaysia's Neutral Foreign Policy in the Tunku Era', (2015) 30 SARJANA 71, 72. Mitsuomi notes further that, for instance, in late 1962, Malaysia's then-Prime Minister Tunku Abdul Rahman stated in Parliament that: "[o]ur foreign policy is... neutral to the extent that we understand the meaning of the word neutral...", however, "[w]here there has been a conflict between democracy and communism, we side with the West and the Western understanding of democracy' (Ito 75, further citations omitted). In 1968 under the same government, Malaysia's then-Deputy Prime Minister Tun Razak answered a question describing Malaysia's approach as 'independent foreign policy' after visiting Russia in 1968. (Ito 76, further citations omitted).

¹⁵ Embassy of Malaysia, Harare, 'News from Mission: 17th Summit of the Non-aligned Movement (Nam) Isla Margarita, Venezuela, 17-18 September 2016' https://www.kln.gov.my/web/zwe_harare/news-from-mission/-/blogs/6690524.

¹⁶ See e.g. 'Mahathir's Speech at Oxford: Reasoning about the West' (1996) 12 Jurnal Komunikasi 173, https://journalarticle.ukm.my/4805/1/V12_1.pdf; and 'Mahathir: Beware of the West' (Al Jazeera, 19 June 2003) <https://www.aljazeera.com/news/2003/6/19/mahathir-beware-of-the-west>. More generally, see Boo Teik Khoo, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (Oxford University Press, 1995).

¹⁷ Speech by Dr Mahathir Mohamad, (19 June 2003) <https://www.islamicity.org/2075/mahathirs-speech-on-a-changed-world/>. See also Baradan Kuppusamy, 'Mahathir Takes Parting Shot at Anglo-Saxon Vices' (South China Morning Post, 20 June 2003) <https://www.scmp.com/article/419173/mahathir-takes-parting-shot-anglo-saxon-vices>.

¹⁸ See e.g. Malaysian Ministry of Foreign Affairs, 'Message from the Honorable Dato' Sri Mohd Najib Tun Haji Abdul Razak, Prime Minister Of Malaysia, on the Commemoration of the 40th Anniversary of the Establishment of the Organisation of Islamic Conference' (25 September 2009) https://www.kln.gov.my/web/guest/home/-/journal_content/56/10136/180884?refererPId=10139.

This anti-Western, anti-colonial shift and protection of Islamic values manifested in the Mahathir government's creation of an official order of priority for Malaysia's foreign policy.¹⁹ Under this re-prioritisation, engagement with the ASEAN ranked first because ASEAN was a regional grouping of all neighbouring states. Engagement with Islamic countries ranked second, because of Malaysia's position as an Islamic country and the increasing influence of Islam in Malaysian national affairs.²⁰ The third priority was the Non-Aligned Movement. The fourth and last priority was the Commonwealth—indeed, a marked difference from foreign policy of the 1950s and 1960s.

Broadly speaking, this shift in foreign policy remains to this day. Of note is the further strengthening of ties with ASEAN and the continuing rejection of Western approaches to democracy and human rights.

¹⁹ For this order of priority, see: Khoo (n 16) 74; and Chamil Wariya, *Dasar Luar Era Mahathir* (Fajar Bakti, 1989) 36; and Munir Majid, 'Knocking Foreign Policy into Shape' (New Straits Times, 25 May 1983) available <http://lib.perdana.org.my/PLF/Digitisation/OCR/OCR4-NAIMAH/1968-1983/1983/00000790.pdf>

²⁰ See Michael Barr and Anantha Raman Govindasamy, 'The Islamisation of Malaysia: Religious Nationalism in the Service of Ethnonationalism' (2010) 64 *Australian Journal of International Affairs* 3, 293 noting: 'The subordination of Islamic identity to Malayness appeared to begin changing with the Islamisation program initiated by Prime Minister Dr Mahathir Mohamad, and there cannot be much doubt about Dr Mahathir's motivation. As Cheah (2002: 213) expressed it succinctly: Dr Mahathir "attempted to curb [a recent rise in] Islamic extremism and militancy among some sections of Muslim intellectuals by playing an 'Islamic card'". The causes of the original rise in Islamic consciousness and militancy cannot preoccupy us in this short article, but we might note that Chandra (1987) explained this outburst of Islamisation as the outcome of spiritual alienation faced by Malays in the rapid urbanisation and westernisation of the country. On the other hand, Amrita (2003: 258) put some of the responsibility for escalating it onto Mahathir himself by arguing that the political rivalry between the ruling UMNO [United Malays National Organisation party] and the opposition PAS [a conservative Islamist party supporting a hardline interpretation of Islamic law] was itself a driver of Islamism. Farish (2003: 199) came close to making the same point when he referred to "the Islamization race between PAS and the UMNO-led Barisan Nasional (National Front) government that took place in the 1980s and 1990s".'

Much of the current Malaysian foreign policy draws its roots from Tun Mahathir's time; this does not come as a surprise considering Tun Mahathir's brief tenure as Prime Minister between 2018-2020.

Since Dato' Seri Anwar Ibrahim became Prime Minister of Malaysia in 2022, the country has demonstrated a renewed commitment to strengthening its ties within ASEAN. Malaysia is set to assume the ASEAN chairmanship in 2025, and the Prime Minister has emphasised themes of 'Inclusivity and Sustainability' for this leadership role.²¹ His recent appointment of former Thai Prime Minister Thaksin Shinawatra as an informal advisor²² and continued commitment to building a bridge linking Kelantan to Thailand²³ underscores Malaysia's intention to leverage regional expertise and enhance collaboration among Member States. The current Prime Minister has repeatedly stressed the need for 'cooperation' between ASEAN states and has issued stern reminders to member states that they should 'reject overtures that are predisposed to cause division'. The Malaysian Prime Minister has also pointed out that all decisions will be made by consensus when Malaysia takes on the mantle of ASEAN chair. Indeed, this consensus-building is demonstrated also by Malaysia's expression of willingness to mediate conflicts within the ASEAN²⁴ region; relevant to this discussion, the Foreign Minister previously indicated an intention to use the ASEAN Chairmanship to play the role of mediator regarding the conflict in Myanmar.²⁵

The focus on shifting towards non-traditional superpowers can also be demonstrated by Malaysia very recently becoming a partner country of BRICS, a coalition of non-Western global superpowers.²⁶ Minister of Economic Affairs Rafizi Ramli²⁷ said that this application is 'centred on building economic partnerships, strengthening trade ties and expanding our growth potential'. Notably, the theme of countering Western superiority features in some of Rafizi's remarks on BRICS; he noted that 'the countries of the Global South have continued to be marginalised, and remain under-represented, and the rise of protectionism cripples smaller countries from getting ahead'.

Dato' Seri Anwar has also expressed a critical view of the Western approach to human rights and democracy, emphasising that the Islamic community should not be judged by Western standards, and has said that there is no need for Western countries to teach the Islamic world the meaning of democracy and human rights.²⁸ He has also been particularly critical of the Western coverage of the Israel-Palestine conflict²⁹ and has also issued strong reminders to the West that Malaysia will not move away from China despite Western suggestions that they should.³⁰

²¹ Malaysian Ministry of Foreign Affairs, 'Launching Ceremony of the Logo and Theme of ASEAN-Malaysia Chairmanship 2025' (22 October 2024) <https://www.kln.gov.my/web/guest/-/launching-ceremony-of-the-logo-and-theme-of-asean-malaysia-chairmanship-2025-22-october-2024#:~:text=Malaysia%20will%20officially%20assume%20the,regional%20peace%2C%20stability%20and%20prosperity>.

²² Efe Ozkan, 'Malaysian Premier Appoints Ex-Thai PM Thaksin as Adviser for ASEAN Presidency Next Year' (Anadolu Ajansı, 16 December 2024) <https://www.aa.com.tr/en/asia-pacific/malaysian-premier-appoints-ex-thai-pm-thaksin-as-adviser-for-asean-presidency-next-year/3425781>.

²³ 'Malaysia Appoints Thaksin as Informal Advisor on Asean' (Bangkok Post, 16 December 2024) <https://www.bangkokpost.com/thailand/general/2920700/malaysia-appoints-thaksin-as-informal-advisor-on-asean>.

²⁴ 'With Malaysia Now Leading Asean, PM Anwar Vows All Decisions Will Follow Consensus' (Malay Mail, 12 October 2024) <https://www.malaymail.com/news/malaysia/2024/10/12/with-malaysia-now-leading-asean-pm-anwar-vows-all-decisions-will-follow-consensus/153329>.

²⁵ Tarrance Tan, 'Myanmar Open to Peace Talks, M'sia Keen to Play Mediator, Says Tok Mat' (The Star, 11 October 2024) <https://www.thestar.com.my/news/nation/2024/10/11/myanmar-open-to-peace-talks-msia-keen-to-play-mediator-says-tok-mat>.

²⁶ Dhesegaan Bala Krishnan, 'Malaysia Is Officially a Brics "Partner Country" Now — Why, and What Does This Mean?' (Malay Mail, 26 October 2024) <https://www.malaymail.com/news/malaysia/2024/10/26/malaysia-is-officially-a-brics-partner-country-now-why-and-what-does-this-mean/154779>.

²⁷ BERNAMA, 'Malaysia Sees Tremendous Synergies between Asean and BRICS – Rafizi' (New Straits Times Online, 25 October 2024) <https://www.nst.com.my/news/nation/2024/10/1125046/malaysia-sees-tremendous-synergies-between-asean-and-brics-rafizi>.

²⁸ 'No Need For Western Countries To Teach Islamic World Meaning Of Democracy, Human Rights - Anwar' (BERNAMA, 25 August 2024) <https://www.bernama.com/en/news.php?id=2333189>; 'Western Nations Needn't Teach Islamic World About Democracy, Human Rights — PM' (Selangor Journal, 25 August 2024) https://selangorjournal.my/2024/08/western-nations-neednt-teach-islamic-world-about-democracy-human-rights-pm/#google_vignette.

²⁹ BERNAMA, 'Anwar Condemns Western Bias in Gaza Discourse, Calls for Consistency on Human Rights Issues' (The Sun, 12 November 2024) <https://thesun.my/malaysia-news/anwar-condemns-western-bias-in-gaza-discourse-calls-for-consistency-on-human-rights-issues-HH13278609>.

³⁰ 'PRIME MINISTER ANWAR: You know these [are] difficult questions to be addressed to the host. But anyway, my reference to China-phobia is because the criticism levied against us for giving additional focus to China – my response is, trade investments [are] open and right now China seems to be the leading investor and trade into Malaysia. Cumulatively still, United States of America, it's an open trading policy to encourage investments overseas from foreign countries. *But we are an independent nation, we are fiercely independent. We do not want to be dictated by any force.*

So, once we remain to be an important friend to the United States or Europe and here in Australia, they should not preclude us from being friendly to one of our important neighbours, precisely China' (emphasis added). As cited in:

Lim Teck Ghee, 'Malaysian PM Anwar Ibrahim Provides Australia With Foreign Policy Lessons – OpEd' (Eurasia Review, 6 March 2024) <https://www.eurasiareview.com/06032024-malaysian-pm-anwar-ibrahim-provides-australia-with-foreign-policy-lessons-oped/>.

Relationship with International Law on Rights & Accountability

Malaysia's pragmatic neutrality, anti-colonial stance, and emphasis on Islamic values helps to explain Malaysia's relationship with international law.

As a dualist legal system, Malaysia's domestic law requires treaties and customary international law to be incorporated into domestic law by Parliament to have legal effect.³¹ Malaysia has been cautious about signing and ratifying treaties³² that could conflict with its racial, ethnic, or religious identity, such as may be related to Islam as the State religion and affirmative action policies for the Bumiputera.³³ Of particular note for this study are Malaysia's decisions not to sign the International Covenant on Civil and Political Rights (ICCPR) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

For example, following his return to power, Prime Minister Tun Mahathir addressed the United Nations (UN) General Assembly in September 2018, stating that the 'new Malaysia will firmly espouse the principles [...] of truth, human rights, the rule of law, justice, fairness, responsibility and accountability, as well as sustainability' and that his new government 'pledged to ratify all remaining core UN instruments related to the protection of human rights.'³⁴ The Prime Minister's commitment to signing and ratifying treaties such as the ICCPR and ICERD appeared to be backed by government minister alignment; in October 2018, the National Unity and Social Wellbeing Minister Waytha Moorthy stated publicly, 'The commitment [to ratify the remaining treaties] is not only by me but also by the Minister in the Prime Minister's Department for Religious Affairs Datuk Mujahid Rawa. It is further strengthened with the statements of Foreign Minister Datuk Saifuddin Abdullah and Prime Minister Tun Dr Mahathir Mohamad at the United Nations General Assembly recently'.³⁵ This included the ICCPR and ICERD.

In a November 2018 parliamentary sitting on ICCPR ratification, the then-Minister of Foreign Affairs Datuk Saifuddin Abdullah suggested that Malaysia needed to improve its human rights performance³⁶ and, by signing the treaty, Malaysia could become an active player on the international stage.³⁷ This interest in Malaysia's diplomatic standing explains, at least in part, why a historically sceptical Prime Minister and key leadership, including the Minister for Religious Affairs, could see a benefit in signing on to treaties that relate to domestic law so central to Malaysian State identity. However, the government's arguments were met with hostility by Members of Parliament (MPs); the parliamentary record indicates that MPs argued, among other things,³⁸ that: there were no human rights problems in

³¹ The executive possesses the power to make and sign treaties, while the power to give effect to those treaties is reposed in Parliament. See Federal Constitution art 76 and *Air Asia Bhd v Rafifah Shima bt Mohamed Aris* [2014] 5 MLJ 318 at [41]: 'The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the executive possesses the treaty-making capacity while the power to give effect domestically rests with parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by parliament.'

³² For definition of terms related to treaty signature, accession, or ratification, see https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#:~:text=Signature%20Subject%20to%20Ratification%2C%20Acceptance%20or%20Approval,-Where%20the%20signature&text=The%20signature%20qualifies%20the%20signatory,the%20purpose%20of%20the%20treaty.

³³ At time of writing, Malaysia is a party to only three out of the nine core human rights treaties and is not a party to the Rome Statute for the International Criminal Court. Malaysia is a signatory to the Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). For a list of the nine core human rights treaties, see the UN treaty database. '<https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>.'

³⁴ '[Speech Text] Dr Mahathir at 73rd UN General Assembly' (New Straits Times Online, 29 September 2018) <https://www.nst.com.my/news/nation/2018/09/415941/speech-text-dr-mahathir-73rd-un-general-assembly>.

³⁵ 'Minister: Govt to Ratify Convention on Racial Discrimination, Five Other Treaties in Q1 2019' (Malay Mail, 24 October 2018) https://www.malaymail.com/news/malaysia/2018/10/24/minister-govt-to-ratify-six-treaties-including-icerd-in-2019/1686303#google_vignette.

³⁶ Malaysian Parliament, 'Penyata Rasmi Parliamen Dewan Rakyat (21 November 2018)' available <https://parlimen.gov.my/files/hindex/pdf/DR-21112018.pdf>. Translated by the author, the original reads: 'Bahawa kita harus meningkatkan prestasi hak asasi manusia kita sendiri'.

³⁷ *ibid*. Translated by the author, the original reads: 'Kita boleh menjadi pemain yang aktif di persada antarabangsa'.

³⁸ A fourth issue appears to have been conflation between the International Covenant on Civil and Political Rights (ICCPR) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as one MP confused the treaties and had to be corrected by the Ministry of Foreign Affairs. As translated by the author, the original reads: 'Saya berterima kasih kepada Yang Berhormat Pasir Gudang. Yang Berhormat Pasir Gudang menyebut tentang ICERD tetapi soalan Yang Berhormat Pasir Mas ialah tentang ICCPR. Namun saya memahami semangat di sebalik apa yang disebutkan oleh Yang Berhormat Pasir Gudang'.

Malaysia that required addressing;³⁹ anti-discrimination provisions in the ICCPR would affect the Bumiputeras' 'special position' under the Federal Constitution;⁴⁰ and ICCPR Article 18—which enshrines freedom of religion—would affect laws which currently do not allow Muslims to convert out of Islam.⁴¹ To date, Malaysia has not ratified the ICCPR.

Likewise, the government's intention to ratify the ICERD was also strongly opposed by opposition parties⁴² and sections of the Malay-Muslim public.⁴³ As with the ICCPR, MPs suggested that ratifying the ICERD would conflict with the Bumiputeras' constitutionally protected 'special position'.⁴⁴ Building on this opposition, a large grassroots protest was organised against ICERD ratification⁴⁵ and the government announced its decision to scrap plans to ratify ICERD on 23 November 2018.⁴⁶

Related to accountability for atrocity crimes, Malaysia is not a Party to the Rome Statute of the International Criminal Court, despite announcing that it would accede to the Rome Statute in March 2019.⁴⁷ Only a month after announcing its decision to accede, Malaysia withdrew the decision, citing 'political confusion' about what accession meant.⁴⁸ More than 'political confusion', the then-opposition leader Ismail Sabri Yaakob argued that any laws affecting the Malay Rulers' interests should not be enacted without the Conference of Rulers' permission.⁴⁹ Likewise, claims were made that accession to the Rome Statute would harm the position of Islam in the country.⁵⁰

³⁹ *ibid.* As translated by the author, in response to the Foreign Minister, a Member of Parliament (MP) from the Parti Islam Se-Malaysia (Pan-Malaysian Islamic Party, PAS) stated: 'We don't have a problem with human rights. Is our Bumiputera special privileges, the rights of Bumiputera, considered a human rights issue, discrimination? Bumiputera includes not only Malays but also indigenous people in Sabah, including natives in Sabah itself. You all from Sabah not fighting for this? Remain silent....' In response, the Minister of Foreign Affairs stated: 'So, the issues raised don't arise. However, ... if I may suggest, the Honourable Member should read [reports by NGOs and the Human Rights Commission of Malaysia on discrimination issues]. If the Honourable Member for Pasir Salak says there is no discrimination and so on, I don't know in what world the Honourable Member is living.'

⁴⁰ *ibid.* The specific provision that the relevant Ministers fear is not cited, but it is likely to be ICCPR Article 26 enshrining the right to equality. As translated by the author: Dato' Sri Haji Tajuddin bin Abdul Rahman [Pasir Salak]: 'Mr. Speaker, what is brought up by the Minister in the Prime Minister's Department followed by the Foreign Minister is discrimination against the non-Bumiputeras. That is what the convention aims to address. Yes, don't shake your head. I know you. You are very liberal.' In response to the Minister of Foreign Affairs, the same MP stated: 'You are prepared to sell your own people [in reference to Bumiputeras].'

⁴¹ *ibid.* An MP also raised (as translated by the author): '... I would like to mention that Article 18 of the ICCPR guarantees freedom of religion, including the right for Muslims to leave their religion. Although the Honourable Minister mentioned that we can implement some reservations, to what extent can we sustain these reservations that will always be subject to review, with permission, every four years? This exposes the government to the risk of having to withdraw these reservations under international pressure.'

⁴² The leader of the opposition political party PAS, Abdul Hadi Awang, said 'Muslims, the religious, the bumiputera and all races must unite to oppose the ICERD agenda, because its concept is not based on religion or humanity'. 'Malaysia Backpedals on U.N. Race Measure in Face of Protests' (Reuters, 23 November 2018) <https://www.reuters.com/article/idUSKCN1NS143/>. Likewise, several parties within the Pakatan Harapan also set out their express opposition to ratifying ICERD, in particular AMANAH and BERSATU. AMANAH (or the National Trust Party, a moderate Islamic party), suggested that ICERD was contrary to national culture and the Federal Constitution. See Norrasyidah Arshad, 'AMANAH Tolak ICERD' (Berita Harian, 14 November 2018) <https://www.bharian.com.my/berita/nasional/2018/11/497792/amanah-tolak-icerd>. BERSATU (or the Malaysian United Indigenous Party, a nationalist party that is also abbreviated as PPBM) took the stance that there was no necessity to sign ICERD and other issues should be given priority. Nor Fazlina Abdul Rahim, 'PPBM Reiterates Rejection of ICERD, Says It Is "Unnecessary"' (New Straits Times Online, 17 November 2018) <https://www.nst.com.my/news/politics/2018/11/432227/ppbm-reiterates-rejection-icerd-says-it-is-unnecessary>.

⁴³ See, e.g., the statement by the MP from Pasir Gudang: 'Ini bukan orang UMNO, bukan orang PAS, ini orang Melayu biasa, orang Islam biasa memberitahu saya bahawa kalau boleh tangguhlah dahulu perkara ratifikasi...'. As translated by the author, this reads: 'These are not politicians but ordinary Malay people and Muslims saying that the signing of ICERD should be postponed'. Malaysian Parliament, 'Penyata Rasmi Parliamen Dewan Rakyat (21 November 2018)' available <https://parlimen.gov.my/files/hindex/pdf/DR-21112018.pdf>

⁴⁴ Minderjeet Kaur, 'Chaos at Dewan Rakyat over Waytha's Speech on ICERD' (Free Malaysia Today, 19 November 2018) <https://www.freemalaysiatoday.com/category/nation/2018/11/19/chaos-at-dewan-rakyat-over-waythas-speech-on-icerd/>.

⁴⁵ The protest was organised for 8 December 2018; after the scrapping of government plans, it went on as a celebration of non-ratification. Kate Mayberry, 'Malaysia: Malays Rally amid Worries over Government "Weakness"' (Al Jazeera, 8 December 2018) <https://www.aljazeera.com/news/2018/12/8/malaysia-malays-rally-amid-worries-over-government-weakness>. Tashny Sukumaran, 'Malaysia's Mahathir Dumps Pledge to Ratify UN Treaty on Racial Discrimination' (South China Morning Post, 23 November 2018) <https://www.scmp.com/week-asia/politics/article/2174750/malaysias-mahathir-dumps-pledge-ratify-un-treaty-racial>.

⁴⁶ 'Notification of Malaysia's Accession to the Rome Statute' (4 March 2019) UN Doc. C.N.69.2019.TREATIES-XVIII.10 <https://treaties.un.org/doc/Publication/CN/2019/CN.69.2019-Eng.pdf>.

Malaysia is a Party to the Geneva Conventions of 1949, which are perhaps the most well-known legal standards for humanitarian treatment during armed conflict.⁵¹ However, as incorporated into Malaysian criminal law,⁵² the crime of ‘grave breaches’ of the Geneva Conventions does not automatically apply to non-international armed conflicts, which limits its relevance in matters related to both Palestine and Myanmar.

Perhaps more relevant to this study, however, Malaysia acceded to the Genocide Convention in December 1994.⁵³ Nonetheless, Malaysia entered a reservation to Article IX on the ICJ’s jurisdiction to hear disputes regarding the Convention. Malaysia’s reservation states that Malaysia must give its ‘specific consent’ ‘before any dispute to which Malaysia is a party may be submitted to the jurisdiction of the [ICJ] under this article.’⁵⁴ The reservation means that Malaysia retains control over when and how it participates in legal disputes under the Convention.

Together, this cautious engagement with international legal instruments appears to reflect Malaysia’s prioritisation of its sovereignty.

⁴⁸ ‘Malaysia Withdraws from the Rome Statute’ (The Star, 5 April 2019)

<https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute/>.

⁴⁹ See Article 3(2) and Article 38 of the Federal Constitution.

⁵⁰ ‘PAS Welcomes Malaysia’s Withdrawal from Rome Statute’ (Malay Mail, 6 April 2019)

https://www.malaymail.com/news/malaysia/2019/04/06/pas-welcomes-malaysias-withdrawal-from-rome-statute/1740502#google_vignette

; However, cf, ‘M’sia Should Ratify Rome Statute, Says Bar Chief’ (The Star, 16 January 2024)

<https://www.thestar.com.my/news/nation/2024/01/16/msia-should-ratify-rome-statute-says-bar-chief>.

⁵¹ See International Committee of the Red Cross, ‘Treaties and States Parties’ International Humanitarian Law Databases,

<https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties>.

⁵² The Geneva Conventions Act 1962 (MY).

⁵³ United Nations Treaty Collection, ‘List of Parties: Convention on the Prevention and Punishment of the Crime of Genocide’

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4.

⁵⁴ *ibid.* At time of writing, 12 other Parties to the Genocide Convention (out of 153 total) maintain similar Article IX declarations or reservations.

Engagement With International Court Of Justice Cases

Malaysia has not incorporated international crimes into its domestic legislation, meaning that it is unable to try such crimes in its domestic courts. Likewise, without being a member of the International Criminal Court, it is difficult to draw further conclusions on Malaysia's approach to accountability for atrocity crimes beyond the withdrawal of its accession to the Rome Statute.

However, by virtue of being a member of the United Nations, Malaysia is a member of the International Court of Justice (ICJ).⁵⁵ While not a mechanism for criminal accountability, the ICJ does adjudicate allegations of violating treaty obligations, including relating to accountability for atrocity crimes such as under the Genocide Convention. The ICJ hears contentious cases and holds advisory proceedings.

Contentious cases involve disputes between States. Malaysia has been a party in a total of four contentious cases, each addressing issues of territorial sovereignty.⁵⁶ Territorial disputes are expected for any State, but all-the-more so given Malaysia's geographical position in a region with complex colonial legacies and overlapping territorial claims. Although the Court's rulings in such cases do not set binding precedent for future disputes, they are binding on the parties directly involved.⁵⁷

Advisory proceedings enable UN organs and agencies to request the Court's opinion on legal questions. While advisory opinions are not legally binding, they offer valuable guidance on how the Court interprets international legal obligations, including those found in treaties. Malaysia has supported—and in some cases actively intervened—in several advisory proceedings related to upholding human rights and addressing or preventing atrocity crimes.⁵⁸

Because advisory proceedings are non-adversarial and do not require States to provide written or oral statements, Malaysia's voluntary participation in such proceedings provides a clearer reflection of its 'interests' and 'values'.

⁵⁵ Charter of the United Nations, (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, ch XIV (hereafter, UN Charter).

⁵⁶ They include: Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore); Application for revision of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v Singapore); and Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v Singapore). It is interesting to note the similarities below in international disputes where it involves the demarcation of territorial boundaries and who said territory belongs to.

⁵⁷ By signing the UN Charter, States agree to comply with ICJ rulings if they are a party to the case. For a backgrounder on the ICJ, see https://www.asiajusticecoalition.org/_files/ugd/811bc6_c7ed2263f913411ab45f2af185325816.pdf

⁵⁸ In addition to those discussed here, see also: Malaysia's support for UN General Assembly Resolution A/RES/71/292 requesting an advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius Malaysia's note verbale in advisory proceedings regarding the Legality of the Threat or Use of Nuclear Weapons and Malaysia's written statement in advisory proceedings regarding the Legality of the Use by a State of Nuclear Weapons in Armed Conflict. Additionally, note that Malaysia submitted to the ICJ advisory proceedings regarding lawsuits filed in Malaysia against Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights (Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights). Domestically, the Malaysian High Court recognised that Malaysia voluntarily agreed to accept the ICJ's decision—although in an advisory opinion—as binding. See *Insas Bhd v Dato' Param Cumaraswamy* [2000] 4 MLJ 727.

Malaysia's Engagement With Advisory Proceedings Related To Palestine

Malaysia's voluntary participation in advisory proceedings related to Palestine is of interest because of the country's historical advocacy for Palestinian rights, a long-standing cornerstone of Malaysian foreign policy.⁵⁹ In 1981, the Palestinian Liberation Organization (PLO) was given permission to open an office in Kuala Lumpur, which was eventually recognised as an official embassy for Palestine in 1988.⁶⁰ Moreover, does not diplomatically recognise Israel and the limited commercial relationships between Malaysian and Israeli⁶¹ entities were diminished with a December 2023 ban by Malaysia of all ships that are Israeli owned, Israeli flagged or heading to Israel, preventing docking at Malaysian ports.⁶²

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

The advisory opinion entitled *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (The Wall Advisory Opinion) addressed the legality under international law of Israel's West Bank barrier.⁶³ Malaysia actively supported the ICJ's hearing of the matter, co-sponsoring the UN General Assembly resolution that requested it⁶⁴ and submitting a written statement to the Court.⁶⁵

Briefly, Malaysia's written statement argued that the ICJ had jurisdiction to issue an advisory opinion in the matter⁶⁶ and that the legal status of the territory precluded Israel from constructing the Wall.⁶⁷ This was because the Wall constituted a separation line that violated obligations to respect the Green Line⁶⁸ and infringed upon territorial integrity,⁶⁹ the right to self-determination,⁷⁰ and the human rights of the Palestinian people.⁷¹ Malaysia also asserted that the Wall constituted a violation of international humanitarian law⁷² and infringed upon the obligation to abstain from unilateral measures undermining a solution to the conflict.⁷³ Finally, Malaysia argued that self-defence and combating terrorism cannot serve as legal justifications for constructing the Wall.⁷⁴

⁵⁹ Dr Nor Aishah Hanifa, 'Opinion: Pragmatism and National Interests Determine Malaysia's Foreign Policy Towards Palestine' (Middle East Monitor, 2 October 2023),

<https://www.middleeastmonitor.com/20231002-pragmatism-and-national-interests-determine-malaysias-foreign-policy-towards-palestine/>.

⁶⁰ Maren Koss, 'Insight 197: The Malaysian-Palestinian Relationship and Transnational Networks: Civil Society Activism, Politics, and Co-Constitution of Interests' (National University of Singapore Middle East Institute, 8 January 2019)

<https://mei.nus.edu.sg/publication/insight-197-the-malaysian-palestinian-relationship-and-transnational-networks-civil-society-activism-politics-and-co-constitution-of-interests/>.

⁶¹ 'Malaysia Never Recognised Israel, Stands Firm with Palestinians, Says PM' (Free Malaysia Today, 16 November 2024)

<https://www.freemalaysiatoday.com/category/nation/2024/11/16/malaysia-never-recognised-israel-stands-firm-with-palestinians-says-pm/>.

⁶² Heather Chen, 'Malaysia Bans Israeli Owned and Linked Shipping Citing "Cruelty against the Palestinian People"' (CNN, 20 December 2023) <https://edition.cnn.com/2023/12/20/asia/malaysia-israel-shipping-ban-palestine-support-intl-hnk/index.html>.

⁶³ *Legal Consequences of the Construction of a Wall* (ICJ Advisory Opinion) 2004 <https://www.icj-cij.org/index.php/case/131>.

⁶⁴ Shortly after the resolution requesting an Advisory Opinion, Malaysia co-sponsored a resolution declaring that the Palestinian territory, including East Jerusalem, was being militarily occupied by the State of Israel (A/58/L.61/Rev.1). For this, the Palestinian delegation to the 58th General Assembly included Malaysia in a speech expressing their gratitude: 'We would like to express our sincere and profound thanks to all States Members of the United Nations that supported today's resolution. We thank in particular the sponsors of the resolution, including Malaysia, and the other States that supported it from the outset...'

⁶⁵ 'Written Statement by Malaysia' *Legal Consequences of the Construction of a Wall* (ICJ Advisory Opinion, 30 January 2004)

<https://www.icj-cij.org/sites/default/files/case-related/131/1625.pdf> (hereafter, Malaysia 2004 Written Statement). Note also Malaysia's

involvement in the written statement provided by the Organisation for Islamic Cooperation (OIC) available https://www.icj-cij.org/sites/default/files/case-related/131/1589.pdf?__cf_chl_tk=GjqccQG8VNMVsfyDk189TNdb_Fj9oI8WXXHTfDWszfw-1746935893-1.0.1.1-GuU.I3jLqSzn6H5gcVtDfqF8_gQ5HZRjHe4mtQWBjY4

⁶⁶ Malaysia 2004 Written Statement [7]-[43].

⁶⁷ *ibid* [45]-[87].

⁶⁸ *ibid* [88]-[109].

⁶⁹ *ibid* [110]-[116].

⁷⁰ *ibid* [117]-[120].

⁷¹ *ibid* [121]-[128].

⁷² *ibid* [129]-[138].

⁷³ *ibid* [139]-[145].

⁷⁴ *ibid* [146]-[151].

Three points are of interest.

First, Malaysia argued that the territory in question was Palestinian⁷⁵ and militarily occupied by Israel.⁷⁶ Because of these facts, the barrier infringed the territorial integrity of Palestine. Malaysia's emphasis on territorial integrity was notable particularly when compared with other State submissions: the phrase 'territorial integrity' appears 16 times in Malaysia's written statement while it appears only three times in South Africa's written statement,⁷⁷ and zero in both Morocco⁷⁸ and Indonesia's⁷⁹ written statements.⁸⁰

Perhaps more notably, Malaysia's understanding of the right to 'territorial integrity' is expansive. Harkening back to Malaysia's anti-colonial foreign policy, Malaysia argues that, '[i]n contemporary international law States have the obligation to respect the territorial integrity *not only of other States, but also of the countries of the peoples who have not been able to achieve statehood, i.e. who are under colonial rule or foreign occupation*' (emphasis added).⁸¹ This expansive understanding of territorial integrity is then key—in Malaysia's argument—to upholding the practical effect of the barrier on Palestine's right to self-determination. The written statement notes that the UN General Assembly already recognised that this right to self-determination is owed to the people of Palestine⁸² and it is a right that has 'erga omnes' character (meaning that the obligation to protect the right is owed to the international community as a whole).⁸³ Malaysia argues: '[T]o contend that a people entitled to self-determination do not have a concrete territory is tantamount to denying them the possibility of the exercise of that right, if not the existence of the right itself⁸⁴ —in other words, upholding the right to self-determination is meaningless if not also coupled with the protection of territorial integrity.

Second, Malaysia makes an argument based on the reach of customary international law. As the Occupying Power, the written statement argues, Israel had obligations under international humanitarian law (IHL) within the Occupied Palestinian Territory⁸⁵—despite whether Israel consented to such obligations or believed they existed.⁸⁶ In support, the written statement cites the ICJ's Legality of Nuclear Weapons Advisory Opinion, noting: '[T]hese fundamental rules are to be observed by all States *whether or not they have ratified the conventions that contain them*, because they constitute intransgressible principles of international customary law' (emphasis added).⁸⁷ Such 'fundamental rules' simply 'indicate the normal conduct and behaviour expected of States'⁸⁸—meaning consent to these obligations is irrelevant because they constitute the baseline for a stable international legal order.⁸⁹

Third, Malaysia's written statement emphasises the importance of holding States accountable for treaty violations—even when Malaysia itself is not bound by the same treaties. For example, Malaysia argues that Israel's construction of the Wall infringed the civil and political rights of Palestinians, referencing

⁷⁵ *ibid* [62]-[65].

⁷⁶ *ibid* [66]-[78].

⁷⁷ 'Written Statement Submitted by the Government of the Republic of South Africa', Legal Consequences of the Construction of a Wall (ICJ Advisory Opinion, 30 January 2004) <https://www.icj-cij.org/sites/default/files/case-related/131/1597.pdf>, [14], [15], [17].

⁷⁸ 'Participation of the Kingdom of Morocco to the Procedure (Written Proceedings)' Legal Consequences of the Construction of a Wall (ICJ Advisory Opinion) <https://www.icj-cij.org/sites/default/files/case-related/131/1585.pdf>.

⁷⁹ 'Written Statement Submitted by the Government of the Republic of Indonesia' Legal Consequences of the Construction of a Wall (ICJ Advisory Opinion, 29 January 2004) <https://www.icj-cij.org/sites/default/files/case-related/131/1587.pdf>. There is, however, reference to 'territorial contiguity' in [6] and [9].

⁸⁰ Like Malaysia, each of these States are considered the so-called 'Global South', have historical experience of colonialism, and have previously been engaged in territorial disputes.

⁸¹ Malaysia 2004 Written Statement [110].

⁸² See Malaysia 2004 Written Statement [113], citing UNGA Resolution 33/24 (29 November 1978), which reaffirms 'the inalienable right of the peoples of Namibia and Zimbabwe, of the Palestinian people and of all peoples under alien and colonial domination to self-determination, national independence, territorial integrity, and national unity and sovereignty without external interference'.

⁸³ See Malaysia 2004 Written Statement [126], citing East Timor (Portugal v Australia) (Judgment) ICJ Reports 1995, [29].

⁸⁴ Malaysia 2004 Written Statement [65].

⁸⁵ *ibid* [129].

⁸⁶ *ibid* [132].

⁸⁷ See *ibid* [130], citing Legality of the Threat or Use of Nuclear Weapons (ICJ Advisory Opinion) 1996 [79].

⁸⁸ See Malaysia 2004 Written Statement [129], citing Legality of the Threat or Use of Nuclear Weapons (ICJ Advisory Opinion) 1996 [82].

⁸⁹ This study uses the phrase 'international legal order' to mean State cooperation based on the rule of law for peaceful resolution of conflicts in the international system. It does so to emphasise the reliance on existing legal norms to provide equity, stability, and predictability between States. It does not use the phrase 'rules-based international order' noting that this phrase is contested. For further discussion on the phrase

Israel's obligations as a State Party to the ICCPR.⁹⁰ This, and similar arguments made elsewhere by Malaysia regarding Israel's obligations,⁹¹ could be considered hypocritical or emblematic of selective engagement in international law. Alternatively, it could be interpreted as reinforcing the principle that States choosing to ratify treaties like the ICCPR must be held accountable for failing to uphold their obligations. This interpretation aligns with the broader notion of an international legal order which demands good-faith adherence to treaties and customary international norms.

Taken together, Malaysia seems to employ every available legal mechanism to support Palestine, highlighting both States' universal obligations under international law and consent-based commitments. This dual emphasis may reflect a concern for safeguarding the international legal order by underscoring the necessity of upholding non-derogable principles that bind all States equally and the fairness of holding States accountable for agreements they voluntarily enter.

'rules-based international order' in other contexts, see, e.g.: Rebecca Strating, 'The Rules-Based Order as Rhetorical Entrapment: Comparing Maritime Dispute Resolution in the Indo-Pacific' (2023) 44 Contemporary Security Policy 372 <https://www.tandfonline.com/doi/epdf/10.1080/13523260.2023.2204266?needAccess=true>; Dr. Julinda Beqiraj, Iris Anastasiadou, Anna Darnopykh, 'The Rules-Based International Order: Catalyst or Hurdle for International Law?' (British Institute of International and Comparative Law, March 2024) https://www.biicl.org/documents/12206_annex_4__rbio_discussion_paper_final.pdf; and John Dugard SC, 'Editorial: The Choice Before Us: International Law or a 'Rules-Based International Order'?' (2023) Leiden Journal of International Law 36, 223 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7BEDE2312FDF9D6225E16988FD18BAF0/S0922156523000043a.pdf/div-class-title-the-choice-before-us-international-law-or-a-rules-based-international-order-div.pdf>.

⁹⁰ See Malaysia 2004 Written Statement [122]-[127]; it also argues Israel has infringed the economic, social and cultural human rights of Palestinians but does not cite the International Covenant on Economic, Social, and Cultural Rights, despite Israel's obligations as a State Party. Malaysia 2004 Written Statement [128].

⁹¹ Malaysia repeated these arguments in its response to the UN Secretary General's report on the implementation of the Geneva Conventions' Additional Protocols by member countries. The relatively short, seven paragraph statement contains multiple references to the fact Israel 'blatantly disregards international law' and reiterates Malaysia's commitment against 'impunity' and support of 'human rights, the rule of law and democracy'. Notably, Malaysia calls upon Israel to comply 'with its obligations under international law including the Geneva Convention and its *Additional Protocols*'. Malaysia goes as far as to state that 'adherence to International Humanitarian Law as codified in the four Geneva Conventions and Additional Protocols, and under customary international law, can only be achieved if these *well-entrenched* International Humanitarian Law principles and practices *are strenuously upheld by the global community*' (emphasis added). Malaysian Permanent Mission to the United Nations, 'Statement by the Honourable Senator Paul Kong Sing Chu Member of Parliament and Representative of Malaysia On Agenda Item 80 Entitled "Status of Protocols Additional to the Geneva Convention of 1949 And Relating to the Protection of Victims of Armed Conflicts" at the Sixth Committee of the Sixty-Seventh Session of the United Nations General Assembly' (22 October 2012) https://www.un.int/malaysia/sites/www.un.int/files/Malaysia/67th_session/2012-10-22_geneva_convention.pdf. This is notable because Malaysia is not a signatory to the Additional Protocols of the Geneva Conventions.

The Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem

The Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (2024 Advisory Opinion) addressed the legality under international law of Israel's continued occupation of the Occupied Palestinian Territory.⁹² Like the Wall Advisory Opinion, Malaysia actively supported the ICJ's hearing of the matter,⁹³ submitting a written statement to the ICJ on 25 July 2023.⁹⁴ Notably, Malaysia also gave an oral statement on 22 February 2024.⁹⁵

In the written statement, Malaysia dedicates approximately 14 paragraphs to arguing that the Court was empowered to exercise its advisory jurisdiction,⁹⁶ compared with approximately 49 paragraphs addressing the broad 'central issue':⁹⁷ the right to self-determination.⁹⁸ This contrasts with the written statements or comments of Israel's supporters, such as the United Kingdom,⁹⁹ United States,¹⁰⁰ and Fiji,¹⁰¹ whose statements predominately make procedural arguments that the exercise of the Court's advisory jurisdiction in these circumstances was unwarranted.

Instead, the written statement examines the content of the right to self-determination. The argument takes as a starting point for defining 'self-determination' a phrase from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970 (the 1970 Declaration),¹⁰² noting 'self-determination entails that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"'.¹⁰³ From this, it then 'draw[s] out' four 'central, substantive elements of the right',¹⁰⁴ including the right to territorial integrity¹⁰⁵ also argued in the 2004 Written Statement. Additionally, Malaysia argues that the right to self-determination includes: the right of the people to national unity and the protection of their integrity as a people;¹⁰⁶ the right to permanent sovereignty over their natural wealth and resources;¹⁰⁷ and the freedom to pursue economic, social and

⁹² 'Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion) 2024 <https://www.icj-cij.org/case/186>.

⁹³ Malaysian Ministry of Foreign Affairs, 'Participation in the Public Hearings on the Request for the International Court of Justice's (ICJ) Advisory Opinion on the Issue of Palestine' (19 February 2024).

⁹⁴ 'Written Statement by Malaysia' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion, 25 July 2023) <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-30-00-en.pdf> (hereafter, Malaysia 2023 Written Statement).

⁹⁵ Malaysian Ministry of Foreign Affairs, 'Participation in the Public Hearings on the Request for the International Court of Justice's (ICJ) Advisory Opinion on the Issue of Palestine' (19 February 2024).

⁹⁶ Malaysia 2023 Written Statement [8]-[22].

⁹⁷ *ibid* [3].

⁹⁸ *ibid* [23]-[72].

⁹⁹ 'Written Statement: The United Kingdom of Great Britain and Northern Ireland' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion, 20 July 2023) <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-15-00-en.pdf>.

¹⁰⁰ 'Written Comments: United States of America' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion, 25 October 2023) <https://www.icj-cij.org/sites/default/files/case-related/186/186-20231025-wri-05-00-en.pdf>.

¹⁰¹ 'Memorial of Fiji' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion, July 2023) <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-37-00-en.pdf>.

¹⁰² Malaysia 2023 Written Statement [27], citing UNGA Res 2625 (XXV), 24 October 1970, A/Res/2625 (XXV), Annex. Footnote 40 also refers the reader to UNGA Res 1514 (XV), 14 December 1960, A/Res/1514 (XV) and, most recently, UNGA Res 77/207, 15 December 2022, A/Res/77/207.

¹⁰³ *ibid* [27].

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* [28].

¹⁰⁶ *ibid* [29].

¹⁰⁷ *ibid* [30].

cultural development.¹⁰⁸ It states, '[t]he breach of any of these elements [constitutes] a breach of the right to self-determination.'¹⁰⁹

Again, three points are of interest.

First, Malaysia's detailed definition of the constituent elements of self-determination goes beyond the importance of the right to territorial integrity noted in 2004 and the freedom to pursue economic, social and cultural development given explicitly in the 1970 Declaration. Instead, the emphasis on—as a separate element—the right of the people to national unity and the protection of their integrity as a people,¹¹⁰ appears to reflect Malaysia's interests in protecting its racial, ethnic, or religious identity.¹¹¹ The emphasis on the right to permanent sovereignty over their natural wealth and resources recalls pre-independence resource extraction.¹¹² Taken together, the four 'substantial elements' of the right reflect both its historical experiences and contemporary State interests—indeed, Malaysia explicitly links its broader statement to its own 'experience of colonial rule' and participation in the Non-Aligned Movement.¹¹³

Second, Malaysia characterises the right to self-determination as a *jus cogens* norm (meaning a fundamental principle of international law that cannot be violated) with *erga omnes* character.¹¹⁴ This is a stronger position than its 2004 written statement,¹¹⁵ representing an unequivocal assertion of the right's universality and non-derogability. It is also a position shared by only 24 out of 39 submissions addressing self-determination.¹¹⁶

Notably, in emphasising the right to self-determination as a *jus cogens* norm, the definition given includes the right to be free from racial discrimination.¹¹⁷ Similar to the 2004 written statement, this could be considered hypocritical given Malaysia's failure to sign the ICERD, but may be distinguishing between racial discrimination that harms a group owed the right to self-determination and discriminatory policies aimed at protecting the majority. Such a distinction aligns with Malaysia's domestic legal framework, where affirmative measures are framed as safeguards for the aforementioned 'national unity and the protection of their integrity as a people' rather than violations of non-discrimination principles.

Recalling its colonial experiences, Malaysia's emphasis on the right to self-determination as a *jus cogens* norm may serve as a levelling argument in international law. This is because if self-determination is truly universal and non-derogable, then the obligation to respect it binds both powerful, colonially-ambitious States and smaller, formerly colonised States alike—reinforcing a more equitable international legal order. Third, Malaysia's statement asserts the responsibilities of third-party States in addressing Israel's violations of the *jus cogens* norm of self-determination—a topic absent from its 2004 submissions. Malaysia explicitly asserts that States have a duty to cooperate to end Israel's violation of the Palestinian

¹⁰⁸ *ibid* [31].

¹⁰⁹ *ibid* [27].

¹¹⁰ Malaysia 2023 Written Statement [29].

¹¹¹ See 'Context' above.

¹¹² See, e.g., Martin Rudner, 'The Evolving Political Economy of Malaya's Rubber Development from Colonial Times to Independence' (Economic History of Malaysia, 3 December 2018)

<https://www.ehm.my/publications/articles/the-evolving-political-economy-of-malayas-rubber-development-from-colonial-times-to-independence>.

¹¹³ Malaysia 2023 Written Statement [4b]: 'Informed by its own experience of colonial rule, Malaysia is dedicated to ensuring that all peoples are able to realise their right to self-determination. This history has also informed Malaysia's deep participation in the Non-Aligned Movement, which has long supported national liberation movements working towards the realisation of the right to self-determination. In this light, Malaysia is particularly concerned by Israel's egregious violations of the right in the Occupied Palestinian Territory.'

¹¹⁴ See Malaysia 2023 Written Statement [32]-[34].

¹¹⁵ Malaysia 2004 Written Statement [126].

¹¹⁶ 'Written Comments of the State of Palestine' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (ICJ Advisory Opinion, 25 October 2023) p 95, [3.11]. There were an additional 14 States who did not address self-determination but submitted a written statement. See Written Comments of the State of Palestine p 1, [3].

¹¹⁷ Malaysia 2023 Written Statement [33], citing Commentary to Article 26, para 5, International Law Commission, Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, A/RES/56/83, Annex.

right to self-determination.¹¹⁸ It argues that this duty extends to prohibiting ‘any form of support’ that sustains Israel’s unlawful occupation, including, *inter alia*, the provision of equipment and financial aid to Israel.¹¹⁹ Notably, Malaysia asserts that the duty ‘requires States to regulate *corporate entities* under their jurisdiction [and therefore not solely their conduct] whose actions are contributing to the maintenance of Israel’s breach of the right to self-determination’ (emphasis added).¹²⁰ While Malaysia does not specify what such regulations should entail, its position reflects an expansive assertion of third-party State obligations.

This argument suggests a notion of collective responsibility,¹²¹ emphasising that accountability under international law extends beyond Israel to include other States whose actions—whether direct or indirect—perpetuate the violation. This could understandably be interpreted to specifically address neocolonial powers such as the United States. Equally, by framing third-party obligations in such strong terms, the argument suggests that the international legal order imposes not just passive non-recognition but active duties on States to take concrete measures against breaches of self-determination.

Indirect Engagement Regarding The Rohingya

Malaysia’s advocacy for Palestine—and its approach to legal accountability for what it believes are violations of Palestinian rights—appears to be underpinned by multiple factors: interests in protecting territorial and political sovereignty, safeguarding racial and religious identity, and upholding an international legal order that supports its anti-colonial and non-alignment values.

The case study on Palestine serves as a foundation for assessing Malaysia’s engagement on accountability issues related to Myanmar and crimes against the Rohingya. Both cases involve allegations of genocide and systemic discrimination against populations with whom Malaysia shares religious ties. However, Myanmar’s geographical proximity and Malaysia’s ASEAN membership¹²² introduce direct

¹¹⁸ See Malaysia 2023 Written Statement [68]-[72].

¹¹⁹ *ibid* [72].

¹²⁰ *ibid*.

¹²¹ For example, while the exact nature and extent of the cooperation is unclear, Malaysia also contributed to OIC efforts to hold Israel accountable for their atrocity crimes. Vikrant Singh, ‘We Are Not Afraid’: Malaysia Working With Partners to Drag Israel to ICJ’ (WION, 26 October 2023) <https://www.wionews.com/world/we-are-not-afraid-malaysia-working-with-partners-to-drag-israel-to-icj-651519>. Notably in this article, the Malaysian Foreign Minister stated: ‘Malaysia will always call and cooperate with the countries of the Organisation of Islamic Cooperation (OIC) and like-minded countries so that the United Nations (UN) can refer the issue of Israeli atrocities not only to the [International Criminal Court], but to the [International Court of Justice]’.

¹²² Article 2(2) of the ASEAN Charter requires Member States to ‘act in accordance with’ the principles of ‘respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States’; ‘non-interference in the internal affairs of ASEAN Member States’; and ‘respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion’.

consequences for its accountability efforts, including managing refugee flows¹²³ and public opinion,¹²⁴ as well as navigating diplomatic¹²⁵ and trade relationships.¹²⁶

Unlike Palestine, there have been no ICJ Advisory Opinions related to crimes against the Rohingya. Therefore, any comparison between Malaysia's engagement in these situations must rely on two areas of examination: public government statements and support of The Gambia's case against Myanmar under the Genocide Convention.

Public Government Statements

Regarding public statements, Malaysia's official response to alleged crimes against the Rohingya has been notably more restrained than its response to Palestine, often framed within the ASEAN principles of respect for Member State sovereignty, equality, and non-interference.¹²⁷ For example, between the 2016 and 2017 so-called 'clearance operations' in Myanmar, then-Prime Minister Najib Razak joined a rally protesting Myanmar's treatment of the Rohingya in December 2016. Alerted to his attendance before the protest, Myanmar publicly urged Malaysia to respect the principle of non-interference in the ASEAN Charter.¹²⁸ At the rally, the Prime Minister declared:

What do they want me to do as head of government of 31 million people? Want me to close my eyes? Keep my mouth shut? I will not. We must defend [the Rohingyas], not just because they are of the same faith, but they are humans, their lives have value. This Rohingya issue is an insult to Islam.¹²⁹

¹²³ As of February 2025, the United Nations High Commissioner for Refugees (UNHCR) reported that there were '171,450 [refugees] from Myanmar, comprising some 112,320 Rohingyas, 28,070 Chins, and 31,050 other ethnic groups from conflict-affected areas or fleeing persecution' registered by UNHCR in Malaysia. This means that Myanmar is the country of origin for approximately 89% of all individuals registered by UNHCR in Malaysia, and that approximately 58% of registered refugees in Malaysia are Rohingya. In contrast, UNHCR reports that there were '520 Palestinians' registered in Malaysia, or approximately 0.3% of the total number of individuals registered. 'Figures at a Glance in Malaysia' (UNHCR Malaysia) <https://www.unhcr.org/my/what-we-do/figures-glance-malaysia>, accessed 25 March 2025.

¹²⁴ Malaysian public sentiment towards the Rohingya in Malaysia has waned since 2016-2017: "We Are Just Surviving on Our Own": The Plight of Rohingya in Malaysia' (Frontier Myanmar, 7 September 2022) <https://www.frontiermyanmar.net/en/we-are-just-surviving-on-our-own-the-plight-of-rohingya-in-malaysia/>. Likewise, rhetoric against the Rohingya has increasingly become extreme since the COVID-19 pandemic: Nadhirah Zainal Rashid and Mohd Irwan Syazli Saidin, '#SayNoToRohingya': A Critical Study on Malaysians' Amplified Resentment towards Rohingya Refugees on Twitter during the 2020 COVID-19 Crisis' (2023) 112 *The Round Table* 386-406, <https://www.tandfonline.com/doi/full/10.1080/00358533.2023.2244287>. However, while Malaysians generally express stronger and more unified outrage over Palestine due to historical ties and deep-rooted support for the Palestinian cause, there are segments of society that oppose the presence of both Palestinian and Rohingya refugees in Malaysia. Analysis of social media posts following the 7 October 2023 attacks suggests that the more extreme rhetoric is driven by ethno-nationalist sentiments. Benjamin Y H Loh and Sarah Ali, 'Rhetorical Sympathy for the Palestinian Struggle in Malaysia and the Poignant Misuse of "Zionism"' (Perspective: Yusof Ishak Institute, 22 January 2024) https://www.iseas.edu.sg/wp-content/uploads/2023/12/ISEAS_Perspective_2024_5.pdf.

¹²⁵ Whereas Malaysia does not recognise Israel, Malaysia and Myanmar have embassies in each other's countries.

¹²⁶ Malaysia's export value to Myanmar in 2022 was estimated at 1.35 billion USD. Although this positions Myanmar as only Malaysia's 29th largest export market, the figure remains economically significant. See 'Malaysia Trade Balance, Exports and Imports by Country: 2022' (World Integrated Trade Solution Database, World Bank)

<https://wits.worldbank.org/CountryProfile/en/Country/MYS/Year/2022/TradeFlow/EXPIMP/Partner/by-country#>.

¹²⁷ See art 2(2) of the ASEAN Charter, particularly art 2(2)(a) and art 2(2)(e).

¹²⁸ 'Myanmar Tells Malaysia Not to Interfere in Internal Issues' (Bangkok Post, 2 December 2016)

<https://www.bangkokpost.com/world/1150141/myanmar-tells-malaysia-not-to-interfere-in-internal-issues>.

¹²⁹ Shannon Teoh, 'Mass Rally in Malaysia Calling for Support of Myanmar's Rohingya Muslims' (The Straits Times, 4 December 2016)

<https://www.straitstimes.com/asia/se-asia/mass-rally-in-malaysia-calling-for-support-of-myanmars-rohingya-muslims>. Note that critics alleged that the Prime Minister's support was for domestic politics, rather than humanitarian purposes. See 'Malaysian PM Leads Protest against "Genocide" of Rohingya' (AP News, 4 December 2016) <https://apnews.com/general-news-06e98ce0eb4f40b0af8bb09cb92bbd5a>. See also 'Najib Now Says Malaysia Not Obligated to Help Rohingya' (Free Malaysia Today, 23 April 2020)

<https://www.freemalaysiatoday.com/category/nation/2020/04/23/najib-now-says-malaysia-not-obliged-to-help-rohingya/>.

But, after the protest, the Prime Minister then released a statement on social media saying he never intended to interfere in Myanmar's internal affairs.¹³⁰

Only three months later, the Deputy Foreign Minister reinforced this backtracking in rejecting a proposal to close the Malaysian Embassy in Myanmar, stating:

Maintaining a constructive bilateral relationship with Myanmar in the spirit of ASEAN solidarity is therefore important, for us to achieve a more comprehensive solution to the problem.¹³¹

An emphasis on particularly non-interference may also explain Malaysia's muted response to the ICJ issuing Provisional Measures the contentious cases of *The Gambia v Myanmar*¹³² in comparison with *South Africa v Israel*¹³³ under the Genocide Convention. At its simplest, to issue Provisional Measures, the Court must find that there is a *prima facie* case of genocide and that urgent action is needed to prevent further harm.¹³⁴

Regarding Israel, Malaysia 'demand[ed]' accountability for what it deemed 'flagrant violations of international law'¹³⁵—even before the issuance of Provisional Measures in *South Africa v Israel*.¹³⁶ In contrast, after the issuance of Provisional Measures in *The Gambia v Myanmar*, Malaysia stated:

The [issuance of Provisional Measures] reflects the serious concern of the international community on the need to effectively address the plight of the Rohingya and establish accountability and justice in respect of *alleged* serious human rights violations against the Rohingya'(emphasis added).¹³⁷

Malaysia then 'call[ed] on Myanmar to fulfil its obligations under the Convention to ensure that the crisis is not prolonged.'¹³⁸ The use of the phrase 'alleged serious human rights violations' and the more conciliatory tone 'call(ing) on' Myanmar to fulfil its obligations appears in stark contrast to the language used regarding Israel—despite the Court having already found *prima facie* evidence of genocide.

¹³⁰ Aung Kyaw Min Ye Mon 'President, Military Chiefs Meet to Smooth Myanmar-Malaysia Ties' (Myanmar Times, 6 December 2016) as cited in 'News Track: Malaysia' Insight Southeast Asia: Southeast Asia & Oceania Centre Bimonthly Newsletter (Institute for Defence Studies and Analyses, November-December 2016) https://www.idsa.in/system/files/newsletters/ISA_5_6.pdf.

¹³¹ 'Closing Malaysian Embassy in Myanmar Not a Solution to Rohingya Crisis, Deputy Minister Says' (Malay Mail, 13 March 2017) <https://www.malaymail.com/news/malaysia/2017/03/13/closing-malaysian-embassy-in-myanmar-not-a-solution-to-rohingya-crisis-depu/1334067>.

¹³² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v Myanmar*: 7 States intervening) ICJ <https://www.icj-cij.org/case/178> (hereafter, *The Gambia v Myanmar*).

¹³³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*) <https://www.icj-cij.org/case/192> (hereafter, *South Africa v Israel*).

¹³⁴ 'Prima facie' means 'at first sight' or 'on the face of the matter'; here, it means there needs to be sufficient evidence to support a claim, but the merits of that claim are yet to be argued. See Statute of the International Court of Justice art 41; *Nuclear Tests (Australia v France)* (Interim Protection) ICJ Reports 1973, [13] and [17] (available here); *Nuclear Tests (New Zealand v France)* (Interim Protection) ICJ Reports 1973, [14] and [18].

¹³⁵ Malaysian Ministry of Foreign Affairs, 'Malaysia Strengthens Action in Support of Palestine' (22 January 2024) <https://www.kln.gov.my/web/guest/-/malaysia-strengthens-action-in-support-of-palestine>.

¹³⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*) (ICJ Order of 26 January 2024) <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

¹³⁷ Malaysian Ministry of Foreign Affairs, 'Order by the International Court of Justice (ICJ) on The Gambia's Request for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v Myanmar*)' (23 January 2020) <https://www.kln.gov.my/web/guest/-/order-by-the-international-court-of-justice-icj-on-the-gambia-s-request-for-the-indication-of-provisional-measures-in-the-case-concerning-application->

¹³⁸ *ibid.*

Reluctance to Intervene?

Malaysia has not intervened in either of the contentious cases involving Israel and Myanmar, despite being a State Party to the Genocide Convention.¹³⁹ This may be because Malaysia retains a reservation on Genocide Convention Article IX, which stipulates the ICJ as the forum for disputes regarding the Convention. No State that retains this reservation has sought to intervene in these cases—in fact, Spain previously had a similar reservation to Malaysia, but withdrew its reservation in 2009 and since sought intervention in *South Africa v Israel*.¹⁴⁰ Malaysia may believe its legal position prevents intervention. Likewise, intervention in a contentious case is procedurally more demanding than submitting a written statement in an advisory opinion, requiring seeking leave from the Court.¹⁴¹ Lastly, intervening in contentious cases may be considered a more politically risky and isolating move compared to engagement with an advisory opinion. This is because only United Nations organs and agencies can request advisory opinions,¹⁴² suggesting a greater degree of multilateral support for the legal question.

Engaging in Collective Support for The Gambia's Contentious Case

This strategy of seeking multilateral support can be seen in the public statements regarding The Gambia's¹⁴³ case. Before official initiation of proceedings, then-Prime Minister Tun Dr Mathahir voiced outright support for the Organisation of Islamic Cooperation (OIC)'s efforts in accountability in September 2019.¹⁴⁴ But when asked in December 2019 whether Malaysia was supporting The Gambia in bringing the case, the then-Minister of Foreign Affairs Saifuddin Abdullah stated:

*Indirectly, we are supporting the Gambia initiative, because we are a member of the OIC, and this is a decision that was made through the OIC. ...[W]e have not decided on our actual position, because the process will require time and resources. I know that Gambia cannot do it alone, in terms of resources. The OIC secretariat will have to decide as to how member countries play a role, and by that time Malaysia will have to have a proper position on it (emphasis added).*¹⁴⁵

¹³⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951).

¹⁴⁰ 'Declaration of Intervention of Spain Under Article 63 of the Statute of the International Court of Justice' (*South Africa v Israel*) (28 June 2024) <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240628-int-01-00-en.pdf>.

¹⁴¹ See, e.g. art 63 of the Statute of the International Court of Justice for disputes related to the construction of treaties to which intervening States are Parties.

¹⁴² UN Charter, art 96.

¹⁴³ The Gambia brought its complaint due, in large part, to conclusions from its role as Chair of the OIC Ad-Hoc Ministerial Committee on the Accountability for Human Rights Violations against the Rohingya—a committee that appears to include Malaysia. Notably, Myanmar references Malaysia's membership in its preliminary objections to The Gambia's case. See 'Preliminary Objections of the Republic of the Union of Myanmar' (*The Gambia v South Africa*) (20 January 2021) <https://www.icj-cij.org/sites/default/files/case-related/178/178-20210120-WRI-01-00-EN.pdf>, [72].

¹⁴⁴ Lokman Mansor, 'Dr M Slams UN, Myanmar Govt over Rohingya Crisis' (New Straits Times Online, 25 September 2019) <https://www.nst.com.my/news/nation/2019/09/524353/dr-m-slams-un-myanmar-govt-over-rohingya-crisis>. The remarks were made at a side-event co-hosted by Malaysia, Bangladesh, Turkey, Saudi Arabia, and Canada. Malaysian Ministry of Foreign Affairs, 'Working Visit of Yab Tun Dr. Mahathir Mohamad Prime Minister of Malaysia to the 74th Session of the United Nations General Assembly' (24 September 2019) <https://www.kln.gov.my/web/guest/-/working-visit-of-yab-tun-dr-mahathir-mohamad-prime-minister-of-malaysia-to-the-74th-session-of-the-United-Nations-General-Assembly-New-York-United-S-1>.

¹⁴⁵ Ben Bland, 'Lowy Institute, In Conversation: Malaysia's Foreign Minister on Great Power Rivalry' (The Interpreter, 4 December 2019) <https://www.lowyinstitute.org/the-interpreter/conversation-malaysia-s-foreign-minister-great-power-rivalry>.

This changed by 2020. Upon the ICJ's issuance of Provisional Measures requested by The Gambia, Malaysia referenced their status as 'a fellow State Party to the 1948 UN Genocide Convention', noting it 'wish[ed] to reiterate its support for The Gambia'.¹⁴⁶ By December 2020, Malaysia is reported to have donated 100,000 USD to support the legal proceedings, one of five OIC States to do so.¹⁴⁷

Consistency in Approach?: Recurring Values and Interests

While superficially appearing to be a departure from Malaysia's direct, written submissions on Israel's violations of Palestinian rights, Malaysia's indirect engagement with The Gambia's ICJ complaint appears to nevertheless be in line with similar values and interests. Indirect, collective engagement allows Malaysia to avoid direct confrontation with Myanmar—a State, unlike Israel, with whom Malaysia maintains ties—while nevertheless supporting a victim population with whom Malaysia shares a religious identity. Moreover, indirect engagement allows Malaysia to uphold its commitments under the ASEAN Charter, ensuring it can be seen as making good on its international commitments. Likewise, by invoking its responsibilities under the Genocide Convention to support The Gambia, Malaysia positions itself as a credible actor within the international legal order.

This suggests that there is a consistent approach to these matters in international justice and accountability that is guided by the following recurring values and interests.

Sovereignty as the Central Node

Malaysia's unwavering focus on sovereignty shapes and directs its engagement with international justice. Territorial sovereignty ensures the integrity of the nation's borders and the security of its resources, while political sovereignty safeguards its freedom to determine domestic policies without external interference. The values of religious identity, anti-colonialism, non-alignment, and a commitment to international legal order all serve to reinforce this core interest.

Racial and Religious Identity

Supporting Muslim causes, such as Palestine and Myanmar, reinforces Malaysia's identity as an Islamic state and strengthens the status of Islam as the state religion. This, in turn, bolsters the political sovereignty of the nation by mitigating potential internal challenges to its authority; in other words, the support of these causes is key in making sure that the majority Muslim populace see the government as upholding Islamic principles and therefore continue to lend its support to the ruling party's domestic agenda.

¹⁴⁶ Malaysian Ministry of Foreign Affairs, 'Statement on Order by the International Court of Justice (ICJ) on the Gambia's Request for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)' (23 January 2020)

https://www.kln.gov.my/web/guest/press-release-mfa-news/-/asset_publisher/qATm4A3OuCWG/content/order-by-the-international-court-of-justice-icj-on-the-gambia-s-request-for-the-indication-of-provisional-measures-in-the-case-concerning-application-of-pop_up?_

¹⁴⁷ Malaysia's contribution was reportedly 100,000 USD, which was the same contribution of both Turkey and Nigeria. Saudi Arabia is said to have contributed 300,00 USD and Bangladesh contributed 500,000 USD. Rumi Kawser, 'OIC draws US\$ 1.2 million for Gambia to run Rohingya genocide case' (Dhaka Tribune, 6 December 2020)

<https://www.dhakatribune.com/world/232556/oic-draws-1.2m-for-gambia-to-run-rohingya>.

Moreover, Malaysia's advocacy for Muslim causes enhances its leadership role within the OIC, a platform where Islamic solidarity often outweighs competing international pressures. This elevated position enables Malaysia to influence regional and global discussions in ways that safeguard its sovereignty. For instance, it can advocate for accountability in cases like Palestine and Myanmar without committing to Western-led human rights frameworks such as the ICCPR or ICC, thus retaining control over its domestic and international obligations.

Anti-Colonialism and Non-Alignment

Malaysia's commitment to anti-colonialism is deeply rooted in its historical experiences of colonial rule, shaping its foreign policy as a tool to protect both its territorial and political sovereignty. Central to this stance is Malaysia's unwavering support for the principle of self-determination. By championing the rights of oppressed nations, such as Palestine and the Chagos Islanders, Malaysia not only reflects its own historical struggle for independence but also reinforces the idea that no state should endure external domination. This advocacy positions Malaysia as a steadfast opponent of imperialism and colonial practices, creating a strong moral and legal foundation for its own sovereignty.

The principle of territorial integrity is equally significant in Malaysia's anti-colonial rhetoric. Its vocal support for the return of the Chagos Islands to Mauritius and for Palestinian sovereignty emphasises its commitment to the sanctity of borders and the illegitimacy of occupation. These actions go beyond solidarity; they are calculated to reinforce Malaysia's own territorial claims, particularly in a region where maritime and territorial disputes are ongoing. By championing these principles on the global stage, Malaysia strengthens its argument for the inviolability of its own borders, underscoring that protecting territorial integrity is not merely a legal necessity but a cornerstone of sovereignty itself.

Anti-colonial advocacy also bolsters Malaysia's leadership and influence in global conversations about sovereignty and justice. This alignment with broader anti-colonial movements allows Malaysia to shape global discussions in ways that safeguard its interests, ensuring that the principles it defends for others—such as self-determination and resistance to external interference—are upheld in its own context. In advocating for Palestinian self-determination, for instance, Malaysia's rhetoric not only speaks to its solidarity with a member of the Muslim community but also advances a universal principle that safeguards its sovereignty from potential external pressures.

Moreover, Malaysia's anti-colonial stance reinforces its political sovereignty by framing its foreign policy as a resistance to outside control. This lens, intertwined with its policy of non-alignment, ensures Malaysia avoids being subject to the influence of major powers or external forces that could constrain its freedom to govern independently. By consistently opposing colonial legacies and practices, Malaysia justifies its selective engagement with international frameworks, ensuring it retains the autonomy to act in accordance with its interests.

At the same time, Malaysia uses its anti-colonial principles to advocate for global norms that protect sovereignty, shaping the international legal environment in ways that align with its priorities. This strategy is evident in its support for cases like *The Gambia v Myanmar* at the ICJ, where Malaysia frames its engagement as part of a broader defence of sovereignty against state-led abuses. By supporting such initiatives, Malaysia reinforces the global community's responsibility to respect territorial integrity and self-determination while simultaneously safeguarding its sovereignty within the same framework.

Malaysia's anti-colonialism, therefore, is not only a reflection of its historical experience but a strategic tool to ensure its territorial and political autonomy. By advocating for oppressed nations and aligning with global anti-colonial movements, Malaysia strengthens its sovereignty, both as a defensive measure and as part of a broader effort to shape global norms that uphold its interests. In this way, anti-colonialism remains a central pillar of Malaysia's foreign policy, protecting its independence while positioning it as a principled actor on the international stage.

Multilateral Advocacy & Adherence To International Legal Order

Malaysia's commitment to multilateralism and a stable and equitable international legal order reflects its belief in the legitimacy of international law as a mechanism for holding States accountable. This belief is exemplified by its engagement with the ICJ in cases such as *The Gambia v Myanmar* and the *Wall Advisory Opinion*, where Malaysia has actively contributed to global efforts to address violations of international law. By participating in these proceedings, Malaysia demonstrates its alignment with the principles of accountability and the rule of law, reinforcing its image as a principled actor on the international stage. Through such actions, Malaysia seeks to strengthen its standing and legitimacy within the international community, positioning itself as a nation committed to upholding legal norms and fostering global stability. This engagement allows Malaysia to assert its role in shaping international legal discourse and demonstrates its resolve to be recognised as an influential and responsible member of the global order.

However, this commitment is carefully calibrated to protect Malaysia's political sovereignty. While Malaysia actively supports international legal norms in specific contexts, it simultaneously avoids binding itself to obligations that might constrain its domestic policies. For instance, Malaysia has refrained from ratifying treaties such as the ICCPR and the ICERD. This selective adherence allows Malaysia to maintain control over its domestic agenda while engaging with global norms on its terms.

This strategic engagement with international law illustrates Malaysia's pragmatic approach to multilateralism. By endorsing and participating in legal mechanisms that align with its values, Malaysia advances its interests without compromising its autonomy. For example, Malaysia's support for the ICJ's jurisdiction in *The Gambia v Myanmar* case underscores its solidarity with the Rohingya people and its commitment to justice, but it does so in a manner that avoids imposing external obligations on itself. Similarly, its involvement in the *Wall Advisory Opinion* highlights its advocacy for Palestinian rights while framing its actions within broader principles of international law that it can selectively invoke to protect its sovereignty.

Through this nuanced approach, Malaysia leverages international norms to align with its values and objectives while preserving its freedom to govern independently. This balance allows Malaysia to reinforce its role as an advocate for justice and accountability, all while safeguarding its sovereignty and maintaining control over its domestic and international commitments. By carefully navigating the complexities of multilateralism, Malaysia ensures that its engagement with the rules-based order remains a tool to advance its values rather than a constraint on its autonomy.

Conclusion

Understanding sovereignty as the central node of Malaysia's international engagements helps reconcile its apparent contradictions. Religious solidarity, anti-colonial rhetoric, and multilateral advocacy are not standalone motivations but tools that converge to reinforce Malaysia's sovereign interests.

For Malaysia, territorial sovereignty ensures protection from external interference, while political sovereignty guarantees the freedom to govern without undue external constraints. These principles explain why Malaysia supports accountability for others (e.g., through the ICJ) but avoids commitments that might erode its autonomy (e.g., ICCPR or ICERD).

Additionally, Malaysia's selective expansion of legal norms—such as advocating for self-determination as a *jus cogens* norm or calling for third-party state responsibilities—reflects its growing interest in shaping global legal structures. By influencing the international system to reflect its priorities, Malaysia indirectly strengthens its sovereignty, not just as a defensive measure but as a proactive strategy to shape global norms.

This nuanced approach highlights Malaysia's ability to leverage international law and institutions to advance its values while safeguarding its sovereignty. Moving forward, this insight offers opportunities to engage Malaysia in global justice initiatives by framing them as complementary to, rather than encroachments on, its territorial and political independence.

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About the Asia Justice Coalition

Founded in 2018, the Asia Justice Coalition's purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The Coalition operates through collaboration, resource-sharing, and coordinating efforts between local and international civil society organizations working in the region. Its work is accomplished by undertaking joint activities relating to justice and accountability and engaging in collective advocacy.

About the Centre for Peace and Justice, BRAC University

The Centre for Peace and Justice (CPJ) is a multi-disciplinary academic and research institute established in 2017 at BRAC University. The mission of the Centre is 'to promote global peace and social justice through the means of education and training, research and advocacy' and with the vision of 'a just, peaceful and inclusive society'. CPJ is playing a vibrant role for justice and accountability for Rohingya refugees in Bangladesh through organising various national and international conferences, seminars, and public lectures. CPJ is also a co-signatory of an Amicus Curiae Observation to the International Criminal Court on behalf of Bangladeshi Non-Governmental Representatives.

The cover photograph represents the diversity, unity, longing for justice and cultural identity through the expressive symbolism of Mehdi (Henna) applied on the hands.

Each hand tells a story of a Rohingya girl's perception and interests of beauty highlighting the community's heritage.

By placing the hands in a circular harmony, the design emphasizes solidarity, justice, shared conception of beauty and values of Rohingya girls belonging to different backgrounds.

Cover Artist and Description: Mohammed Junaid