

# Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice

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## ABSTRACT

*In recent years, the use of strategic litigation to secure accountability for atrocity crimes has become an increasingly popular tool in a wide variety of national, regional, and international judicial fora. Strategic litigation is brought not only to obtain a judicial remedy on the issues before the Court in question, but also to act as a catalyst for broader change, with the relevant actors negotiating these changes in the shadow of the litigation. In response to alleged crimes against the Rohingya, The Gambia, acting as a proxy claimant on behalf of the Organization of Islamic Cooperation (“OIC”), recently took Myanmar to the International Court of Justice (“ICJ”) alleging that it bears responsibility under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). Placing an important milestone in the OIC’s campaign to secure accountability for alleged crimes against the Rohingya, the ICJ ordered provisional measures, pending a final determination on the merits. These measures require Myanmar to observe its obligations under the Genocide Convention, to preserve evidence, and to report periodically on its progress in implementing the interim order. Tracking the OIC campaign for accountability, this article evaluates the goals and effects of the ICJ case on crimes against the Rohingya. It considers some of the identifiable effects that have arisen from the litigation so far, and notes the adverse consequences that the Genocide Convention’s shadow may inflict on the diplomatic negotiation of the Rohingya situation, which involves a myriad of peace and security imperatives.*

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I. INTRODUCTION

In recent years, “strategic litigation” has become an increasingly popular tool for human rights organizations in promoting the goals of their campaigns. Strategic litigation uses courts to enhance the negotiating leverage of the broader campaign and to produce effects that go beyond the parties and issues in the proceedings.<sup>1</sup> The client bringing the case, although selected to symbolize the campaign’s values, acts as a proxy to vindicate the interests of a broader class. That the client is “selected” necessarily points to an organized approach reaching beyond the initiatives of that individual client.<sup>2</sup> Strategic litigation is, in this light, a symptom of wider political marginalization: reframing a dispute in legal terms through the courts offers a

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1. These aspects of the definition are explored in detail in Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, 4 CIV. JUST. Q. 407 (2019).

2. “Strategic litigators” are comprised of a variety of organized groups, be they inter-governmental organizations, non-governmental organizations, human rights lawyers, academics, or international research centers. On the variety of actors, see generally Catherine Corey Barber, *Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations*, 16 INT’L J. HUM. RTS. 411 (2012); Rachel A. Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence Against Women*, 50 LAW & SOC’Y REV. 890 (2016).

means to challenge and negotiate “prevailing distributions of political, social, economic, and/or legal values and resources.”<sup>3</sup> A particular area in which strategic litigation is on the ascendency features campaigns that seek to obtain accountability for “atrocities crimes,” a term used to describe the core international crimes of aggression, genocide, crimes against humanity, and war crimes.<sup>4</sup> This trend has been facilitated by the emergence of overlapping norms in international law that impose responsibilities not only on individuals but also on states, including in the fields of international human rights law and international criminal law.<sup>5</sup> As Alexandra Huneus described, the use of courts to challenge state conduct violating human rights can be characterized as “international criminal law by other means,” where mass atrocity crimes are litigated through the prism of international human rights law and other bases of state obligation that contain duties to prevent and investigate such crimes.<sup>6</sup> Strategic litigation practice of this nature has come in many different forms, including domestic-level lawsuits that make use of universal jurisdiction in civil lawsuits, claims before supranational human rights tribunals, and the filing of communications at the International Criminal Court (“ICC”).<sup>7</sup> While obtaining a legal remedy is an important aspect of such human rights strategic litigation, they also serve other goals,

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3. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 13 (Austin Sarat & Stuart Scheingold eds., 1998).

4. See JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* 1 (2020). In political science, “accountability actors” have been the subject of study. The notion refers to “all individuals or bodies, domestic, external, or international, who promote judicial accountability measures in either criminal or civil form.” KEITH TESTER, *HUMANITARIANISM AND MODERN CULTURE* 36 (2010).

5. As to the interrelationship between norms on individual criminal responsibility and norms on state responsibility in relation to atrocity crimes, see generally André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 *INT’L COMP. L. Q.* 615 (2003); Andrea Bianchi, *State Responsibility and Criminal Liability of Individuals*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 16 (Antonio Cassese ed., 2009).

6. Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 *AM. J. INT’L L.* 1, 1 (2013).

7. Amongst the growing scholarly literature on strategic litigation in the human rights field, see generally Ole Solvang, *Chechnya and the European Court of Human Rights: The Merits of Strategic Litigation*, 19 *SEC. & HUM. RTS.* 208 (2008); Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 *EUR. HUM. RTS. L. REV.* 732 (2008); Freek Van der Vet, *Transitional Justice in Chechnya: NGO Political Advocacy for Implementing Chechen Judgments of the European Court of Human Rights*, 38 *REV. CENT. & E. EUR. L.* 363 (2013).

including to reframe the terms of conflict diplomacy in order to promote dispute settlement on a broader set of issues.<sup>8</sup> Strategic litigation may, as Helen Duffy noted, be brought with the purpose of altering the context and tone of a political debate, such as to challenge official narratives where victims themselves have been cast as wrongdoers, “terrorists,” or “enemies.”<sup>9</sup>

The recent case brought by The Gambia against Myanmar to the International Court of Justice (“ICJ”) exemplifies how strategic litigation is used as part of a campaign for atrocity crimes accountability, set in the context of a humanitarian crisis negotiation. The Gambia, standing as a proxy for the fifty-seven-member State Organization of Islamic Cooperation (“OIC”), sought a determination from the ICJ that Myanmar bears responsibility under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) for violating the Convention’s requirements, including for orchestrating state-sponsored genocide against the Rohingya and failing to punish those responsible.<sup>10</sup> Although it will take many years for this litigation to be concluded, it has met some early success.<sup>11</sup> On January 23, 2020, the ICJ, having found the allegations of genocide to be “plausible,” ordered provisional measures.<sup>12</sup> Myanmar is to “take all measures within its power” to prevent actions violating the Genocide Convention, to preserve evidence, and to report periodically to the ICJ on all measures taken to give effect to the order.<sup>13</sup> In making this order, the ICJ drew on various pieces of evidence to conclude that there was a “risk” of “irreparable prejudice” to the rights of the “extremely vulnerable” Rohingya minority if provisional measures were not ordered.<sup>14</sup> Although this is a significant interim outcome, genocide is not the only lens through which to view the

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8. These campaign goals vary widely. See HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT 43–53 (2018).

9. *Id.* at 59.

10. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for Provisional Measures, 2019 I.C.J. ¶ 114 (Nov. 11, 2019) [hereinafter *The Gambia’s Application*]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

11. By way of comparison, when Bosnia and Herzegovina initiated proceedings against Serbia and Montenegro at the ICJ alleging violations of the Genocide Convention, that case took over 14 years to conclude.

12. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures Decision, ¶ 56 (Jan. 23, 2020), <https://www.icj-cij.org/en/case/178/provisional-measures> [<https://perma.cc/RT78-YX2W>] [hereinafter *The Gambia v. Myanmar Provisional Measures Decision*].

13. *Id.* at ¶ 86.

14. *Id.* at ¶ 72–73.

Rohingya crisis. Repatriation of displaced Rohingya, especially the large number displaced in neighboring Bangladesh as a result of Myanmar's "clearance operations" targeting the insurgents in Rakhine, has also received multilateral attention.<sup>15</sup> Additionally, the OIC has characterized the alleged crimes in broader terms than genocide, suggesting that "other mass atrocity crimes" such as "gross and systematic violations of human rights" have been committed.<sup>16</sup> It is therefore instructive to consider the OIC strategic litigation's effects in two aspects: both in terms of securing accountability for crimes against the Rohingya, and in terms of the consequences (intended or otherwise) on the diplomatic negotiation of the refugee crisis and the ongoing internal armed conflict. This article aims to contribute, through the lens of the OIC's campaign to advance accountability, to the embryonic literature on the impact of human rights strategic litigation on broader processes of social, political, or legal change.

The analysis proceeds as follows. Part II considers, as a general matter, the use of strategic litigation in the ICJ by campaigns to advance human rights. The article considers potential reasons why a litigant may view the ICJ as a suitable forum in which to initiate a strategic litigation, while also noting the possible drawbacks. One effect of ICJ-focused strategic litigation that makes the ICJ a desirable forum for strategic litigation is the potential for such litigation to impact diplomacy in the principal political organs of the UN, namely the Security Council and the General Assembly. In particular, this article analyzes the provisional measures brought by the OIC's strategic litigation in the ICJ, and what impact those measures may have on diplomatic negotiations, with reference to prior ICJ interim orders. Part III considers the background of the Rohingya crisis and the OIC's goal in seeking accountability for atrocity crimes against the Rohingya. Building upon the analysis in Part II, Part III identifies the reasons why the OIC regarded the ICJ to be a suitable forum in which to advance its campaign goal for accountability. Part IV then considers the ICJ's provisional measures decision in *The Gambia v. Myanmar* and tracks the decision's immediate impact on diplomatic

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15. As to these multilateral responses, see generally David Lewis, *Humanitarianism, Civil Society and the Rohingya Refugee Crisis in Bangladesh*, 40 *THIRD WORLD Q.* 1884 (2019); Nehginpao Kipgen, *The Rohingya Crisis: The Centrality of Identity and Citizenship*, 39 *J. MUSLIM MINORITY AFF.* 61 (2019); Irawan Jati, *Comparative Study of the Roles of ASEAN and the Organization of Islamic Cooperation in Responding to the Rohingya Crisis*, 1 *INDON. J. SOUTHEAST ASIAN STUD.* 17 (2017).

16. Organization of Islamic Cooperation Res. 59/45-POL, preamble, (May 5–6, 2018), <https://www.oic-oci.org/docdown/?docID=1868&refID=1078> [<https://perma.cc/7LS7-G392>].

relations between Myanmar and other states, particularly within the UN system. Part V outlines a framework with which scholars may evaluate how much the OIC's strategic litigation may influence the future settlement of the Rohingya situation, both in terms of attaining accountability and in terms of other imperatives including peaceful reconciliation and repatriation for the Rohingya. The framework considers the anticipated positive impact, and also the possible unintended consequences that may arise from the use of the genocide frame in future diplomatic relations on this situation. Part VI concludes the article.

## II. THE ICJ'S STRUCTURAL AMENABILITY TO STRATEGIC LITIGATION

### A. *Factors Influencing the Selection of the ICJ*

Strategic litigation takes place in a variety of national, regional, and international fora. Many factors influence the choice of an international forum.<sup>17</sup> One such factor is the absence of a viable alternative, perhaps because the litigant has been unable to vindicate their interests on a domestic level due to uncooperative local authorities or a lack of judicial independence.<sup>18</sup> In this respect, elevating a dispute to the supranational plane brings judicial supervision that the domestic plane could not provide.<sup>19</sup> Where a litigant has the choice to file in international courts, the litigant—in selecting a forum—weighs factors such as the binding power of the decision, types of available remedies, state records of compliance, the experience of the presiding judges, and the speed and openness of the hearings that facilitate media engagement.<sup>20</sup> The litigant may also consider a Court's receptiveness to protecting a particular legal interest in its precedent.<sup>21</sup>

With these general considerations in mind, there are a number of reasons why a litigant may select the ICJ as the forum to advance

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17. Sometimes lawsuits are brought in multiple international fora, even concurrently. For example, suits pertaining to Senegal's refusal to prosecute or extradite Hissein Habré, the former Chadian President, were filed before the African Court on Human and Peoples' Rights, the Court of Justice of the Economic Community of West African States, and the ICJ. See Sangeeta Shah, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 13 HUM. RTS. L. REV. 351, 352 (2013).

18. See Solvang, *supra* note 7, at 211.

19. *Id.*

20. DUFFY, *supra* note 8, at 254.

21. *Id.*

their goals and to enhance their negotiating leverage vis-à-vis the adverse party.<sup>22</sup> First, the ICJ is viewed as a forum of great authority, due to its influence over the development of international law and its status as the UN's principal judicial organ.<sup>23</sup> The ICJ's authority is reinforced by the treaties that identify it as the forum for dispute settlement and the highest judicial interlocutor on rules under the instruments, including the Genocide Convention.<sup>24</sup> Although the ICJ takes a considerable amount of time, often many years, to decide the merits of a dispute, its interim remedy jurisdiction allows litigants to obtain a remedy at a lower standard of proof—showing a risk of irreparable harm—within a relatively short period of time.<sup>25</sup> The timely acquisition of an interim remedy may hold a double advantage. First, it may bolster the credentials of a fledgling human rights campaign where this campaign has sought litigation at its early stage, and elevate a legal issue to the international public's attention where before the issue was only negotiated politically.<sup>26</sup> Second, compared to some other judicial fora, the ICJ regards itself as less constrained in its scrutiny as a result of a margin of appreciation doctrine that requires curial deference on certain legal or evidentiary questions.<sup>27</sup> The ICJ, for example, considers a dispute even if hostilities are actively occurring on the ground or if the Security Council is acting.<sup>28</sup> The ICJ's

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22. See Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 20 (2016) (noting that “[t]he ability to forum shop may enhance a plaintiff’s negotiating leverage by allowing him or her to select a court that is more likely to rule favorably”).

23. Amongst the considerable scholarly literature, see CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 436–37 (2004) (noting compliance to be generally satisfactory); Sean D. Murphy, *The International Court of Justice*, in THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 12, 12 (Chiara Giorgetti ed., 2012) (noting the ICJ to be a “highly respected and authoritative tribunal”).

24. Alter, *supra* note 22, at 4.

25. See Statute of the International Court of Justice art. 41, June 26, 1945, 33 U.N.T.S. 993. [hereinafter *ICJ Statute*]; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Rep. Iran v. U.S.)*, Provisional Measures Decision, 2018 I.C.J. 645, ¶ 77 (Oct. 3, 2018).

26. See Tullio Treves, *The Political Use of Unilateral Applications and Provisional Measures Proceedings*, in VERHANDELN FUER DEN FRIEDEN 464 (J.A. Frowein et al eds., 2003).

27. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2005).

28. Note, however, that for such disputes, the ICJ will likely avoid adjudication that calls into question the *vires* of Security Council acts. See generally Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Political Organs of the United Nations?*, 46 INT’L & COMP. L. Q. 309 (1997).

amenability to considering disputes subject to ongoing diplomatic negotiation may make the ICJ an attractive forum: convinced that the law is on its side, a litigant may seek to use a judicial forum to influence contemporaneous negotiations in the UN's political fora. Third, litigants may select the ICJ as a forum based on its status as the "principal judicial organ" of the UN.<sup>29</sup> The ICJ's status as the UN's principal judicial organ carries several implications. Legally, an ICJ decision is binding on the parties of the contentious proceedings, and the decision is backed by the UN Charter's authority; a failure to comply with the decision also violates the Charter.<sup>30</sup> Politically, an ICJ decision is respected by the UN's political organs and may influence peace and security dispute settlement on a broader level. This article covers such concerns in greater detail in Part II.C.

However, the ICJ carries limitations as a forum for strategic litigation. First, in contrast to some "new-style" supranational courts with mandatory jurisdiction, the ICJ has no true compulsory jurisdiction.<sup>31</sup> A state may consent to the ICJ's jurisdiction in a variety of ways, be it *ad hoc* or established in advance in bilateral or multilateral treaties.<sup>32</sup> However, state parties to a treaty sometimes enter a reservation to an ICJ dispute resolution clause, either to qualify the extent of their acceptance of the Court's jurisdiction, to premise it upon both parties' acceptance in relation to a specific dispute, or to deny it entirely.<sup>33</sup> Such a reservation reduces the scope of strategic

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29. U.N. Charter, art. 92.

30. See U.N. Charter art. 94, ¶ 1 (stipulating that each member undertakes "to comply with the decision of the International Court of Justice in any case to which it is a party."). See also *The Gambia v. Myanmar Provisional Measures Decision*, *supra* note 12, at ¶ 84; *La Grand (Germany v. U.S.)*, Judgment, 2001 I.C.J. 506, ¶ 109 (June 27, 2001); Karin Oellers-Frahm, *The International Court of Justice, Article 94*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1957, 1960 (Bruno Simma et al eds., 3rd ed. 2012) (noting there to be good reasons to support "the understanding that the wording in art. 94 (1) is also meant to comprise decisions other than judgments, namely incidental and interlocutory orders. This is even more convincing if one takes into account art. 94 of the UN Charter as a whole, which, in ¶ 2, explicitly uses the term "judgment" instead of the "decision" used in ¶ 1.").

31. See Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 19 (2016); Cesare P. Romano, *From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 808-11 (2007); Rachel A. Cichowski, *The European Court of Human Rights, Amicus Curiae, and Violence Against Women*, 50 LAW & SOC'Y REV. 890, 903 (2016).

32. See Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993.

33. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Bangladesh, for example, entered the following reservation: "Article IX: For the submission of any dispute in terms of this article to the



litigation, both in finding an appropriate claimant state to bring the case and in challenging the conduct of a jurisdiction-consenting state.<sup>34</sup> Second, in contrast to the wider access rules of “new-style” international courts, the ICJ only entertains disputes from states. This limitation prevents campaigning organizations from bringing the challenges themselves and forces them to find willing states whose interests are sufficiently aligned to bring the case.<sup>35</sup>

### B. *The ICJ’s Procedural Amenability to Strategic Litigation*

Whether a judicial forum is receptive to strategic litigation depends on the extent to which its rules of standing filter out the parties seeking to litigate a dispute. A narrow approach to standing rules would only allow a party to bring a case where they have been particularly affected by the conduct of the offending party. A broader approach, by contrast, would allow a party to bring a case where they claim to represent a public interest or a wider class of affected persons. In this regard, the ICJ adopts a decidedly broad approach toward standing in contentious disputes, at least insofar as *erga omnes partes* treaties are concerned. In *Belgium v. Senegal*, the ICJ noted obligations under the Convention Against Torture to be *erga omnes partes*, or all-treaty parties, on the basis that the treaty’s object and purpose were to effectively combat torture “throughout the world.”<sup>36</sup> The common interest in effective enforcement implies that each state party is entitled to seek the cessation of any breach of the Convention Against Torture.<sup>37</sup> It necessarily follows, as the ICJ noted in *The Gambia v. Myanmar* (considered in greater detail in Part III), that the Genocide Convention is also of an *erga omnes partes* character; any state party, and “not only a specially affected [s]tate,” may invoke

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jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case” [hereinafter *Bangladesh Reservation*]. As to the scope of reservations to ICJ jurisdiction, see generally Stanimir A. Alexandrov, *Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations: An Overview of Practice with a Focus on Recent Trends and Cases*, 14 LEIDEN J. INT’L L. 89 (2001).

34. The lack of compulsory jurisdiction may in turn affect the bargaining positions of the parties to a treaty, since a State that has not accepted an ICJ dispute resolution clause may be less inclined to negotiate for dispute settlement. See Alter, *supra* note 31, at 18.

35. Furthermore, as Adler noted, where the filing of a suit depends upon a government’s choice, the decision to litigate will often be influenced by political and diplomatic concerns unrelated to the merits of the case. *Id.* at 19.

36. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 449, ¶ 68 (July 20).

37. *Id.*

the responsibility of another state party.<sup>38</sup> A state is therefore able to invoke such a treaty against another state before the ICJ, even if the victims of alleged violations of the treaty are not nationals of that State. While the victims of human rights abuses are unable to appear before the court themselves, they can be notionally represented by a state that belongs to an *erga omnes partes* treaty.

A corollary point is that the ICJ, in assessing standing, does not take into account a case's background players or their motives for organizing the litigation.<sup>39</sup> This is a long-held principle in the context of advisory proceedings. For example, in an advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ found it irrelevant that nuclear weapons abolitionist groups had pressured the General Assembly to request the advisory opinion.<sup>40</sup> *The Gambia v. Myanmar* reaffirmed this principle in the context of contentious proceedings. The court viewed it to be immaterial that the OIC was funding the litigation and that several OIC members were not parties to the Genocide Convention.<sup>41</sup> All that mattered was that The Gambia engaged in the proceedings in its own name and showed itself to have had a dispute with Myanmar (as evidenced in diplomatic exchanges).<sup>42</sup>

Although the ICJ has adopted a broad approach to standing for treaties of an *erga omnes partes* character, as mentioned in Part II.A, the feasibility of mounting strategic litigation in the ICJ is contingent upon the adverse party consenting to the Court's jurisdiction. Such

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38. *The Gambia v. Myanmar Provisional Measures Decision*, *supra* note 12, at ¶ 41.

39. See Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867, 881 (2003).

40. Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 2 (July 8, 1996) (separate opinion by Judge Guillaume) ("The opinion requested by the General Assembly of the United Nations . . . originated in a campaign conducted by an association called International Association of Lawyers Against Nuclear Arms . . . I am sure that the pressure brought to bear in this way did not influence the Court's deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible.").

41. *The Gambia v. Myanmar Provisional Measures Decision*, *supra* note 12, at ¶¶ 25–27.

42. *Id.*

consent may arise by way of referral or by inserting a dispute resolution clause in a treaty.<sup>43</sup> However, few *erga omnes partes* treaties recognize the ICJ as a dispute resolution forum. Conventional prohibitions on enforced disappearances and racial discrimination may also be considered *erga omnes partes*. But even these instruments provide the ICJ with a limited basis on which to adjudicate human rights cases because they address specific forms of human rights violations; applicant-states are therefore forced to recharacterize allegations of broader human rights abuses into the narrower optic provided by these treaties.<sup>44</sup> By contrast, the more comprehensively framed International Covenant on Civil and Political Rights, which contains broadly textured rights that may be used to bring a case against an adverse party, does not recognize the ICJ's jurisdiction over disputes concerning the treaty.<sup>45</sup> Therefore, even though the ICJ adopts a broad approach to standing, jurisdictional limitations inevitably impede strategic litigation. Litigants may, in turn, discard the ICJ from the list of appropriate fora for mounting a legal challenge. Or, litigants may narrowly frame their arguments so as to fit within the confines of the ICJ's jurisdiction, with possible consequences to how the situation is more broadly negotiated at the diplomatic level. Part III further examines how the OIC narrowly framed its arguments in order to come within the ICJ's jurisdiction.

### C. *The Scope of ICJ Remedies' Influence Over Dispute Settlement and UN Actions*

Strategic litigation aims to produce systemic effects that reach beyond the Court proceedings and decision. Accordingly, strategic litigation often aims to leverage the bargaining position of the successful party to augment its broader campaign for change. In the context of strategic litigation in the ICJ, the UN's principal judicial organ, the litigation may have an impact on the diplomatic negotiations and

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43. See Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993.

44. See International Convention for the Protection of All Persons from Enforced Disappearance art. 42, Dec. 20, 2006, 2716 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination art. 22, Mar. 7, 1966, 660 U.N.T.S. 195. See also Gentian Zyberi, *The Interpretation and Development of International Human Rights Law by the International Court of Justice*, in HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 201, 205 (Martin Schenin ed., 2019) (noting that '[t]hese jurisdictional gaps and limitations have caused states to stretch the Court's jurisdictional basis' under specific human rights treaties in order to 'raise cases involving serious human rights or humanitarian law violations').

45. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

decision making of the UN's principal political organs, namely the Security Council and the General Assembly. More specifically, interim remedies, given their preliminary nature, are known to be particularly useful in advancing toward a negotiated settlement.<sup>46</sup> A party may seek provisional measures to reveal their chances on the merits so that it may make an informed choice on whether to continue litigating or to enter into negotiations.<sup>47</sup> For example, the provisional measures ordered in *Passage Through the Great Belt* are thought to have induced Denmark to negotiate a settlement and discontinue the case.<sup>48</sup> Even if provisional measures do not induce a party to settle in the short term, they may nonetheless alter the respective bargaining positions of the parties and other actors, which in turn may facilitate a settlement in the future.

In this respect, parties may seek provisional measures from the ICJ to inflict reputational costs on the allegedly deviant state or to pressure the state to settle through UN processes.<sup>49</sup> Interim remedies are known as a means to address the international public, including multilateral fora such as the Security Council and the General Assembly. These two fora are particularly relevant where the dispute touches upon international peace and security,<sup>50</sup> as that is one of their shared institutional responsibilities in the UN system within the framework of their respective competencies.<sup>51</sup> Under Chapter VII of the UN Charter, the Security Council may undertake coercive action against a party, including the imposition of sanctions and the use of force.<sup>52</sup> The General Assembly is limited to making recommendations, but due to its near-universal membership of states, it holds meaning as a prominent multilateral forum in which states form coalitions, mobilize shame, and exert pressure on other states to negotiate their disputes or comply with their obligations, including obligations under the ICJ's provisional measures.<sup>53</sup>

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46. See CAMERON MILES, *PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 445–49 (Cambridge Univ. Press ed. 2017).

47. *Id.* at 447.

48. See generally *Passage through the Great Belt* (Fin. v. Den.), Provisional Measures, 1991 I.C.J. 12 (July 29, 1991); see also Miles, *supra* note 46, at 448–49.

49. It is worth noting that these two purposes are not mutually exclusive.

50. Miles, *supra* note 46, at 461.

51. For a delineation of these respective responsibilities, see *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20, 1962).

52. The Security Council has the power to enforce ICJ judgments. U.N. Charter art. 94.

53. U.N. Charter art. 10, 14 (“[T]he General Assembly may recommend measures for the peaceful adjustment of any situation”). See also Erlend M. Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures*

While the Security Council and the General Assembly's responses to the ICJ's provisional measures are by no means consistent, there have been some observable trends. A common occurrence is that the party successful in obtaining provisional measures reiterates the ICJ's legal findings to these political organs, and requests that they make recommendations to the losing side to settle the dispute.<sup>54</sup> As a result, interim orders have been referenced in the text of some resolutions and debates, including, at the highest level, demands for compliance, condemnation of non-compliance, or (in the case of the Security Council) a threat of Chapter VII action if the recalcitrance continues.<sup>55</sup> In turn, delegates have taken advantage of provisional measures decisions to condemn state conduct and force offending states to defend their actions in UN debates.<sup>56</sup> The process has also led opposing parties to exchange letters, often on the effect of a provisional measures order, with the Security Council acting as an

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*When Non-Compliance Is to Be Expected*, 5 J. INT'L DISP. SETTLEMENT 306, 330–36 (2014). For a more comprehensive account of GA practice in exerting pressure on offending states to observe their international obligations, see generally MICHAEL RAMSDEN, INTERNATIONAL JUSTICE IN THE UNITED NATIONS GENERAL ASSEMBLY (forthcoming 2021). The General Assembly might also seek to exert pressure on the Security Council to act on provisional measures. For a discussion on the habits of GA-SC dialogue in relation to mass atrocity crimes, see generally Michael Ramsden & Tom Hamilton, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L & COMPAR. L. Q. 893 (2017).

54. Following the ICJ's order in *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Provisional Measures Decision, 1979 I.C.J. 7 (Dec. 15, 1979), see Permanent Representative of the U.S. to the U.N., Letter dated Dec. 22, 1979 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/13705 (Dec. 22, 1979). Following the ICJ's order in *Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Provisional Measures Decision, 1993 I.C.J. 3 (Apr. 8, 1993), see Permanent Representative of Bosnia and Herzegovina to the U.N., Letter dated Apr. 16, 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council, U.N. Doc. S/25616 (Apr. 16, 1993). Following the ICJ's order in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Provisional Measures Decision, 1984 I.C.J. 169 (May 10, 1984), see Permanent Representative of Nicaragua to the U.N., Letter dated May 10, 1984 from the Permanent Representative of Nicaragua to the United Nations addressed to the Secretary General, U.N. Doc. S/16556 (May 11, 1984).

55. See, e.g., S.C. Res. 461, ¶ 2 (Dec. 31, 1979) (“deplor[ing]” Iran’s continued detention of hostages contrary to the ICJ interim order); S.C. Res. 819, preamble (Apr. 16, 1993) (“taking note” of an ICJ interim order on the Genocide Convention); U.N. SCOR, 3200th mtg. at 31, 48, U.N. Doc. S/PV.3200 (Apr. 17, 1993) (providing record that some delegates spoke of the need to uphold the provisional measures decision).

56. For illustrative discussions in compliance with the ICJ interim order in *Nicar. v. U.S.*, 1984 I.C.J., see U.N. GAOR, 39th Sess., 36th mtg., U.N. Doc. A/39/PV.36 (Oct. 24, 1984) and U.N. SCOR, 39th Sess., 2557th mtg. at 2, U.N. Doc. S/PV.2557 (Sept. 7, 1984).

intermediary. These exchanges occasionally result in an agreed-upon course of action. For example, in relation to a territorial dispute between Cameroon and Nigeria, the provisional measures from the case fostered dialogue between the opposing parties, and the parties established a fact-finding mission to facilitate dispute settlement.<sup>57</sup>

That said, ensuring compliance with the ICJ's provisional measures does not always translate well in the UN's principal political organs' rougher climate of dispute management. The incongruence may be due to the organs' coming into conflict with the interests of permanent members (or their client states). The most powerful sanctioning instrument available—Chapter VII—has never been used as a means to enforce provisional measures because permanent members have vetoed the resolutions proposed to address recalcitrance.<sup>58</sup> The ICJ also carries a structural limit, in that it must frame a dispute and its issues in legal terms.<sup>59</sup> Whether it is desirable to impose a legal framework on a dispute that may have been negotiated in political terms is contestable. In negotiating a dispute, weaker states (or states that perceive themselves to have the stronger case) may find it strategically beneficial to use the law to counteract the bargaining imbalance with their adversary.<sup>60</sup> Yet states may make the political judgment that “strategic ambiguity,” rather than legal certainty, is the better channel for arriving at a negotiated settlement.<sup>61</sup> States may also make a political judgment that letting political organs invoke and impose legal rules (including ICJ decisions) carries the risk of eroding the reciprocity required for successful dispute settlement.<sup>62</sup>

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57. See *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Provisional Measures Decision, 1996 I.C.J. 13 (Mar. 15, 1996); Permanent Representative of Cameroon to the U.N., Letter dated Dec. 11, 1998 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/1159 (Dec. 11, 1998).

58. For example, a U.S.-sponsored resolution that proposed to sanction Iran for its non-compliance with the ICJ interim order, among other obligations, was not adopted due to the veto of the Soviet Union. U.N. SCOR, 35th Sess., 2191st mtg. ¶¶ 25, 27, 149, U.N. Doc. S/PV.2191 (Jan. 11–13, 1980).

59. See Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993, (applying sources of international law).

60. As one commentator put it, in relation to *Nicar. v U.S.*, 1984 I.C.J., Nicaragua “effectively used the suit at the World Court to reframe the U.S.-Nicaraguan conflict using the norms and values of respect for international law and the rule of law,” thereby enabling it to mobilize public opinion against the U.S. See HÉCTOR PERLA, JR., SANDINISTA NICARAGUA'S RESISTANCE TO US COERCION: REVOLUTIONARY DETERRENCE IN ASYMMETRIC CONFLICT 174 (Cambridge Univ. Press ed. 2016).

61. Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52, 52 (2005).

62. *Id.*

## III. STRATEGIC LITIGATION IN THE ROHINGYA CRISIS

A. *Background to the Rohingya Crisis*

The sections above provided an outline of how parties may use strategic litigation in the ICJ, and how interim remedies may influence dispute settlement in the wider UN system. This article now analyzes the case brought by The Gambia to the ICJ as part of the broader diplomatic campaign for atrocity crimes accountability in Myanmar. As the nature of Myanmar's "clearance operations" around October 2016 came to light, a broad coalition including OIC members sought to use the UN's political organs to express disapprobation and call for accountability regarding the Rohingya crisis.<sup>63</sup> The process started when the Human Rights Council created the Independent International Fact-Finding Mission on Myanmar ("IFFM") in March 2017.<sup>64</sup> Its mandate was explicit: to "establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State."<sup>65</sup> A General Assembly resolution followed, expressing "grave concern" at the reports of human rights violations in Rakhine State.<sup>66</sup> The Myanmar delegate in the General Assembly took issue with the accusatory tone, calling it an "orchestrated demonization of Myanmar's Government" that would contribute to "further polarization and an escalation of tensions among the various communities inside the country."<sup>67</sup> Nonetheless, the accusatory tone continued to spread in the diplomatic scene, with the OIC members resolving in their May 2018 Dhaka Declaration that the clearance operations "reached

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63. As to the putative rationale for the "clearance operations," see, e.g., Application of the Convention on the Prevention of the Crime of Genocide (Gam. v. Myan.), Public Sitting, CR 2019/19, at 15 (Dec. 11, 2019) [hereinafter *Dec. 11 Hearing*] (explaining that the term clearance operations "simply means to clear an area of insurgents or terrorists"). For a more detailed exposition of the factors that led to these "clearance operations," see generally Zoltan Barany & Frank C. Erwin, Jr., *Where Myanmar Went Wrong: From Democratic Awakening to Ethnic Cleansing*, 97 FOREIGN AFFS. 141 (2018).

64. See Human Rights Council Res. 34/22, U.N. Doc. A/HRC/Res/34/22 (Apr. 3, 2017). The resolution did not specify a temporal limit to the mandate of the commission of inquiry, although the commission itself noted the hostilities in 2011–2012 to be "key turning points that generated renewed violence." See Hum. Rts. Council, Rep. of the Detailed Findings of the Indep. Int'l Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, ¶ 5 (Sept. 17, 2018) [hereinafter *IFFFM 2018 2nd Report*].

65. *Id.* ¶ 11.

66. See G.A. Res. 72/248, preamble (Dec. 24, 2017).

67. U.N. GAOR, 72nd Sess., 76th mtg. at 6, U.N. Doc. A/72/PV.76 (Dec. 23, 2017).

the level of ethnic cleansing.”<sup>68</sup> But the Security Council paid no attention to the nascent campaign against Myanmar, despite requests from states that the issue be placed on the agenda.<sup>69</sup> Given Myanmar’s alliance with China, a veto-wielding permanent member, this was unsurprising.<sup>70</sup> Still, failure to mobilize the Security Council was a weakness of the campaign for accountability, as it meant that the Security Council would not refer the Myanmar situation to the Prosecutor of the ICC under Chapter VII. The situation could not reach the Prosecutor without a Security Council referral because Myanmar is not a party to the ICC Statute.

The accountability campaign gained momentum through two developments in September 2018, and the concessions they brought from Myanmar that it would conduct domestic investigations. First, the ICC decided that it had jurisdiction to consider certain alleged crimes against the Rohingya regarding acts of deportation, on the grounds that the acts spilled over into the territory of Bangladesh, which is a party to the ICC Statute.<sup>71</sup> Second, the IFFM released its first report in September 2018, observing that there existed “reasonable grounds to conclude that serious crimes under international law

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68. Organization of Islamic Cooperation, Res. No. 59/45-POL preamble (May 5–6 2018), <https://www.oic-oci.org/docdown/?docID=1868&refID=1078> [<https://perma.cc/BT7W-JNAM>]; Organization of Islamic Cooperation, *The Dhaka Declaration*, 45th Sess. of the Council of Foreign Ministers, ¶ 14 (May 5–6, 2018) (“We express deep concern over the recent systematic brutal acts perpetrated by security forces against the Rohingya Muslim Community in Myanmar that has reached the level of ethnic cleansing, which constitute a serious and blatant violation of international law.”). For the commitment to accountability outlined by President Barrow of The Gambia in the GA, see U.N. GAOR, 73rd Sess., 7th mtg. at 29, U.N. Doc. A/73/PV.7 (Sept. 25, 2018) (“[T]he Gambia has undertaken [through the OIC] to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book.”).

69. Permanent Representative of the Netherlands to the U.N., Letter dated 23 Aug. 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2018/779 (Aug. 24, 2018).

70. The veto has been used on numerous occasions despite credible allegations of atrocity crimes occurring in a given situation. See generally Michael Ramsden, *Uniting for Peace in the Age of International Justice*, 42 YALE J. INT’L L. 1 (2016). See also Jennifer Trahan, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 1 (2020).

71. See Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-RoC46(3)-01/18, Decision on Jurisdiction (Sept. 6, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.PDFn](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDFn) [<https://perma.cc/8YV9-8AKW>].



have been committed that warrant criminal investigation and prosecution,” including genocide.<sup>72</sup> Notably, the IFFM 2018 Report also concluded on “reasonable grounds, that the factors allowing the inference of genocidal intent are present.”<sup>73</sup> Speaking in the General Assembly, Myanmar rejected the veracity of such claims and argued that the unwanted international pressure eroded its domestic social cohesion.<sup>74</sup> At the same time, however, Myanmar announced that they had recently created a domestic institution called the Independent Commission of Enquiry (“ICOE”), staffed by a mix of foreign and local officials, to “investigate all violations of human rights and atrocities committed in Rakhine State.”<sup>75</sup> Therefore, while Myanmar continued to resist requests to externalize accountability investigations, it did acknowledge in an international forum that the allegations merited investigation.

The international community responded with limited encouragement toward Myanmar’s creation of ICOE, and the international campaign for accountability continued to intensify. In October 2018, the Human Rights Council adopted Resolution 39/2 in which it “acknowledg[ed]” the creation of ICOE but also noted past failures in prior investigations in Myanmar that were unable to “work with independence, transparency and objectivity.”<sup>76</sup> It called for the ICOE’s “close cooperation” with all UN bodies and mandates, while “deeply regretting” Myanmar’s failure to cooperate with the international commission of inquiry to date.<sup>77</sup> The resolution also recognized, for the first time in a UN resolution, the possibility that the Myanmar military had committed genocide “in relation to the situation in Rakhine State.”<sup>78</sup> Resolution 39/2 decided to establish another international mechanism, this time with the power to prepare individual

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72. Hum. Rts. Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, ¶¶ 83, 84–87, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018) [hereinafter *IFFM 2018 1st Report*].

73. *IFFM 2018 2nd Report*, *supra* note 64, at ¶ 1441.

74. See U.N. GAOR, 73rd Sess., 13th mtg. at 45, U.N. Doc. A/73/PV.13 (Sept. 28, 2018) (“[W]e are concerned that the release of the report, which is based on narratives and not on hard evidence . . . will serve only to further inflame tensions and could potentially hinder our efforts to create the much-needed social cohesion in Rakhine.”).

75. *Id.* at 46.

76. Hum. Rts. Council Res. 39/2, U.N. Doc. A/HRC/Res/39/2, at ¶ 2 (Sept. 27, 2018).

77. *Id.* at 1, 5.

78. *Id.* at 3. Compare this to language in prior resolutions: Human Rights Council Res. 37/32, U.N. Doc. A/HRC/Res/37/32, at 3 (Mar. 23, 2018) (stating that it “[s]trongly condemns the reported widespread, systematic and gross human rights violations and abuses committed in Rakhine State since 25 August 2017”); G.A. Res.

case files against suspects to facilitate criminal prosecutions.<sup>79</sup> Therefore, while Resolution 39/2 recognized Myanmar's efforts in creating ICOE, it set an overall tone of distrust in the capacity of this domestic mechanism to obtain the accountability sought by the international community. Accordingly, the resolution pursued a separate international mechanism to conduct separate investigations.

In December 2018, the General Assembly sustained the attitude of distrust by adopting Resolution 73/264. Although the resolution substantively reproduced the Human Rights Council's Resolution 39/2, it signaled that the international drive toward accountability was intensifying. Some references in the resolution, including the observation that there exists "sufficient information to warrant investigation and prosecution" of genocide, were a departure from the General Assembly's traditional reticence in using the genocide label in their resolutions.<sup>80</sup> Now, with the support of 136 member states (with eight opposing and twenty-two abstaining on the vote), the general UN discourse embraced the narrative that the allegations of genocide were credible and warranted investigation. Myanmar did not miss the significance of the developing atmosphere, and criticized states in the General Assembly for "abusing various mechanisms in the name of human rights" to undermine "constructive engagement."<sup>81</sup> Myanmar further highlighted that it considered "the accountability issue" serious enough to create the ICOE, but did not commit to "seek[ing] support and expertise" from the UN as Resolution 73/264 recommended.<sup>82</sup> Rather, Myanmar insisted on the view that accountability was a domestic issue: "[n]o one is in a better position than the Government and the people of Myanmar to understand the depth and complexity of their own challenges."<sup>83</sup>

With a substantial number of UN member states now recognizing the imperative to investigate allegations of genocide in Myanmar, it is interesting to note that the IFFM's final report, released in September 2019, went into greater detail on the issue. It pointed to

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72/248, at 2 (Dec. 24, 2017) (stating that it is "[f]urther alarmed by the disproportionate and sustained use of force by the Myanmar forces against the Rohingya community and others in northern Rakhine State").

79. Hum. Rts. Council Res. 39/2, *supra* note 76, at ¶ 2.

80. G.A. Res. 73/264, ¶ 1 (Dec. 22, 2018). See Michael Ramsden, *The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects*, HUM. RTS. L. REV. (2021 forthcoming).

81. U.N. GAOR, 73rd Sess., 65th mtg. at 10, U.N. Doc. A/73/PV.65 (Dec. 21, 2018).

82. *Id.*

83. *Id.*

“seven indicators” supporting the conclusion that Myanmar “incurs [s]tate responsibility for committing genocide and is failing in its obligations under the Genocide Convention to investigate and, where appropriate, prosecute genocide.”<sup>84</sup> Accordingly, the IFFM had “reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State, identified in its last report, has strengthened.”<sup>85</sup> It may well have been that the IFFM’s 2019 Report, in stressing state responsibility under the Genocide Convention, touched upon the issues that would soon be before the ICJ; the report even acknowledged the fact that The Gambia was preparing to take Myanmar to the ICJ.<sup>86</sup>

### B. *Goals of the Strategic Litigation*

The increasing attention within the General Assembly and the Human Rights Council on the Myanmar issue, alongside the initiation of proceedings in the ICJ, was supported by the OIC’s campaigning efforts. Having sponsored both Resolutions 39/2 and 73/264, the OIC was equally active in seeking accountability in a judicial forum.<sup>87</sup> Although an ICC investigation was ongoing, it was narrower in scope than the allegations contained in the IFFM report and required Myanmar’s unlikely cooperation in order for suspects to appear before the ICC.<sup>88</sup> Myanmar’s lack of cooperation would be less problematic if the IFFM report’s findings related to state accountability could be tested in a judicial forum in which Myanmar had accepted jurisdiction. Because Myanmar consented to the dispute resolution clause of the Genocide Convention, the ICJ provided such a forum.<sup>89</sup> Thus The Gambia, appointed and funded by the OIC to bring the case, submitted its application to the ICJ in November 2019

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84. Hum. Rts. Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, para.213, 224 U.N. Doc. A/HRC/42/CRP.5 (Sept. 16, 2019) [hereinafter *IFFM 2019 Report*].

85. *Id.* at 7.

86. *Id.* at 12.

87. The OIC’s role was appreciated multilaterally. See G.A. Res. 74/246, at 2(Dec. 27, 2019) (“Acknowledging the efforts of the Organization of Islamic Cooperation, alongside relevant international efforts, aimed at bringing peace and stability to Rakhine State . . .”). This resolution was also co-sponsored by the United Arab Emirates on behalf of OIC members.

88. See Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Authorizing an Investigation (Nov. 14, 2019) (confining to the crimes against humanity of deportation and persecution); *IFFM 2019 Report*, *supra* note 84, at ¶¶ 1–25 (including, in addition to persecution and deportation, the crime against humanity of “other inhumane acts” and war crimes of torture, forced-labor, attacks on cultural property, and the crime of genocide).

89. See Genocide Convention, *supra* note 10, art. IX.

to initiate proceedings and to obtain provisional measures.<sup>90</sup> The application asserted a wide range of claims pointing to Myanmar's violation of the Genocide Convention, "including by attempting to commit genocide; conspiring to commit genocide; inciting genocide; complicity in genocide; and failing to prevent and punish genocide."<sup>91</sup> Accordingly, the provisional measures it sought against Myanmar included the prevention of genocide, the preservation of evidence, and periodical reports to the ICJ on the steps taken to implement the interim order.<sup>92</sup>

Although not self-identified as such, The Gambia's lawsuit against Myanmar meets the definition of what this article describes as strategic litigation, in that it (1) involves the selection of an applicant to represent interests broader than its own; (2) uses the litigation process to obtain judicial findings and remedies that support legal or political claims beyond the case at hand; and (3) augments the campaigning activities of the group responsible for bringing the litigation.

First, The Gambia brought the case to vindicate an interest broader than its own, be it the interest of state parties to the Genocide Convention or the Rohingya victims (or, indeed, both). In relation to the latter, Rohingya victims could not themselves take the case to the ICJ directly for reasons explained in Part II. In a formalistic sense, as a party to the Genocide Convention, The Gambia is legally affected by any violations to the Convention and has an *erga omnes partes* interest in seeking judicial remedies to redress such violations.<sup>93</sup> But in a practical sense, as a geopolitically remote state, it has no real world connection to the issues in the case. Neighboring Bangladesh, home to a large number of displaced Rohingya, would have been a better contender to bring the case, if not for its reservation to the Genocide Convention.<sup>94</sup> Still, in terms of the litigation's public image, The Gambia's appearance offered the advantage of humanizing the case for the Rohingya victims. As a new democracy coming to terms with its own legacy of gross human rights violations,

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90. The Gambia's Application, *supra* note 10. See also U.N., GAOR, 74th Sess., 8th mtg. at 27, U.N. Doc. A/74/PV.8 (Sep. 26, 2019) ("The Gambia is ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice on behalf of the Organization of Islamic Cooperation.").

91. The Gambia's Application, *supra* note 10, at ¶ 2.

92. *Id.* at ¶ 132.

93. The Gambia's interest in the case is based on the broad approach to standing articulated in *Belgium v. Senegal*, *supra* note 36.

94. Bangladesh Reservation, *supra* note 33.

The Gambia came with “relatively clean hands” and empathy towards victims of human rights abuse; it could use its history in public discourse as a somber reminder as to why impunity should not prevail in Myanmar.<sup>95</sup> The Gambia’s geopolitical remoteness to the situation also supported public perceptions that the lawsuit arose from a desire to promote accountability for victims rather than to promote self-interest.<sup>96</sup> The Gambia’s size, one of the smallest in the world and the smallest state in Africa, also offered a powerful rule-of-law symbolism that even those with minor international power can access international judicial institutions and hold more powerful states accountable.<sup>97</sup>

Second, the purpose of the litigation reached beyond the formal purpose of obtaining a judicial remedy outlining Myanmar’s obligations and responsibility under the Genocide Convention, even though remedy-seeking was an important component of the litigation’s purpose. The OIC campaign aimed more generally to ensure “accountability and justice for gross violations of international human rights and humanitarian laws and principles.”<sup>98</sup> Although The Gambia’s pleadings in the ICJ case were ostensibly confined to issues under the Genocide Convention, The Gambia’s initiating application hinted of a broader purpose, noting that acts of genocide are “distinct from other

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95. Application of the Convention on the Prevention of the Crime of Genocide (The Gambia v Myan.), Hearing on Request for Provisional Measures, CR 2019/18, at 19 (Dec. 10, 2019) [hereinafter *Dec. 10 Hearing*] (“The Gambia know only too well how it feels like to be unable to tell your story to the world, to be unable to share your pain in the hope that someone somewhere will hear and help, to feel helpless. Twenty-two years of a brutal dictatorship in my own country has taught us that we must use our moral voice in condemnation of the oppression of others wherever it occurs around the world so that others will not suffer our pain and our fate.”). See also Oumar Ba, *This Tiny African Country Got the U.N.’s Top Court to Investigate Myanmar for Genocide*, WASH. POST (Jan. 29, 2020), <https://www.washingtonpost.com/politics/2020/01/29/this-tiny-african-country-got-uns-top-court-investigate-myanmar-genocide/> [https://perma.cc/Q3A5-3FKF].

96. See U.N. GAOR 8th mtg., *supra* note 90, at 31 (“[T]he Gambia champions the promotion and protection of human rights . . . [of] people elsewhere in the world.”).

97. The same rationale—relative size and geopolitical remoteness—also supports the sincerity of the Maldives’ subsequent indication of its intention to intervene at the merits stage. See Ministry of Foreign Affairs, The Republic of Maldives to file declaration of intervention in support of the Rohingya people, at the International Court of Justice (Feb. 25, 2020), <https://www.foreign.gov.mv/index.php/en/mediacentre/news/5483-the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people-at-the-international-court-of-justice> [perma.cc/AYZ6-UNKN].

98. See, e.g., IFFM 2019 Report, *supra* note 84; Organization of Islamic Corporation, *Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya*, OIC/ACM/AD-HOC/ACCOUNTABILITY/REPORT-2019/FINAL, ¶ 14 (Sep. 25, 2019), <https://www.oic-oci.org/docdown/?docID=4519&refID=1255> [https://perma.cc/77D2-NE9Y].

prohibited acts—such as discrimination, ethnic cleansing, persecution, disappearance, and torture—but that there is often a close connection between all such acts.”<sup>99</sup> The Gambia further explained that “acts of genocide are invariably part of a continuum,” and that it is important “to place the acts of genocide in their broader context.” Where The Gambia’s application refers to “Myanmar’s acts of persecution and other violations of international law that have been committed against the Rohingya,” The Gambia’s case is based on those aspects constituting genocidal acts under the Genocide Convention.<sup>100</sup> One may reasonably infer that the “broader context” provides the opportunity to allege a range of international law violations, so as to bring them to the surface in an international judicial forum. Indeed, at the provisional measures hearing, The Gambia described a range of alleged crimes, including murder, rape, and torture.<sup>101</sup> While the ICJ would be unable to rule on actions outside of the legal framework of genocide, bringing abusive practices to light in court offered some vindication to the victims seeking accountability and a judicial remedy on a broader scale.<sup>102</sup>

Third, the ICJ case was likely brought to complement the broader campaign within the UN system, given that the guiding hand of the litigation, the OIC, was also active in invoking the UN’s political processes to obtain accountability. As noted in Part II, provisional measures provide a relatively quick procedure for a party to obtain an ICJ remedy that can be used to strengthen the party’s bargaining position and promote dispute settlement. In this regard, Myanmar’s refusal to cooperate with UN investigations regarding crimes against the Rohingya has proven to be a persistent problem.<sup>103</sup> Provisional measures that impose legal duties to be complied with generate a measure of legal supervision that was previously lacking. But legal obligations do not require a state to cooperate with other UN institutions, specifically the General Assembly and the

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99. The Gambia’s Application, *supra* note 10, at ¶ 4 (emphasis added).

100. *Id.*

101. Dec. 10 Hearing, *supra* note 95, at 24 (“Rohingya Muslims have been killed, tortured, raped, burnt alive and humiliated . . .”).

102. As one activist noted, “[f]or me, it does not even matter whether these crimes are found to meet the legal definition of genocide. What matters is that we see justice and accountability for what has happened. . . .” Wai Wai Nu, *Aung San Suu Kyi Was My Idol – Now She’s Defending My People’s Genocide*, NEWSWEEK, Dec. 18, 2019, <https://www.newsweek.com/daw-aung-san-suu-kyi-hague-genocide-1478041> [<https://perma.cc/25DM-JDPR>].

103. See, e.g., G.A. Res. 73/264, at 2 (Dec. 22, 2018) (“[s]trongly regretting” Myanmar’s lack of cooperation).

Human Rights Council processes that the OIC invoked.<sup>104</sup> It is worth noting, then, that one of the provisional measures sought by The Gambia was for Myanmar to cooperate with investigations by the relevant UN bodies, including to grant them access to the territory.<sup>105</sup> Although The Gambia suggested that such cooperation would be limited to the “subject of this case” (i.e. the crime of genocide), the reality is that a cooperation order, if granted by the ICJ, would have facilitated a comprehensive investigation on all allegations of serious international law violations, given that the order would have obliged Myanmar to accept a fact-finding delegation and allow unfettered access to witnesses.<sup>106</sup>

#### IV. THE PROVISIONAL MEASURES DECISION AND ITS IMMEDIATE IMPACT

Having noted the OIC and The Gambia’s goals in taking Myanmar to the ICJ and seeking interim relief, this section considers the provisional measures decision and its impact. In terms of identifiable impact, this section observes that Myanmar engaged more willingly with the ICJ prior to the provisional measures hearing than it ever cooperated with political organs in the UN. This section then notes that Myanmar took certain measures to show that it was investigating The Gambia’s allegations, and that Myanmar more actively defended its position in the UN political organs than it previously did. The appearance of Aung San Suu Kyi, Myanmar’s then de facto head of state, to defend Myanmar in the ICJ also brought a number of important concessions that were used as a framework of analysis in the ICOE report and as a basis for the ICJ’s provisional measures. Compared to how Myanmar had been outright refusing to explain its conduct in the UN political organs, the ICJ case therefore had a noticeable impact in calling forth an official explanation for the “clearance operations,” an explanation that can be used to support future legal demands. Although the parties (The Gambia and Myanmar) have settled on different interpretations of the significance of the decision, Myanmar has acknowledged that the campaign for accountability brought against it has had an impact on its international

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104. See, e.g., Steven Ratner, *After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses*, 36 MICH. J. INT’L. L. 541, 551 (2015).

105. Dec. 10 Hearing, *supra* note 95, at 71.

106. However, the ICJ did not ultimately make such an order, as it held that the proposed provisional measures’ orders were not sufficiently connected to the issue of whether the final merits are more difficult to prove for the applicant. *The Gambia v. Myanmar Provisional Measures Decision*, *supra* note 12, at ¶¶ 61–62.

reputation. This section also notes that the ICJ's provisional measures will bring a layer of legal supervision—supported by legal obligations—to the Rohingya situation that was lacking in the political organs.

Notably, following the initiation of ICJ proceedings, Myanmar showed a greater willingness to justify its actions and to provide some official acknowledgment of possible criminality. The change in attitude stood in sharp contrast to its previous attitude toward the General Assembly and the Human Rights Council, when Myanmar had perfunctorily rejected their enquiries into the alleged crimes.<sup>107</sup> While Myanmar could accuse these organs of selection bias and unjustified political coercion, it was unable to make the same accusation of the ICJ without harming Myanmar's reputation as a law-abiding member of the international community. Failure to engage with the ICJ would lend further weight to the claim that Myanmar has no respect for international law.<sup>108</sup> Consequentially, Myanmar chose not only to engage, but to do so by making a grand gesture: as already noted, Aung San Suu Kyi, a Nobel Peace Prize winner, would appear as an agent for Myanmar in the ICJ hearing. One may infer that both sides of the dispute were keen to project a virtuous public image in strategic litigation, the OIC in nominating The Gambia to appear, and Myanmar in making Aung San Suu Kyi appear. But Suu Kyi had the difficult task of modulating two positions when she appeared before the ICJ in the December 2019 hearings. On the one hand, she had to assuage her domestic audience. On the other hand, she had to provide a plausible explanation for the military operations that had resulted in the mass displacement of Rohingya, especially into Bangladeshi territory. Among Suu Kyi's statements, her acknowledgement that "disproportionate force" might have been used by the military in particular areas of Rakhine, in "some cases in disregard of international humanitarian law," carried particular implications that are discussed below.<sup>109</sup>

A party's desire to avoid litigation may sometimes compel that party to take action in the hope of obviating the need for litigation,

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107. Comparatively, the role of supranational litigation as a tool to promote "official acknowledgment" and "truth telling" has been noted in relation to strategic litigation brought against Turkey to the European Court of Human Rights. See generally Başak Çal, *The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases Before the European Court of Human Rights, 1996–2006*, 35 LAW & SOC. INQUIRY 311 (2010).

108. The same criticism was also directed at the U.S. when it refused to appear before the ICJ to answer Nicaragua's case. Schulte, *supra* note 23, at 399–402.

109. Dec. 11 Hearing, *supra* note 63, at 15.



leading to the establishment of truth and reconciliation processes among other things.<sup>110</sup> In a similar vein, Myanmar's creation of ICOE and its assurance that domestic investigations were ongoing supported its arguments that the ICJ needed to defer to ongoing domestic investigations and that the litigation was premature or moot, based on a principle known as the "complementarity principle." As Suu Kyi argued, the "emerging system of international criminal justice rests on the principle of complementarity"; "only if domestic accountability fails, may international justice come into play."<sup>111</sup> To Suu Kyi, the ICJ was subjecting Myanmar to a double standard: the domestic investigation of international crimes was expected to proceed considerably more swiftly than trials in international tribunals, which typically take many years. Accordingly, it was "inconsistent with complementarity to require that domestic criminal justice should proceed much faster than international criminal justice."<sup>112</sup> In diplomatic negotiations, as noted earlier, the UN might have had more space to engage with these domestic processes and to offer international assistance without having to first doubt their genuineness. Once the issue entered the field of litigation, however, the response to Myanmar's efforts comes framed within a legal logic that requires a judgment on the genuineness or effectiveness of Myanmar's investigations. Accordingly, The Gambia, citing the words of a UN Special Rapporteur, cautioned that "[t]hose responsible for these violations enjoy impunity which perpetuates the devastating cycle of abuse," and that Myanmar was "incapable of delivering accountability."<sup>113</sup> The ICJ, as explained below, arrived implicitly at substantively the same conclusion.

Nevertheless, following the ICJ hearings, Myanmar was intent upon showing the credibility of its domestic investigations against the various allegations it faced. A week after the hearings, Myanmar explained the domestic investigative steps it had taken to the General Assembly, noting that ICOE had "taken approximately 1,500 witness statements from all affected groups in Rakhine" and was finalizing its report.<sup>114</sup> It also called upon Bangladesh to cooperate in

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110. Duffy, *supra* note 8, at 42.

111. Dec. 11 Hearing, *supra* note 63, at 18.

112. *Id.*

113. Application of the Convention on the Prevention of the Crime of Genocide (The Gambia v Myan.), Hearing on Request for Provisional Measures, CR 2019/20, at 17 (Dec. 12, 2019) [hereinafter *Dec. 12 Hearing*].

114. See U.N. GAOR, 74th Sess., 52nd mtg. at 32, U.N. Doc. A/74/PV.52 (Dec. 19, 2019).

collecting evidence from victims at Cox's Bazar, explaining "facilitation and cooperation are needed for the success of evidence collection, which is a crucial part of accountability measures."<sup>115</sup> Although Myanmar still rejected the alternative pathway of international accountability, it adopted a decidedly more forthright attitude after the hearings, both in explaining to the General Assembly what domestic steps were being taken and in opening the door for cooperation with Bangladesh on an accountability response. Resolution 74/246 welcomed these domestic efforts, "encouraging the [ICOE] to issue an initial report and to cooperate with all relevant United Nations mandate holders."<sup>116</sup>

The ICOE released a summary of its report on January 20, 2020.<sup>117</sup> The timing—three days before the ICJ handed down its provisional measures decision—was perhaps not coincidental. Human rights monitors criticized the ICOE report's contents as falling short of international standards, although the report did attribute considerable responsibility for war crimes to the military, unlike the prior investigations that had completely exonerated military forces.<sup>118</sup> Intriguingly, the ICOE report also drew from Aung San Suu Kyi's statements at the ICJ hearing to observe that "war crimes may have occurred in northern Rakhine State in 2017" by the Defence Services and the Police Force.<sup>119</sup> Although this is not the first time that Myanmar has pledged to act in response to alleged criminality, it is plausible that international pressure, and Suu Kyi's concession in response to the strategic litigation, contributed to the domestic accountability agenda's direction, at least to the extent of bringing greater focus to the need to prosecute the alleged crimes. Immediately after the ICOE report's release, Myanmar's Judge Advocate

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115. *Id.*

116. G.A. Res. 74/246, preamble (Dec. 27, 2019). Curiously, Res. 74/246, although containing quite pointed statements on alleged human rights violations in Myanmar, excluded the paragraph contained in the prior resolution on Myanmar concerning the allegations of genocide. *See* G.A. Res. 73/264, ¶ 1 (Dec. 22, 2018).

117. *See generally* Republic of the Union of Myanmar, Office of the President, *Executive Summary of Independent Commission of Inquiry* (Jan. 21, 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/01/21/id-9838> [<https://perma.cc/E6SJ-25SG>] [hereinafter *ICOE Report*].

118. *See Myanmar: Government Rohingya Report Falls Short*, HUMAN RIGHTS WATCH (Jan. 22, 2020, 1:32 PM), <https://www.hrw.org/news/2020/01/22/myanmar-government-rohingya-report-falls-short> [<https://perma.cc/E66S-774N>].

119. ICOE Report, *supra* note 117, at 9.

General and Attorney General are said to have begun conducting the necessary investigations and prosecutions.<sup>120</sup>

The ICOE was not the only body that used Suu Kyi's concessions as a catalyst for action. The ICJ's provisional measures decision against Myanmar, released on 23 January 2020, also referred to Suu Kyi's concessions. In particular, Suu Kyi's observation that disproportionate force might have been used in contravention of international humanitarian law supported the view that the Rohingya were at risk of irreparable prejudice regarding their rights to be protected from genocide.<sup>121</sup> Although the bulk of evidence cited by the provisional measures came from the IFFM reports and Resolutions 73/264 and 74/264 (presumably for their restatement of IFFM conclusions), Suu Kyi's statements were significant.<sup>122</sup> As the ICJ observed, the steps Myanmar took to hold its military accountable "do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia [happened]," particularly given that Myanmar did not make any investigations on allegations under the Genocide Convention.<sup>123</sup>

The ICJ ordered provisional measures on such grounds. The measures required that Myanmar observe its obligations under the Genocide Convention and report to the ICJ every six months on the steps it had taken to observe these obligations.<sup>124</sup> By imposing this requirement with the support of Article 94's legal authority, the ICJ did what only the Security Council can also do within the UN system: it legally required that Myanmar answer for its actions.<sup>125</sup> The reporting requirement may, as the case proceeds, serve an important function in the case. Not only does it bring the Rohingya issue onto the international agenda every six months (this would be true even if the reports that Myanmar submit to the Court are confidential), but it also means that if Myanmar shows a similarly uncooperative approach to the ICJ that it has shown toward the General Assembly

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120. See Press Release, Republic of the Union of Myanmar, Office of the President (Jan. 21, 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2020/01/21/id-9835> [<https://perma.cc/GQH2-69EK>]; Union Attorney General's Office, *Holding the First Meeting of the Criminal and Prosecution Committee* (Feb. 14, 2020), <https://www.oag.gov.mm/?p=5895> [<https://perma.cc/FNG5-MSJS>].

121. *The Gambia v Myanmar Provisional Measures Decision*, *supra* note 12, ¶¶ 53, 56.

122. *Id.*

123. *Id.* at ¶ 73.

124. *Id.* at ¶ 86.

125. See Karin Oellers-Frahm, *The International Court of Justice, Art. 94, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. II 1957, 1959* (Bruno Simma et al eds., 3rd ed. 2012); U.N. Charter, Art. 25.

and the Human Rights Council, Myanmar will be violating its legal obligation under Article 94 of the UN Charter. The Security Council is unlikely to enforce any measures of recalcitrance given China's veto, but an ICJ finding of non-compliance would impose reputational costs on Myanmar and support further collective denunciation in the General Assembly and the Human Rights Council.<sup>126</sup> Relatedly, the ICJ's finding that the allegations of genocide were "plausible" carried more fundamental implications than the provisional measures themselves.<sup>127</sup> The finding of plausible genocide validated the IFFM's fact-finding initiatives and the OIC's campaign for accountability. On a more general level, the finding suggested that Myanmar would need to engage more closely with ongoing UN investigations in the future in order to put itself on the right side of international law.

Although strategic litigation's effects cannot be easily outlined, one evident effect was the formal recognition of the Rohingya as a vulnerable group. As Helen Duffy noted, a judicial decision arising from a strategic litigation can validate a group's experiences and formally recognize the wrong they suffered; this function holds particular power in circumstances where the victims have been cast as wrongdoers or stigmatized as "terrorists" or "enemies."<sup>128</sup> Duffy's observation is particularly poignant here because Myanmar had officially denied the term "Rohingya" and frequently suggested that the purpose of the "clearance operations" was to suppress acts of terrorism.<sup>129</sup> Far from accepting this characterization, the ICJ noted that the Rohingya "remain extremely vulnerable" as victims. The Court endorsed the views contained in the IFFM reports and the General Assembly and the Human Rights Council resolutions that the Rohingya have been historically subject to oppressive state action, including being made stateless by domestic legislation, electorally disenfranchised, and forced to flee from their homes.<sup>130</sup> The Court's adoption of such a characterization offers a degree of vindication for

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126. For past condemnations of Myanmar, see G.A. Res. 74/246, at 2 (Dec. 27, 2019) ("[c]ondemning" the "ongoing non-cooperation" of Myanmar with U.N. mechanisms); G.A. Res. 73/264, at 2 (Dec. 22, 2018) ("deeply regretting that the Government of Myanmar" has not "cooperated with the fact-finding mission").

127. The Gambia v. Myanmar Provisional Measures Decision, *supra* note 12, at ¶ 56.

128. Duffy, *supra* note 8, at 51.

129. Hearing on Request for Provisional Measures, CR 2019/19, ¶ 12 (Dec. 11, 2019); Hum. Rts. Council, Rep. of the detailed findings of the Indep. Int. Fact-Finding Mission on Myanmar, ¶¶ 696, 702, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) (noting official descriptions as "illegal Bengali immigrants" and "terrorists").

130. The Gambia v. Myanmar Provisional Measures Decision, *supra* note 127, at 72–73.

the victims in an international judicial forum, albeit limited to the context of an interim remedy, and adds support to the version of Myanmar history that treats the Rohingya as victims of oppressive state conduct rather than as perpetrators of terrorism. The Court's attitude also shows that, despite the narrow legal frame of the litigation focusing on genocide, the Court produced judicial findings that may be used to support other legal claims in the future, such as the proposition that the Rohingya have been "persecuted" or made stateless in contravention of international law.<sup>131</sup>

Both sides presented their own interpretation of the ICJ's decision to the international media upon the decision's release, aiming either to maximize or minimize its impact. According to the OIC, the ICJ ordered "provisional measures to prevent *further* acts of genocide."<sup>132</sup> The ICJ's findings certainly did not go that far. By contrast, Myanmar's ruling party sought to neutralize the decision's impact, claiming that the government did not need to implement any special domestic measures; in fact, the order was "not a very bad demand" because it was simply a request to prevent genocide, something that all states have to do.<sup>133</sup> Writing in the *Financial Times*, Aung San Suu Kyi noted that the international condemnation for Myanmar in the UN has presented a "distorted picture" which has negatively affected the country's "bilateral relations" and its "endeavours to bring stability and progress to Rakhine."<sup>134</sup> Rather than attack the ICJ decision's legitimacy, Suu Kyi focused on what she regarded as the international community's unwarranted collective action against Myanmar. Nonetheless, the timing of the article's publication—on

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131. As to the law of statelessness paradigm in relation to the Rohingya population, see generally, Shehmin Awan, *The Statelessness of the Rohingya Muslims*, 19 WASH. U. GLOBAL STUD. L. REV. 85 (2020); Katherine Southwick, *Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions*, 68 J. INT'L AFFS. 137 (2015).

132. Organization of Islamic Cooperation, *OIC Welcomes ICJ Decision Ordering Myanmar to Stop Genocide Against Rohingya* (Jan. 23, 2020), [https://www.oic-oci.org/topic/?t\\_id=23137&t\\_ref=13911&lan=en](https://www.oic-oci.org/topic/?t_id=23137&t_ref=13911&lan=en) [<https://perma.cc/BE7E-PGXR>] (emphasis added). Similarly, OIC members have also used the decision to promote their self-image as human rights defenders, as with Saudi Arabia. See *OIC Contact Group Discusses Rohingya Protection with UN Chief*, ARAB NEWS, Mar. 1, 2020, <https://www.arabnews.com/node/1635141/world> [<https://perma.cc/S6CE-CM5D>].

133. *Myanmar's Ruling Party Says No Special Measures Required After ICJ Ruling*, RADIO FREE ASIA Jan. 24, 2020, <https://www.rfa.org/english/news/myanmar/myanmar-icj-nld-reaction-01242020161650.html> [<https://perma.cc/3TY4-V8Q6>].

134. Aung San Suu Kyi, *Give Myanmar Time to Deliver Justice on War Crimes*, FIN. TIMES (Jan. 23, 2020). See also Min Zin, *Myanmar in 2019: Deepening International Pariah Status and Backsliding Peace Process at Home*, 60 ASIAN SURVEY 140 (2020) (noting that the ICJ case has contributed to Myanmar's growing international isolation).

the day of the provisional measures decision's release—was doubtless a plea for states to refrain from intensifying economic sanctions against Myanmar in response to the decision.<sup>135</sup>

While the OIC (and other groups of states) effectively mobilized the UN's legal and political structures against Myanmar in the campaign for accountability, it forewent one organ: the Security Council. What was the Security Council's reaction to the provisional measures? Part II noted that the ICJ's ordering of provisional measures have occasionally prompted Security Council engagement where the issue contains a peace and security dimension, which may open the path to dispute settlement. But that was not the case in the immediate aftermath of the Myanmar decision, despite the best efforts of a number of Security Council members. In February 2020, the Security Council failed to produce a joint statement that would have required Myanmar to fully observe the provisional measures ordered and to take credible action to bring those responsible for the international law violations to justice. The joint statement failed because China and Vietnam opposed it. Instead, the European Union members of the Security Council issued their joint statement to the media.<sup>136</sup> Still, the ICJ decision undeniably compelled the Security Council to discuss the Rohingya issue. Nor would this be the end of the matter: The Secretary-General, having consulted the OIC after the ICJ decision was released, indicated that he would continue to press the issue in the Security Council.<sup>137</sup> As for the UN's other political fora, there is every indication that they will integrate the ICJ provisional measures decision into their recommendations. The Human Rights Council has already done so, "welcoming" the ICJ's conclusions in

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135. Indeed, the U.S. had already imposed sanctions on six senior members of the Myanmar military. See U.S. Department of the Treasury, *Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (Dec. 10, 2019), <https://home.treasury.gov/news/press-releases/sm852> [<https://perma.cc/Y5NE-R46L>]. See also Sorvar Alam & Md. Kamruzzaman, *ICJ Judgment May Put Powerful Pressure on Myanmar*, ANADOLU AGENCY (Aug. 26, 2020) (quoting Michael Becker, former ICJ Associate Legal Officer, noting that "economic sanctions might be part of a broader effort by states to get Myanmar to comply with the court's final judgment"), <https://www.aa.com.tr/en/asia-pacific/icj-judgment-may-put-powerful-pressure-on-myanmar-/1953933> [<https://perma.cc/U9JS-AV6R>].

136. See *UN Fails to Take Action on Order against Myanmar on Rohingya*, AL-JAZEERA, Feb. 5, 2020, <https://www.aljazeera.com/news/2020/2/5/un-fails-to-take-action-on-order-against-myanmar-on-rohingya> [<https://perma.cc/8Z7V-J224>].

137. *OIC Contact Group Discusses Rohingya Protection with UN Chief*, *supra* note 132.

Resolution 43/26 and calling for Myanmar to prevent acts of genocide and ensure the preservation of evidence.<sup>138</sup>

In the months following the provisional measures decision, Myanmar made further progress in its domestic investigations. Interestingly, these investigations have covered incidents in the same locations that Suu Kyi mentioned as the sites of possible crimes in the ICJ hearing.<sup>139</sup> In terms of substance, current domestic investigations are concerned more with war crimes than with genocide, taking after the ICOE report's approach.<sup>140</sup> But recent investigations diverge from the ICOE report in its treatment of evidence. Whereas the ICOE report found insufficient evidence of genocidal intent, and described largely isolated war crimes by aberrant soldiers, Myanmar's President's office issued a directive in April 2020 stating that anyone with "credible information" of individuals committing acts under the Genocide Convention should inform the Office of the President.<sup>141</sup> Another directive required authorities to preserve evidence pertaining to alleged "violations of human rights," which included the acts prohibited under Article II of the Genocide Convention in an almost verbatim manner—but curiously, without using the "genocide" label.<sup>142</sup> Such developments suggest that the ICOE report that came before the ICJ decision will not limit future prosecutorial discretion to a focus on war crimes; the later Presidential directives suggest that domestic investigations and prosecutions may occur under the Genocide Convention. Whether this possibility

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138. Human Rights Council Res. 43/26, U.N. Doc. A/HRC/RES/43/26, ¶ 3 (June 22, 2020).

139. See Republic of the Union of Myanmar, Office of the President, *Executive Summary of Independent Commission of Inquiry* (Jan. 21, 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/01/21/id-9838> [<https://perma.cc/Z3J3-4SH9>]; Tianying Song, *Positive Complementarity and the Receiving End of Justice: The Case of Myanmar*, 104 *TORKEL OPSAHL ACADEMIC EPUBLISHER* (2020), <https://www.toaep.org/pbs-pdf/104-song/> [<https://perma.cc/V4PM-PJBQ>].

140. See ICOE Report, *supra* note 117. So far, three military officers have been convicted for crimes in Rakhine during the relevant period since the commencement of the "clearance operations," although details on these crimes have not been publicized. See *Myanmar Finds Troops Guilty in Rohingya Atrocities Court-Martial*, *AL-JAZEERA*, June 30, 2020, <https://www.aljazeera.com/news/2020/6/30/myanmar-finds-troops-guilty-in-rohingya-atrocities-court-martial> [<https://perma.cc/RHG6-6YGN>].

141. Republic of the Union of Myanmar, Office of the President, *Compliance with the Convention on the Prevention and Punishment of Genocide*, Directive No. 1/2020 (Apr. 8, 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/09/id-10001> [<https://perma.cc/22T9-6287>].

142. Republic of the Union of Myanmar, Office of the President, *Preservation of Evidence and Property in Areas of Northern Rakhine State*, Directive No. 2/2020, ¶ 4 (Apr. 8, 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/09/id-10003> [<https://perma.cc/8NHE-UKNX>].

leads to any tangible action remains to be seen. Even so, the strategic litigation against the Rohingya has clearly had an impact on how the domestic investigations are framed.

#### V. EVALUATING THE FUTURE IMPACT OF THE ROHINGYA LITIGATION

While the provisional measures decision had the immediate effect of promoting dialogue on the issue and assurances of domestic investigations, the long-term effects of the litigation are harder to analyze. As noted earlier, the strategic litigation constituted a part of the larger picture, namely the accountability campaign for crimes against the Rohingya. Therefore, the litigation's achievements vis-à-vis the goal of accountability has to be considered in light of other legal and political strategies, including the case pending before the ICC, pressure exerted by the UN political organs, and individual state efforts such as the imposition of sanctions against Myanmar officials.<sup>143</sup> Nonetheless, focusing the analysis on the strategic litigation itself, the extent to which the Rohingya strategic litigation will make a contribution toward the accountability campaign will turn upon a number of interlinked factors as explored below. These factors include the priorities of international actors in managing the Rohingya crises; Myanmar's incentives to engage with the ICJ and the wider UN processes; the degree to which the genocidal characterization for the "clearance operations" influences ethnic relations in Myanmar; and the extent to which the UN is prepared to take stronger action to address impunity gaps.

First, much will turn upon the priority that international crisis management assigns to potentially conflicting imperatives in the Rohingya situation: peace and reconciliation, repatriation, and accountability. Thus far, the OIC and the western powers have pressured Myanmar to answer for crimes against the Rohingya and to repatriate the displaced Rohingya population back into their territory. As of February 2021, the Myanmar military is tightening its grip on power, imprisoning political opponents including Suu Kyi and

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143. Also relevant will be any interpretations that confirm or diverge from the ICJ findings in the proceedings before the ICC (albeit within the framework of crimes against humanity). See Alessandra Spadaro, *Introductory Note to the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar Decision to Authorize Investigation (I.C.C.) and The Gambia v. Myanmar Order for Provisional Measures (I.C.J.)*, 59 INT'L L. MATERIALS 616, 617 (2020); Priya Pillai, *Expanding the Scope of Provisional Measures Under the Genocide Convention*, 79 CAMBRIDGE L. J. 201, 202 (2020) ("The interaction with other courts and institutions that have commenced investigating the crimes against the Rohingya will be a crucial element to follow.").



violently suppressing protestors. These developments add a new dimension to managing the crisis, and are likely to distract international attention from the human rights abuses on the Rohingya. States may also choose to negotiate the genocide and atrocity crimes aspect of the crisis in “strategic ambiguity” to accommodate the other imperatives of crisis management. A comparable case is the Security Council’s reaction to the crisis in former Yugoslavia. The Security Council prioritized a peace plan for the Balkans and used the euphemism of “ethnic cleansing” in place of a genocidal label for conduct in former Yugoslavia, even though the ICJ provisional measures decision provided a basis to use the term genocide.<sup>144</sup> Time will tell how much international diplomacy will prioritize the genocide accountability imperative regarding the Rohingya issue. A factor to consider is whether *The Gambia v. Myanmar* proceeds to a trial on the merits or not, in light of the risk that the OIC will lose the case because genocidal intent is difficult to prove. There is every indication at this stage that the case will continue, although the OIC will find it harder to prove Myanmar’s responsibility for genocide on the merits with a much higher evidentiary standard.<sup>145</sup>

Second, a related point concerns the extent to which Myanmar is incentivized to engage with the UN’s legal and political processes, which have been initiated by a coalition of the OIC and the western powers. Suu Kyi’s appearance in the ICJ proceedings indicated that the progressive wing of the Myanmar government, at least, perceived a sufficient incentive to engage with the ICJ case. However, with the military *coup d’etat* of February 2021, ICJ demands may now face even more domestic resistance; especially because Myanmar’s military personnel were the perpetrators of the alleged crimes arising from the “clearance operations.” International relations also influence Myanmar’s incentives; in particular, whether Myanmar’s allies accept ICJ’s engagement in the issue or, conversely, shield Myanmar from the consequences of recalcitrance. In this respect, China has defended Myanmar in the UN against calls for accountability.<sup>146</sup> Such an approach reflects the consolidation of a sovereigntist conception of

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144. See, e.g., S.C. Res. 819, preamble (Apr. 16, 1993). As to the use of euphemisms in U.N. resolutions to facilitate negotiations, see Michelle E. Ringrose, *The Politicization of the Genocide Label: Genocide Rhetoric in the UN Security Council*, 14 GENOCIDE STUD. & PREVENTION 124 (2020); Ramsden, *supra* note 80.

145. On the lower evidentiary standard at the interim stage, see Miles, *supra* note 46, at 445–46.

146. See generally Jaesoo Park, *Myanmar’s Foreign Strategy Toward China Since Rohingya Crisis: Changes, Outlook and Implications*, 6 J. LIBERTY & INT’L AFFS. 10 (2020).

UN-Member State relations that numerous non-western powers, including China and Russia, have adopted in their diplomacy.<sup>147</sup> In the past decade, China, for its part, has strengthened its ties with Myanmar through economic and conflict resolution assistance.<sup>148</sup> Although China has sometimes indicated that the violence in Rakhine is unacceptable, and is now treading carefully with a “wait and see” approach to the 2021 *coup d'état*, it has avoided assigning the blame to Myanmar officials for the Rohingya crisis.<sup>149</sup> It may be that, over time, Myanmar's growing economic and political cooperation with China will reduce Myanmar's incentives to engage with the OIC and the western-centric demands for international accountability on the Rohingya issue. One writer has already noted that the narrow-sighted approach of the accountability campaign has “contributed significantly to the strengthening of ties between China and Myanmar.”<sup>150</sup> If this has indeed happened, it would be an unintended consequence of the strategic litigation and the broader accountability campaign. If the international community presses too hard on the genocide accountability imperative instead of negotiating with “strategic ambiguity,” Myanmar may move decisively into China's sphere of influence. This would not only impact the future peace in Rakhine but would influence other areas, including the future of “western-style” constitutional democracy in Myanmar.<sup>151</sup>

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147. See Russia Federation and People's Republic of China, *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law* (June 25, 2016), [http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2331698](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698) [<https://perma.cc/GY3H-5LPQ>].

148. See Yun Sun, *On the Yunnan-Rakhine Corridor*, 109 *TORKEL OPSAHL ACADEMIC EPUBLISHER* (2020), <https://www.toaep.org/pbs-pdf/109-sun-yun/> [<https://perma.cc/S6T9-34LA>].

149. See Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on November 24, 2017*, (Nov. 24, 2017), (noting that “[a]s a friend of both Myanmar and Bangladesh, China is willing to continue with its constructive role for the proper settlement of the Rakhine State issue”), [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1513791.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1513791.shtml) [<https://perma.cc/LB8N-ST4M>]; *Myanmar Coup: China Blocks UN Condemnation as Protest Grows*, BBC (Feb. 3, 2021), <https://www.bbc.com/news/world-asia-55913947>; *China Treads Lightly on Myanmar Coup with Billions at Stake*, NIKKEI ASIA (Mar. 5, 2021), <https://asia.nikkei.com/Spotlight/Myanmar-Coup/China-treads-lightly-on-Myanmar-coup-with-billions-at-stake>.

150. Yun Sun, *supra* note 148, at 4. See also Park, *supra* note 146, at 11 (“Myanmar has crafted a neutral foreign policy since its colonial years to avoid leaning too much on any foreign power, but a spiraling political crisis at home is pushing it toward China as a buffer against international outrage because of Rohingya issue.”).

151. Cf. Dingding Chen & Katrin Kinzlbach, *Democracy Promotion and China: Blocker or Bystander?*, 22 *DEMOCRATIZATION* 400 (2014) (arguing that the People's Republic of China is relatively agnostic on regime type in Myanmar). See also Elsie

Third, the ICJ's interim decision and its ongoing proceedings carries implications for future ethnic and political relations in Rakhine, as well as the re-integration of the displaced Rohingya back to their homes. The ICJ's view that Rohingya are victims at risk of genocide—albeit in the context of an interim order—may domestically reinforce a belief of “them and us,” thereby entrenching ethnic divides.<sup>152</sup> It also bears emphasizing that in the ICJ proceedings, The Gambia accused Myanmar of state-sponsored genocide.<sup>153</sup> The ICJ decision was careful to avoid directly attributing genocidal conduct to Myanmar but perhaps implied it by copiously referencing the IFFM report, which boldly concludes that the evidence establishes a “genocidal intention on the part of the State.”<sup>154</sup> The now crystallized legal view that Myanmar itself bears responsibility for committing genocide, not just for failing to punish isolated crimes by rogue military forces, has removed any veneer of bargaining ambiguity as to who is

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Rainer & Anish Goel, *Self-Inflicted Instability: Myanmar and the Interlinkage Between Human Rights, Democracy and Global Security*, 16 *DEMOCRACY & SEC.* 334, 335 (2020) (attributing the economic and political instability to its lack of a democratic structure and its human rights record).

152. There is also a separate point here in terms of the ethical and moral obligations in bringing strategic litigation on behalf of victims (as The Gambia did on behalf of the Rohingya), which may have the consequence of ultimately undermining their interests. See Icarus H.S. Chan, “*The People v. Myanmar*: Of “Compassion” in *International Justice*,” 116 *TORKEL OPSAHL ACADEMIC EPUBLISHER* 1, 1 (2020) (“In domestic strategic litigations, creative transactions and quasi-legislation beyond the four corners of the law often happen out of court. Here, then, to what extent can victims decide to ‘settle’—when refugees in Cox’s Bazaar are even threatened against repatriating to Rakhine, as going back is seen by some actors to ‘indicate an acceptance of Myanmar’s measures?’”).

153. The Gambia’s Application, *supra* note 10, at ¶ 131 (“All members of the Rohingya group in Myanmar are presently in grave danger of further genocidal acts because of Myanmar’s deliberate and intentional efforts to destroy them as a group.”); Dec. 12. Hearing, *supra* note 113, at 22 (“The Fact-Finding Mission’s conclusion that the only reasonable inference to be drawn from Myanmar’s pattern of conduct is genocidal intent still stands.”).

154. The only instance in which the ICJ suggested a possible involvement of Myanmar in a campaign of genocide was in referring to domestic legislative measures that made the Rohingya stateless and disenfranchised. The Gambia v. Myanmar Provisional Measures Decision, *supra* note 12, at ¶ 72. As to references to the government’s genocidal intent, see IFFM 2019 Report, *supra* note 84, at ¶ 9 (“[H]aving considered the Government’s hostile policies towards the Rohingya, including its continued denial of their citizenship and ethnic identity, the living conditions to which it subjects them, its failure to reform laws that subjugate the Rohingya people, the continuation of hate speech directed at the Rohingya, its prior commission of genocide and its disregard for accountability in relation to the “clearances operations” of 2016 and 2017, the Mission also has reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State, identified in its last report, has strengthened, that there is a serious risk that genocidal actions may occur or recur . . .”).

responsible for the crimes against the Rohingya. Given that the ICJ case creates an imputation of criminality to Myanmar as a state (albeit to the lower evidentiary threshold the ICJ applies in ordering provisional measures), the case and the international accountability campaign supporting it could increasingly be viewed by domestic political discourse as an existential threat to the nation.<sup>155</sup> Growing domestic aversion toward the UN may in turn reduce the Myanmar regime's political will and capacity to not only comply with ICJ orders, but also to constructively engage with other states on the peace and reconciliation, repatriation, and accountability imperatives.<sup>156</sup> At worst, the amplification of the "them and us" and "perpetrators and victims" views could lead to violent reprisals against the Rohingya or foment a hostile environment that inhibits their repatriation, even as reports of widespread attacks on the Rohingya receded by 2020.<sup>157</sup>

Fourth, the strategic litigation's long-term effects will also turn upon the extent to which the UN is able to take more tangible action to secure accountability; condemnatory resolutions in the General Assembly and the Human Rights Council can only go so far where the subject state is decisively recalcitrant. It has already been noted that the threat of a Chinese veto has caused Security Council paralysis and any enforcement action is highly unlikely to occur, at least with regards to the accountability imperative. In the event that Myanmar fails to secure accountability for the atrocity crimes, the concerned international community would have to find creative solutions outside of Chapter VII of the UN Charter. Notably, the Security Council's failure to take action in the face of atrocity crimes has revived the possibility of using the fabled *Uniting for Peace* mechanism, which includes the creation of an *ad hoc* tribunal to try all of the

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155. That said, domestic politics is not static, and an international court might hope that state recalcitrance is short-lived and gives way to long term compliance with a turnover of government officials. Alter, *supra* note 22, at 28.

156. See Morten B. Pedersen, *Gambia vs Myanmar: The Best Last Hope for The Rohingya?*, AUSTRALIAN INSTITUTE INT'L AFFS. (Dec. 28, 2019), <http://www.internationalaffairs.org.au/australianoutlook/gambia-vs-myanmar-the-best-last-hope-for-the-rohingya/> [<https://perma.cc/Q88U-XPQ9>].

157. This unintended consequence ("them and us") has been noted in several other strategic litigations. Alter, *supra* note 22, at 29. Although no reports of widespread attacks on Rohingya have arisen since the ICJ decision, there has been a mobile internet "blackout" over much of Rakhine, which would inhibit the recording of ongoing acts of violence. See Global Justice Center, *Q&A: The Gambia v Myanmar: Rohingya Genocide at The International Court of Justice* (May 5, 2020), [https://www.globaljusticecenter.net/files/20200519\\_ICJ\\_QandA\\_Update\\_FINAL.pdf](https://www.globaljusticecenter.net/files/20200519_ICJ_QandA_Update_FINAL.pdf) [<https://perma.cc/GH3C-E6ER>].

alleged crimes against the Rohingya.<sup>158</sup> It is also important to note that the *Uniting for Peace* resolution is premised upon the Security Council “failing” through the exercise of a permanent member veto.<sup>159</sup> Now, with both broad state support for accountability in the General Assembly and the ICJ’s interim order, accountability actors may seek to force the issue in the Security Council to support the conclusion that the Security Council has “failed” in its primary responsibility to maintain international peace and security in relation to the Myanmar situation. Although speculative, such a course of action is not beyond the realm of possibility. The General Assembly and the Human Rights Council have already been inventive in creating mechanisms containing a mandate to prepare individual case files on suspects so as to assist domestic and international prosecutorial efforts.<sup>160</sup> Accordingly, the IFFM has now been superseded by a mechanism containing such a quasi-prosecutorial mandate.<sup>161</sup> It is therefore possible that accountability actors would explore more creative solutions, now that the ICJ’s interim order offers support for these measures.<sup>162</sup>

## VI. CONCLUSION

Through a case study on the effects of the Rohingya strategic litigation, this article has shown how human rights campaigners may use ICJ proceedings and decisions as part of a campaign to address serious violations of international law. Although the ICJ’s jurisdiction is limited to disputes with states, a number of factors open up

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158. See Rebecca Barber, *Accountability for Crimes Against the Rohingya: Possibilities for the General Assembly Where the Security Council Fails*, 17 J. INT’L CRIM. JUST. 557, 584 (2019). For this possibility in other situations, see Hum. Rts. Council, Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, at 362 (Feb. 7, 2014). See also Michael Ramsden, *Uniting for MH17*, 7 ASIAN J. INT’L L. 337 (2017).

159. On determining “failure,” see also Michael Ramsden, “*Uniting for Peace*” and *Humanitarian Intervention: The Authorising Function of the U.N. General Assembly*, 25 WASH. INT’L L. J. 267, at 299–302 (2016). The General Assembly has sometimes been quite pointed in its condemnation of the Security Council’s failure to act in atrocity crimes, “deploring” the failure of the SC to take action over the Syria crisis. See G.A. Res. 66/253(B), preamble (Aug. 3, 2012).

160. See also Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. INT’L CRIM. JUST. 231 (2017).

161. Human Rights Council Res. 39/2, ¶ 22 (Sept. 27, 2018).

162. Indeed, one judge anticipated this. The *Gambia v. Myanmar* Provisional Measures Decision, *supra* note 12, at ¶ 7 (separate opinion by Xue, J.) (stating that the General Assembly and Human Rights Council “all stand ready and indeed, are being involved in the current case to see to it that acts prohibited by the Genocide Convention be prevented and, should they have occurred, perpetrators be brought to justice”).

the Court to litigation, the effects of which stretch beyond the ICJ proceedings' issues and parties. These factors include the ICJ's broad approach to standing for *erga omnes partes* treaties and its indifference on whether campaigning organizations (such as the OIC) are controlling the litigation in the background. Given that the ICJ is held in high esteem as a guardian of international legality including specific treaty regimes such as the Genocide Convention, seeking and obtaining a remedy from the Court is capable of boosting a human rights campaign's visibility in the international public's eye. Using the ICJ to achieve campaign goals is particularly advantageous where the remedy sought is an interim one, because an interim remedy can be obtained relatively quickly and under a lower evidentiary standard. Strategic litigation in the ICJ is also particularly useful where the goal of a human rights campaign is to mobilize the UN in a more general sense, because the Court's remedy allows campaigners to reframe the imperative for action in legal terms within the organization.

However, there are also some notable limitations in using the ICJ as an instrument for strategic litigation, including the production of unwanted effects. In particular, the Court's jurisdiction over *erga omnes partes* treaties is very limited. A human rights campaign, in seeking to use the ICJ, may only be able to raise a specific legal complaint that is narrower than its broader goals. This need not be a negative aspect, since incremental breakthroughs obtained in legal terms may produce wider effects that advance the human rights campaign. In this sense, *The Gambia v. Myanmar*, alongside the broader international pressure for accountability, drove investigations and potential prosecutions forward in Myanmar, not on the subject matter before the ICJ (i.e. genocide) but on the broader range of alleged war crimes. However, a general concern exists that when an issue is reframed and distilled in order to bring it within the ICJ's jurisdiction, it may adversely affect international peace and security negotiations where strategic ambiguity rather than specified legal responsibility may better facilitate dispute settlement. The Rohingya situation's management from a security perspective, in this respect, is concerned not only with accountability but also with the mitigation of a humanitarian crisis including the repatriation of displaced populations. The growing divide between Myanmar and the western and OIC powers may be due in part to the framing of their dispute as one concerning genocidal accountability, especially given that the allegations accuse Myanmar itself of being responsible under the Genocide Convention.

Although not explored by this article, there is also the issue of whether the “clearance operations” actually rise to the level of genocide as opposed to “ethnic cleansing,” which, absent an intention to physically destroy the group, would not meet the definition of the crime under the Genocide Convention.<sup>163</sup> Again, it was necessary to frame the Rohingya case as a genocide case in this strategic litigation given the ICJ’s jurisdictional limitations. Given the high evidentiary threshold, the OIC is taking a risk in alleging Myanmar of genocide at the ICJ, either for sponsoring genocide or for failing to prevent it, although the risk is likely a calculated one: the OIC had enough evidence to obtain the interim remedy that would add momentum to its broader campaign for the Rohingya within the UN system. The OIC may also be calculating the possibility that the case will not proceed to its merits and that Myanmar will accept a negotiated solution that will involve, for example, an *ad hoc* acceptance of the ICC’s jurisdiction or the creation of an international/hybrid criminal tribunal to try the full range of crimes that have generated international concern. The hope here is that, in the “shadow of law,” Myanmar—and behind it, veto-wielding China—will come to the table. Whether this is the OIC’s best hope, or in the famous words of a court-sceptic, a “hollow hope,” remains to be seen.<sup>164</sup>

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163. Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 43, at 122–23 (Feb. 27, 2007).

164. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 302 (1991).

