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Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights

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Abstract

Strategic litigation, a form of litigation brought with the goal to stimulate structural change, is a growing practice in international courts. Although there has been increased scholarly attention on these trends, it has yet to consider the impact arising from strategic litigation before the International Court of Justice (ICJ). This article outlines a basic structure to evaluate the impact of ICJ strategic litigation. It does so generally and through a case study into the campaign by the Organisation of Islamic Cooperation (OIC) to restore Rohingya rights and secure accountability for crimes committed against this population through the claim that Myanmar has violated the Genocide Convention. This article identifies the OIC's campaign goals and how the ICJ case initiated by The Gambia furthered that campaign and evaluates the impact of this case in advancing Rohingya rights.

1 Introduction

'Strategic litigation' is on the ascendency in international courts.[1] The key feature of this litigation model is that one or more of the parties intend to use the court to promote structural change.[2] This litigation has implications beyond the individual litigant and adjudication of discrete interests based upon a completed set of events, typical of traditional litigation, to challenges to the distribution of political, social, economic

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1 See H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018).

2 Ramsden and Gledhill, 'Defining Strategic Litigation', 4 *Civil Justice Quarterly* (2019) 407, at 411.

and legal values in a society.[3] Strategic litigation typically involves an organized approach, with the litigant selected by a social movement campaign.[4] It entails strategy formation through analysis of the social situation at hand and reflection on the most appropriate judicial forum and sequencing of litigation alongside non-legal strategies, with the aim to maximize cause impact.[5] Given its goal to achieve structural change, strategic litigation is typically initiated by those unable to achieve reform through political processes.[6] These characteristics have received increased scholarly attention, generally and in particular courts, especially the European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR).[7]

However, there has been limited attempt to analyse the practice and effectiveness of strategic litigation before the International Court of Justice (ICJ).[8] This lack of attention is unsurprising given the relatively small number of such cases compared to the ever-growing dockets of the ECtHR and IACtHR.[9] Nonetheless, as Section 2 shows, strategic litigation has a long history in the ICJ, and social movements continue to explore the possibility of litigating their causes before the Court.[10] Accordingly, this article outlines a structure for evaluating the impact of ICJ strategic litigation. It considers this model generally (in Sections 2–3) and specifically (in Sections 4–5) through a study on a recent case of this type: *The Gambia v. Myanmar*.[11] This is a paradigmatic strategic litigation, brought to augment the campaign led by the Organisation of Islamic Cooperation (OIC) to advance the goals of restoring Rohingya rights in Myanmar and securing accountability for alleged crimes committed against this population. The Gambia, a geopolitically remote state with no direct connection to Rohingya victims, was selected by the OIC to bring the case, becoming the first indirectly affected state to invoke the Genocide Convention before the ICJ.[12] As will be shown, the case was brought given the lack of effective political action on the Rohingya cause, including

3 Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts', 40 *Yale Journal of International Law* (2015) 1, at 2.

4 Ramsden and Gledhill, *supra* note 2, at 412–413 ('public-spirited' individuals also occasionally initiate strategic litigations).

5 Duffy, *supra* note 1, at 256.

6 Ramsden and Gledhill, *supra* note 2, at 413.

7 Cavallaro and Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', 102(4) *American Journal of International Law* (*AJIL*) (2008) 768; Huneeus, *supra* note 3.

8 On the effectiveness of international courts, see Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', 106(2) *AJIL* (2012) 225; Helfer and Slaughter, 'Towards a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (*YLJ*) (1997) 273.

9 Cavallaro and Brewer, *supra* note 7.

10 See Netherlands, *The Netherlands Holds Syria Responsible for Gross Human Rights Violations*, 18 September 2020, available at www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations.

11 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, ICJ.

12 Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277; Organisation of Islamic Cooperation (OIC), OIC Welcomes First Hearing of Legal Case on Accountability

Security Council (SC) inaction. The ICJ was selected to bring greater international attention to Rohingya human rights abuses, with the 'root causes' of abuse (statelessness, disenfranchisement and systemic racial discrimination) bundled into a claim under the Genocide Convention. In enriching understanding on strategic litigation before the ICJ, *The Gambia v. Myanmar* commands attention.

It might be queried whether this case provides an appropriate focus, given that no firm conclusions can be made on litigation impact in an evolving situation, especially following Myanmar's lurch into military dictatorship in 2021. However, there are advantages in enquiring into recently initiated litigation to identify variables to support longer-term studies into the impact of a case. Furthermore, the ICJ's ordering of provisional measures in January 2020 against Myanmar allows evaluation of the shorter-term impact. The seeking of interim remedies has long been featured as a litigation strategy; aside from preserving existing rights, scholars have noted its use by litigants to advance goals beyond the courtroom.[13] The impact of provisional measures ordered in *The Gambia v. Myanmar* therefore merits consideration. As, too, does the continued desirability of this litigation after the 2021 coup d'état.

This article is divided into five parts, excluding this introduction. Section 2 provides an overview of strategic litigation practice before the ICJ and the extent to which the Court has accommodated the novel features of this litigation model. Based on past practice, Section 3 identifies the goals of parties in strategic litigations and outlines some general considerations relevant to the assessment of litigation impact. Drawing upon this basic structure, Section 4 identifies goals in *The Gambia v. Myanmar* and the ICJ's strategic choices in its provisional measures decision, with Section 5 identifying the observable impact so far and the factors relevant to longer-term impact assessment. The article then concludes.

2 Strategic Litigation before the ICJ

A *Practice*

To what extent has the ICJ been used for strategic litigation? In one sense, all litigation before the Court is 'strategic', brought to augment the applicant's bargaining position against the adversary state.[14] However, strategic litigation's focus is on advancing structural change rather than the resolution of individualized grievances such as, for example, the claims in *Diallo* concerning redress for the mistreatment of a Guinean

for Crimes against Rohingya, 24 November 2019 ('The Gambia, as Chair of this Committee was tasked with submitting the case to the ICJ, following a decision by the OIC Heads of State'); OIC, Final Communiqué of the 14th Islamic Summit Conference: Session of Hand in Hand toward the Future, Doc. No OIC/SUM-14/2019/FC/FINAL 11, 31 May 2019, para. 47; OIC Res. 61/46-POL, 1–2 March 2019, para. 1.

[13] C. Miles, *Provisional Measures before International Courts and Tribunals* (2017), at 461.

[14] Fischer-Lescano, 'From Strategic Litigation to Juridical Action', in M. Saage-Maaß *et al.* (eds), *Transnational Legal Activism in Global Value Chains* (2021) 299, at 300.

businessman in the Democratic Republic of Congo (DRC).[15] Whether a case qualifies as a strategic litigation, brought to stimulate structural change, is an empirical question (see Section 3).[16] An additional issue is what counts as 'litigation'. A narrow view excludes advisory proceedings by defining litigation to mean bilateral contentious proceedings. However, this ignores the purpose of strategic litigation in seeking to use judicial power instrumentally to pressure structural reform.[17] The Court's advisory opinions have been noted to have produced 'legal findings with significant legal and political implications'.[18] Indeed, civil society has played an important role in pressuring the General Assembly (GA) to make advisory requests in *Legality of Nuclear Weapons* and *Construction of a Wall*, with campaigning bodies (including the OIC) submitting direct representations to the Court.[19]

Although a comprehensive analysis of each case is not possible here, ICJ strategic litigation has followed two themes (which are not necessarily mutually exclusive). The first concern practices alleged to contravene international law, particularly human rights, the use of force and environmental and marine conservation.[20] These challenges have also been identified as the litigation of community interests in that their observance concerns many, if not all, states.[21] They are concerned with achieving policy change or law reform within a state or the creation of useable legal precedent having community-wide implications, such as clarification on the legality of nuclear weapons use.[22] The second cluster concerns what Bruno Simma has described as 'juridical *Nebenkriegsschauplatz*'; collateral action within a wider political-military dispute with the purpose of altering the course of international

[15] *Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, 30 November 2010, ICJ Reports (2010) 639, at 647; see also Huneeus, *supra* note 3, at 4.

[16] Hondora, 'Civil Society Organisations' Role in the Development of International Law through Strategic Litigation in Challenging Times', 25 *Australian Journal of International Law* (2018) 115, at 122.

[17] C. Harlow and R. Rawlings, *Pressure through Law* (1991), at 159–160.

[18] Contesse, 'The Rule of Advice in International Human Rights Law', 115(3) *AJIL* (2021) 367, at 376.

[19] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136. See discussion in Gray, 'Why States Resort to Litigation in Cases Concerning the Use of Force', in N. Klein (ed.), *Litigating International Law Disputes* (2014) 305, at 326; Powell, 'The International Court of Justice and Islamic Law States', in K. Alter (ed.), *International Court Authority* (2018) 277, at 292.

[20] See, e.g., *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, 5 October 2016, ICJ Reports (2016) 833; *Whaling in the Antarctic (Australia v. Japan)*, Merits, 31 March 2014, ICJ Reports (2014) 226; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 449; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43; *Nuclear Weapons*, *supra* note 19; *Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, ICJ Reports (1974) 253; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase Judgment, 18 July 1966, ICJ Reports (1966) 6.

[21] Longobardo, 'The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of *The Gambia v. Myanmar* and Beyond', 24 *International Community Law Review* (forthcoming).

[22] *Nuclear Weapons*, *supra* note 19.

relations on this dispute.[23] Typically, the applicant will attempt to bundle aspects of this wider dispute into a particular legal regime, mainly because of limits in the Court's contentious jurisdiction to consider this dispute on a broader basis.[24] The most studied example in this cluster is *Military and Paramilitary Activities*, although numerous other states have used the Court to wage 'lawfare'.[25] More recently, the Convention on the Elimination of Racial Discrimination (CERD) has been strategically invoked in the wider geopolitical conflicts concerning the conduct of Russia (in Georgia and Ukraine) and the United Arab Emirates (UAE) (imposing a blockade against Qatar).[26]

B *Strategic Judging*

Strategic litigation entails 'a novel kind of judging', with the metamorphosis of the judge into 'creator and manager of complex forms of ongoing relief', having 'widespread effects on persons not before the court'.[27] Although approaches vary between courts, the friendliest approach involves a court developing its remedial power, where a violation is found, to order and supervise structural reform, remaining seized of the matter until it deems the state to have implemented their orders successfully.[28] Strategic judging is calibrated towards stimulating structural change, with the court monitoring the concrete factors that work both for and against legal compliance and an evaluation whether and how they can respond to these factors.[29] This includes avoiding 'jurisprudential elements likely to provoke

[23] Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?', in C. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 301, at 310; see also I. Marchuk, 'From Warfare to "Lawfare": Increased Litigation and Rise of Parallel Proceedings in International Courts', in A. Kent *et al.* (eds), *The Future of International Courts* 217, at 228–229.

[24] *Ibid.*

[25] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, ICJ Reports (1986) 14; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168; *Legality of Use of Force (Yugoslavia v. United States)*, Provisional Measures, 2 June 1999, ICJ Reports (1999) 916.

[26] Convention on the Elimination of All Forms of Discrimination against Racial Discrimination (CERD) 1965, 660 UNTS 195; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, 1 April 2011, ICJ Reports (2011) 70; *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, Application Instituting Proceedings, 16 January 2017, ICJ; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, 4 February 2021, ICJ. See also Ukraine's case brought against Russia under the Genocide Convention following the February 2022 invasion, discussed in: Ramsden, 'Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention', *Vanderbilt Journal of Transnational Law* (forthcoming).

[27] Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', 4 *Third World Legal Studies* (1985) 107, at 108; Chayes, 'The Role of the Judge in Public Law Litigation', 89(7) *Harvard Law Review* (1976) 1281, at 1284.

[28] Huneeus, *supra* note 3, at 3–4, 13–14, 30.

[29] Cavallaro and Brewer, *supra* note 7, at 770.

public or government backlash'.[30] Under this approach, a court will also not be so astute as to find impediments to adjudication (such as standing or jurisdiction), the preference being to address the substantive issues in the case.[31] To what extent does the ICJ exhibit these characteristics?

The ICJ exists both as a forum to adjudicate interstate disputes and as a pivot to the attainment of the purposes of the Charter of the United Nations (UN Charter).[32] The institutional purposes goal is especially pronounced in advisory proceedings, with the Court being a participant 'in the activities of the organisation', opining upon legal questions to augment the requesting organ's functions.[33] Motivated by the imperative to advance United Nations (UN) purposes, and to help the requesting organ meet its goals, the Court has noted that a request 'in principle, should not be refused', even where affecting state interests.[34] By contrast, the Court's contentious jurisdiction is premised upon the 'fundamental principle of [state] consent', irrespective of the dispute's broader public importance such as alleged *jus cogens* violations.[35] The consensual aspect of the Court's contentious jurisdiction places constraints on judicial strategies aimed at stimulating structural change.[36] It often leaves the Court judging at the margins of a dispute, given the limits of the parties' consent, as with Russia's various unlawful acts bundled into claims under the CERD (although, as noted below, the Court employs strategies to ensure its relevance to that broader dispute and comparable situations).[37]

Judges are also undoubtedly mindful of the fragility of state consent to jurisdiction, with the risk of overly progressive approaches causing backlash, including states withdrawing or limiting their consent to avoid such litigation in the future.[38] Still, this has not stopped the Court from minimizing barriers to strategic litigation in adopting a broad approach to standing; entertaining provisional measures based upon a relatively low evidentiary threshold and jurisdictional basis (*prima facie*); construing abuse of process challenges as only met in 'exceptional circumstances'; and rejecting the relevance of a case's wider political dimension including parallel SC involvement in the dispute.[39] Although this has not prevented the Court from rejecting politically

[30] *Ibid.*, at 794.

[31] Huneeus, *supra* note 3, at 5.

[32] Giladi and Shany, 'The International Court of Justice', in Y. Shany (ed.), *Assessing the Effectiveness of International Courts* (2014) 161, at 166.

[33] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950, ICJ Reports (1950) 65, at 71; M. Ramsden, *International Justice in the United Nations General Assembly* (2021), at 191–192.

[34] *Ibid.*

[35] *Georgia v. Russia*, *supra* note 26, at 25; *Bosnia v. Serbia*, *supra* note 20, at 104.

[36] Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', 18 *European Journal of International Law* (*EJIL*) (2007) 815, at 816; Huneeus, *supra* note 3, at 20.

[37] Powell, *supra* note 19, at 280; *Marshall Islands v. United Kingdom*, *supra* note 20, at 1101, Separate Opinion of Judge Crawford (the CERD used as a 'device to bring a wider set of issues before the Court').

[38] Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', 23(3) *EJIL* (2012) 769, at 783; Simma, *supra* note 23, at 323.

[39] See Longobardo, *supra* note 21; Lemey, 'Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process"', 20 *Law and Practice of International*

charged strategic litigation, including in *Marshall Islands v. United Kingdom*, these developments widen the scope for cases to be brought to advance campaign goals (see Section 3).[40]

The feature of courts as active monitors of structural reform also requires qualification in the ICJ context. Under the UN Charter, post-adjudicative compliance monitoring is within the SC's purview (a power never exercised).[41] It is arguably within the Court's power to establish a post-adjudicative monitoring organ, although they have yet to do so despite receiving arguments from litigants on this point.[42] Nonetheless, there are two relevant developments. The first is the insertion of Article 11 in the Internal Judicial Practice (introduced after *The Gambia v. Myanmar*), creating an ad hoc committee (comprising three judges) to monitor provisional measures implementation.[43] The committee's mandate is to examine information supplied by the parties and report periodically to the Court with recommendations.[44] Although limited to provisional measures, it signals a readiness for the Court to adapt its working methods to perform a formal monitoring role, particularly given the increased use of interim remedies by strategic litigants.[45] Given the length of time it takes typically for a case to conclude, this reform is significant as it will involve the Court in the longer-term monitoring of unfolding situations. A second development is the possibility for the Court to stimulate institution building in the UN principal political organs to monitor the structural changes required in the judgment/opinion. Following *Construction of a Wall*, the GA established the UN Register of Damage, enabling individuals to file reparations claims to be resolved with Israel's cooperation.[46] Although an outlier in GA practice, it offers a template for future collective responses to litigation within the UN system.

It is also necessary to consider the extent to which the Court acts strategically to promote the acceptability of its decision to the parties, including to stimulate structural change. Judicial strategy is inevitable, even if denied by judges.[47] This strategy is identifiable from the substantive content of the decision, comprising the choices made

Courts and Tribunals (2021) 5, at 27; Bonafe, 'Adjudicative Bilateralism and Community Interests', 115 *AJIL Unbound* (2021) 164, at 169.

40 *Marshall Islands v. United Kingdom*, *supra* note 20. For criticism of these decisions, see Venzk, 'Public Interests in the International Court of Justice: A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)', 111 *AJIL Unbound* (2017) 68, at 74.

41 Charter of the United Nations (UN Charter) 1945, 1 UNTS 16, Art. 94(2); McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2009) 283, at 305.

42 Patarroyo, 'Monitoring Provisional Measures at the International Court of Justice: The Recent Amendment to the Internal Judicial Practice', *EJIL:Talk!* (22 January 2021).

43 Resolution Concerning the Internal Judicial Practice of the Court (Rules of Court, Article 19), 21 December 2020, Art. 11.

44 *Ibid.*

45 Pillai, 'New Mechanism at the International Court of Justice on Implementation of Provisional Measures: Significance for *The Gambia v. Myanmar*', *OpinioJuris* (22 December 2020).

46 GA Res. ES-10/17, 15 December 2006.

47 Shany, 'Bosnia, Serbia and the Politics of International Adjudication', 45 *Justice* (2008) 21; Burmester, 'Australia's Experience in International Litigation', in Klein, *supra* note 19, 61, at 70.

in norm construction, reasons for a decision, as well as *obiter dictum*.[48] Equally relevant is what the Court does not say, particularly in view of the parties' arguments. Enquiry into norm construction considers whether the Court uses the opportunity to articulate legal principles of general significance (as opposed to constructions that are just enough to decide the case at hand), such as the 'extremely progressive' reading of the Genocide Convention in *Bosnia v. Serbia*.[49] The considerations relied upon by the Court in arriving at its decision will also be revealing, particularly on controversial aspects. In *Ukraine v. Russia*, the Court's decision to only grant interim measures in relation to the CERD, while avoiding allegations of Russian-sponsored terrorism, was driven by strategic considerations.[50] Finally, *obiter dictum* has been used by judges to promote change beyond the case.[51] The Court has expressed regret about state conduct (even if lawful), as with Germany's refusal to compensate Italian victims of the Third Reich.[52] Similarly, in ordering provisional measures in *Ukraine v. Russia*, the Court went beyond protecting rights under the CERD to encourage broader settlement, expecting the parties 'to work for the full implementation' of the Minsk Agreement.[53] Identifying judicial strategy requires close attention to each case, as Section 4 explores.

3 Identifying Goals and Impact

Analysis of a strategic litigation must delineate goals from impact.[54] The applicant's goals will provide a benchmark to evaluate whether the litigation has the desired impact, although the impact will also be unforeseen.[55] The respondent's engagement in the case will also provide information to support analysis on the extent to which the litigation has had, or can have, impact. The goals of both parties will

[48] Cavallaro and Brewer, *supra* note 7, at 794; Fouchard, 'Allowing Leeway to Expediency, without Abandoning Principle? The International Court of Justice's Use of Avoidance Techniques', 33 *Leiden Journal of International Law* (*LJIL*) (2020) 767, at 777–778. Concurring opinions have also articulated strategic visions reflecting the Court's choices. Coleman, 'The International Court of Justice and Highly Political Matters', 4 *Melbourne Journal of International Law* (*MJIL*) (2003) 29, at 61–62 (including citations).

[49] *Bosnia v. Serbia*, *supra* note 20; Milanović, 'State Responsibility for Genocide: A Follow Up', 18(4) *EJIL* (2007) 669, at 687; see also Grossman, 'The Normative Legitimacy of International Courts', 86 *Temple Law Review* (2013) 61, at 70–71.

[50] *Ukraine v. Russia*, *supra* note 26; Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)', 18 *MJIL* (2017) 436, at 443.

[51] Dothan, 'How International Courts Enhance Their Legitimacy', 14 *Theoretical Inquiries in Law* (2013) 455, at 461.

[52] *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, at 143–144.

[53] *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, Provisional Measures, 19 April 2017, ICJ Reports (2017) 104, at 139–140; Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement), 5 September 2014.

[54] Duffy, *supra* note 1, at 47.

[55] *Ibid.*

therefore be considered in turn, followed by an identification of various perspectives on litigation impact.

A *Applicant's Goals*

The nomenclature of 'applicant' here denotes the initiating party in contentious proceedings, although, as noted above, strategic litigation extends to advisory proceedings (where there is no applicant as such but, rather, a requesting organ). A material difference is that a judgment in contentious proceedings is binding on the parties, in contrast to an 'advisory' opinion. There have been occasions where the contentious route was preferred so as to obtain a binding decision to secure greater political leverage, as in *South West Africa*.[56] Conversely, the advisory route has been pursued out of necessity (due to a lack of consensual jurisdiction over the dispute) or to enable the Court to deal with an issue more comprehensively given jurisdictional gaps in contentious proceedings.[57] Nonetheless, the goals underpinning strategic litigation through both routes are identical, in seeking structural impact, as the analysis in this section demonstrates.[58]

Applicant goals are identifiable in various ways. Directly, the structural change will be articulated in the applicant's legal requests that seek wide-ranging determinations of structural violations, as with, for example, the DRC's requests in *Armed Activities*.[59] Part of this contextual enquiry will be to consider how goals adapt to changing events.[60] For example, a primary goal while violations are unfolding has been to obtain information; once obtained, other goals, such as cessation or accountability, become relevant.[61] However, the applicant's legal request does not provide a complete account of the litigation's purpose. The legal challenge to South Africa's continued mandate over South West Africa was as much about ending their administration of this territory as it was about ending apartheid in South Africa (the latter goal not part of the applicants' legal claims in *South West Africa*).[62] Identifying indirect goals, sometimes lacking clear distillation or articulated only retrospectively, can be challenging.[63] The applicant is often circumspect in articulating indirect goals in the legal proceedings to avoid allegations that it is abusing the Court's process. The goals will therefore typically be identifiable outside of the proceedings, in the objectives of the campaign from which the litigation originated. Writers have found a richer understanding of the goals in *South West Africa* from a series of pan-African conferences preceding the selection of Liberia and Ethiopia

[56] D'Amato, 'Legal and Political Strategies of the South West Africa Litigation', 4 *Law Transition Quarterly* (1967) 8, at 17.

[57] See further note 19 above.

[58] See also Duffy, *supra* note 1, at 224.

[59] See findings in *Armed Activities*, *supra* note 25, at 239.

[60] Duffy, *supra* note 1, at 48.

[61] *Ibid.*

[62] *South West Africa*, *supra* note 20; Irwin, 'Apartheid on Trial: South West Africa and the International Court of Justice, 1960–66', 32(4) *International History Review* (2010) 619, at 624.

[63] Harlow and Rawlings, *supra* note 17, at 291.

as applicants.[64] Goals are also inferable from events preceding the initiation of proceedings. Responding to domestic political pressure was thus a contributing factor behind the challenges of Australia and New Zealand to French nuclear testing.[65] Similarly, the fact that Yugoslavia's case against the USA and others in *Legality of Use of Force* was manifestly lacking in jurisdiction supported an inference of a publicity objective.[66]

A common applicant goal is to obtain a favourable clarification of international norms, alleging breaches to test and advance particular interpretations of legal rules.[67] This pursues the aim of deterring states from engaging in that conduct and supporting policy reform (as with Australia's arguments that French nuclear testing violated *jus cogens* or its submissions on the unlawfulness of Japan's whaling programme).[68] Particularly noteworthy is where a state seeks a ruling that the respondent is obliged to meet certain common standards that can also be used against similarly situated states not party to the case, as with Marshall Islands' arguments in *Marshall Islands v. Pakistan*.[69] A finding that a state violated international law has been used by campaigns to advance political goals, be that in providing a framework for monitoring compliance, energizing civil society, exerting pressure for a negotiated settlement through the attribution of blame or providing legal justification for coercive measures, such as the imposition of sanctions or even armed intervention (goals of Liberia and Ethiopia in *South West Africa*).[70]

Aside from legal clarification, another goal would be to use the Court, as an objective and expert trier of evidence, with the aim for it to publicly express conclusions on a situation. These judicial findings can then be used as a source of information to guide interstate negotiations, advocacy campaigns and institutional action or otherwise impose reputational costs upon the offending state.[71] These findings hold a perceived value in themselves, such as where wrongdoing against victims is found.[72] They have also acted to validate the findings of prior fact-finders, such as commissions of inquiry or other courts, thereby establishing a judicial record of violations.[73]

64 Barnes, '"The Best Defense Is to Attack": African Agency in the South West Africa Case at the International Court of Justice, 1960–1966', 69(2) *South African Historical Journal* (2017) 162, at 168–169.

65 Fischer, 'Decisions to Use the International Court of Justice: Four Recent Cases', 26(2) *International Studies Quarterly* (1982) 251, at 258.

66 *Legality of Use of Force*, *supra* note 25; Lemey, *supra* note 39, at 20 (including citations).

67 Meyer, 'How Compliance Understates Effectiveness', 108 *AJIL Unbound* (2014) 93, at 95.

68 Fischer, *supra* note 65, at 272.

69 See, e.g., *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Counter-Memorial of Pakistan, 1 December 2015, ICJ, at 34 (Marshall Islands sought 'to attract judicial statements of a general nature').

70 Irwin, *supra* note 62, at 621; Gehring, 'Litigating the Way Out of Deadlock: The WTO, the EU and the UN', in A. Narlikar (ed.), *Deadlocks in Multilateral Negotiations* (2012) 96, at 101–102; Scott, 'Litigation versus Dispute Resolution through Political Processes', in Klein, *supra* note 19, 24, at 28.

71 Guzman, 'International Tribunals: A Rational Choice Analysis', 157 *University of Pennsylvania Law Review* (2008) 171, at 179; Fischer, *supra* note 65, at 258.

72 See, e.g., *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Verbatim Record CR 2009/08, 6 April 2009, ICJ, at 10.

73 Duffy, *supra* note 1, at 238.

One notable practice is parallel action in multiple courts, typically with each court addressing a different legal aspect, as with Georgia's sequential cases in the ECtHR, International Criminal Court (ICC) and ICJ.[74] The goal here is for the parallel litigations to complement each other, for example, with findings in one court being used by the other as well as to collectively support campaign goals.[75]

However, applicant goals have not been solely fixated on obtaining a favourable ruling. Cases have been brought for publicity and symbolic reasons to educate and shape discourse as well as to stimulate negotiations, even if a successful ruling is uncertain or unlikely.[76] Tuvalu's threat to commence proceedings against the USA for its failure to ratify the Kyoto Protocol generated substantial publicity, even though no application was initiated.[77] A public relations goal has been noted both in the initiation of proceedings and the seeking of provisional measures, as the request will provide the applicant with an opportunity to express its opinions publicly, even if the Court denies jurisdiction.[78] As part of this publicity goal, an applicant will bring the case so as to push disinterested third party states to take a position on the litigated cause.[79] A publicity goal has revealed itself in argumentation, for example, with applicant states broadening their factual presentation to include violations beyond the scope of the Court's jurisdiction (as with Ukraine and Georgia's use of the CERD to give publicity to a range of alleged Russian violations against these states).[80] Applicants will generally hope that the initiation of proceedings will push the recalcitrant state to see negotiation as preferable to protracted litigation that brings their practices under the judicial microscope.[81] On the other hand, an applicant will pursue litigation having made the calculation that, even in defeat, their campaign will benefit through scoring interim victories, inspiring outrage, mobilizing civil society and underlying the need for political action to redress legal failure.[82]

Some applicants will also have specific goals in using the ICJ given its status as the UN's 'principal judicial organ' – this includes the Court's ability to reflect a cause's international importance, which cannot be conveyed in domestic or regional courts alone.[83]

[74] Wittke, 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?', 72(2) *Europe-Asia Studies* (2020) 180, at 196.

[75] Duffy, *supra* note 1, at 252.

[76] *Ibid.*, at 244–245; Ebobrah and Lando, 'Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question', in J. Gathii (ed.), *The Performance of Africa's International Courts* (2021) 178, at 195.

[77] Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice', 14 *Pacific Rim Law and Policy Journal* (2005) 103, at 105.

[78] Lemey, *supra* note 39, at 20; Kyoto Protocol 1997, 37 ILM 22 (1998).

[79] Johns, 'Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication', 56(2) *Journal of Conflict Resolution* (2012) 257, at 272–273.

[80] Okowa, 'The International Court of Justice and the Georgia/Russia Dispute', 11(4) *Human Rights Law Review* (2011) 739, at 740; Wittke, *supra* note 74, at 202.

[81] Fischer, *supra* note 65, at 273.

[82] Nejaime, 'Winning through Losing', 96 *Iowa Law Review* (2011) 941, at 969–971.

[83] Fischer, *supra* note 65, at 258.

Applicants have hoped that the Court's legal framing of a situation will have a bearing on the tone and quality of debate in the principal political organs (SC and GA) as well as on the nature of the action taken.[84] Markus Gehring thus noted that Georgia's case against Russia was brought to 'influence the development of the broader United Nations itself'.[85] The added impetus provided by the ICJ's identification of a legal obligation or violation has also been anticipated by applicants to impose reputational costs on those states, including offenders who continue to reject measures in the UN political organs.[86] These considerations underpinned the GA's requests for advisory opinions in *Construction of a Wall* and *Nuclear Weapons*.[87] This scope for institutional dialogue was also the hope of Ethiopia and Liberia in *South West Africa*: whereas South Africa had ignored the GA's recommendations, it was anticipated that a legal ruling would force the USA and the United Kingdom (UK) to support binding SC action.[88]

B *Respondent's Goals*

Although case studies on strategic litigation typically focus on applicant goals, it is equally necessary to examine those of the respondent. The respondent's perspective forms part of the context in which the Court exercises its strategic choices (see Section 2).[89] It also provides insight into whether the litigation has been, or is capable of being, effective in accomplishing the applicant's goals in bringing the strategic litigation (see Section 3.C). There has been a tendency for the scholarly literature to assume a common purpose between the applicant and the respondent in utilizing international adjudication.[90] Litigation on this understanding is a tool to overcome coordination problems through the creation of focal points and signals to resolve a dispute within an 'indifference curve uniting the position of litigating states'.[91] On this basis, adjudication allows states to isolate a particular dispute from their otherwise friendly relations.[92] However, this understanding does not adequately capture the totality of respondent perspectives on strategic litigation. The respondent will often perceive strategic litigation as threatening sovereign interests rather than resolving discrete bilateral coordination problems.[93] Furthermore, strategic litigation often arises as a

84 Venzk, *supra* note 40, at 71.

85 Gehring, *supra* note 70, at 101–102.

86 D'Amato, *supra* note 56, at 31–33.

87 Ramsden, *supra* note 33, at 195–196.

88 Falk, 'The South West Africa Cases: An Appraisal', 21(1) *International Organization* (1967) 1, at 4.

89 Ginsburg, 'The Institutional Context of the International Court of Justice', in C. Esposito and K. Parlett (eds), *Cambridge Companion to the International Court of Justice* (forthcoming).

90 Fang, 'The Strategic Use of International Institutions in Dispute Settlement', 5(2) *Quarterly Journal of Political Science* (2010) 107, at 109 (this assumption is 'rarely challenged').

91 K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014), at 51; Ginsburg and McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45(4) *William and Mary Law Review* (2004) 1229, at 1328; Fischer, *supra* note 65, at 271–272.

92 Davis and Morse, 'Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice', 62 *International Studies Quarterly* (2018) 709, at 712.

93 See, e.g., Stephens, 'International Environmental Disputes: To Sue or Not to Sue?', in Klein, *supra* note 19, 284, at 289; Ginsburg and McAdams, *supra* note 91, at 1316.

last resort because relations between the disputant states have broken down due to military/economic conflict or the alleged failure of the respondent to address serious violations of international law.[94] Whereas friendly states use litigation to isolate a dispute, the respondent will perceive a strategic litigation as embedded in a wider political conflict that materially affects relations with the applicant state.[95] This feature is also reflected in the material power imbalance of many of the disputants, with weaker states initiating proceedings against stronger adversaries including veto-wielding permanent members: *Military and Paramilitary Activities*, *Ukraine v. Russia* and *Marshall Islands v. United Kingdom* are all cases in point.[96] Given their stronger bargaining position in the political arena, a powerful respondent is unlikely to always share the applicant's perspective on the value of a Court-imposed legal framework to the dispute.

Accordingly, there is a pattern of respondent resistance towards strategic litigations before the Court. These cases, invariably, are initiated unilaterally by the applicant, with the respondent's involvement as a party arising from its prior acceptance of the ICJ's jurisdiction rather than from a desire for judicial involvement in the dispute.[97] Respondents have failed to appear, or only selectively engage, in order to try to deprive the case of legitimacy, cause inconvenience to the applicant and Court, impede the quality of judicial reasoning and prepare the ground for non-compliance.[98] Jurisdictional and 'abuse of process' challenges are also common, the respondent hoping that the Court avoids merits adjudication or at least the consideration of sensitive collateral elements (such as Ukraine's alleged use of the CERD 'as a vehicle for submitting the dispute on the status of Crimea to the Court').[99] There have also been times where respondents have provided tactical concessions to incentivize negotiations outside the courtroom or to render the proceedings moot, as with France's unilateral declaration on non-nuclear atmospheric testing in the South Pacific after the initiation of *Nuclear Tests*.[100]

However, the picture is not solely of resistance towards strategic litigation. Respondents have used the litigation as a way to convey their narratives to international and domestic audiences as well as to influence political bargaining on the litigated situation.[101] Where already subjected to severe international condemnation,

94 See, e.g., Marchuk, *supra* note 23.

95 Bilder, 'International Dispute Settlement and the Role of International Adjudication', 1 *Emory Journal of International Dispute Resolution* (1987) 131, at 155.

96 Venzk, *supra* note 40, at 74 (on these power differentials).

97 Fang, *supra* note 90, at 108.

98 Alexandrov, 'Non-Appearance before the International Court of Justice', 33 *Columbia Journal of Transnational Law* (*CJTL*) (1995) 41, at 54; Fry, 'Non-Participation in the International Court of Justice Revisited: Change or Plus Ca Change?' (2010) 49 *CJTL* 35, at 40, 60, 69.

99 Burmester, *supra* note 47, at 65; *Application of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, Russia's Preliminary Objections, 12 September 2018, ICJ, at para. 306.

100 Fang, *supra* note 90, at 108; Johns, *supra* note 79, at 273; *Nuclear Tests*, *supra* note 20, at 270–272.

101 Irwin, *supra* note 62, at 621; Fang, *supra* note 90, at 110; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Verbatim Record CR 2009/09, 6 April 2009, ICJ, at 23 (trial of Hissène Habré on 'African soil'); D'Amato, *supra* note 56, at 22.

respondents have felt there to be nothing to lose in fully participating, with the chance (even if slight) that victory can be used to impart a 'rule of law' imprimatur on its actions in an effort to undermine the political campaign against it.[102] Two of the Court's procedural features, in particular, support the advancement of the respondent's interests. The first is the litigants' power to each appoint an ad hoc judge together with a culture of judges giving separate (and often dissenting) opinions.[103] If the respondent state loses, the judgment is unlikely to be unanimous, thereby allowing it to save face.[104] For example, Russia downplayed the significance of the provisional measures against it in the Georgia dispute by pointing, during a GA debate, to the seven-judge dissenting opinion that supported its position.[105] A second feature is the Court's character as an independent and impartial tribunal that observes rules of procedural fairness.[106] The respondent state will therefore seek to benefit from the Court scrutinizing and defending practices that, perhaps until that point, were only subjected to fact-finding and condemnation in the UN political process (as motivated South Africa in *South West Africa*).[107] The flip side is that the applicant state is unable to make allegations, without meeting a legal burden of proof, that they would otherwise get away with in the political sphere.[108]

As France's concession in *Nuclear Tests* shows, there is scope for strategic litigation to modify the respondent's preferences. Challenging the assumption that state interests are always predefined and fixed in litigation, Karen Alter identified two additional approaches that, when considered together, generate more specified and accurate hypotheses about the factors that affect state preferences in litigation (be that at the pre-initiation, during and post-decision phases of the litigation).[109] The first enquires into the influence of the multilateral political system on state engagement with the case.[110] Such multilateral factors are addressed in greater detail below when evaluating litigation impact (Section 3.C), but they are also relevant to how a respondent formulates and evolves its litigation strategy. Most pertinently, pressures from the multilateral system explain a respondent's preparedness to open up and defend its practices, within the legal framework applicable before the Court, to avoid the reputational costs of not doing so. This invites further enquiry into the extent to which the respondent has

[102] Highet, 'Litigation Implications of the U.S. Withdrawal from the Nicaragua Case', 79(4) *AJIL* (1985) 992, at 998; Marchuk, *supra* note 23, at 218; Irwin, *supra* note 62, at 621; Alter, 'Delegating to International Courts: Self-Binding vs. Other Binding Delegation', 71(1) *Law and Contemporary Problems* (2008) 37, at 40.

[103] UN Charter, *supra* note 41, Art. 31(2); Mistry, '"The Different Sets of Ideas at the Back of Our Heads": Dissent and Authority at the International Court of Justice', 32(2) *LJIL* (2019) 293; Burmester, *supra* note 47, at 76.

[104] D'Amato, *supra* note 56, at 22; Davis and Morse, *supra* note 92, at 711.

[105] UNGA Official Records, UN Doc. A/64/PV.32, 30 October 2009, at 7.

[106] Allee and Huth, 'Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover', 100(2) *American Political Science Review* (2006) 219, at 224.

[107] *Ibid.*, at 22; Barnes, *supra* note 64, at 172–175; Irwin, *supra* note 62, at 629.

[108] D'Amato, *supra* note 56, at 21–22.

[109] Alter, *supra* note 91, at 32, 60.

[110] *Ibid.*, at 47–50.

engaged with the legal framework applicable before the Court, including any modifications that have arisen in its official position on a situation resulting from their legal invocations.[111] The second complementary approach seeks to understand the influence of the domestic political structure on a state's preferences on the international plane.[112] On this understanding, states are not monolithic actors captured by a single point but, rather, are a collection of quasi-independent actors, including judges, administrators, criminal prosecutors, political parties and interest groups.[113] In strategic litigation case studies, it is therefore instructive to consider the manner in which the litigated issues have been internalized domestically, be that in solidifying or reconstituting national interests, and the effect that this has on respondent engagement with the case.[114]

Finally, the focus here has been on the allegedly offending state's goals in responding to proceedings initiated against it, but there have also been instances where the ICJ has been used to impede strategic litigation. The DRC, Republic of the Congo and Germany used the ICJ to assert the applicability of immunities to prevent Belgium, French and Italian courts respectively founding various claims for human rights violations against these states or its officials.[115] The Court, as a respected forum of international legality, can thus be used to undermine the legal initiatives of strategic litigants seeking to advance progressive interpretations of international law in domestic courts.[116]

C *Identifying and Classifying Impact*

Identifying and classifying impact is a crucial part of case studies on strategic litigation.[117] Although empirical studies remain at an early stage, scholars have begun to classify different forms of impact.[118] Many studies emphasize the impact of litigation on domestic processes within a state. This is understandable given the extensive occurrence of strategic litigation in domestic courts and the role of state organs in effectuating change.[119] Helen Duffy, in a detailed classification of perspectives on impact, also has focused on the domestic, while recognizing the relevance of enquiry into the effect on

[111] *Ibid.*, at 65.

[112] *Ibid.*, at 50; see also Koh, 'Why Do Nations Obey International Law?', 106(8) *YLJ* (1997) 2599, at 2634.

[113] *Ibid.*; Fang, *supra* note 90, at 111, 125.

[114] Highet, *supra* note 102, at 998 (on the domestic decision-making process that led to South Africa's appearance in *South West Africa*); Alter, 'Agent or Trustee: International Courts in Their Political Context', 14(1) *European Journal of International Relations* (2008) 33, at 53 (*Military and Paramilitary Activities*, *supra* note 25, as leading to the shift of a few key votes against Congressional support of aid to Nicaraguan Contras); Justwan *et al.*, 'Analyzing Mass Attitudes toward the International Court of Justice', 17(2) *Foreign Policy Analysis* (2021) 1.

[115] See *Jurisdictional Immunities*, *supra* note 52; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, 17 June 2003, ICJ Reports (2003) 102.

[116] Grossman, *supra* note 49, at 71.

[117] Duffy, *supra* note 1, at 37.

[118] Fischer-Lescano, *supra* note 14, at 299–312.

[119] See, e.g., NeJaime, *supra* note 82.

international processes.[120] These perspectives, in summary, examine the contribution of litigation to (i) victim rights, empowerment and identity, including deterrence against ongoing violence against such populations; (ii) domestic/international legal reform or jurisprudential development; (iii) reform to state policies and practice; (iv) institutional capacity (be that international or domestic, such as the creation of new institutions or strengthening the capacity of existing ones within the subject of the litigation); (v) processes of information gathering, truth telling and historical record; (vi) social and cultural change, through changing ideas, perceptions and collective social constructs; (vii) mobilization and empowerment of social movements and social structures within affected groups (including activists, the media, progressive government elites); and (viii) maturity of democratic governance through incorporation of the values advanced in the litigation.[121] Some of these factors have been occasionally applied by scholars to gauge the impact of ICJ strategic litigation on domestic processes, including *Military and Paramilitary Activities* on US legislative action and *Construction of a Wall* on the initiation of domestic investigations against companies who facilitated the wall's construction.[122]

Given the interstate nature of ICJ litigation, an additional vantage point is provided by studies into impact on the multilateral system, including negotiations between states and the exercise of functions by international organizations. First, the interstate litigation process supplies information to guide interactions and negotiations.[123] The reframing of a political dispute to one engaging an international court raises the stakes for the states concerned.[124] This generates reputational consequences for a violation, making reprisals more likely and acceptable to other states.[125] In addition to any modification in the respondent's preferences, impact here can be gauged by how the litigation adjusts the position and conduct of states towards the respondent. Second, the impact of litigation taken within the court of an international organization should be evaluated by the effects it produces within that organization.[126] The impact of ICJ litigation on this basis will consider how it has shaped UN political monitoring and decision-making, including the mobilization of resources and the creation of specialist subsidiary organs, particularly in the SC, the GA, the Human Rights Council (HRC) and the Secretariat.[127] It will consider adjustments in member state

[120] Duffy, *supra* note 1, at 50–80.

[121] *Ibid.* See also Cavallaro and Brewer, *supra* note 7, at 770; Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law', 47 *German Yearbook of International Law* (2004) 343, at 345; Marchuk, *supra* note 23, at 217.

[122] Reichler, 'Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court', 42 *Harvard International Law Journal* (2001) 15, at 35; O. Kittrie, *Lawfare: Law As a Weapon of War* (2015), at 14.

[123] Guzman, *supra* note 71, at 179–180.

[124] *Ibid.*, at 174; Fischer, *supra* note 65, at 266.

[125] *Ibid.*

[126] Gehring, *supra* note 70, at 96. This does not preclude non-United Nations (UN) courts from also influencing the UN process, such as the International Criminal Court (ICC). Ramsden and Hamilton, 'Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC', 66 *International and Comparative Law Quarterly* (2017) 893.

[127] McCarthy, *supra* note 41, at 307; Powell, *supra* note 19, at 293.

behaviour towards the litigated issue – for example, in UN resolution voting. It will evaluate the extent to which the recalcitrant state (and its supporters) has adjusted its position towards the issue within these UN political processes – for example, through an acknowledgment of wrongdoing or explanation – as well as the significance of these behavioural shifts in contributing towards structural change.[128]

Care is needed in specifying the extent to which litigation is effective in light of other events and campaigning activities.[129] Sometimes the taking of action will be directly and visibly attributed to the litigation, for example, in a legislative reform to bring domestic law into compliance with the ruling or in the publicity of campaigning organizations.[130] On other occasions, it is impossible to separate all the factors that influence an outcome. For example, the campaign to hold Hissène Habré accountable occurred in multiple courts and political fora, such that the impact of the ICJ case has to be evaluated in this context.[131] There is a risk, particularly for those initiating strategic litigations, in overestimating impact.[132] However, these limitations act as a caveat rather than as a reason not to research impact.[133] The more evidence that can be produced to show impact, the stronger the causative claim will be.[134] Relatedly, there is a need to evaluate impact temporally.[135] A distinction should be drawn between impact arising before or upon the initiation of proceedings and judicial decisions rendered during the proceedings.[136] Distinct phases of the proceedings thus provide focal points for impact assessment. For example, the Australian government believed that the change of French policy towards underground nuclear testing resulted directly from the initiation of proceedings.[137] At the same time, it is necessary to consider strategic litigation as contributing to long-term processes of change, thereby evaluating how impact unfolds over time.[138]

The fulfilment of the applicant state's goals, as discussed above, provides a yardstick for researchers to evaluate whether the litigation was successful, but not exclusively so. Whether the litigation benefited the cause must be evaluated independently of these goals; the wisdom of bringing a case is only realized afterwards.[139] There has been unanticipated success from failure in prior cases, for example, by provoking the UN political organs into creative solutions.[140] After *South West Africa*, a coalition refocused their political efforts, using the GA to terminate the mandate and declare

[128] D'Amato, *supra* note 56, at 20–21. Following *Construction of a Wall*, see Ramsden, *supra* note 33, at 195.
[129] G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, 2008), at 7.
[130] Duffy, *supra* note 1, at 40.
[131] Cimiotta, 'The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?', 13 *Journal of International Criminal Justice* (*JICJ*) (2015) 177, at 184.
[132] Fischer-Lescano, *supra* note 14, at 299–312.
[133] Rosenberg, *supra* note 129, at 108.
[134] *Ibid.*
[135] Duffy, *supra* note 1, at 38.
[136] Fischer, *supra* note 65, at 266.
[137] *Ibid.*, at 265.
[138] Duffy, *supra* note 1, at 38; Ebobrah, *supra* note 76, at 183.
[139] Ramsden and Gledhill, *supra* note 2, at 416.
[140] Duffy, *supra* note 1, at 44, 77–80.

apartheid an international crime.[141] Conversely, litigation has also harmed the interests that it sought to advance.[142] Where an applicant state is bringing a case to protect victims who remain under the power of the alleged abuser state, there is a danger that the legal claim will be insensitive to their conditions and local context, thereby contributing to backlash against those victims.[143] Another risk is that, if the case fails, it would allow the respondent state to find validation for its conduct in the judgment, thereby exacerbating the systemic problem.[144] Another adverse impact flows from perceptions of litigation as an unfriendly act that can provoke backlash from and within the accused state, thereby impeding respondent engagement in the structural change that the litigation was designed to stimulate.[145] This is especially problematic where an applicant state, steered into a particular legal regime by necessity due to jurisdictional limitations, advances arguments at the extreme end of its legal claims (see Section 5).[146]

4 Goals in *The Gambia v. Myanmar*

Having outlined a basis to evaluate strategic litigation impact, the following parts apply these concepts to the OIC campaign on the advancement of Rohingya rights, as reflected in the application initiated by The Gambia. They start by identifying the parties' goals and then move on to impact assessment.

A *OIC/The Gambia*

Although The Gambia brought the case in its own capacity (as is jurisdictionally necessary), it regarded the case as reflecting the will of the 57 states comprising the OIC.[147] It was the OIC that 'tasked' The Gambia with bringing the case (and the OIC membership funded it), although this is not to downplay the role of Gambian officials in influencing the decision to resort to litigation in the first place, including the conduct of the litigation.[148] Prior to the initiation of proceedings, the OIC was briefed

[141] Barnes, *supra* note 64, at 176; Irwin, *supra* note 62, at 621.

[142] Venzk, *supra* note 40, at 74.

[143] Duffy, *supra* note 1, at 77–78; Fischer-Lescano, *supra* note 14, at 299–312.

[144] D'Amato, *supra* note 56, at 32; Falk, *supra* note 88, at 4.

[145] Madsen *et al.*, 'Backlash against International Courts: Explaining Forms and Patterns of Resistance', 14 *International Journal of Law in Context* (2018) 197, at 200–201.

[146] See also Alter, Helfer and Madsen, 'How Context Shapes the Authority of International Courts', 79(1) *Law and Contemporary Problems* (2016) 1, at 29.

[147] See, e.g., UN General Assembly (GA), 74th Session, 8th Meeting, UN Doc. A/74/PV.8, 26 September 2019, at 27 (The Gambia brought the case 'on behalf of' the OIC); *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, para. 14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim Record CR2019/18, 10 December 2019, ICJ, at 47.

[148] See note 12 above. Further socio-legal research is needed on the influence of cause lawyers in building support for the case and in goal setting. Reports credit the work of The Gambia's former Attorney-General Abubacarr Tambadou with spearheading the litigation, having joined the OIC delegation to refugee camps in Bangladesh, chaired the Ad Hoc Ministerial Committee and served as agent in the provisional

by The Gambia 'on the legal case to be presented to the [ICJ] in line with Council of Foreign Ministers and Summit decisions'.[149] As will be shown here, The Gambia's legal arguments connected to the OIC's Rohingya rights campaign.

The OIC exists to advance the 'rights, dignity and religious and cultural identity' of Muslim communities.[150] It has long maintained an interest in restoring the Rohingya's rights in Myanmar, including repatriation and freedom of movement, and addressing the 'root causes' of abuse (statelessness, denial of citizenship, land dispossession and racial discrimination).[151] The October 2017 'clearance operations', resulting in hundreds of thousands of displaced Rohingya, added another layer to this campaign: accountability for crimes.[152] Ensuring 'accountability and justice' was 'the most crucial step towards preventing genocide and other mass atrocity crimes' as well as an environment respectful of rights.[153] The OIC envisaged a number of techniques to restore the Rohingya's rights, which included efforts to 'mobilize and coordinate international political support' and to 'collaborate with … international bodies', including the SC.[154] The OIC recognized its role in supporting the 'international community' to use 'effective political and economic measures' to 'bring about Myanmar's compliance with its international obligations'.[155] It thus saw value in utilizing international institutions to exert collective pressure and mobilize shame against Myanmar, thereby raising the stakes for the continued denial of Rohingya rights.

Despite multilateral political efforts, OIC/The Gambia pursued the ICJ litigation 'in the face of an insufficient response by the international community'.[156] Political system failure thus informed its goals.[157] The OIC successfully mobilized the HRC and the GA into adopting resolutions, with these groups even acknowledging the possible occurrence of genocide in Myanmar, thereby strengthening the language as compared to previous resolutions.[158] The OIC member states also supported the creation of the

measures hearing. See further 'Rohingya Crisis: The Gambian Who Took Aung San Suu Kyi to the World Court', *BBC News* (23 January 2020), available at www.bbc.com/news/world-africa-51183521; *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 17; OIC Res. 59/45-POL, 5–6 May 2018, para. 1.

149 OIC, Report of the Ad Hoc on Human Rights Violations against the Rohingya, 25 September 2019, para. 7.

150 Charter of the Organisation of Islamic Cooperation 1973, 914 UNTS 111, Art. 1(16).

151 OIC Res. 3/4-EX (IS), 15 August 2012; OIC Res. EX-CFM/2017/FINALRES, 19 January 2017; OIC, 14th Islamic Summit Final Communique, 31 May 2019, paras 45–49.

152 OIC Res. 59/45-POL, *supra* note 148, preamble; OIC Res. 4/45-MM, May 2018, para. 10; OIC Res. 61/46-POL, 1–2 March 2019, preamble.

153 *Ibid.*; OIC, Report of the Ad Hoc Ministerial Committee on Human Rights Violations against the Rohingya, 25 September 2019, paras 12–13.

154 OIC Res. 59/45-POL, *supra* note 148, para. 2.

155 OIC, *supra* note 153, para. 6.

156 *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 63.

157 See also Mennecke and Stensrud, 'The Failure of the International Community to Apply R2P and Atrocity Prevention in Myanmar', 13 *Global Responsibility to Protect* (*Global R2P*) (2021) 111, at 125.

158 GA Res. 74/246, 27 December 2019, preamble; GA Res. 73/264, 22 December 2018, para. 1; HRC Res. 39/2, 27 September 2018, para. 1. However, this strengthening of language cannot be solely attributed to OIC campaigning but arose after the release of a fact-finding report. See further Human Rights

Independent International Fact-Finding Mission on Myanmar (IFFM), which documented a range of human rights abuses against the Rohingya, including genocide.[159] However, there were two notable failings. First, Myanmar refused to cooperate with the GA/HRC and the IFFM, thereby preventing a comprehensive investigation.[160] Second, the SC has not responded to the Rohingya crisis, despite calls to do so.[161] The SC's inaction is explicable given China's ties with Myanmar, the former defending the latter in the UN against calls for action.[162] Although expressive of the degree of international disapprobation towards Myanmar, this limited the Rohingya campaign in the UN to non-binding recommendations (from the GA, the HRC and the IFFM), there also being no duty on Myanmar to grant access and cooperate with the IFFM.[163]

The ICJ litigation was seen by the OIC/The Gambia as a way to redress these deficiencies. In particular, an ICJ decision imposes obligations under the UN Charter.[164] The Gambia sought a provisional measure requiring Myanmar to 'grant access' and 'cooperate with all [UN] fact-finding bodies that are engaged in investigating alleged genocidal acts against the Rohingya, *including* the conditions to which the Rohingya are subjected'.[165] The goal therefore was to use the Court to add a legal impetus behind GA/HRC-initiated investigations.[166] Although these measures could not go as far as the SC is entitled in advancing accountability (ICC-referral/coercive action) the order sought speaks to a litigation goal of using the Court to generate cooperation obligations that have been previously lacking.[167] Furthermore, the ICJ was selected because of an absence of alternative judicial fora to convey the necessary gravity of the allegations.[168] While the ICC prosecutor has opened an investigation into the *Bangladesh/Myanmar* situation, The Gambia application highlighted the limited scope of this investigation as being concerned with those crimes against the Rohingya consummated on Bangladeshi territory (an ICC state party).[169] There was no basis for jurisdiction

Council (HRC), Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441.

159 HRC Res. 34/22, 24 March 2017, para. 11.

160 See, e.g., GA Res. 73/264, *supra* note 158, preamble.

161 Security Council (SC), Letter from the Netherlands to the President of the Security Council, UN Doc. S/2018/779, 24 August 2018; HRC, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5, 16 September 2019, para. 701.

162 Park, 'Myanmar's Foreign Strategy toward China since Rohingya Crisis: Changes, Outlook and Implications', 6(1) *Journal of Liberty and International Affairs* (2020) 10, at 11.

163 Ramsden, *supra* note 33, at 187.

164 UN Charter, *supra* note 41, Art. 94(1).

165 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, 23 January 2020, ICJ Reports 2020 3, para. 10 (emphasis added).

166 *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 71.

167 An alternative explanation is that The Gambia sought this order so that it could collect evidence to shore up their case rather than empower the Independent International Fact-Finding Mission on Myanmar (IFFM) and other fact-finding processes as such. Even so, such empowerment would arise as a by-product of the case strategy.

168 *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, para. 5.

169 *Ibid.* See further, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of

over crimes committed entirely on the territory of Myanmar (as a non-state party), including genocide.[170] There is probably another reason why The Gambia brought the case to the ICJ rather than pinning its hopes on the ICC process. Given the OIC's campaign objective to restore Rohingya rights, obtaining a finding that Myanmar bears responsibility under the Genocide Convention would entail obligations, at the state level, to make reparations (which, if The Gambia's proposed reparations were ordered, would require wide-ranging restoration of Rohingya legal rights within Myanmar). Alternatively, the OIC could have identified suitable national courts to try the case under universal jurisdiction, as the UK Burmese Rohingya Organisation did in Argentina.[171] However, The Gambia's application perceived there to be a symbolic benefit in obtaining an international ruling, as speaking for the 'collective conscience'.[172]

The Gambia's legal case focused solely on Myanmar's obligations under the Genocide Convention. It is an interesting hypothetical whether The Gambia/OIC would have focused its litigation efforts on establishing genocide if Myanmar had been a party to other relevant treaties and had accepted the Court's jurisdiction over them. The OIC's wider campaign has included allegations that Myanmar has violated international law in denying Rohingya citizenship and subjecting the group to racial discrimination.[173] These arguments would be particularly apt under the CERD and the Convention on the Reduction of Statelessness.[174] However, given Myanmar's limited acceptance of the ICJ's jurisdiction in relation to human rights treaties (that is, the Genocide Convention), the OIC did not have the luxury of being able to make a strategic legal regime choice.[175] Still, it is evident that claims under the Genocide Convention offered space for an extensive narration of historical abuses against the Rohingya, including the 'root causes' of abuse and the need for rights restoration.

The Gambia bundled these broader root causes and rights-restoration narrative into its claim under the Genocide Convention. The Gambia's initiating application noted that acts of genocide are 'distinct from other prohibited acts – such as discrimination, ethnic cleansing, persecution, disappearance and torture – *but* that there is often a close connection between all such acts'.[176] Genocide 'does not occur in a vacuum'; different actions 'individually and together, and over stages and time' provide evidence of this crime.[177] This broad case framing was reflected in the requested

Myanmar, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19-27), Pre-Trial Chamber III, 14 November 2019.

170 *Ibid.*

171 Nagakoshi, 'The Scope and Implications of the International Criminal Court's Jurisdictional Decision over the Rohingya Crisis', 43(2) *Human Rights Quarterly* (2021) 259, at 266–267.

172 *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, para. 5; *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 18, 64.

173 See note 151 above.

174 Convention on the Reduction of Statelessness 1975, 989 UNTS 175.

175 Myanmar ratified the Genocide Convention on 14 March 1956.

176 *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, para. 4 (emphasis added).

177 *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim Record CR2019/20, 11 December 2019, ICJ, at 38–39.

declarations. These included not only the most generic (a finding that Myanmar had violated the Genocide Convention by committing and failing to prevent genocide) but also specific requirements for Myanmar to respect Rohingya rights.[178] Quite striking was the request that Myanmar undertake wide-ranging structural reform to allow the 'return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution and other related acts'.[179] At the provisional measures hearing, applicant counsel described a range of alleged crimes (including murder, sexual violence and torture), other human rights violations (including restrictions on freedom of movement) and a history of discriminatory practices against the Rohingya (electoral disenfranchisement and loss of citizenship).[180] The Gambia sought the cessation of these different acts on the basis that they fell within conduct proscribed under the Genocide Convention.[181]

Another litigation goal was to challenge 'Myanmar's false narratives and sham investigations'.[182] Following the release of the first IFFM report, Myanmar established the Independent Commission of Enquiry (ICOE) to 'investigate all violations of human rights and atrocities committed in the Rakhine State'.[183] Still, the product of domestic investigations yielded few prosecutions, and the official narrative remained to deny Rohingya injury, with the 'clearance operations' a legitimate method to suppress terrorism.[184] Litigating under the Genocide Convention provided a means to challenge the validity of these investigations and official narrative, as emblematic of the obstacles that existed towards the prevention of genocide and accountability for international crimes.[185]

B *Myanmar*

Myanmar's litigation goals can be identified, at this stage, through its provisional measures challenges and diplomatic positions in the GA and the HRC, which emphasized an indigenous solution. The dominant domestic narrative, shared by the National League for Democracy (NLD) and the Tatmadaw military, was that outsiders did not understand local realities, including the scale of terrorist violence perpetrated by the Arakan Rohingya Salvation Army.[186] When the GA and the HRC condemned

[178] *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, paras 2, 112.

[179] *Ibid.* See also the claim that return is premised upon 'compensation for past injustices'. *The Gambia v. Myanmar*, Verbatim Record CR2019/20, *supra* note 177, at 68.

[180] *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 23–24, 28–29, 38, 70.

[181] *Ibid.*

[182] *Ibid.*, at 43.

[183] GA, 73rd Session, 13th Meeting, UN Doc. A/73/PV.13, 28 September 2018, at 46.

[184] *The Gambia v. Myanmar*, Verbatim Record CR2019/18, *supra* note 147, at 42; *The Gambia v. Myanmar*, Verbatim Record CR2019/20, *supra* note 177, at 12; Nagakoshi, *supra* note 171, at 274.

[185] See also Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting', 48 *Georgia Journal of International and Comparative Law* (2019) 425, at 470.

[186] Putra *et al.*, 'Aung San Suu Kyi's Defensive Denial of the Rohingya Massacre: A Rhetorical Analysis of Denial and Positive-Image Construction', 9(2) *Journal of Social and Political Psychology* (2021) 353, at 361.

violence in Rakhine and cast blame on state officials, Myanmar described this as 'orchestrated demonization of Myanmar's Government' that would contribute to 'further polarization and an escalation of tensions among the various communities inside the country'.[187] Following the IFFM's creation, Myanmar lamented the abuse of 'various mechanisms in the name of human rights'.[188]

Myanmar's response before the ICJ placed this theme within a legal logic that requested the Court to decline jurisdiction. Foremost within this legal strategy was Myanmar's selection of Claus Kress as its ad hoc judge, driven undoubtedly by this scholar's strict interpretation of the specific intent requirement to prove genocide.[189] In addition to lengthy submissions on standing and jurisdiction, Myanmar also challenged attempts to prematurely 'externalize' accountability.[190] According to Aung San Suu Kyi, it was 'inconsistent with complementarity to require that domestic criminal justice should proceed much faster than international criminal justice'.[191] The Court should wait for the ongoing domestic investigations in Rakhine to conclude – a 'rush to externalize accountability may undermine professionals in domestic criminal justice agencies'.[192] This tied to wider consequences noted from what Myanmar regarded as 'an incomplete and misleading factual picture' presented in The Gambia's application, warning that the case risks feeding 'the flames of an extreme polarization' that can 'harm the values of peace and harmony in Myanmar'.[193] The concern that The Gambia had used the ICJ to advance an extreme claim (genocide), risking domestic political stability, was thus a central contention of Myanmar and used to impel the Court into case avoidance.

Myanmar used the case to present its narrative to an international audience.[194] The 'bracing optics' of having Suu Kyi, a Nobel Peace Prize winner, appear as an agent was no doubt intended to generate (favourable) attention in the international media for its 'domestic realities' narrative.[195] With international attention on the case, the hearings allowed it to advance 'arguments of denial' through an explanation of the local realities that were said to have been ignored in the GA/HRC narrative, including the armed conflict in Rakhine.[196] To Myanmar, none of the prior international processes understood these complexities; the IFFM was merely 'campaigning for a case rather

[187] GA, 72nd Session, 76th Meeting, UN Doc. A/72/PV.76, 23 December 2017, at 6

[188] GA, 73rd Session, 65th Meeting, UN Doc. A/73/PV.65, 21 December 2018, at 10.

[189] See, e.g., Kress, 'The Darfur Report and Genocidal Intent', 3 *JICJ* (2005) 562.

[190] *The Gambia v. Myanmar*, Verbatim Record CR2019/20, *supra* note 177, at 18.

[191] *Ibid.*, at 19.

[192] *Ibid.*

[193] *Ibid.*

[194] *Ibid.*; see also Suu Kyi, 'Give Myanmar Time to Deliver Justice on War Crimes', *Financial Times* (23 January 2020).

[195] See Prasse-Freeman, 'Aung San Suu Kyi at the ICJ', 36(1) *Anthropology Today* (2020) 2, at 3. It also consolidated her domestic support. Diamond, 'The Failure to Protect in Myanmar: A Reflection on National Protection of Rohingya against Mass Atrocity Crimes and Prospects for the Responsibility to Protect', 13 *Global R2P* (2021) 379, at 385.

[196] *The Gambia v. Myanmar*, Verbatim Record CR2019/20, *supra* note 177, at 13; Putra, *supra* note 186, at 366.

than assessing a situation in an objective and impartial manner'.[197] Myanmar thus turned to the Court as a 'vital refuge' for 'less resourceful countries' to have their case considered 'dispassionately and accurately'.[198]

C *ICJ*

It was noted in Section 2 that the ICJ makes strategic choices to promote the acceptability of its decisions.[199] It can be reasonably inferred, as this section shows, that the Court was aware of this dimension and attempted to moderate the competing exigencies.[200] The Court diplomatically moderated the order reached. It found The Gambia to have standing to act in the 'common interest' of all Genocide Convention parties, with sufficient evidence of a dispute between the parties.[201] The Court avoided Myanmar's complementarity submission, except to say rather ambiguously that Myanmar's investigations 'do not appear sufficient'.[202] It avoided endorsing The Gambia's submission that these investigations were a 'sham'.[203] In contrast to The Gambia's request that Myanmar take measures to address particular crimes (such as sexual violence or burning of homes), the ICJ formulated the order generically to require observance with its obligations under Article 2 of the Genocide Convention.[204] Further, the ICJ avoided the implication that it was attributing responsibility to any particular state organ or person (by contrast, The Gambia specifically accused the Tatmadaw general, Min Aung Hlaing).[205] It avoided consideration of whether the relevant perpetrators had specific genocidal intent, thereby sidestepping the sensitive issue of Myanmar's responsibility for acts of genocide (at this stage at least).[206] Instead, the Court justified its order on the finding that a risk of irreparable prejudice exists because 'at least some' reported acts against the Rohingya were capable of falling within the Genocide Convention.[207] Finally, rather than exclusively relying on the IFFM's findings to establish this risk, it used Suu Kyi's concession, where she noted the possibility that military personnel used 'disproportionate force' in 'disregard of international humanitarian law'.[208] The provisional measures order thus connected with Myanmar's official acknowledgement on the need for domestic investigations.

[197] *Ibid.*, at 34.

[198] *Ibid.*, at 12–13.

[199] See also the effects anticipated from *The Gambia v. Myanmar*, Provisional Measures, *supra* note 165, Separate Opinion of Judge Xue, para. 10 (provisional measures 'would, in my view, enhance the control of the situation').

[200] Indeed, Judge Trindade criticized the Court's tendency to balance 'inter-State susceptibilities'. *Ibid.*, Separate Opinion of Judge Trindade, para. 64.

[201] *Ibid.*, para. 41.

[202] *Ibid.*, para. 73.

[203] *Ibid.*

[204] Compare *ibid.*, para. 5 with para. 86.

[205] *The Gambia v. Myanmar*, Verbatim Record CR2019/20, *supra* note 177, at 13; *The Gambia v. Myanmar*, Application Instituting Proceedings, *supra* note 11, para. 71.

[206] *The Gambia v. Myanmar*, Provisional Measures, *supra* note 165, paras 30, 56, 75.

[207] *Ibid.*

[208] *Ibid.*, para. 53.

The decision was also framed in a manner that supported the OIC campaign goals. Notably, the ICJ ordered that Myanmar report to the Court on the implementation of provisional measures, thereby providing a legal monitoring of the Rohingya situation that did not exist previously.[209] Other findings provide support for general human rights-based claims in favour of the Rohingya. In finding them to be 'extremely vulnerable', the Court noted the long historical ties of the Rohingya to Myanmar that pre-dated independence and the subsequent domestic legal acts that made them stateless and electorally disenfranchised.[210] The ICJ recognized the Rohingya by name (contrary to Myanmar's official denial) and noted that they 'appeared' to be a protected ethnical group.[211] Furthermore, the ICJ's copious referencing of GA resolutions to support its findings on the risk of irreparable prejudice, although not strictly required (given that they just restated the IFFM's findings), was a tacit endorsement of this wider political process.[212] Yet the Court stopped short of fully supporting these processes by refusing to order Myanmar to cooperate with relevant UN fact-finding bodies.[213]

Still, the legal impact of a provisional measures decision is limited; the Court could not 'at this stage make definitive findings of fact'.[214] However, the above analysis shows that it still made strategic choices; as Marko Milanović has noted, those choices were 'palatable and diplomatic'.[215] In making its order with some strategic ambiguity, it no doubt had in view the need for Myanmar to remain engaged in the process of monitoring and reporting of provisional measures implementation. The ICJ ordered Myanmar to 'submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court'.[216] Indeed, after the provisional measures ruling, the Myanmar government was able to save face by characterizing the decision as 'not a very bad demand', given that all states have generic obligations to prevent genocide.[217] What the ICJ would not have anticipated was the February 2021 coup d'état, leading to the removal from power of those moderate elites (including Suu Kyi) who had proven willing to engage with the Court.

[209] *Ibid.*, para 86.

[210] *Ibid.*, paras 72–73; *cf.* Article 15 Decision, *supra* note 169, para. 17.

[211] *The Gambia v. Myanmar*, Provisional Measures, *supra* note 165, para. 52.

[212] *Ibid.*, paras 54, 69, 71; see also Separate Opinion of Judge Xue, para. 7 (the GA and the HRC are 'involved in the current case').

[213] *Ibid.*, para 62.

[214] *Ibid.*, para. 66.

[215] Milanović, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case', *EJIL:Talk!* (23 January 2020).

[216] *The Gambia v. Myanmar*, Provisional Measures, *supra* note 165, para. 86.

[217] 'Myanmar's Ruling Party Says No Special Measures Required after ICJ Ruling', *Radio Free Asia* (24 January 2020).

5 Impact of the ICJ Strategic Litigation

Identifying the impact of the ICJ's provisional measures decision and the litigation in the future is, as Section 3 noted, a complex enquiry. Predicting impact is all the more uncertain following the coup d'état, which raises issues both as to the level of engagement of the military regime with the Court and future OIC campaign goals in light of these developments. Nonetheless, the provisional measures decision of January 2020 allows the short-term impact to be assessed from the period when the application was initiated to responses after 'judgment day'. The coup also provides another dimension to analyse longer-term impact.

A *Provisional Measures Impact*

From the perspective of advancing the OIC's goals, the provisional measures decision was used to embolden their allegations in the international media and push for stronger responses in the UN political organs. The decision was held up by the OIC as judicial support for the genocide allegations (including 'to prevent *further* acts of genocide'), a narrative that became the dominant frame in international media reporting on the Rohingya crisis both in the lead up to the hearing and its aftermath.[218] Despite state pressure, SC members failed to agree on a joint statement on Myanmar's need to observe provisional measures.[219] This led the US and European Union members of the SC to release the statement in their names, thereby casting blame for the SC's failings on those who voted against the statement (China and Vietnam).[220] This creation of a more hardened division between SC members (in contrast to simple inaction on Rohingya rights previously) could lead to the majority of SC members proposing measures in the future (or at least forcing a vote in which vetoing permanent members have to bear the reputational cost of their decision). For its part, GA Resolution 75/238 (2020) quoted the Court's statement that the Rohingya 'appeared to constitute a "protected group"' under the Genocide Convention and exhorted Myanmar to meet its obligations.[221] Whether the ICJ frame will remain a constant in future resolutions on Myanmar has to be considered now in light of the coup d'état. The post-coup GA Resolution 75/287 (2021) took note of the provisional measures decision but did not include observance of the court order

[218] OIC, OIC Welcomes ICJ Decision Ordering Myanmar to Stop Genocide against Rohingya, 23 January 2020 (emphasis added). However, the genocide narrative has not been consistently stated since the decision. OIC, We Follow the Current Developments in Myanmar and Reiterate our Firm Position in Support of the Rohingya Muslim People, 1 February 2021. Media content analysis on the provisional measures' decision supports its genocide reframing effect in international media reporting. P. Soe, 'Media Bias and Framing Analysis of Local Media and Foreign Based Media Coverage on the Case of "Rohingya: Gambia Files Case against Myanmar at International Court of Justice"' (2021) (Master's thesis on file at Charles University, Prague).

[219] 'UN Fails to Take Action on Order against Myanmar on Rohingya', *Aljazeera* (5 February 2020).

[220] *Ibid*. See also the SC president's post-coup press statements on the need to protect minorities in the Rakhine State and to address 'root causes'. UN, Security Council Press Statement on Situation in Myanmar, UN Doc. SC/14430, 4 February 2021.

[221] GA Res. 75/238, 31 December 2020, preamble, para. 4.

amongst its recommendations (its focus now being democratic reinstatement); some members abstained from voting because the resolution did not adequately address the Rohingya crisis.[222] By contrast, the HRC has been more consistent in 'welcoming' the ICJ's decision and urging Myanmar to observe its obligations under the Genocide Convention.[223]

On Myanmar's part, the ICJ proceedings have led to more engagement with the UN on allegations of human rights violations, the apparent initiation of further domestic investigations and official acknowledgements of crimes. Prior to the initiation of proceedings, Myanmar was rather dismissive of GA and HRC monitoring, rejecting such inquiries as politically tainted.[224] By contrast, after the ICJ hearings, Myanmar indicated the steps that it was taking to investigate allegations of abuse.[225] Myanmar's report into the investigation, released in January 2020, attributed responsibility for war crimes to the military, unlike prior investigations.[226] Interestingly, the investigation report referenced Suu Kyi's statements at the ICJ hearing that 'war crimes may have occurred in northern Rakhine State in 2017' perpetrated by members of the Defence Services and the police force.[227] Indeed, the subsequent domestic investigations covered those sites of alleged crimes noted by Suu Kyi in her ICJ statements.[228] However, these investigations were limited in scope; they remained consistent with the official narrative that isolated war crimes (not genocide) were committed by aberrant soldiers.[229] Instead of taking the initiative to investigate genocide, an official directive invited anyone with 'credible information' of genocide occurring to inform the President's Office.[230] Some will contend that these measures are mere window dressing, especially given that these investigations have yielded few prosecutions so far and are narrow in subject matter (that is, war crimes).[231] Nonetheless, what followed in September 2020 was a striking acknowledgement by the Tatmadaw that it

[222] GA Res. 75/287, 18 June 2021, preamble; GA, 75th Session, 83rd Meeting, UN Doc. A/75/PV.83, 18 June 2021, at 3, 6.

[223] HRC Res. 43/26, 22 June 2020, para. 3; HRC Res. 47/1, 12 July 2021, para. 6.

[224] See notes 186–187 above.

[225] GA, 74th Session, 52nd Meeting, UN Doc. A/74/PV.52, 19 December 2019, at 32.

[226] Myanmar President Office, Executive Summary of Independent Commission of Inquiry, 21 January 2020, available at www.president-office.gov.mm/en/?q=briefing-room/news/2020/01/21/id-9838.

[227] *Ibid.*, at 9.

[228] *Ibid.*, at 5; Myanmar President Office, Press Release, 21 January 2020, available at www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2020/01/21/id-9835; Myanmar Attorney General's Office, Holding the First Meeting of the Criminal and Prosecution Committee, 14 February 2020, available at www.legal-tools.org/doc/rjttm.

[229] Myanmar President Office, *supra* note 226.

[230] Myanmar President Office, Compliance with the Genocide Convention, Directive No. 1/2020, 8 April 2020, available at www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/09/id-10001; see also Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in *The Gambia v Myanmar* at the International Court of Justice', 21(2) *MJIL* (2020) 1, at 20.

[231] Three military officers have been convicted so far, although public information on these convictions is limited. 'Myanmar Finds Troops Guilty in Rohingya Atrocities Court-martial', *Aljazeera* (30 June 2020); Human Rights Watch, Myanmar: Court Martial Latest Accountability Sham, 3 July 2020 (noting the lack of information on those convicted and their crimes or sentences).

was investigating 'wider patterns of violations' in Rakhine State.[232] This 'unprecedented acknowledgment' signals a break from Myanmar's narrative presented in the provisional measures hearing of violations being isolated rather than structural.[233]

Still, the impact of the provisional measures decision on the OIC's goal of rights restoration has been limited so far. Myanmar has submitted the required reports to the ICJ, thereby showing cooperation (these reports have not been made public).[234] Further, the decision has been recognized by activists to be of symbolic importance to the Rohingya in providing the first international judicial recognition (*prima facie*) of their status as a protected group that has been subjected to human rights abuses.[235] However, other goals of the OIC, including domestic law reform – for example, to recognize the Rohingya's citizenship rights – have not been realized. Instead, as noted above, Myanmar has internalized the provisional measures decision as requiring merely a criminal justice approach rather than one mandating wider recognition of the Rohingya's rights in the legal system. Any notion that the decision would increase repatriation of the Rohingya under safe conditions has also not occurred, with hundreds of thousands of them still displaced in Bangladesh.[236]

B *Evaluating Longer-Term Impacts*

Assessing the litigation's longer-term impacts should also be evaluated using the factors identified in Section 3. A more specified and accurate enquiry into such an impact can thus be gathered from a review of the parties' goals, including goals that develop as the litigation progresses, while also identifying sources of unintended impact from the litigation. For the OIC/The Gambia, the purpose of initiating the litigation, as noted above, was to advance accountability and to restore the Rohingya's rights in Myanmar. Invoking the Genocide Convention before the Court has secured a provisional measures victory, but there are evidentiary challenges ahead in substantiating these allegations at the merits phase, particularly in establishing specific intent and the existence of state-sponsored genocide.[237] Even with the risk of losing, the lengthy period it takes for the merits phase to conclude provides a window of time for the OIC to plausibly allege violations of the Genocide Convention as a way to exert multilateral political pressure on Myanmar, supported by the findings of the Court in its provisional measures order. The coup d'état will also recalibrate how the OIC (and other actors) approach and use the strategic ligation as a multilateral political instrument. So far, its purpose has been victim-centric: to advance accountability and rights restoration for the Rohingya. After the coup, there was evidence of genocidal allegations

[232] Nagakoshi, *supra* note 171, at 276 (including citations).

[233] *Ibid.*

[234] 'Myanmar Submits 2nd Rohingya Report to Top UN Court', *Anadolu Agency* (24 November 2020).

[235] Wai Nu, 'Aung San Suu Kyi Was My Idol Now She's Defending My People's Genocide', *Newsweek* (18 December 2019).

[236] Mallick, 'Rohingya Refugee Repatriation from Bangladesh: A Far Cry from Reality', 7(2) *Journal of Asian Security and International Affairs* (2020) 202.

[237] See Milanović, *supra* note 215.

being used by state and civil society actors as a tool to delegitimize and isolate the ruling Tatmadaw regime, in support of a democratic reinstatement goal.[238] This reinstatement goal thus provides an additional vantage point in which to evaluate the litigation's potential impact, while contemplating the possibility that this goal relegates the Rohingya's rights restoration/accountability goals to lesser importance in the priorities of states.[239]

Evaluating Myanmar's future perspectives towards the strategic litigation is complicated. Prior to the coup d'état, it can be reasonably hypothesized that Myanmar, led by Suu Kyi, regarded there to be sufficient incentives to engage in the litigation, both to advance its domestic realities narrative as well as to avoid reputational harm in not participating (see Section 4.B). Whether the Tatmadaw, whose leaders have been accused of genocide by the OIC/The Gambia, consider there to be similar incentives to engage remains, at the time of writing, an open question.[240] The suppression of moderate elites within Myanmar, including Suu Kyi, has removed one source of pressure to engage with the case.[241] Similarly, scholars have noted that Myanmar has forged closer ties with China 'as a buffer against international outrage because of the Rohingya issue'.[242] Myanmar could therefore follow what other respondents have done in the past: not appear or only selectively engage (see Section 3.B). However, the Tatmadaw's acknowledgement that it is investigating systematic violations suggests some readiness on its part to engage with the allegations made in the ICJ case.[243] If Myanmar does engage with the merits, then the informational outputs of this litigation (including any official acknowledgements of crimes) will also support the ongoing case at the ICC and other accountability processes (where Myanmar's cooperation has not been forthcoming to date).[244]

Possible unintended consequences (from the OIC's perspective) must also be considered in long-term impact studies. The Gambia, as a transitional democracy with its own legacy of mass atrocities, was amongst the best placed OIC members to embody, understand and frame a victim-centric case at the ICJ. At the same time, the genocide legal framework, although able to accommodate the OIC's 'root causes' narrative, provides a narrow and stigmatizing framework in which to view the crisis. It reflects a tension in the construction of the OIC's campaign goals, in what some will see as impossible to achieve simultaneously (wide-ranging rights restoration while also holding to account incumbent state

[238] See, e.g., Mennecke and Stensrud, *supra* note 157, at 121; Nagakoshi, *supra* note 171, at 278; Strangio, 'Is a Coup Worse Than a Genocide?', *The Diplomat* (26 February 2021); United Kingdom, House of Commons Foreign Affairs Committee, The UK Government's Response to the Myanmar Crisis, 13 July 2021, paras 15, 39.

[239] See, e.g., GA Res. 75/287, *supra* note 222 (emphasizing democratic reinstatement).

[240] See further Pillai, 'Myanmar Coup d'état: Implications for International Justice', *OpinioJuris* (11 February 2021).

[241] Thein-Lemelson, '"Politicide" and the Myanmar Coup', 37(2) *Anthropology Today* (2021) 3.

[242] Park, *supra* note 162, at 11.

[243] Nagakoshi, *supra* note 171, at 276.

[244] Pillai, 'Expanding the Scope of Provisional Measures under the Genocide Convention', 79(2) *Cambridge Law Journal* (2020) 201, at 202.

officials for systematic human rights violations).[245] The OIC's accusation of a genocidal state policy, perpetrated by the Tatmadaw under the command of Min Aung Hlaing, removed the veneer of diplomatic ambiguity on the character of the alleged crimes, including who bears responsibility. In light of the coup d'état, the continued use of the ICJ as a basis to find the Tatmadaw responsible for genocide risks undermining the future attainment of the Rohingya's rights, including peace and democracy in Myanmar. Challenging the view that the coup d'état arose because of Min Aung Hlaing's personal ambitions as the key causal factor, Catherine Renshaw has rightly argued that this analysis neglects the impact of international litigation given its focus on holding the incumbent military regime accountable.[246] 'What cannot be forgotten', according to Renshaw, 'is Myanmar's history and the new leadership's perception that the honour of the country is tied to the status of its military'.[247] The wisdom of this case framing, in accusing a major base of power in a fragile transitional democracy of the gravest crime, must therefore also be assessed in longer-term studies when seeking to evaluate the litigation's impact.

6 Conclusion

This article has provided a basic structure to evaluate strategic litigation before the ICJ. Going further than studies on judgment compliance, a more specified and accurate understanding of impact requires distillation of the parties' goals alongside a contextual enquiry into foreseen and unforeseen effects. It justifies consideration of state incentives for engaging in the judicial process and effectuating structural change, including the Court's place in stimulating multilateral and domestic political responses. To balance these exigencies effectively, the Court needs to exercise its strategic choices to be relevant to wider processes and to enhance the acceptability of its outputs. There is much interesting research to be done, in this respect, on the impact of each strategic litigation brought before the Court.

In providing an opener into the early impact of one case, *The Gambia v. Myanmar*, this article has identified prospects and problems in using the ICJ as a site for strategic litigation. As for prospects, this case opens up the possibility for more *erga omnes partes* challenges under human rights treaties. Although the Court's jurisdiction over states is uneven, the indivisibility of many human rights standards enables broad claims of abuse to be bundled into claims under a specific treaty. Following the OIC's example, it is not difficult to envisage states pooling their resources and filing cases at the ICJ through a proxy applicant.[248] The Court's readiness to adapt its working methods,

[245] On the challenges of this balancing act and the conciliatory strategies adopted at a regional level, see Morada, 'ASEAN and the Rakhine Crisis: Balancing Non-interference, Accountability, and Strategic Interests in Responding to Atrocities in Myanmar', 13 *Global R2P* (2021) 131, at 147.

[246] Renshaw, 'Myanmar on Trial', *Policy Forum* (25 February 2021).

[247] *Ibid.*

[248] Canada and the Netherlands are considering pooling their resources to challenge Syria's alleged violations of the Torture Convention. Netherlands, *supra* note 10; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

with the creation of an ad hoc committee to monitor provisional measures implementation, opens up the possibility for other procedural refinements to accommodate the novel features of strategic litigation in the future.

Yet the unfolding events in Myanmar show that strategic litigation into atrocities in ongoing conflicts is problematic. Although it produced a provisional measures decision of apparent symbolic value to Rohingya victims and prised concessions from Suu Kyi, it has yet to stimulate broader change at a domestic level, which, given the coup d'état, is unlikely in the foreseeable future. The decision was cited in subsequent GA and HRC resolutions, therefore of value to these processes, but the coup soon led to this genocide prevention imperative being replaced with more diplomatic language. Like these political organs, the ICJ exercises strategic choices. It is unlikely that the Court, being called on to address documented widespread human rights abuses in the face of UN political failings, will be so astute to find reasons to avoid judging the merits of a mass atrocity case where it can. This opens up not only opportunities for campaigns bringing strategic challenges but also the peril, due to the Court's uneven contentious jurisdiction over human rights matters, of an extreme or inapposite claim being advanced that ends up counterproductive to the litigated cause.