Provisional Measures in *The Gambia v. Myanmar* Case Before the ICJ:

The Case for Making Myanmar's Report Public

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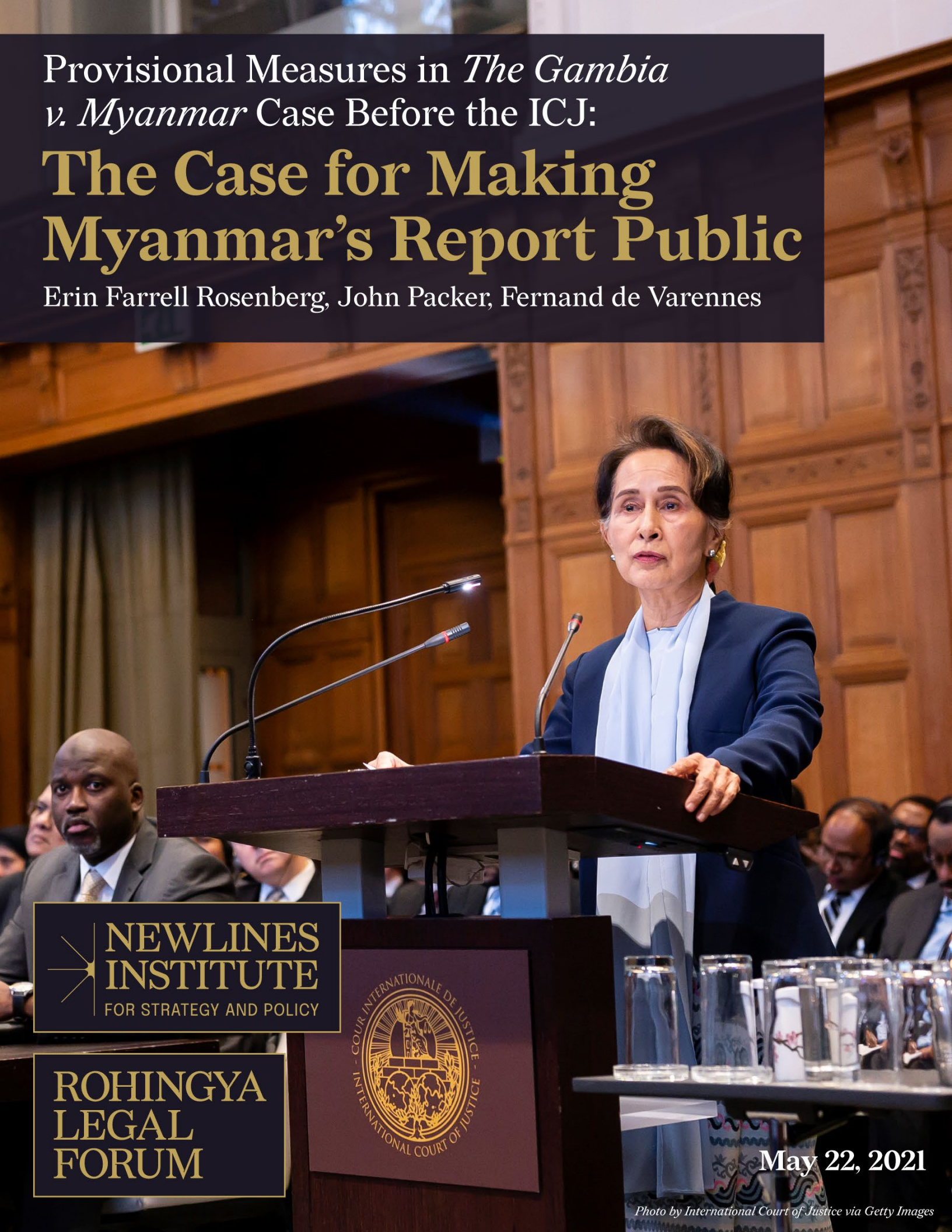

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Executive Summary

On November 11, 2019, The Gambia filed an application at the International Court of Justice (ICJ) instituting proceedings against the Republic of the Union of Myanmar for violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in respect of the Rohingya group. The case was brought pursuant to the Convention's obligations that are considered *erga omnes* (owed to the international community as a whole) and *erga omnes partes* (owed by all member States to the Convention). In other words, a public interest case.

On January 23, 2020, the ICJ issued an order requiring Myanmar to take measures to prevent the risk or possible recurrence of genocide against the Rohingya minority and to preserve evidence of the 2017 attacks. Myanmar is required to report periodically on the measures it has taken to comply with the Order. The purpose of the provisional measures reporting requirement is to permit the Court to assess the appropriateness and adequacy of measures taken and to consider whether additional measures may be merited. Myanmar's two reports filed to date have been classified confidential, available only to the Court and The Gambia. Myanmar's third report is due in the coming days.

The Genocide Convention is of direct interest to the 150 other States parties to the treaty in addition to The Gambia and Myanmar. Each State party has both obligations and rights relating to the situation and the case itself. Nonetheless, the confidential nature of Myanmar's reporting does not permit these States to assess their own obligations or rights. The confidential reporting also precludes the UN Security Council from ensuring that it is fulfilling its obligations relevant to maintaining and restoring international peace and security with respect to the situation in Myanmar. Most importantly, confidentiality excludes the victims, the Rohingya themselves, from knowledge of the specific process or from being active participants in ensuring Myanmar's compliance with the Order. For these reasons alone, the ICJ should re-evaluate its approach to confidentiality and make Myanmar's reports publicly available. Publication would be consistent with the letter and spirit of the Genocide Convention and with the UN Charter and correct the existing practice.

The coup d'état of February 1, 2021 has changed the circumstances of the case, increasing risk for the Rohingya and causing greater confusion as to intentions of the military *junta* with the real prospect that the *junta* will be shielded through confidentiality while the States parties and the victims remain in the dark. In the current crisis, it is all the more critical that Myanmar's reports be made public without delay in order for the international community as a whole, including the Rohingya as victims, to see, assess and draw conclusions on any measure which Myanmar has (or has not) taken.

Introduction

After the February 1, 2021 military coup d'état[i] and the subsequent widespread violence,[ii] including hundreds of killings[iii], against pro-democracy protesters, the world's attention is once more focused on Myanmar. Yet, while the military coup d'état dominates headlines, justice for the ongoing genocide against the Rohingya remains unrealized. Moreover, the Rohingya themselves remain in the dark about key processes affecting their vital interests and without direct voice regarding their future.

Amongst the current turmoil, the genocide case of *The Gambia v. Myanmar* before the International Court of Justice (ICJ) continues, as does Myanmar's obligation to file progress reports on its compliance with the provisional measures ordered by the ICJ in January 2020 (Order).[iv] Myanmar's reports are filed confidentially, preventing other States, human rights organizations, the United Nations Office of the High Commissioner for Human Rights, and the Rohingya themselves from learning their content. In an August 2020 opinion piece as a part of *OpinioJuris*' "Rohingya Symposium", authors Abbot, Becker and Gelinas-Faucher argued that the confidential status of Myanmar's reports represented "a missed opportunity" and presented a compelling case for the Court to consider making the reports publicly available "at least on a going-forward basis."[v] For their own part, Rohingya representatives have been left to speculate on the contents of Myanmar's reporting and the Court's evaluation thereof while seeking informally to contribute valuable information and analysis.[vi]

The failure to publish Myanmar's reports on compliance with the provisional measures Order is directly germane to the current situation in the country as a whole and immediate heightened risk to the Rohingya in particular and the associated or similar risks for other ethnic and religious minority groups. This is of urgent concern to the international community as a whole, not least for the threat to regional peace and security at the core of the Genocide Convention and the United Nations Charter-based system which underpins it.

In the specific terms of the ICJ's issuance of the provisional measures Order, nearly a year and a half later the confidential status of Myanmar's reports remains unjustified, unnecessary and unwarranted and is weakening *prima facie* the effectiveness of the provisional measures, preventing interested third parties (such as other States, human rights organizations, the United Nations, and Rohingya advocacy groups) from being able to monitor or engage with Myanmar's reports, and ultimately resulting in the ICJ itself potentially not receiving all of the relevant information needed to ensure its Order is in fact being complied with. Moreover, the real-time nature of risks of the Rohingya genocide and its larger context constitute real pressing threats for which the Court cannot sensibly or justly remain with the parties cloistered in some distant and private process suspended from the very situation which its provisional measures are intended to protect against. Rather, the military coup and the ensuing violence substantially compound the urgent need for increased international attention and engagement in ensuring that the Rohingya people are protected from further genocidal acts and that evidence of the previous

alleged genocidal acts is not destroyed. Further, it is beyond now manifestly urgent that publication of Myanmar's reports be at the service of the public interest for which the Genocide Convention is founded and in this case explicitly invoked, such that the conduct of Myanmar (notably the coup leaders now in control) be fully exposed, fully scrutinized by all those affected and interested, and all possible steps may be taken including further measures by the Court if and as appropriate.

I. Background on the ICJ case and the provisional measures

The Rohingya are an ethnic minority group that reside primarily in Rakhine State, a province of Myanmar that borders Bangladesh. The Rohingya have suffered decades of violence, discrimination, and persecution at the hands of Myanmar's government authorities and military,[vii] which culminated in Myanmar's 2016-2017 genocidal attacks, which they referred to as "clearance operations", against the Rohingya civilian population; these attacks included mass killings, torture, rape and other forms of sexual violence, the destruction of property and burning of entire villages.[viii] According to the United Nations' Independent International Fact-Finding Mission on Myanmar (FFM), approximately 10,000 Rohingya were killed and three quarters of a million Rohingya were forced to flee to Bangladesh to escape the violence.[ix] Before concluding its work in 2019, the FFM concluded that "the Rohingya people remain at serious risk of genocide".[x]

On November 11, 2019, The Gambia instituted proceedings[xi] against the Government of Myanmar for violating its obligations under the *1948 Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention)[xii] and requested provisional measures be ordered by the Court in order to "protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention".[xiii]

On January 23, 2020, the ICJ ordered four provisional measures against Myanmar,[xiv] namely: 1) to take all measures within its power to prevent the commission of all acts of genocide; 2) to ensure that the military, as well as any irregular armed groups, organizations or persons under its control, do not commit acts of genocide; and 3) to prevent the destruction and ensure the preservation of evidence related to allegations of acts of genocide.[xv] The final provisional measure requires Myanmar to report on the measures it is taking to comply with the Order, initially four months after the Order and then every six months thereafter.[xvi] Myanmar has so far filed two reports, with its third report due this month (May 2021).

The issuance of the provisional measures Order, decided unanimously, led to a wave of excitement and raised the expectations of the Rohingya people that they might finally receive some respite from the ceaseless persecution that they have endured. These hopes were however soon tempered by the fact that Myanmar's reports were to be filed confidentially, leaving the Rohingya community and other interested observers unable to assess what actions, if any, Myanmar was taking. Indeed, despite an appeal from 30 Rohingya representative groups addressed to the Court on June 19, 2020 expressly

requesting publication (*inter alia*, so they could, as the most affected and close to the situation, know and evaluate the representations made by Myanmar), the ICJ has so far as known neither responded to nor acknowledged receipt of this communication from the victims.[xvii] And despite the obvious deterioration in the situation, the unexplained and unjustified confidentiality of the Court's choice of process persists with evident prejudices.

II. Why Myanmar's progress reports should be made public by the ICJ

A. The relationship between the administration of justice and publicity of proceedings

Before discussing the reasons why Myanmar's reports should be made public, it is worth first asking *why* they are confidential. Publicity of court proceedings assists in the proper administration of justice by supporting the search for truth and ensuring judicial accountability and public confidence.[xviii] It is axiomatic that especially judicial processes *a fortiori* in cases of great public interest affecting large numbers of victims who are not party to the action should be public. Indeed, within the context of criminal proceedings, the principle of transparency in Court proceedings is set out in several international human rights instruments.[xix] Thus, the default is that Court proceedings, including the filings of the parties, are public unless there is a reason for making them confidential.

At the ICJ, the Registry is responsible for assisting in the "administration of justice" and, according to the Handbook of the ICJ, "[a]mong the Registry's duties [in this regard] is that of making the outside world aware of the Court's work."[xx] Further, as Abbot et al. point out, "[l]egally, there is nothing in its Statute or the Rules of Court to prevent the ICJ from deciding to make reports submitted pursuant to a provisional measures order accessible to the public."[xxi] Indeed, it is important to note that, in the Order, the ICJ provided no reasons at all for keeping the reports confidential. Arguably, *prima facie* it is in the interests of justice and would encourage public confidence for the ICJ to, at the least, set out considerable and compelling reasoning for the confidential status of Myanmar's reports. Absent such justification, the confidentiality of the reporting appears in plain contradiction with the requirements of elementary justice, the purposes of the Court in such a case, and the very confidence and effectiveness which the Court must surely hope to inspire rather than undermine.

B. The Gambia v. Myanmar: *A case unlike others at the ICJ*

While commentators have alluded to the "practice of the Court", *The Gambia v. Myanmar* case differs in important respects to those other cases, including those involving the Genocide Convention. Unlike in cases where the ICJ functions as a dispute resolution body between two States in concern of matters exclusively between them (e.g. territorial delimitations, trade, or diplomatic relations), and where it may be beneficial to the exclusive interests of the parties for the Court to discretely mediate between the two, the character of *The Gambia v. Myanmar* case is decidedly a public interest case.

The Gambia v. Myanmar case involves both *erga omnes* obligations (those owed to the international community as a whole) and *erga omnes partes* obligations (those owed by any State party to all the other States parties to a Convention). In the *Bosnia v. Serbia* case, the ICJ held that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*"[xxii] and has repeatedly recognized that the principles laid out in the Convention are a part of customary international law and that the prohibition on genocide has *jus cogens* status.[xxiii]

With respect to the *erga omnes partes* obligations, the Court held that:

> "[A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention."[xxiv]

Further, it should be highlighted that The Gambia's own interest in bringing the case is based solely on the *erga omnes* and *erga omnes partes* character of the Genocide Convention's obligations. In this regard, The Gambia did not argue that it was "specially affected" by Myanmar's alleged violations of the Convention for purposes of its standing to bring the case.[xxv] As argued in a different context before the ICJ in an application that was ultimately dismissed: "[*Erga omnes* obligations,] by their very nature, are owed to the whole of the international community, and it makes no sense to conceive of them as sets of obligations owed, on a bilateral basis, to each member of that community."[xxvi] In line with this argument, this case is of a distinct public interest nature in the sense that it does not involve a traditional bilateral dispute between two States. Instead, The Gambia is in essence representing not its own individual interests, but rather the international community's shared interest, of which it is a part, in the obligations of the Genocide Convention being upheld by Myanmar. Specifically, moreover, The Gambia has invoked the interests of the fifty-seven (57) Member States of the Organization of Islamic Cooperation, not to mention its own express motivation, and the fact there are 152 States Parties to the Genocide Convention. At a minimum, therefore, all those States (i.e. the great majority of the world) are undoubtedly interested as part of the "international community as a whole". Of course, this is without any regard to the actually affected subjects of the case – the Rohingya victims as a minority group.

However, despite the *erga omnes* character of the Genocide Convention's obligations and the Court's explicit endorsement of the "common interest" of all State parties, the international community and all other States parties to the Convention, except for The Gambia, are excluded by virtue of the reports' confidential status from being informed of what measures Myanmar is undertaking to comply with the Order. Given that the first and third provisional measures relate to preventing acts of genocide and preserving evidence of alleged genocidal acts, this exclusion appears contradictory to the common interest of State parties and the international community in precisely these same matters. Explicitly, this engages the shared duty of all States parties under the Genocide Convention to prevent

genocide – a duty which the Court has stated arises "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[xxvii] Clearly, the confidentiality of the reporting process obstructs States parties from the very knowledge they require in order to act appropriately and effectively on their now engaged obligations.

The dual *erga omnes* and *erga omnes partes* character of the obligations at issue, and the corresponding interest of the international community and States parties in those obligations being met, strongly suggests that there should be a presumption of publicity for Myanmar's reports on its compliance with the Order. In other words, for a case such as *The Gambia v. Myanmar*, the norm and consistent practice should be that reports are public and that confidentiality should be justified only by compelling reasons from the Court.

C. The lack of detailed requirements in the Order and the deteriorating situation on the ground

In theory, it could be argued that the interest of the international community and States parties to the Convention is met by having access to the Order itself. However, one of the unfortunate aspects of the Order is that it does not identify any specific actions that Myanmar must take, particularly with regard to the first provisional measure, which it is recalled requires Myanmar to take "all measures" within its power to prevent acts of genocide.

In its application, The Gambia had requested that the Court include specific acts that Myanmar must prevent, such as the burning of homes or villages, the destruction of land and livestock, and the deprivation of food and other necessities of life.[xxviii] The Gambia's request follows to some degree the FFM's analysis, which found that the failure to reform the structural discrimination against the Rohingya in Myanmar's laws, policies and practices, the destruction of homes and villages, food deprivation, and movement restrictions were all factors that led the FFM to conclude that "there is a serious risk genocidal actions may occur or recur."[xxix]

In the Order, the Court did state that the measures Myanmar asserted it was currently undertaking (namely repatriation initiatives, the promotion of ethnic reconciliation, peace and stability in Rakhine State, and to hold its military accountable for international humanitarian and human rights law violations) were insufficient and that, "[i]n particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya minority to exist as a protected group under the Genocide Convention."[xxx] However, the Court declined to identify any specific measures that Myanmar should undertake and instead merely restated the Genocide Convention's general prevention obligations.

Leaving aside the veracity or even bona fides of representations made by Myanmar before the Court, not to mention the situation since the coup d'état of February 1, 2021, the lack of clarity and precision from the Court has given rise to confusion and uncertainty as to what concrete actions the Court considers sufficient to prevent the commission of genocide.

The confidential status of Myanmar's reports further prevents any understanding of what Myanmar considers *its* prevention obligations to entail.

In terms of what is publicly known, it is likely that the three presidential directives issued by Myanmar in April 2020[xxxi] were included in its May 2020 report to the Court. These directives, however, mainly echo the general terms of the provisional measures themselves, with the exception of the third directive, which bans hate speech and incitement to violence. However, these directives cannot be said to represent "concrete measures" that are sufficient to ensure the Rohingya's right to exist as a group.

Furthermore, it is not necessary to have access to Myanmar's reports to determine that the discriminatory laws and policies against the Rohingya minority have not been repealed or reformed. As just one example, based on the discriminatory provisions of Myanmar's 1982 Citizenship Law, the Rohingya as a group are still unable to (re)claim their status as citizens of Myanmar and were disenfranchised from participating in the November 8, 2020 national elections held almost ten months after the provisional measures were ordered.[xxxii] The FFM and the United States Holocaust Memorial Museum, among others, have identified the repeal or reform of this law as being necessary in order for Myanmar to comply with its obligation to prevent the recurrence of genocide.[xxxiii]

The situation in Myanmar has also not improved in any noticeable way. To the contrary, the plight of the Rohingya minority appears to be deteriorating. In this regard, since the issuance of the Order, Rohingya human rights organizations have argued that not only is Myanmar not taking sufficient concrete measures to prevent genocide, but have also documented crimes and human rights violations that indicate that the commission of genocide against the Rohingya remains ongoing.[xxxiv] Further, the military's actions in response to the coup protesters demonstrates that the Order in itself has not had a deterrent effect on its criminal behavior. Given that the Myanmar military, under the high command of Senior General Min Aung Hlaing, was the main perpetrator of the violations that occurred during the 2016-2017 attacks and is currently actively committing crimes against civilians in relation to the coup under the direction of the very same Senior General Min Aung Hlaing, the need for clarity regarding what precise concrete actions are required of Myanmar is all the more urgent.

Making Myanmar's reports public would permit other States, international organizations, and the Rohingya themselves to engage with Myanmar and the Court on this critical issue. As publication appears solely a decision of the Court and immediately available in the now even greater public interest, in the absence of any indication of a compelling justification to the contrary the Court should immediately act to make public Myanmar's reports on compliance with the provisional measures Order of January 20, 2020.

D. The lack of access to the reports frustrates States' ability to determine whether to intervene in the case

Notwithstanding the Court's own immediate action, one way in which States could engage with the Court and Myanmar is by intervening in the case. Under Article 62 of the ICJ Statute

and Article 81 of the Rules, a State may request permission to intervene in a case where it "consider[s] that it has an interest of a legal nature which may be affected by the decision in the case". This includes intervening in provisional measures proceedings.[xxxv] Article 63 of the Statute grants a right to intervene "[w]henever the construction of a convention to which states other than those concerned in the case are parties is in question". Further, under Articles 75 and 76 of the Rules, the Court may, on its own or at the request of a party, issue further provisional measures or, based on a change to the situation, amend the provisional measures already ordered. Each of these bases for immediate action is available, and some States have declared already their intentions.

In February 2020, the Maldives announced its intention to intervene in the case, with Canada and The Netherlands making a similar announcement in September of last year.[xxxvi] However, to date, none of these States have filed an application or declaration of intervention. In October 2020, in light of the absence of publicly available reports, the United States Holocaust Museum called on the Court, "following the submission of each progress report, [to] assess whether the concrete measures put forward by Myanmar in that report are sufficient for purposes of complying with the Court's order."[xxxvii] If not sufficient, the Museum called on the Court to proceed *proprio motu* under the Rules to issue further or amended provisional measures so that Myanmar "can receive immediate guidance on whether it is in compliance and can adjust its policy response accordingly."[xxxviii] However, despite the lack of visible policy reform and the deteriorating situation in Myanmar, the Court has not reacted to the information contained in Myanmar's first or second report. The Court's inaction makes it all the more necessary that States take action to ensure that Myanmar is complying with the Order.

Yet, not having access to Myanmar's reports frustrates the ability of States to determine whether it is appropriate to intervene, including with respect to the provisional measures. Making Myanmar's reports public could encourage other States to intervene in the case with respect to what the Convention's obligation to prevent genocide entails and the scope of measures that are required to ensure compliance with that obligation. It would also provide States with access to the necessary information to assess whether there is a need for further provisional measures or an amendment to the current Order. Given the *erga omnes partes* character of the Convention's obligations, which extend to the provisional measures, it would benefit all States parties to the Convention to have access to Myanmar's reports. This is even more so the case in light of the military coup, which would appear to constitute a serious "change to the situation" in Myanmar that carries with it significant increased risk of violence and other violations being committed against the Rohingya minority and which, as mentioned above, has been documented to actually be occurring.

E. Third party States' obligation to prevent genocide

The obligation to prevent and punish genocide applies to *all* State parties to the Convention, not just Myanmar.[xxxix] This means that not only do States have a common interest in ensuring that the *erga omnes* obligations of the Convention are upheld, they also have their own binding obligation under the Convention to take steps to prevent and to punish

genocide as a third party State.

As mentioned above, the ICJ has held that "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[xl] The Court further explained that:

> "Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law."[xli]

It should be stressed that the fact that the ICJ issued the provisional measures Order puts all States on notice of the existence of a serious risk of genocide being committed against the Rohingya minority. Further, in order to meet their own prevention obligation, States may take other actions outside of bringing or intervening in the case before the ICJ – actions which are available to each State party, arguably constituting an obligation and certainly a right. Such actions need not be adversarial, but could potentially include providing assistance and support to the Government of Myanmar in preventative actions that it is undertaking. States may also consider using their influence within the United Nations organs to push for greater protections for the Rohingya. Many possibilities could be considered.

However, the confidential status of Myanmar's reports prevents other States from assessing whether they might be able to influence, either directly or through the United Nations, or potentially assist Myanmar in the actions that it is taking. Put simply, the confidential status of Myanmar's reports prevents other States parties to the Convention from ensuring that they are meeting their own prevention obligations and limits their ability to use their influence and political relationships with Myanmar to ensure that *all* measures possible are taken to prevent genocide against the Rohingya from ongoing or recurring.

F. The role of the United Nations Security Council in maintaining and restoring international peace and security

The United Nations Security Council has recognized in numerous resolutions that serious and gross breaches of international human rights and humanitarian law constitute threats to international peace and security.[xlii] Genocide and the risk of genocide are clearly matters that threaten international peace and security.[xliii] The UN Security Council therefore has a strong interest in closely monitoring Myanmar's compliance with the ICJ's Order.

Article 77 of the Rules read with Article 41(2) of the Court's Statute provides that any provisional measures ordered by the Court are to be communicated to the United Nations

Security Council. However, there is no provision for the communication of Myanmar's reports to the Council, nor does it appear that the reports are in fact being provided to it. As already discussed, the Order itself does not provide much insight as to what concrete measures Myanmar should undertake to ensure compliance with the Order. As such, absent also having access to Myanmar's reports, the communication of the Order alone does not appear to have much value, nor is it clear how the Order on its own could meaningfully assist the Security Council in determining whether it should take any steps under its Charter powers to protect the Rohingya's right to exist as a protected group. Clearly, the spirit of Article 41(2) of the Statute, especially in such a case as the Rohingya genocide, strongly suggests that the reports on compliance should be conveyed to the Security Council in order for the oversight to hold meaning.

Following the February 1, 2021 coup d'état, the UN Security Council has met three times in closed session to discuss the situation in Myanmar.[xliv] On April 9, 2021, at the initiative of the United Kingdom, the Security Council held an Arria-formula meeting on Myanmar.[xlv] However, these meetings, while important, have focused primarily on the anti-democratic coup and not on whether Myanmar is complying with the provisional measures Order. The Security Council could take a more active role, such as by maintaining the situation in Myanmar on its agenda, convening a meeting specifically to discuss Myanmar's compliance with the provisional measures Order, and encouraging Myanmar to implement policy and legislative changes that are necessary to fulfil its obligation to prevent by ending the institutional discrimination against the Rohingya, as well as granting humanitarian aid organizations access to Rakhine State to alleviate the deplorable living conditions to which the Rohingya minority who remain in Myanmar are subjected.

Making Myanmar's reports publicly available would assist the Security Council, and its individual members, in any of these or other potential actions. Further, as suggested by Param-Preet Singh of the NGO Human Rights Watch, the UN Human Rights Council (HRC), the General Assembly, and the Secretary-General can each "be more explicit in pressing the Security Council to be active on the Myanmar file."[xlvi] Thus, making Myanmar's reports public would also permit member States of the General Assembly and HRC, individually or with those like-minded, to be more proactive and effective both in the bodies' own remits and in pressing the UN Security Council to fulfil its role in ensuring international peace and security with respect to the actual situation and compliance with the Court's Order.

G. Enabling the active participation of the Rohingya

One of the more noticeable and troubling aspects of the ICJ proceedings is that the Rohingya, despite being the very group that is the subject of the matter and that remains at risk of genocide, are not parties in the case. They are the subject of genocide, but only the object in the proceedings. This means that the Rohingya community does not have access to confidential filings and is put in the same position as the general public, consigned to reading the Court's press releases and publicly available documents. Yet, there can be no question that no one has more of an interest in understanding what actions Myanmar is taking in response to the Order than the Rohingya themselves. It is their very existence

that remains threatened and their right to justice for the acts committed against them that underpins the Order's requirement of the non-destruction and preservation of evidence. It is no exaggeration to say that the case and proceedings are of existential significance for the Rohingya and the very raison d'être of the action before the Court and of any measures ordered.

As mentioned above, for almost a year Rohingya advocacy groups have called for the ICJ to make Myanmar's reports public.[xlvii] Sadly, given their lack of status before the Court, these pleas have gone unanswered. Even more concerning is the real risk, highlighted by the European Rohingya Council (representing 30 Rohingya advocacy groups), that the Rohingya may interpret the Court's non-action on Myanmar's reports filed to date as indicating that the Court considers these minimal and superficial actions that are known to the public to be sufficient to comply with the Order.[xlviii] The confidential status of Myanmar's reports risks undermining Rohingya trust and confidence in the Court and, more broadly, in the real world value of protective measures and even the Convention's obligation to prevent genocide. Given the failure of the Court's provisional measures to have an impact on the *Srebrenica* genocide, the Court's enforcement of the Convention's obligations, and the rationale of protective measures, risks being viewed by endangered and vulnerable populations as mere words on paper that do not offer a meaningful avenue for justice from genocide or effective protection in the face of a serious risk of a genocide (re)occurring.

Making Myanmar's reports public would empower the Rohingya minority by giving them access to the information they need to be active participants in the fight for their survival. It would enable them to strengthen their advocacy efforts vis-à-vis the Government of Myanmar (or, more exactly, now against the coup leaders and in potential cooperation and prospective reconciliation with the National Unity Government), with other States, the various mechanisms of the United Nations, and other international actors. And, it would allow them, as the people who know best, to contest the veracity and sufficiency of the actions that Myanmar is putting forward in its reports as evidence of its compliance with the Court's Order.

Moreover, the Court has the opportunity to modernize its practice, in the obvious interest of justice, at least to act with cognizance of the victims – for the very subjects for which the matter before the Court intends to protect and of which the Court has already acknowledged that aim. Now the Court needs to act in a way not disconnected with the victims and their right to exist – the meat of the case – along with the victims' human rights to know, to truth (as elaborated by the United Nations), and to effective participation in a suitable form and manner.[xlix] To ignore entirely or simply exclude the Rohingya, as they have exactly endured as the oft-cited "most persecuted minority in the world", means for the Court only to perpetuate the experience of the Rohingya. In the spirit of the UN Charter which gives the Court its own life, the Court must reconcile its own conduct with respect for human rights stipulated in the Charter on which the Court relies and draws its own authority and legitimacy.

III. Conclusion

The Genocide Convention was the first human rights treaty adopted by the General Assembly of the United Nations on December 9, 1948. Its promise that genocide should never happen again was a direct result of the horrors of the Holocaust, one of the most shocking human tragedies of the twentieth century. The United Nations' commitment of "never again", to learn from and not repeat history more than 70 years later, is still difficult to translate into action, even when it is most needed to protect who are most likely to be again the victims of genocide – minorities.

The ICJ's unanimous decision to grant provisional measures in the case of *The Gambia v. Myanmar* marked an important moment of recognition of the extremely precarious and vulnerable position of the Rohingya minority in Myanmar. The Order underscores the serious risks to life, safety, and their very existence as a group that the Rohingya continue to face. However, well over a year since the issuance of the Order, it remains unclear what, if anything, Myanmar is doing in terms of "concrete measures" to comply with the Order.

The *raison d'être* of *The Gambia v. Myanmar* case rests on the *erga omnes* and *erga omnes partes* obligations under the Genocide Convention, obligations in which all State parties and the international community as a whole have a common interest in seeing fulfilled, leading to the conclusion that Myanmar's reports should be public as the default position. Absent a compelling reason for the confidential status, the Court should make Myanmar's reports available to all States and interested observers, i.e. "the international community as a whole".

Further, in order to ensure that the protective measures achieve their stated goals and result in meaningful actions that prevent the recurrence of genocide and ensure that perpetrators of the alleged prior genocide can be held to account, the ICJ should remove the confidential status of Myanmar's reports and make them publicly available. In so doing, the Court will enable other actors – from States parties, international organizations, and Rohingya advocacy groups, to the various bodies of the United Nations – to play a more active, and proactive, role in ensuring that Myanmar fully complies with the protective measures ordered. Making the reports public will also enable other States parties to ensure that they are taking all measures possible with respect to their own obligations under the Genocide Convention. Most importantly, it would also allow the Rohingya themselves to engage in a more meaningful manner in the protection of their rights under the Convention and of their full rights to human rights and dignity under the UN Charter and related instruments. Finally, in the face of the obviously changed and deteriorated circumstances notably subsequent to the coup d'état of February 1, 2021, the Court must act immediately to make public Myanmar's reports on compliance with the provisional measures ordered on January 20, 2020.

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About the Rohingya Legal Forum

A Special Initiative of Newlines Institute, the Rohingya Legal Forum (RLF) brings together a global group of prominent jurists with a specialization on what has been described as a "slow-burning genocide" of the minority community in Myanmar. The RLF was formed to map out strategies, develop applications of international law, and offer advice on how to address the situation of the Rohingya people. The RLF is chaired by Dr. Azeem Ibrahim, Director of Special Initiatives at the Newlines Institute.

Endnotes

i *See* https://www.aljazeera.com/news/2021/2/23/timeline-of-events-in-myanmar-since-february-1-coup.
ii *See* https://www.cnn.com/2021/04/03/asia/myanmar-yangon-interview-arrests-intl/index.html.
iii *See,* for daily tracking of documented killings and other acts of violence against the protesters, Assistance Association for Political Prisoners (Burma), *available online at*: https://aappb.org/.
iv *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order.
v Kingsley Abbott, Michael A Becker, and Bruno Gelinas-Faucher, "Rohingya Symposium: Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order", 25 August 2020 (Abbot et al.), *available online at:* http://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/.
vi For example, *see* "Assessment of the Burmese Response to the ICJ Provisional Measures" produced by the Arakan Rohingya National Organisation (ARNO), 28 May 2020, *available online at*: https://www.rohingya.org/assessment-of-the-burmese-response-to-the-icj-provisional-measures/
vii High Commissioner report on Rohingya and other minorities in Myanmar, Human Rights Council 43rd Session, Statement by Michelle Bachelet, United Nations High Commissioner for Human Rights, Geneva, 27 February 2020, *available online at*: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25623&LangID=E.
viii "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", A/HRC/39/CRP.2, 17 September 2018, paras. 1273-1282.
ix *Ibid.* paras. 1174, 1275.
x "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", A/HRC/42/CRP.5, September 2019 (FFM September 2019 Report), para. 242.
xi *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 (Request).
xii UN General Assembly, Resolution 260/III, 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S. 277.
xiii Request, para. 116.
xiv *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order.
xv Order, para. 86.
xvi *Ibid.*
xvii For the text of the appeal letter, *see* Media Release, The European Rohingya Council, "JOINT LETTER TO ICJ: MYANMAR'S OBLIGATION TO COMPLY WITH THE PROVISIONAL MEASURES", 19 June 2020 (ERC Joint Letter), *available online at*: https://www.theerc.eu/joint-letter-to-icj-myanmars-obligation-to-comply-with-the-provisional-measures/
xviii *See* McLachlin, Beverley, "Courts, Transparency and Public Confidence – To the Better Administration of Justice", 2003, Deakin Law Review 1, *available online at*: http://www.austlii.edu.au/au/journals/DeakinLawRw/2003/1.html.
xix *See, e.g.* the International Covenant on Civil and Political Rights, Art. 14; the European Convention on Human Rights, Art. 6; and the American Convention on Human Rights, Art. 8. Significantly, guidance from the UN High Commissioner for Human Rights even in highly sensitive security contexts nonetheless repeatedly reiterates in Principle 3 the importance of a public hearing of a trial with the caveat that "Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate"; *see* Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, October 2014, at p. 1. The rationale arguably applies *mutatis mutandis* to the ICJ for such a case as the Rohingya Genocide if not *a fortiori* given the nature of the matter and the risk for the existence of the group.
xx ICJ Handbook, 1976, updated December 2108, pp. 30-31, *available online at*: https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf. According to the Handbook, its purpose (at p. 5) "is to provide, without excessive detail, the basis for a better practical understanding of the facts concerning the history, composition, jurisdiction, procedure and decisions of the International Court of Justice."

xxi Abbot et al.
xxii *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Preliminary Objections, Judgment, 11 July 1996, para. 31.
xxiii *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, para. 87 (Bosnia v. Serbia 2007 Judgment).
xxiv *Ibid.*, para. 41.
xxv *See* Order, paras. 39–41.
xxvi *See Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, Application for Permission to Intervene under the Terms of Article 62 of the Statute submitted by the Government of Australia, 23 August 1995, para. 19 (Australia Application to intervene). *See also* para. 17.
xxvii Bosnia v. Serbia 2007 Judgment, para. 431; *see* in greater detail *infra*.
xxviii Request, para. 132.
xxix FFM September 2109 Report, paras 2–9.
xxx Order, para. 73.
xxxi Republic of the Union of Myanmar, Office of the President, Directive No. 1/2020, 8 April 2020 (instructing all entities and persons under its control not to commit acts of genocide and to report any credible information in this regard to the office of the Presidency); Directive No. 2/2020, 8 April 2020 (dealing with the preservation of evidence); Directive No. 3/2020, "Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech", 20 April 2020.
xxxii On the discriminatory nature of the legislation in Myanmar and dire consequences for Rohingya in the resulting statelessness, see Fernand de Varennes, UN Special Rapporteur, Report of the Special Rapporteur on minority issues – Statelessness: a minority issue, UN Doc. A/73/205, 20 July 2018, available online at: https://undocs.org/pdf?symbol=en/A/73/205.
xxxiii *See supra* endnote xxi; Legal Brief, United States Holocaust Memorial Museum, "*Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar* – Report #2: The Denial of the Right to Citizenship and the Right to Participate in Public Affairs" (USHMM, Practical Prevention Brief), *available online at*: https://www.ushmm.org/m/pdfs/PracticalPreventionReport2.pdf.
xxxiv *See* Burmese Rohingya Organization UK, "Dereliction of Duty – International Inaction over Myanmar's Noncompliance with ICJ Provisional Measures", November 2020, *available online at: https://docs.google.com/viewerng/viewer?url=https://www.rohingyatoday.com/sites/default/files/2020-11/BROUK+Briefing+on+ICJ+case+Nov+2020+.pdf*
xxxv *See* Australia Application to Intervene, para. 24.
xxxvi "Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice", 2 September 2020.
xxxvii USHMM, Practical Prevention Brief, p. 5.
xxxviii *Ibid.*
xxxix *See* FFM September 2019 Report, paras. 52-55.
xl Bosnia v. Serbia 2007 Judgment, para. 431.
xli *Ibid.*, para. 430.
xlii *See* United Nations Office on Genocide Prevention and the Responsibility to Protect, "Atrocity Crimes-Prevention", *available online at*: https://www.un.org/en/genocideprevention/prevention.shtml.
xliii *See* Param-Preet Singh, "Rohingya Symposium: A Strategy for Strong Security Council Action on Myanmar", 27 August 2020 (Singh Article). *available online at*: http://opiniojuris.org/2020/08/27/rohingya-symposium-a-strategy-for-strong-security-council-action-on-myanmar/.
xliv Security Council Report, "Myanmar: Arria-formula Meeting", 8 April 2021, *available online at*: https://www.securitycouncilreport.org/whatsinblue/2021/04/myanmar-arria-formula-meeting-2.php.
xlv *Ibid.*
xlvi *See* Singh Article.

xlvii ERC Joint Letter *supra* fn. xvi. Media Release, Burmese Rohingya Organization UK, "Rohingya genocide continues unabated as Myanmar ignores the "World Court's" provisional measures", 25 May 2020, *available online at*: https://www.rohingyapost.com/rohingya-genocide-continues-unabated-as-myanmar-ignores-the-world-courts-provisional-measures/.

xlviii ERC Joint Letter, stating that "It is also a simple fact that Rohingya communities may misinterpret the confidential nature of the reports as acceptance or endorsement of Myanmar's position."

xlix On the rights to know, to truth and to effective participation, in addition to the right to exist, see the evolved corpus of applicable international human rights norms and standards as substantially elaborated notably by mechanisms of the UN Human Rights Council. As a principal body of the United Nations proceeding from the UN Charter, surely the ICJ must conform its conduct and practices with, and be respectful of, these norms and practices and not against them.