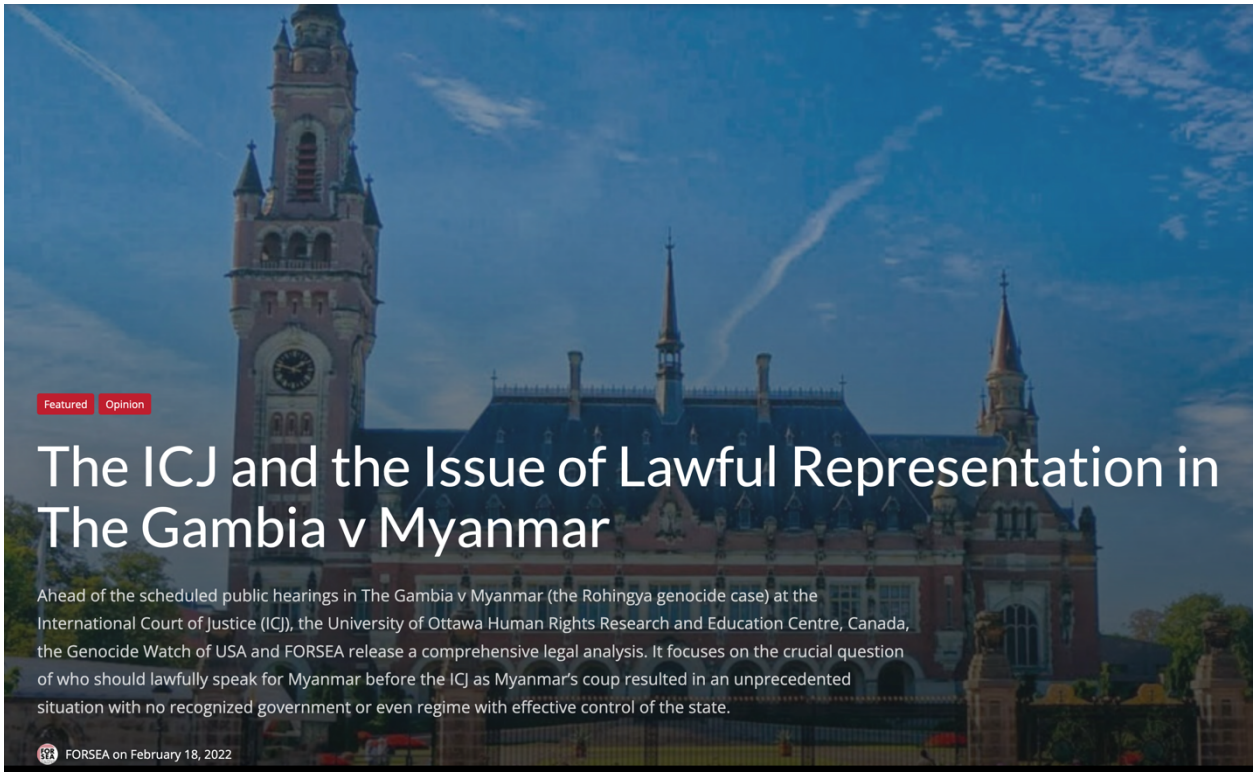

by Prof. John Packer, Dr. Gregory Stanton, Nathalie Chaar, Loujain El-Sahli, and Bailey Pelletier

I. The Issue

This paper discusses the issue of the lawful representation of the Republic of the Union of Myanmar (Myanmar) in the proceedings at the International Court of Justice (ICJ) in the case of *The Gambia v Myanmar*. While there is no doubt that, as a State, Myanmar holds obligations owed to other States and to the international community as a whole, notably pursuant to the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (the Genocide Convention), and while there is no doubt that the case before the ICJ involves two States parties to the Genocide Convention for which the Statute of the Court and, more specifically, the Convention explicitly provide for the Court's competence in the event of a dispute, the issue is who exactly possesses lawful authority to represent—and to determine Myanmar's representation—in the proceedings before the Court. In short, who may speak for Myanmar, most immediately with respect to the hearings notified by the Court to take place in The Hague on 21-28 February 2022? In this regard, the question of the lawful representative for Myanmar has been made problematic by the uncertainty surrounding the legitimate governing authority of the State, competing claims and procedural capacities, and the varied and indeterminant State practice concerning recognition of any particular claim to represent Myanmar. As such, proceeding with the Court's hearings is problematic and entails consequences and risks both for the case per se and for other actually or potentially interested parties.

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II. Executive Summary

This paper concludes that, pursuant to applicable international law under the *Charter of the United Nations* (UN Charter), and in the absence of any law that unequivocally confers upon the ICJ the competence to decide matters of government recognition, the ICJ is not competent to determine the lawful representative of the Republic of the Union of Myanmar in the notified proceedings in *The Gambia v Myanmar* case. In the event that the Court nonetheless proceeds at this time, and in this context, with the scheduled hearings, there would be risks of injustice and prejudices for which it would not be reasonable to conclude that the Court would be acting in accordance with international law as it is mandated to do. Moreover, alternatives exist which would avoid prejudices caused by proceeding amidst evident uncertainties.

Following the military coup d'état of 1 February 2021, the democratically elected Government of Myanmar was deposed and, in its place, a military junta has asserted authority. Contrary to the Constitution of Myanmar, the then President, State Counsellor and Foreign Minister of Myanmar (as well as Agent before the ICJ), among others, were arrested by the military and subjected to extraordinary and unlawful trials. The people of Myanmar reacted en masse through nationwide civil disobedience which the junta met with extreme force which is ongoing. In response, deposed government officials and parliamentarians formed the National Unity Government (NUG) asserting authority as a government in exile as the legitimate Government of Myanmar. The situation remains fluid.

Internationally, there has been uncertainty about the legitimate representative of the State within multilateral relations (notably at the UN and the Association of Southeast Asian Nations–ASEAN) and bilateral relations. In particular, the UN General Assembly (UNGA)'s Credentials Committee has received requests to represent Myanmar from both the junta and the NUG. The Committee opted to defer its determination of this question and has allowed the Permanent Representative appointed under the previous democratically elected Government of Myanmar, Ambassador Kyaw Moe Tun, to remain in his seat and to continue to enjoy privileges and immunities, pursuant to Article 105(2) of the UN Charter, in respect of Myanmar as a UN Member State.

Pursuant to the UN Charter, the UNGA has the authority to "adopt its own procedures," which includes the procedure regarding the recognition of an agent to represent a State within the UN system. In situations when the representation of a State is disputed, the Credentials Committee is tasked with assessing competing claims to legitimate representation and making a recommendation to the UNGA whereupon UN Member States render a decision. When examining the claim of a potential representative, the Credentials Committee will consider the effective control of the entity in question, their compliance with international law, and the purposes and principles of the UN Charter, including respect for human rights and the will of the people. Since the coup of 1 February 2022, it is uncertain that any claimant meets these requirements—a fact that has undoubtedly contributed to the absence of a determination. Furthermore, the recognition of credentials is ultimately a political decision, and the Credentials Committee has recommended as recently as December 2021 that recognition of any party to represent Myanmar be deferred. Therefore, significant uncertainty persists around who is the legitimate representative of Myanmar and, accordingly, who may speak for Myanmar in matters of relations between and among States including disputes.

The ICJ does not have an unequivocal procedure regarding representation of a party to a dispute and the ICJ does not enjoy, in accordance with international law, the competence to determine its own competence in such a fundamental matter. Rather, in accordance with the UN Charter under which the ICJ is established, the Court should defer to the determinations of the UNGA. In the absence of such a determination, the ICJ should refrain from making its own unilateral determination. In the event that the Court nonetheless proceeds, such a unilateral step would have prejudicial effects to proceedings and to the interests and certain rights of other States parties to the Genocide Convention, UN Member States, intergovernmental organizations, other UN organs and bodies, and, significantly, to the Rohingya people. As such, the process may contribute to injustice rather than justice. The evident implications of the case

now proceeding entail certain effects and the risk of serious harm—both in terms of and beyond the case—in the absence of any compelling need to proceed at this time.

This paper concludes by providing potential alternatives to a unilateral ICJ determination, namely for the Court to suspend the proceedings pending a UNGA determination on who may lawfully represent Myanmar and for concerned parties—States and intergovernmental organizations alike—to register their concerns before the ICJ.

III. The Facts

(i) Procedural and Contextual Overview

On 19 November 2019, The Gambia, as a party to the *Convention on the Prevention and Punishment of Genocide*[1] (Genocide Convention or Convention), applied to institute proceedings against the Republic of the Union of Myanmar at the International Court of Justice (ICJ).[2] Myanmar achieved independence from British colonial rule on 4 January 1948, became a member of the United Nations on 19 April 1948[3], and ratified the Genocide Convention on 14 March 1956[4]. The Application by The Gambia, which acceded to the Convention on 29 December 1978[5], concerns actions said to be taken and condoned by the Government of Myanmar against members of the Rohingya group (protected under the Convention) who primarily reside in Rakhine State in northwestern Myanmar.[6] In its application, The Gambia argues that the State of Myanmar has committed and continues to commit genocide against the Rohingya in violation of the terms of the Convention.[7]

Subsequent to three days of public sittings in the Peace Palace in The Hague on 10-12 December 2019, in an Order published 23 January 2020 the ICJ found unanimously that, as a party to the Genocide Convention, The Gambia has prima facie standing to bring a case against Myanmar before the Court.[8] Certain obligations enshrined in the Genocide Convention, including the duties to prevent and punish genocide, are obligations owed *erga omnes* to all State parties to the treaty.[9] The ICJ concluded that the "common interest [to prevent and punish genocide] implies that the obligations in question are owed by any State party to all the other State parties to the Convention."[10] Following this determination on The Gambia's standing, proceedings at the ICJ were affected by the COVID-19 pandemic.

In addition to The Gambia's role in proceedings as a matter of public interest, other State parties and organizations comprised of State parties have interests in the matter. Indeed, in announcing before the UNGA its intention to proceed with the case, The Gambia called upon other UN Member States to join it.[11] At the 43rd Session of the United Nations Human Rights Council (UNHRC) on 26 February 2020, the Minister of Foreign Affairs of the Maldives announced[12] that State's intention to intervene in the matter before the ICJ in line with the decision made unanimously by the Organization of Islamic Cooperation (OIC) in March 2019 to take action against Myanmar.[13] The Gambia ultimately applied to institute proceedings with the support of the OIC of which 42 members are parties to the Convention, including special support from Bangladesh.[14] On 2 September 2020, Canada and The Netherlands issued a joint statement announcing their intention to intervene in the matter as State parties to the Convention.[15] The statement reads in part that, "Canada and the Netherlands consider it our obligation to support these efforts which are of concern to all of humanity."[16]

On 20 October 2020, Ambassador Kyaw Moe Tun was appointed Permanent Representative of Myanmar to the United Nations in New York, whereupon his credentials were accepted by the UNGA in November 2020.[17]

On 1 February 2021, a military coup d'état took place in Myanmar. The democratically elected parliament and the governing National League for Democracy (NLD) party were ousted by Myanmar's military, the

Tatmadaw, which declared a one-year state of emergency.[18] Government officials, including President Win Myint and State Counsellor and Foreign Minister Aung San Suu Kyi, were detained by the military and remain in detention today.[19] The military junta thereupon created its own body, the State Administration Council (SAC), composed of military and civilian members appointed by Senior General Min Aung Hlaing[20], who, in August 2021, went on to appoint himself Prime Minister in contravention to Myanmar's Constitution.[21] Following the coup, Ambassador Kyaw Moe Tun remained in his position as Permanent Representative, pending a determination by the UNGA Credentials Committee established pursuant to Article 9 of the UN Charter.

On 12 February 2021, a representative of the junta was permitted to speak for Myanmar at the United Nations Human Rights Council (UNHRC), in response to criticisms expressed by Tom Andrews, the UN Special Rapporteur on the situation of human rights in Myanmar.[22] This junta representation was again permitted to speak during a UNHRC session on 11 March 2021. Both of these appearances drew sharp criticisms from States as well as international commentators.[23]

On 16 April 2021, in response to the coup, exiled elected parliamentarians formed the National Unity Government (NUG), retained President Win Myint and State Counsellor Aung San Suu Kyi, and asserted legitimate governing authority over Myanmar.[24] The NUG has reportedly established offices in six States: the United States of America, the United Kingdom, France, Czech Republic, Australia and South Korea.[25] The NUG is labelled as a "terrorist" organization by the junta.[26]

On 18 June 2021, the UNGA adopted Resolution 75/287, which criticizes the Tatmadaw rule and calls for a return to democratic governance. The resolution passed with a strong majority of 119 votes in favour, 1 vote against, 36 abstentions, and 37 non-voting members.[27] Of the 119 votes in favour, 104 are State parties to the Genocide Convention.[30]

Additionally, using the official titles of recognized plenipotentiaries of the State of Myanmar, UNGA Resolution 75/287 calls upon the military "to immediately and unconditionally release President Win Myint, State Counsellor Aung San Suu Kyi and other government officials and politicians and all those who have been arbitrarily detained, charged or arrested, including to ensure their rightful access to justice, and to engage and support the Association of Southeast Asian Nations constructively with a view to realizing an inclusive and peaceful dialogue among all stakeholders through a political process led and owned by the people of Myanmar to restore democratic governance."[31]

The positions of the international community towards recognition of the junta, including representation at the UN, have also been expressed bilaterally and multilaterally in the strongest, negative terms. For example, on adoption of UNGA Resolution 75/287, in its statement of that day delivered on behalf of its Members and associated, candidate and some potential candidate States, the EU stated unequivocally that the junta "have no support" – that "the international community does not accept the coup, and it does not recognize any legitimacy to the regime that emerged from it. […] We will not let this coup stand."[32]

On 1 December 2021, the UNGA Credentials Committee released a report opting to defer its decision on granting credentials to representatives of the junta in Myanmar (as well as representatives for the Taliban in Afghanistan).[33] On 6 December 2021, the Credentials Committee report was approved by consensus in UNGA Resolution 76/15.[34] As such, Ambassador Kyaw Moe Tun, the representative of the democratically elected civilian government, retained his status and remains the Permanent Representative of Myanmar to the United Nations (notably at the UNGA), pending a future determination.

Between 21 and 27 September 2021, the UNGA held its annual high-level meetings, attended by Heads of State and Governments, as well as ministerial-level representatives. Following an agreement made by the United States of America, Russia and China—three current members of the UNGA Credentials Committee—it was reported that Ambassador Kyaw Moe Tun was permitted to remain in Myanmar's seat during these meetings, as long as he agreed not to address the Assembly.[35] However, the Ambassador continues to address other plenary and committee meetings attended by permanent representatives.[36]

His remarks are consistently critical of the junta and he has aligned himself with the NUG.[37] This ambiguity around Kyaw Moe Tun's powers at the UNGA further illustrates the uncertainty surrounding the legitimate authority and effective Government of Myanmar.

On 19 January 2022, the ICJ published a press release giving notice of public hearings on *The Gambia v Myanmar* from 21 February through 28 February 2022.[38] On 28 January 2022, UN High Commissioner for Human Rights, Michelle Bachelet, urged governments to "intensify pressure" on the Tatmadaw to uphold human rights protection and restore civilian rule.[39] The repeated condemnation and lack of recognition of the junta's rule within the UN system raises serious questions about their ability to represent Myanmar in the coming proceedings at the ICJ.

Overall, State practice and the practice of UN bodies, agencies, and fora (as addressed further below) concerning representation—and related implications for recognition of the Government of Myanmar—have been at times inconsistent, but with the dominant position being to defer the matter with due deference to the Credentials Committee consistent with the UN Charter. In sum, the issue remains unresolved.

(ii) The Matter of Agency

In the verbatim record of the Court's hearing of 10 December 2019, the Government of the Republic of the Union of Myanmar is identified as represented by "H.E. Ms Aung San Suu Kyi, Union Minister for Foreign Affairs of the Republic of the Union of Myanmar, as Agent; [and] H.E. Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of the Republic of

the Union of Myanmar, as Alternate Agent";[40] the verbatim records of the subsequent hearings of 11 and 12 December 2019 repeat the same identifications of Myanmar's Agent and Alternate Agent. In none of the further published notices or documents from the Court since the initiation of proceedings has there been any indication of a change in the representation of Myanmar, nor has there been any such notice published or known from any representative of the State of Myanmar recognized by the United Nations.

As noted above, as a matter of fact reported widely in the media and beyond doubt, the then State Counsellor, Minister of Foreign Affairs and Agent of Myanmar before the Court was, with others (including the Alternate Agent), unlawfully arrested on 1 February and has since then been detained in Myanmar by the Tatmadaw which has controlled communications and undoubtedly obstructed her capacity to exercise recognized authority as identified before the Court. It is unclear whether or, if so, to what extent the Court has expended any effort to communicate with the identified Agent or Alternate Agent of Myanmar before the Court, or whether or, if so, to what extent the Agent or Alternate Agent have sought to communicate with the Court. Specifically, it is unclear whether Myanmar's Agent and Alternate Agent before the Court have been withdrawn or replaced and, if so, by what exact means in accordance with international law as the Court is required to apply.

In its notice of 19 January 2022 announcing public hearings to be held in *The Gambia v Myanmar* case to take place from 21 February to 28 February 2022, there is no indication or explanation with regard to the representation of the State of Myanmar.[41]

Two separate and competing positions have been expressed by the SAC and by the NUG. On 24 June 2021, the junta formed a new legal team, led by its "Foreign Minister" Wunna Maung Lwin, to respond to the case brought by The Gambia at the ICJ.[42] In its Announcement (2/2022) of 1 February 2022, the NUG expressly refers to the junta's unlawful detention of Myanmar's Agent and Deputy Agent and states that "Myanmar's Permanent Representative to the United Nations (UN), Ambassador Kyaw Moe Tun, has communicated to the Court that he is the acting alternate agent under the direction of the NUG and is the only person now authorized to engage with the Court on behalf of Myanmar."[43]

With regard to the lawful authority to appoint an Agent or alternates representing the State of Myanmar before the Court, Senior General Min Aung Hlaing, who has named himself Prime Minister, asserts that actions by the Tatmadaw on 1 February 2021 are both lawful and legitimate by reference to Article 417 of the Myanmar Constitution of 2008[44], which states:

If there arises or if there is sufficient reason for a state of emergency to arise that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means, the President may, after coordinating with the National Defence and Security Council, promulgate an ordinance and declare a state of emergency.

The junta has asserted that purportedly widespread voter fraud in the November 2020 general election risked leading to the disintegration of the Union, necessitating military takeover.[45] The election watchdog, the Asian Network for Free Elections (ANFREL), issued a 176-page report reviewing the observations from the 2020 Myanmar General Elections and concluded that "the results of the elections were, by and large, representative of the will of the people of Myanmar."[46]

Irrespective of the existence of an ostensible impetus for action under Article 417 of the Constitution, as a matter of stipulated procedure the President, Win Myint, was at the time the person prescribed by the Constitution as holding the authority to act should he so decide. There is no evidence that President Win Myint duly issued a declaration nor in any other way initiated or approved the state of emergency. To the contrary, the President was forcibly arrested absent any lawful authority in an open act of overthrowing the Government. In order for the Commander-In-Chief of the Defence Services (in fact, Senior General Min Aung Hlaing) to obtain legislative, executive and judicial powers, the President would have had to relinquish that power.[47] The President did not do so.

It is clear that neither the relinquishment of power from the Head of State (i.e. President Myint) nor State Counsellor Aung San Suu Kyi occurred lawfully and that, instead, they were both detained, placed in ongoing custody, subsequently charged with crimes and subjected to processes (including convictions) which the NGO Human Rights Watch has called "bogus charges… all about steadily piling up more convictions against Aung San Suu Kyi so that she will remain in prison indefinitely."[48]

The prevailing factual situation is of contested claims following the coup d'état of 1 February 2021 resulting in considerable uncertainty as to the status of the originally notified Agent, Alternate Agent and possible replacements in the case before the ICJ, together with uncertainty regarding the lawful authority of the State of Myanmar to change the Agent before the Court. It is, however, clear that the Permanent Representative of Myanmar to the United Nations, as considered by the UNGA's Credentials Committee, is against the junta representing Myanmar before the Court.

IV. Applicable International Law

As a matter of international legal personality, the UN is one legal person as is any UN Member State or State party subject of international law also one legal person. It would render international relations impracticable and unreliable should such primary subjects be conceived as possessing multiple and possibly contradictory personalities. Of course, it is a matter of necessity that natural persons must represent the State.

As a matter of treaty law, the UN Charter (of which the ICJ Statute is appended and forms an integral part) provides in Article 9 for representatives of Member States comprising the General Assembly which has been said to hold "an eminent position among the organs of the UN"[49] and is the only principal organ of the UN in which all UN Member States are represented.

As a principal organ of the UN, and explicitly as “the principal judicial organ” of the UN, the ICJ derives its authority from States and, specifically, its establishment pursuant to Article 92 of the UN Charter. Such authority, as delineated in the Statute of the ICJ, requires the Court to make decisions “in accordance with international law” not least including the UN Charter.[50]

It has been observed that “the principal organs of the UN, taken as a whole, exercise all the functions which the UN members have assigned to the Organization” (i.e. as one legal person) and that, notwithstanding the distinct roles of the principal organs and their “mutual independence”, the ICJ is co-ordinated with the other organs and that, moreover, “the competence of one organ may be conditional on the action of another”.[51] Indeed, this follows from the necessity of coherence presumed of one legal person.

The ICJ Statute does not stipulate the competence of the Court to determine representation of Member States or of State parties in disputes before it. That is, in principle, a prerogative of the State. Rather, the ICJ Statute provides in Article 30 for the Court to adopt Rules of Procedure “for carrying out its functions”.[52] Accordingly, Article 40 of the Rules of Court sets out a process for notification of Agents (i.e., a natural person representing the State) and communications therewith.[53] To that end, “Agents shall have an address for service at the seat of the Court to which all communications concerning the case are to be sent. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves.”[54] Of course, the process of conducting communications should not serve, in effect, to determine the Agent or, more so, the lawfulness of representation of a State in a dispute before the Court; communications are purely of procedural character and not substantive character.

The UN Charter provides that the UNGA “shall adopt its own procedures”, and the UNGA has developed procedures with regard to the credentialing of an agent who seeks to represent a State.[55] In essence, although the Statute of the ICJ lacks procedural clarity on the matter of representation of a party to a dispute, the UNGA has such a procedure. This process involves a Credentials Committee composed of Member States which scrutinize submissions, deliberate, and make decisions pertaining to representation on behalf of a given UN Member State and, subsequently, present a recommendation to the UNGA as to whether or not to recognize such credentials and thereby confer representative capacity.[56]

Historically, the international community avoids making determinations with regard to the legitimacy of governments.[57] However, when scenarios arise where representation of a Member State is disputed, the Credentials Committee exists to make a recommendation to the UNGA in accordance with an early resolution, i.e. UNGA Resolution 396(V) of 14 December 1950.[58] The UNGA will, when possible, consider the impact on the international community in their assessment, particularly when a party seeking representation fails to embody the principles and purposes of the UN Charter as required by treaty law and the general principle of good faith. Specifically in the context of contested claims to representation, UNGA Resolution 396(V), titled “Recognition by the United Nations of the representation of a Member State”, provides in full as follows (with emphasis added):

The General Assembly,

Considering that difficulties may arise regarding representation of a Member State in the United Nations and that there is a risk that conflicting decisions may be reached by its various organs,

Considering that it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations,

Considering that, in virtue of its composition, the General Assembly is the organ of the United Nations in which consideration can best be given to the views of all Member States in matters affecting the functioning of the Organization as a whole,

1.
    1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;
    2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;
    3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;
    4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;
    5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate.

Accordingly, it is to be presumed that the ICJ was duly informed and is fully cognizant of the treatment of the matter, its rationale, the subsequent practice, and the ongoing need for coherence in the interests of the Organization, of Member States and of international law and its core elements of legality and foreseeability.

Whether in a specific case an authority receives recognition as the entitled representative is subject to varying practices and considerations by the Credentials Committee. Prior to 1990, a crucial element for consideration was the effective control over the State maintained by a claimant seeking representation of that State at the UN.[59] Practice since 1990 has tended to lean in favour of the legitimacy of such purported authority, notably that it derives from the will of the people and is exercised consistently with the purposes and principles of the UN including respect for human rights and other cornerstones of the UN Charter.[60]

Further, even in scenarios where effective control is established, the Committee retains the discretion to deny the credentials of a government imposed by force both internally or externally, or if the UNGA perceives a regime to be incompatible with the UN Charter, such as one failing manifestly to respect human rights. Notably, for example, pursuant to obligations arising from Articles 1 and 55 of the UN Charter, and based on the recommendation of the Credentials Committee, the UNGA declined to recognize the credentials of the South African delegation under the apartheid regime for 24 years between 1970 and 1994.[61]

While a change in tendency in assessing claims is observable, the practice has been inconsistent.[62] In the case of Haiti, although a military junta following a coup wielded effective control of that State from 1991 to mid-1994, the UNGA accepted, without objection, for three consecutive years (1991-1993) the credentials submitted by the ousted democratically elected government, which then returned to power in Haiti in October 1994.[63] Between 1996 and 2000 the Committee continued to recommend that the UNGA defer recognizing the credentials of any party—which during the time were the ousted democratically elected government and the Taliban—until the Taliban were no longer the *de facto* Government of Afghanistan.[64]

In none of the cases or scenarios described or referenced above were the State parties whose membership credentials were a matter of dispute involved in ongoing proceedings at the ICJ. However, two cases before the ICJ have touched upon the issue of this paper. First, in the case of *Bosnia and*

Herzegovina v Serbia and Montenegro, agency was confused (including Co-Agents) on the part of a State (Bosnia and Herzegovina) having the extraordinary Constitutional structure of a triumvirate Presidency resulting in the State not behaving uniformly; one agent wanted to discontinue proceedings, while another did not. The Court declined to recognize one agent over another and simply noted that they could not establish unequivocally that Bosnia wanted to discontinue proceedings—and therefore the case continued.[65]

Second, in the more salient case of *Honduras v Brazil* (concerning a bilateral matter not affecting a public interest, much less a peremptory norm), in addressing the UNGA at its 65th Session (as foreseen in the UN Charter), the then President of the ICJ, Judge Owada, reported that "the Court was faced with conflicting contacts coming from competing governmental authorities both purporting to be acting on behalf of Honduras in a situation of political uncertainty" (within the country); there became competing notices of different Agents and Co-Agents such that, "[u]nder these unclear circumstances, the Court decided that no further action would be taken in the case until the situation in Honduras was clarified."[66] Eventually, within the year, the situation in Honduras was clarified and the case was discontinued pursuant to reliable notice from the undisputed representative of Honduras.[67] As such, in the two possibly relevant cases so far before the ICJ, the Court conducted itself in sensible and not precipitous ways.

It bears recalling that the issue of the representation of the State of Myanmar in the case of *The Gambia v Myanmar* concerns a matter of public interest arising from a multilateral treaty on a peremptory norm with implications far beyond a bilateral dispute and with actual or potential affects of the interests and rights of other States, international organizations and, not least, the victims. As such, it is incumbent upon the Court to take all good care to ensure it acts in accordance with international law, avoids injustices or prejudices, respects the Purposes and Principles of the United Nations, and seeks so far as possible to behave coherently with the UN as a whole.

V. Analysis

(i) Lawfulness of the Junta-Led Regime

Generally, three characteristics inform the assessment of whether or not an entity should be recognized as the government of a State: compliance with international law, effective control, and legitimacy.

(a) Compliance with international law

Since the takeover in February 2021, there has been documented evidence of the junta responding to the country-wide protests and civil disobedience with indiscriminate attacks and mass shootings, killing around 1,500 civilians and arresting, charging, or jailing nearly 9,000 more.[68] The military crackdown on the civil disobedience movement has also included accounts of torture and execution.[69] Additionally, the regime has beaten and shot healthcare workers providing care to injured protesters and forced clinics operated by NGOs to close, pushing medics and volunteers to work in poorly resourced makeshift clinics.[70] The junta's grave human rights violations following the coup has drawn global outrage and condemnation, including from the UN.[71]

(b) Effective control

A recognition of the junta is not backed by any sign of its growing power or decisive control of Myanmar's territory. In fact, empirical evidence points to the opposite conclusion: that the junta is hanging onto a weakening and tenuous thread. The coup regime lacks effective control over systems of taxation, revenue collection, territorial stability and population movements across Myanmar.[72] In Rakhine State, the

regional focus of the ICJ case, sixty percent of the administration is under the control of the anti-regime Arakan Army, which collects household revenues from the inhabitants.[73]

Moreover, flows of funds to the junta are being progressively disrupted. Foreign companies, such as top energy companies Chevron and TotalEnergies, are closing their operations, citing concerns over indirectly funding the military's human rights abuses, and expressing support for targeted sanctions on Myanmar's natural gas revenues, the junta's largest source of foreign currency revenue.[74]

Politically, the military regime is not only struggling to consolidate power but its power is languishing.[75] While neither the military nor the NUG appear likely to prevail, a growing and mobilizing opposition presents a tumultuous and contested political climate for the junta.[76] The junta regime is embroiled in continuous protests and organized civil disobedience, both online (where the junta's social media accounts have been banned) and offline, further contributing to the fragility of the junta's control.[77] It also continues to face growing threats and attacks from insurgent and ethnic armed groups like the Arakan Army, who are increasingly winning the support of resistance groups opposing military control.[78] This not only discredits the claim that the junta has effective control over Myanmar's territory, but raises serious doubts about its durability and survival, and in turn about the ICJ's credentialing of the junta despite its uncertain and precarious state.

(c) Legitimacy

A government's legitimacy can be evidenced if its role of authority represents the genuine "will of the people," as enshrined in Article 21(3) of the Universal Declaration of Human Rights.[79] The measure of popular legitimacy is typically determined by looking at the results of free and universal elections. This principle is equally reflected within the Burmese national legal framework. Article 391 of the 2008 Constitution of Myanmar enshrines the right to vote by secret ballot for all eligible citizens that are 18 year of age or older.[80] The most recent elections were held on 8 November 2020, the results of which illustrated the overwhelming popularity of the NLD as the governing party of Myanmar. The NLD won 396 seats in the Upper and Lower Houses of Parliament, which is 66 more seats than would have been required to form a majority government.[81] In contrast, the Tatmadaw does not enjoy popular legitimacy in Myanmar. In fact, there is evidence of a general sense of contempt towards their claims to authority.[82]

In particular, the Tatmadaw cannot argue that it has popular legitimacy and that it promotes the wellbeing of Myanmar's population. Article 55 of the UN Charter sets out the State's duty to promote the wellbeing of populations, namely through ensuring higher standards of living, full employment, and conditions of economic and social progress and development.[83] Yet since the junta's takeover, public services like education and healthcare, already in a dire state since the start of the COVID-19 pandemic, are collapsing as doctors, medical staff, and teachers have gone on strike in support of the civil disobedience movement against the coup.[84]

According to a recent UN Humanitarian Needs Overview, the socioeconomic and humanitarian crises have escalated since the military takeover, with 14 out of 15 states and regions being afflicted with acute malnutrition.[85] Since the coup, the junta has also actively worsened the situation by imposing new travel restrictions on humanitarian workers, attacking aid workers, and blocking needed humanitarian aid from reaching millions of displaced people and others at risk.[86] The UN estimates that the number of people requiring assistance grew from 1 million before the coup to 14.4 million by 2022.[87] The ICJ would therefore have no basis to lend legitimacy to the junta on the grounds that the military enjoys popular legitimacy among the Burmese population.

(ii) Prejudicial Effects

In addition to the absence of any legal and factual basis grounding a unilateral step by the ICJ to recognize the junta as the lawful representative of Myanmar at proceedings before the Court, there are

serious implications in doing so. Such a decision would carry significant, material, and prejudicial effects to the Court's proceedings, to State parties to the Genocide Convention, to UN Member States, other UN organs and bodies, UN specialized agencies, to the international community as a whole, and, more importantly, to the Rohingya. Due to these prejudices, the ICJ would not be promoting the values that the UN Charter embodies and promotes.

(a) *Prejudice to the proceedings*

The Court's decision to allow the junta over any other entity to represent Myanmar is not merely incidental[88] to the case but will undeniably result in a known specific posture adopted by the respondent in the proceedings with substantive representations directly affecting the parties and the considerations of the Court. There are undeniable legal consequences which, moreover, concern the international community as a whole given the character of the case.[89] Contrary to the alternative positions taken by other actors, such as those expressed by the NUG or potentially by the Permanent Representative of Myanmar to the United Nations (acting in his capacity confirmed by the UNGA), the junta continues to deny that the Rohingya are a protected group under Article II of the Genocide Convention. The junta has also not admitted the existence of large-scale persecution of the Rohingya. And the junta has not claimed responsibility for its actions against the Rohingya. This means that the decision to invite the military junta to represent Myanmar before the ICJ would necessarily result in a materially distinct character for the proceedings at the heart of the case and of the interests asserted by The Gambia.

There are also credible doubts over the compliance of Myanmar (if the ICJ legitimates the junta's claim to represent the State) with the Provisional Measures. It is to be recalled that the Court ordered Myanmar to: take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention in relation to the members of the Rohingya group in its territory; ensure that its military, and any irregular armed units, organizations and persons subject to its control, direction or influence, do not commit acts within the scope of Articles II and III of the Genocide Convention; take "effective measures" to protect evidence relating to The Gambia's allegation; and submit periodic reports on all measures taken in compliance with the Order.[90]

Compliance with the Provisional Measures remains far from a possibility for the junta, particularly as it denies the existence of the very group to be protected (the Rohingya) and the central issue in the ICJ case—acts of genocide or a serious risk of continued genocide perpetrated against the Rohingya. Moreover, there has been increasing evidence since the coup that the junta has been brazenly inflicting lethal violence on Myanmar's population and imposing ever more restrictive measures on the Rohingya and other ethnic groups.[91]

Beyond influencing how the proceedings will unfold, there are also wide implications regarding the outcome of the case and the prospects of reparations. Owing to the junta's disposition towards responsibility for the atrocities against the Rohingya, it is doubtful that it would admit or accept State responsibility or perform the corresponding obligation of a State to remedy its internationally recognized wrongful act. This would render the case before the ICJ futile, because resolution of the dispute through payment of reparations by Myanmar is an essential part of the Court's function. Due to the dramatically opposed attitudes of the actors that are asserting claims for lawful authority in Myanmar, the Court's decision over Myanmar's representative will determine the legitimacy of the case itself and will determine whether the case would bring any real, positive or substantial outcome that would provide reparations to the Rohingya.

(b) *Prejudice to State parties to the Genocide Convention*

The Gambia's institution of proceedings against Myanmar at the ICJ marked the first time that a non-injured State—a State that did not assert a specific injury or special interest beyond being a party to the Genocide Convention—has brought a dispute to the ICJ.[92] This is in line with an established principle

recognized by the ICJ, which entitles State parties to the Genocide Convention to invoke the responsibility of another State party for the breach of its obligations, particularly due to their *egra omnes partes* character.[93]

As the Court stated: "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention," namely to prevent acts of genocide and, if they occur, to ensure the authors do not enjoy impunity.[94] As such, and by virtue of that common interest, the obligations under the Convention are owed by any State party to all the other State parties.[95]

In this case, the ICJ granted The Gambia prima facie legal standing on the basis of being one of the 152 State parties to the Genocide Convention.[96] Non-disclosure of decisions consequential to the case therefore prejudices the interest of State parties to bring to an end the failure of Myanmar to meet its obligations under the Convention.

In addition to each and all State parties' interest in the case, the lack of transparency around who will represent Myanmar in the notified 21-28 February 2022 proceedings prejudices their rights under the ICJ Statute. Under Article 62 of the ICJ Statute and Article 81 of the Rules of the Court, a State may request permission to intervene in a case where it considers that "it has an interest of a legal nature which may be affected by the decision in the case."[97] Furthermore, Article 63 of the Statute gives states a right to intervene whenever "the construction of a convention to which states other than those concerned in the case are parties is in question."[98] Article 62 and 63 of the Statute are both potentially and actually in play in the current case: 150 State parties to the Convention, other than those in the present dispute, could invoke recourse to interests or rights arising from Articles 62 or 63, three States (the Maldives, Canada and The Netherlands) have expressly stated their intentions to do so, and it is to be recalled that The Gambia has represented itself expressly as acting with the support and "on behalf of" the 57 Member States of the OIC and that The Gambia, in its 26 September 2019 address before the UNGA, called upon all other States to join it.

By neither disclosing the identity of Myanmar's representative in the proceedings nor releasing the periodic compliance reports issued by Myanmar, the Court effectively undercuts the ability for State parties (and others) to assess how the changing circumstances on the ground—namely the coup d'état and the ensuing events—affect the case, their interests and rights. As such, it frustrates their ability to evaluate the appropriateness of interventions as stipulated in the ICJ Statute, not least to assess what may be entailed at this time pursuant to the Convention's distinct and fundamental obligation to prevent genocide and the measures necessary to ensure each State's compliance therewith.[99] Thus, the opportunity for States to exercise their rights under the UN Charter system and their explicit duty (and possible right, e.g. separately to initiate proceedings under Article IX) under the Genocide Convention is severely undermined by the opaque nature of the judicial decisions surrounding the proceeding and would be prejudiced by the Court now proceeding in such a way accepting the junta as representing Myanmar.

(c) *Prejudice to UN Member States*

Article 53 of the Rules of the Court states that "copies of the pleadings and documents annexed" may be made public on or after the oral proceedings if the Court, after ascertaining the views of the disputing States, so decides.[100] The Court's practice has been to keep confidential all documents filed by the disputing parties, including their memorials and counter-memorials as well as Myanmar's compliance reports that are issued every six months pursuant to the fourth provisional order.

The Gambia v Myanmar case differs markedly from previous cases before the Court in significant ways.[101] The Gambia did not institute proceedings against the Government of Myanmar on the grounds that the former is "specially affected," exclusive of other States, by the actions of Myanmar. Instead, it

brought the case to the ICJ from the standpoint that the impugned actions of Myanmar constitute a violation of *erga omnes* obligations, which are owed towards each and all States on a bilateral basis.[102]

The corollary to the Court's endorsement of a collective interest character for this case is that the international community has a *prima facie* interest in being apprised of whether the obligations set out in the Provisional Measures are being met and of any significant change in the case. The latter necessarily includes a change in the agent of either disputant, particularly when the matter of a State's representation is far from settled and, moreover, is in fact specifically contested.

Transparency in the judiciary demands the public disclosure of both the documents filed by the parties and the identity of the agents who will be representing the parties in the proceeding, especially in a dispute that involves *erga omnes* obligations. Indeed, the principle of transparency substantially distinguishes a judicial process and is intimately linked with the administration of justice.

Not only would transparency promote confidence in the ICJ and in the fair administration of justice, but, as the ICJ President stated in his address to the 76th session of the UNGA, i.e. the last annual report of the ICJ: "[t]he quantity and diversity of issues presented before the Court, from countries the world over, is indicative of the trust that Member States place in it. It reaffirms its role as an impartial and objective institution in the peaceful settlement of international disputes."[103] Only through maintaining conformity with international law and coherence with the UN can the Court preserve its judicial role and the international community's trust in it.

In order for UN Member States to retain full confidence in the ICJ in the instant case and in such other public interest cases, especially in light of the express provisions of UNGA RES 396(V), and having in mind the expressed interests of other UN Member States, The Gambia's call for any and all other UN Member States to join it, and the interests of the international community as a whole as represented by the UN Member States, the Court should take scrupulous care to avoid prejudicing the interests and rights of UN Member States individually or together.

(d) *Prejudice to intergovernmental organizations*

The ICJ Statute recognizes that intergovernmental organizations can have an interest in a proceeding. While, pursuant to Article 34(1), only States may be parties in cases before the Court, Article 34(2) and (3) stipulate the interests and procedural rights of "public international organizations". These organizations, which include intergovernmental organizations like the OIC and ASEAN, have the right to be notified by the Court and to submit information to the Court.[104] Articles 43 and 69 of the Rules of the Court further expound on the right of a public international organization to furnish information "on its own initiative."[105] A number of potential intergovernmental organizations, including the ASEAN and the OIC (which is expressly and publicly supporting The Gambia in the case), have an interest in voicing their concerns and ensuring that the case before the ICJ proceeds in accordance with international law including without any undue prejudice and in the interests of justice—above all for the Rohingya.

By the Court proceeding at this stage and in the prevailing context, the interests and rights of public international organizations, both in general and specifically of the OIC and ASEAN, will be affected.

(e) *Prejudice to other UN organs and bodies and to specialized agencies*

It is to be recalled that UNGA RES 396(V) explicitly calls upon "other organs of the United Nations and in the specialized agencies"[106] to take into account the effects of their decisions on questions of representation of a UN Member State with a view to avoiding "a risk that conflicting decisions may be reached by various organs" and "the interest of the proper functioning of the Organization that there

should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State" notably when the "question becomes the subject of controversy in the United Nations." The compelling logic of "one legal person", "one UN", and "one Member State", along with the express purpose of the UNGA resolution, certainly applies to the ICJ as one of the UN's principal organs and would apply despite facile statements to the contrary. The relationship with the specialized agencies follows expressly from Article 57 of the UN Charter.

Given the effect this case will likely have on Myanmar's security situation, the role of the UN Security Council (UNSC) is also affected by a decision regarding who will represent Myanmar before the ICJ. Since the UN Charter authorizes the UNSC to give effect to one of the UN's chief purposes of maintaining international peace and security, the Court should apprise the UNSC, in addition to the UNGA, of any decision that will likely shape Myanmar's security landscape and the status of human rights in the country. Indeed, this follows explicitly from Article 41(2) of the Court's Statute notably in regard to the indication of any provisional measures since the UNSC holds responsibility for enforcement action regarding such binding decisions. This would include the choice of Myanmar's representative in the ICJ proceedings. Failing to take this into account and act accordingly could hamstring the UNSC's ability to deliberate on matters related to international peace and security, especially since the question of Myanmar's representation is at the core of a dispute that has serious international peace and security implications.

The ICJ is one of several bodies and specialized agencies of the UN, including the World Health Organization (WHO), the Human Rights Council, and the International Labour Organization (ILO), that have faced the question of Myanmar's representation.[107] None of the aforementioned have conclusively recognized the junta, and to date there has only been mixed action by UN bodies and specialized agencies concerning representation of Myanmar in their deliberations and activities. Instead, they have elected to postpone any accreditation of representatives, namely from the junta and the NUG, and to await the UNGA's decision with a view to achieving system-wide coherence and avoiding confusion arising from possibly multiple "personalities" of the one, single UN Member State of Myanmar.

In April 2021, the WHO members excluded Myanmar altogether from participating in the 74th World Health Assembly. Notably, the Credentials Committee for the WHO, which is tasked with verifying country delegation credentials, proposed deferring a decision on who should represent Myanmar at the meeting, "pending guidance from the United Nations General Assembly" on how the UN system as a whole should view the matter.[108] In a similar move, the ILO rejected the credentials of the military junta to the International Labour Conference (ILC) before adopting a resolution that called for the restoration of democratic order and civilian rule together with respect for human rights in the country.[109] This followed the decision by the ILC's Credentials Committee not to proceed with accrediting any delegate from Myanmar, absent a determination from the UNGA's Credentials Committee on this matter. Citing the decisions of the World Health Assembly and the International Labour Conference, and "noting the practice of the United Nations General Assembly", the Credentials Committee for the Food and Agriculture Organization also decided to "defer a decision on the credentials of Myanmar, pending guidance from the Credentials Committee of the United Nations [General] Assembly."[110]

Given that the ICJ is not institutionally superior to other bodies in the UN system, not is it competent to decide for other organs, bodies, or the specialized agencies, the ICJ should avoid prejudicing them in the exercise of their mandates. As the ILC's Credentials Committee recalled: "according to resolution 396(V), adopted on 14 December 1950 by the UN General Assembly, whenever more than one authority claims to be the government entitled to represent a State, the attitude adopted by the General Assembly concerning any such question should be taken into account in other organs of the UN and in the specialized agencies."[111] Therefore, in the prevailing context, the ICJ must not wade into the matter of legal representation of a UN Member State and must instead exercise its own authority with a view to maintaining coherence with the UN as a whole.

(f) *Prejudice to the Rohingya people*

Article 41 of the ICJ Statute gives the Court the power to indicate Provisional Measures where "irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences."[112] On that basis, the Court determined that there was a real and imminent risk of irreparable prejudice to the rights of both The Gambia and the Rohingya group of people protected under the Convention.[113]

It is to be emphasized that the case of The Gambia v Myanmar concerns allegations of genocide amongst the gravest of breaches of international law and an international crime. In the face of extreme policies and practices attributed to the State of Myanmar, the very existence of the Rohingya is at issue with judgment from the Court potentially carrying substantial reparations. The prospect of such reparations is of vital material interest for the Rohingya not only that they may be awarded, but in what kinds and measures. In this regard, it is to be underlined that, as victims, the Rohingya hold, individually and collectively, the human right to an effective remedy pursuant to Article 8 of the Universal Declaration of Human Rights[114] for which the Court should be fully attentive and seek to vindicate in acting in accordance with international law and the interests of justice.

Despite being the principal and ultimate subjects of the case and the group that the Provisional Measures aim to protect, the Rohingya are not a party to the case and have no procedural standing. If the ICJ accepts the junta as the representative of Myanmar, the interests and rights of the Rohingya, notably to reparations and to Myanmar's compliance with its obligations under the Genocide Convention, risk serious prejudice. Credentialing the junta, an entity that has not recognized the Rohingya as a persecuted group and denies their very existence, risks creating irreparable harm to the Rohingya by consigning them to a yet more vulnerable position in the Court's proceedings or, worse, discontinuance of the case should the objections asserted by the junta succeed. Furthermore, with States' rights to intervene being imperiled by the ICJ's lack of disclosure on Myanmar's representation in the proceedings or Myanmar's compliance with the Provisional Measures, the Rohingya risk losing such State support as they may enjoy should States intervene in the case to bolster The Gambia's positions or to make other claims in their own right under Article 62 of the Statute.

With the decision to profile the junta as Myanmar's representative, the Court risks undermining its own judicial concern for "further, irreparable harm" to the Rohingya under the Genocide Convention. In the words of 807 Rohingya survivors of the alleged genocide, pursuant to a letter addressed to the ICJ: "[w]e are outraged and fearful that the ICJ could recognize the Burmese junta as the government of Myanmar … [t]he Tatmadaw continue to commit genocide against us—they have failed to follow the provisional measures ordered by the ICJ."[115]

While, in the absence of transparency from the Court, it is unclear to what extent Myanmar is or is not complying with the Court's Order of 23 January 2020 for Provisional Measures, continuous reports and independent analyses indicate that Rohingya are far from out of harm's way. Indeed, the junta has made clear by its unmistakable actions and its own words that it has no intention to repatriate Rohingya who fled Myanmar's "clearance operations". The junta has also rejected any allegations of wrongdoing while its ongoing conduct plainly contradicts the spirit of the Court's concerns and the Court's Order. Notably, in an interview, Senior General Min Aung Hlaing reiterated that Myanmar has no legal duty to take back "Bengalis" and, "[w]hen asked whether that meant the vocal international appeals on behalf of the Rohingya were to no avail, he nodded [concurring]."[116] Therefore, to proceed with the case with Myanmar represented by the junta would disconnect the ICJ even further from the interests and rights of the victims and would consequently place the Court at odds with the norms expressed in the UN Charter, the multilateral treaty from which the ICJ derives its jurisdiction and raison d'être, and the associated corpus of international human rights standards intended to protect victims and ensure responsible State conduct.

(iii) Risks to Confidence

There is no compelling reason or necessity for the Court to proceed absent an available and legitimate agent of Myanmar. Suspension of the proceedings pending settlement of the lawful representation of Myanmar would not cause irreparable harm or not cause harm comparable with harms or risks manifest or foreseeable. Indeed, it would be difficult to undo decisions which may follow from arguments presented by an unlawfully representative entity—an entity that may not even survive very long.

Proceeding without any cogent rationale for representation and in a prejudicial manner risks damaging confidence in the Court and its judicial process—against the expressed requests from alternative representatives and appeals from the victims. For the Court to take a decision in such a case and situation, without due regard to a range of interests and the likelihood and certainty of prejudicing rights explicitly arising from its Statute and from the Genocide Convention, is unwarranted. Given that the ICJ is not mandated by law to decide who is or should be the lawful representative of Myanmar, deciding such a matter without regard to its negative implications for justice and its prejudicial consequences would undermine confidence in the Court. Indeed, concern for the reputation of the Court in this regard has been publicly voiced by international jurists and other well-informed commentators.[117]

VI. Conclusion

Given the absence of a determinative procedural rule permitting the ICJ to recognize the junta as the Government of Myanmar, and the absence of widespread State recognition of the junta as Myanmar's lawful representative (indeed, most States reject the junta), and in light of the broad range of existing, likely, or possible prejudices that would cause irreparable harm, it would be inconsistent with international law to credential the junta as Myanmar's representative in the ICJ proceedings.

The rapidly shifting and unpredictable situation on the ground in Myanmar, marked by contesting political adversaries, massive civil disobedience, and no clear or decisive authority in sight, presents a serious danger that recognizing the junta as Myanmar's representative would promote the status of the junta despite its brutality and lack of legitimacy.

At a time where long-standing international legal norms hang in the balance, the Court should serve the international community as a body that contributes sobriety, acts judiciously and instills confidence in international law.

At the very least, the Court should ensure that the *erga omnes* obligations to prevent and punish genocide are not trampled on by procedural opacity. If the Court operates with a lack of transparency and pursues unilateral and consequential decisions that are not clearly rooted in international law, the ICJ would be prejudicing the victims of the case and the international community concerned with violations of the Genocide Convention. Indeed, it would undermine foundational issues of State authority and representation.

A judicial decision which in effect recognizes the junta as the Government of Myanmar, and confers upon it procedural capacity would, despite any expressions from the Court to the contrary, seriously subvert the Court's own purpose of acting in accordance with international law. Allowing the junta to represent Myanmar would undermine the ICJ's credibility and its authority as the principal judicial body of the United Nations.

VII. Options for Action

Having regard to the arguments laid out in this paper, the following options are available:

1.
    a. The Court should suspend the proceedings pending a determination of the lawful representation of the State of Myanmar—notably, the conclusion of the UN Credentials Committee's deliberation and recommendation to the UNGA for its decision. In this regard, the Court should refer the matter of representation in the case before the Court to the UNGA for advice.
    b. The Court should invite and ascertain views on the issue of representation from the State parties to the Genocide Convention along with their possibly affected interests and rights.
    c. The Court should demonstrate its efforts to engage with the formally notified Agent in the case, Daw Aung San Suu Kyi, and her deputy and follow scrupulously procedural requirements according with representation (its notification, withdrawal or other change) in reaching any decision on the matter.
    d. Should the Court nonetheless proceed with the scheduled hearings, the option is available for the Court to do so without a representative on behalf of Myanmar. However, such a process would raise questions of fairness and call into question the justice of any decision the Court may take.
    e. State parties to the Genocide Convention should register their own individual and collective concerns and request the Court to suspend the proceedings in order to preserve their interests and rights as well as the interests of the victims.
    f. The Gambia should request the Court to suspend proceedings pending a determination of the lawful representative of the State of Myanmar. At a minimum, The Gambia should raise the issue of the lawfulness of Myanmar's representation during the proceedings and place it on the record. This would ensure that The Gambia is indeed acting in the public interest of the international community as a whole and of the State parties to the Genocide Convention.
    g. Other concerned parties, such as the OIC and the UN High Commissioner for Human Rights, should register their concerns and express their views over the representation of Myanmar in the proceedings before the Court and, in so doing, emphasize the primary interests of justice, notably the interests of Rohingya, which are at risk and should guide the Court.
    h. Irrespective the course of proceedings and representation of Myanmar, the OIC and other appropriate international organizations as well as State parties to the Genocide Convention should convey to the Court the importance of representation of the interests of the victims with a view to the Court enjoying the fullest information, notably from authentic voices of the victims, and with a view to the Court giving the fullest consideration to the interests and wishes of the victims.

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    In particular, UNGA Resolution 75/287 "[c]alls upon the Myanmar armed forces to respect the will of the people as freely expressed by the results of the general election of 8 November 2020, to

end the state of emergency, to respect all human rights of all the people of Myanmar, and to allow the sustained democratic transition of Myanmar, including by opening the democratically-elected parliament and working towards bringing all national institutions, including the armed forces, under a fully inclusive civilian government that is representative of the will of the people."[29] *Supra*, note 28, 18 June 2021, at OP1.

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