

# **Human Rights and Foreign Policy: South Africa's Genocide Complaint Against Israel at the International Court of Justice**

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## **Abstract**

On December 21st, 2023 the South African Government filed an urgent application to the International Court of Justice (ICJ) in the wake of Israel's military activities in Gaza in response to the attack in Israel on October 7th in which more than 1,200 Israeli citizens were killed and several hundred were taken as hostages. The Israeli government responded to the attacks and the taking of hostages by launching a military campaign into Gaza, with the express purpose of destroying Hamas and especially its ability to attack Israel in the way that it did on October 7th. The first few days of Israel's military campaign resulted in a number of civilian deaths and injuries, as well as considerable destruction of infrastructure, especially health facilities. In its Application to the ICJ, the South African government requested that the ICJ address the issue "as a matter of extreme urgency" because of the nature of the violations of rights and "the ongoing, extreme and irreparable harm being suffered by Palestinians in Gaza." In this article I address the following questions: What factors motivated the South African government to pursue this momentous action against the state of Israel? (In addressing this question, I pay specific attention to the role of human rights in South Africa's foreign policy, as well as the historic connection between the African National Congress (ANC), the prior ruling party and now in a governing coalition, and the

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Palestinian Liberation Organization and the longstanding support for the struggle of the Palestinian people for statehood.) What was the substance of the complaint and how did the ICJ respond? What are the benchmarks to assess the observance of human rights in South Africa's foreign policy? In other words, if states commit themselves to a human rights-based foreign policy, as South Africa has done, what are the parameters by which such a commitment can be evaluated?

## Table of Contents

I. INTRODUCTION .....	196
II. SOUTH AFRICA'S CONSTITUTIONAL, HUMAN RIGHTS, AND FOREIGN POLICY FRAMEWORK .....	203
III. CIVIL SOCIETY INFLUENCE AND THE SOUTH AFRICAN GOVERNMENT'S DECISION TO APPROACH THE ICJ .....	208
IV. THE APPLICATION TO THE ICJ .....	212
V. PROVISIONAL ORDER OF THE ICJ .....	223
VI. EVALUATING SOUTH AFRICA'S HUMAN RIGHTS RECORD IN FOREIGN POLICY .....	227
CONCLUSION.....	233

### I. INTRODUCTION

On December 21st, 2023, the South African Government filed an urgent application to the International Court of Justice (ICJ)<sup>1</sup> after

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1. Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures (S. Afr. v. Isr.), (Dec. 29, 2023) [hereinafter South Africa's Application], <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>. The South African government made further applications to the ICJ after the latter had issued its Order. Those applications were made on February 12th and March 6th respectively, and both were allegations that Israel was in violation of the ICJ's Order and that additional measures needed to be taken by the ICJ. Those later applications were therefore pleas to the ICJ to mandate that Israel follow the ICJ Order of January 26, 2024. See Nellie Peyton, *South Africa Asks World Court to Weigh Israel's Rafah Offensive*, REUTERS (Feb. 13, 2024), <https://www.reuters.com/world/south-africa-approaches-world-court-over-israels-rafah-offensive-2024-02-13/>; Observations of the State of Israel on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated (S.

Israel's military response in Gaza to the attack in Israel on October 7th in which more than 1,200 Israeli citizens were killed and several hundred were taken as hostages.<sup>2</sup> Hamas and other Palestinian armed groups launched a large barrage of rockets towards Israel, breached the Israeli fence abutting Gaza, and attacked Israeli military bases, civilian towns, and a music festival attended by thousands of young people.<sup>3</sup> Some of these incidents have been referred to the International Criminal Court (ICC)<sup>4</sup> and the Prosecutor at the ICC has issued warrants of arrests against Prime Minister Benjamin Netanyahu, the Minister of Defense Yoav Gallant, and three Hamas leaders.<sup>5</sup> The United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict issued a report after a visit to Israel and the West Bank in January and February, 2024, stating that widespread sexual violence was perpetrated against women and girls during the attack as well as "in the context of abduction and hostage-taking."<sup>6</sup>

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Afr. v. Isr.), Pleading,

<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240315-wri-01-00-en.pdf>. This paper concerns itself only with the Application of South Africa of December 21, 2023.

2. See South Africa's Application, *supra* note 1, ¶ 41. The President of South Africa noted that: "South Africa is gravely concerned with the plight of civilians caught in the present Israeli attacks on the Gaza Strip due to the indiscriminate use of force and forcible removal of inhabitants . . . Furthermore, there are ongoing reports of international crimes, such as crimes against humanity and war crimes, being committed as well as reports that acts meeting the threshold of genocide or related crimes . . . have been and may still be committed in the context of the ongoing massacres in Gaza." Daniel De Simone & Alys Davies, *South Africa Files ICJ Case Accusing Israel of 'Genocidal Acts'*, BBC (Dec. 29, 2023), <https://www.bbc.com/news/world-africa-67844551>.

3. Armed Conflict Location & Event Data Project, *Fact Sheet: Israel and Palestine Conflict*, RELIEF WEB (Oct. 19, 2023), <https://reliefweb.int/report/occupied-palestinian-territory/fact-sheet-israel-and-palestine-conflict-19-october-2023>. This attack occurred on "a Jewish sabbath day, the end of the weeklong Jewish festival of Sukkot, and a day after the 50th anniversary of the Yom Kippur War." *Id.*

4. JP Leskovich, *Israel Families of Hamas Victims File ICC Complaint as Accusations of War Crimes, Genocide Exchanged*, JURIST (Nov. 6, 2023, 5:46 PM), <https://www.jurist.org/news/2023/11/israel-families-of-hamas-victims-file-icc-complaint-as-accusations-of-war-crimes-genocide-exchanged/#>.

5. Emma Bubola et al., *What to Know About the I.C.C.'s Decision to Issue Warrants for Israeli and Hamas Leaders*, N.Y. TIMES (May 21, 2024), <https://www.nytimes.com/2024/05/20/world/middleeast/icc-arrest-warrants-israel-hamas.html>. ICC Issues Arrest Warrants for Netanyahu, Gallant and Hamas Commander, UN NEWS (Nov. 21, 2024), <https://news.un.org/en/story/2024/11/1157286>.

6. Off. of the Special Representative of the Sec'y-Gen. on Sexual Violence in Conflict, Mission Rep.: Official Visit of the Office of the SRSG-SVC to Israel and the Occupied West Bank 29 January—14 February 2024, at 2 (Mar. 4, 2024), <https://www.un.org/sexualviolenceinconflict/wp->

The Israeli government responded to the attacks and the taking of hostages by launching a military campaign into Gaza, with the express purpose of destroying Hamas and especially its ability to attack Israel as it did on October 7th.<sup>7</sup> The first few days of Israel's military campaign resulted in a number of civilian deaths and injuries, as well as considerable destruction of infrastructure, especially health facilities.<sup>8</sup>

In its Application to the ICJ, the South African government requested that the ICJ address the issue "as a matter of extreme urgency" because of the nature of the rights violations and "the ongoing, extreme and irreparable harm being suffered by Palestinians in Gaza."<sup>9</sup> After the closing of the Israeli Embassy in South Africa in November 2023, the South African President Cyril Ramaphosa, "condemn[ed] the genocide that is being inflicted against the people of Palestine, including women and children, through collective punishment and ongoing bombardment of Gaza."<sup>10</sup> In that same statement, the President also condemned the attacks in Israel carried out by Hamas and called for all hostages to be returned.<sup>11</sup>

In light of this historically momentous development,<sup>12</sup> I decided

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content/uploads/2024/03/report/mission-report-official-visit-of-the-office-of-the-srsg-svc-to-israel-and-the-occupied-west-bank-29-january-14-february-2024/20240304-Israel-oWB-CRSV-report.pdf.

7. Nidal Al-Mughrabi & Emily Rose, *Israel Vows to Demolish Hamas as Troops Prepare to Move on Shattered Gaza*, REUTERS (Oct. 15, 2023, 3:45 PM), <https://www.reuters.com/world/middle-east/gaza-braces-israeli-ground-assault-fears-conflict-spreading-grow-2023-10-15/>.

8. Ephrat Livni & Gaya Gupta, *What We Know About the War Between Israel and Hamas*, N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/article/israel-gaza-hamas-what-we-know.html>.

9. South Africa's Application, *supra* note 1, at ¶ 112.

10. *President Ramaphosa Meets with the South African Jewish Board of Deputies*, THE PRESIDENCY (Dec. 13, 2023), <https://www.thepresidency.gov.za/president-ramaphosa-meets-south-african-jewish-board-deputies>.

11. *Id.*; see also South Africa's Application, *supra* note 1, at ¶ 40 ("South Africa unequivocally condemns the targeting of Israeli and foreign national civilians by Hamas and other Palestinian armed groups and the taking of hostages on 7 October 2023, as expressly recorded in its Note Verbale to Israel of 21 December 2023.").

12. This complaint to the ICJ could be regarded as momentous. South Africa, as the state noted for its fight against apartheid and the triumph over such a system, managed to establish a constitutional democracy in 1994 under the leadership of President Nelson Mandela. Members of the first apartheid government in 1948 were known to be Nazi sympathizers. See Penelope Andrews, *South Africa*, in *ENCYCLOPEDIA OF HUMAN RIGHTS* 481–82, 486 (David P. Forsythe ed., 2009), [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2316&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2316&context=fac_articles_chapters); E.F. Dube, *Yesterday's Nazi Sympathizers, Today's South African Leaders*, N.Y. TIMES (Aug. 16, 1985), <https://www.nytimes.com/1985/08/16/opinion/yesterday-s-nazi-sympathizers-today-s-south-african-leaders-195124.html>. This accusation of genocide against Israel is ironic because many survivors of the European

to revisit an issue that I had previously commented on in an op-ed piece, namely South Africa's foreign policy and the question of human rights.<sup>13</sup> That piece had focused specifically on corruption and South Africa's foreign policy, but its major premise was that South Africa had committed itself to a set of human rights principles in its constitution, and had also signed many international treaties, including the major international treaty regarding the eradication of corruption globally.<sup>14</sup> My interest in that piece was to explore the stated reasons for South Africa's human rights actions on the global stage and the constitutional underpinnings which enabled South Africa's actions.

It has now been nearly two years since the Hamas attack in Israel. I cannot recall any international dispute that has aroused more passion, generated greater emotion, rancor and created stronger division among friends, families, and colleagues.<sup>15</sup> In addition, this paper is written against the backdrop of mounting deaths and destruction in Gaza, settler violence in the West Bank, and attacks against Israel from Hezbollah and Iran.<sup>16</sup> Recognizing the complexity and challenges inherent in the Israeli/Palestinian conflict, I approach the topic with trepidation and immense humility.<sup>17</sup>

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genocide fled to Israel during the Second World War.

13. Penelope Andrews, *Corruption and South Africa's Foreign Policy*, AFRONOMICS L. (Mar. 25, 2021), <https://www.afronomicslaw.category/analysis/corruption-and-south-africas-foreign-policy>.

14. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

15. Belinda Luscombe, *The Israel-Hamas War is Making Americans Question Their Relationships*, TIME (Oct. 31, 2023), <https://time.com/6329962/israel-hamas-personal-relationships-strain-us/>.

16. Bassem Mroue, *Hezbollah Introduces New Weapons, Tactics Against Israel as War in Gaza Drags On*, PBS NEWS (May 17, 2024, 10:59 AM), <https://www.pbs.org/newshour/world/hezbollah-introduces-new-weapons-tactics-against-israel-as-war-in-gaza-drags-on>.

17. As a Black South African who grew up in apartheid South Africa and spent almost my entire personal and professional life involved in anti-apartheid and anti-racism work, the Israeli/Palestinian struggle appears extraordinarily challenging on many levels and bereft of easy solutions. See Ahmed Abubakar Lamin, *Israel-Palestine Conflict: The World's Most Intractable Conflict* (Nov. 17, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3965270>. In my perspective, and as has been acknowledged in voluminous literature, both the Jewish and Arab communities have legitimate claims to Israel/Palestine. See Iain Scobbie & Sarah Hibbin, *The Israel-Palestine Conflict in International Law: Territorial Issues*, SOAS SCH. L. (U.S./Middle East Project), 2009, at 111, <https://ssrn.com/abstract=1621382>; Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 684 (2016). Human rights violations have occurred and have been perpetrated by both Israelis and Palestinians and the ongoing animosity between both communities is a powerful force for evading some kind of peaceful resolution. See Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territory et al., Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, U.N. Doc. No. A/HRC/56/26 (May 27, 2024). The Israeli

International law was central to the creation of the state of Israel<sup>18</sup> and Palestinians' resort to international law to vindicate their rights has highlighted both its limitations ("the story of disenchantment")<sup>19</sup> and possibilities.<sup>20</sup> I situate this article within the broader context of "lawfare" which is defined as the "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."<sup>21</sup> Drawing on the South African scholarship of Richard Abel, Michelle Le Roux and Dennis Davis, the "lawfare" I refer to in this instance is the use of law as a substitute for achieving political ends.<sup>22</sup> I interpret the ICJ case as one in which the South African government, the appellant, seeks to appeal

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occupation in the West Bank and the continued activity of the settlers, especially recently, in perpetrating gross violations of human rights against the Palestinian people are intolerable as a human rights concern. See Ronen Bergman & Mark Mazzetti, *The Unpunished: How Extremists Took Over Israel*, N.Y. TIMES (May 16, 2024), <https://www.nytimes.com/2024/05/16/magazine/israel-west-bank-settler-violence-impunity.html>. Similarly, the Israeli response to Hamas in Gaza, although justified and defensive, is disproportionate to the goals articulated by the Israeli government. The response has been extraordinarily cruel and there appears to be a consensus that even if the ICJ has not yet decided on the issue of genocide brought by South Africa, the Israeli military has committed war crimes and gross violations of human rights in Gaza. Kenneth Roth, *Crimes of War in Gaza*, N.Y. R. BOOKS (July 18, 2024), <https://www.nybooks.com/articles/2024/07/18/crimes-of-war-in-gaza-kenneth-roth/>; Aryeh Neier, *Is Israel Committing Genocide?*, N.Y. R. BOOKS (June 6, 2024), <https://www.nybooks.com/articles/2024/06/06/is-israel-committing-genocide-aryeh-neier/>. Of course, Hamas also does not have clean hands: the mere act of kidnapping nearly 300 Israel civilians is a war crime. Birgit Schwarz & Belkis Wille, *Interview: Building the Evidence for Crimes Committed in Israel on October 7*, HUM. RTS. WATCH (Jan. 31, 2024, 12:00 AM), <https://www.hrw.org/news/2024/01/31/interview-building-evidence-crimes-committed-israel-october-7>.

18. On November 29, 1947, the General Assembly of the United Nations adopted Resolution 181 for the establishment of independent Arab and Jewish states in Palestine, setting out boundaries and related matters. See G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947); see also ROBBIE SABEL, INTERNATIONAL LAW AND THE ARAB-ISRAELI CONFLICT 103 (2022).

19. Jean D'Aspremont, *The International Legal Scholar in Palestine: Hurling Stones Under the Guise of Legal Forms?*, 14 MELBOURNE J. INT'L L. 1, 2 (2013).

20. "International law has accordingly been seen as a narrative providing legitimacy and authority to various claims heard in the context of the Israeli-Palestinian conflict. In the same vein, it was also expected that fighting on the side of (and on the basis of) international law would help convince third parties (the 'international community' and, above all, the strategic allies) that one's fight was just and legitimate." *Id.* at 2.

21. Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008).

22. RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994 (1995); MICHELLE LE ROUX & DENNIS DAVIS, LAWFARE: JUDGING POLITICS IN SOUTH AFRICA (Mark Ronan ed., 2019).

to international law to pursue its political ends. In other words, while it is acknowledged that the current Israeli/Palestinian conflict should be resolved politically by the United Nations, with the Israeli government and the representatives of the Palestinian people,<sup>23</sup> in the absence of such a resolution South Africa seeks a legal ruling to halt Israel's ongoing destruction of Gaza.<sup>24</sup>

South Africa's appeal to the ICJ also has the added benefit of conveying a message it wants publicized to the world.<sup>25</sup> It is worth noting the diverse legal team representing South Africa—multiracial, multigendered, multigenerational, and led by its youthful and energetic Minister of Justice—was viewed with much admiration in many quarters. In South Africa, the legal team signifies the “rainbow nation,” a term coined by the late Archbishop Desmond Tutu.<sup>26</sup> Indeed, on their arrival home from arguing the case before the ICJ, some members of the legal team were “mobbed like rockstars” by members of the public at the airport in Johannesburg, many waving South African and Palestinian flags.<sup>27</sup> From the South African perspective, the narrative that unfolded at the ICJ proceedings, broadcast to the world, was not just about the legal technicalities and legal arguments, but the emotive power of putting Israeli colonization and apartheid under the microscope.<sup>28</sup> It brought into sharper focus

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23. Press Release, Security Council, Secretary-General Underscores Two-State Solution Only Way to End Israeli-Palestinian Conflict, One-State Formula Inconceivable, in Day-Long Debate, U.N. Press Release SC/15569 (Jan. 23, 2024), <https://press.un.org/en/2024/sc15569.doc.htm>.

24. This is in effect what Judge Sebutinde states in her dissent to the ICJ Order. See Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Dissenting Opinion of Judge Sebutinde, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>. (“In my respectful dissenting opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist—It is not a legal dispute susceptible of judicial settlement by the Court . . .”).

25. For an interesting discussion of the use of international criminal justice as performative practice, see CARSTEN STAHN, JUSTICE AS MESSAGE: EXPRESSIVIST FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE (2020).

26. Mark Austin, *Desmond Tutu Coined the Phrase ‘Rainbow Nation’ and His Hope Lives On*, SKY NEWS (Dec. 26, 2021, 5:25 PM), <https://news.sky.com/story/desmond-tutu-coined-the-phrase-rainbow-nation-and-his-hope-lives-on-12504006>.

27. Stephanie Busari et al., *Israel's War in Gaza Has Exposed a Deepening Global Divide*, CNN (Jan. 20, 2024, 2:29 AM), <https://www.cnn.com/2024/01/19/middleeast/israels-war-in-gaza-has-exposed-a-deepening-global-divide/index.html>.

28. Nesrine Malik, *It's Not Only Israel on Trial. South Africa is Testing the West's Claim to Moral Superiority*, THE GUARDIAN (Jan. 15, 2024),

the death and destruction of Israel's military campaign in Gaza.<sup>29</sup> In response, Israel also provided its own narrative, emphasizing the brutal attack on its citizens and the need to retaliate forcefully.<sup>30</sup> For many Israelis, the attacks were seen as a second Holocaust.<sup>31</sup> These competing visions and narratives about the meaning of October 7th and its aftermath permitted an airing to the ICJ judges tasked with adjudicating and determining the outcome. The Judges also allowed the events to be shared with people in Israel, South Africa, and around the world who were vested in the proceedings and its outcome.<sup>32</sup>

In this article I address the following questions: What factors motivated the South African government to pursue this momentous action against the state of Israel? In addressing this question, I pay specific attention to the role played by human rights in South Africa's foreign policy. I also give attention to the longstanding connection between the African National Congress (ANC), the prior ruling party, and now, a governing coalition, the Palestinian Liberation Organization, and the longstanding support for the struggle of the Palestinian people for statehood.<sup>33</sup> What was the substance of South Africa's complaint<sup>34</sup> and how did the ICJ respond? What are the

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<https://www.theguardian.com/commentisfree/2024/jan/15/israel-trial-south-africa-icj-palestine>.

29. In addition, the case has highlighted a global divide between Israel and its traditional Western allies, most notably the United States and Europe, and countries of the global South, as highlighted by the number of global South countries that joined the South African complaint to the ICJ. See Nosmot Gbadamosi, *Why the Global South Supports Pretoria's ICJ Genocide Case*, FOREIGN POLICY: AFRICA BRIEF (Jan. 17, 2024), <https://foreignpolicy.com/2024/01/17/israel-gaza-icj-genocide-south-africa-namibia-bangladesh-global-south/>.

30. Arguing that the case was a "a concerted and cynical effort" on the part of South Africa, Israel has rejected the claim of genocide arguing that it was an attempt to "pervert the meaning" of the term. Christian Edwards, *Israel Denies Genocide Accusations at Top UN Court, Says War in Gaza is Self-Defense*, CNN (Jan. 12, 2024), <https://www.cnn.com/2024/01/12/middleeast/icj-israel-gaza-hamas-genocide-hearing-hague-day-two-intl/index.html>.

31. Jamie Dettmer, *How the Holocaust Shapes Israel's War in Gaza*, POLITICO (Feb. 2, 2024), <https://www.politico.eu/article/how-the-holocaust-shapes-israels-war-in-gaza/>.

32. Amanda Taub, *What Might Happen Next in the Genocide Case Against Israel*, N.Y. TIMES: THE INTERPRETER (Jan. 19, 2024), <https://www.nytimes.com/2024/01/19/world/europe/israel-south-africa-genocide-icj.html>.

33. See generally MONA N. YOUNIS, LIBERATION AND DEMOCRATIZATION: THE SOUTH AFRICAN AND PALESTINIAN NATIONAL MOVEMENTS (2000) (Describing how the South African and the Palestinian national liberation movements, despite similar circumstances and experiences, have arrived at such dissimilar outcomes).

34. I use "complaint" and "application" interchangeably in this paper. The formal terminology is the "application," but in everyday parlance, this was a complaint against Israel. For background on the substance of the complaint, see Andrew Thomas,



benchmarks to assess the observance of human rights in South Africa's foreign policy? In other words, if states commit themselves to a human rights-based foreign policy, as South Africa has done, what parameters can be used to evaluate that commitment?

In pursuing these questions, I proceed as follows: Section II highlights the underpinnings of South Africa's constitutional, legal, and policy framework to explore the motivation for lodging the Application to the ICJ. Section III examines the influence of civil society actors within South Africa to pursue the complaint against Israel, noting the historic ties between South Africa's liberation movements and representatives of the Palestinian people, as well as the Israeli governments' historic support for the apartheid government. Section IV explores the complaint lodged by South Africa and the ICJ's Provisional Order. Section V examines the role of human rights in South Africa's foreign policy and evaluates the consistency in its application since South Africa established a constitutional democracy in 1994.

My conclusion is that South Africa's foreign policy, although publicly (and rhetorically) driven by human rights, is much more opportunistic and politically driven, influenced as it is by the ANC's historical and contemporary political and ideological allies.<sup>35</sup> The case and its outcome may provide the current South African government of national unity the opportunity to once again center the commitment to human rights in a way that situates South Africa as the "moral conscience" of the world.

## II. SOUTH AFRICA'S CONSTITUTIONAL, HUMAN RIGHTS, AND FOREIGN POLICY FRAMEWORK

Moving away from a system of unchecked abuse of state power, as conducted under apartheid, to one of accountability, the rule of law, and the values enshrined in the expansive constitution was one of the crucial elements of South Africa's transformative constitutional vision.<sup>36</sup> South Africa's troubled engagement with international law,

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*Explainer: What is the Two-State Solution to the Israeli-Palestinian Conflict?*, THE CONVERSATION (Feb. 6, 2024), <https://theconversation.com/explainer-what-is-the-two-state-solution-to-the-israeli-palestinian-conflict-221872>.

35. Steven Friedman, *South Africa's Quest to Retake the Moral High Ground*, FOREIGN AFFAIRS (Feb. 8, 2024), <https://www.foreignaffairs.com/south-africa/south-africas-quest-retake-moral-high-ground>.

36. Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 147 (1998). The irony is that before the rise of the apartheid state in 1948, former South African Prime Minister, Jan Smuts, served as a principal drafter of the Preamble to the Charter of the United Nations, and South Africa was a founding

especially international human rights law, was emblematic of the apartheid state. The apartheid state, including a body of oppressive and discriminatory laws, directly contrasted and violated the United Nation's human rights system.<sup>37</sup> In 1948, apartheid was the official policy of the ruling National Party, but in 1973 the United Nations deemed apartheid a crime against humanity.<sup>38</sup> Despite its status as the antithesis to international human rights law, apartheid has had an undeniable impact on international law. The eminent international law scholar, Henry Richardson, observes that the struggle against apartheid helped influence and impact the development of international law more broadly, shaping international principles aimed at eliminating racism worldwide.<sup>39</sup>

Drafting the post-apartheid constitution was an international endeavor. Between Nelson Mandela's release in 1990 and South Africa's first democratic elections in 1994, the country felt like one large constitutional law workshop.<sup>40</sup> It appeared as if every notable legal and constitutional law scholar and advocate, especially those involved in the global human rights movement, converged on South Africa to engage with, provide advice, give support to, and help draft, the new constitution. The voluminous literature by non-South African scholars on the constitutional framework evidences the influence of international scholar engagement in drafting South Africa's constitution.<sup>41</sup> After several decades of global human rights advocacy and the ascent of a universal consensus around human rights, justice,

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party to the Charter, yet this did not prevent the establishment of the apartheid state. Christof Heyns, *The Preamble of the United Nations Charter: The Contribution of Jan Smuts*, 7 AFR. J. INT'L AND COMPAR. L. 329, 329–30 (1995).

37. See LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA (1994); JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978).

38. G.A. Res. 3068 (XXVIII)), International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I (July 18, 1976).

39. Henry J. Richardson, III, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978).

40. This point was made to the author by Judge Dennis Davis, Former Judge of the High Court of South Africa and Professor Emeritus, University of Cape Town. Many of the workshops were published as volumes. See e.g., PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991); THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE (Sandra Liebenberg ed., 1995).

41. See e.g., Patrick Macklem & Craig Scott, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socioeconomic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007); Stephen Gardbaum, *Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa*, 9 CONST. CT. REV. 1 (2019); Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816 (2014).

and the rule of law, drafting the South African constitution was of significant global import.<sup>42</sup> The international human rights legal scholar Makau Mutua, argues:

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions.<sup>43</sup>

The design and emergence of the late 20th century constitutional project in South Africa provided an exciting global moment. It provided an opportunity to recalibrate and consider both the possibilities and limitations of a constitutional project that is purposely designed to generate the specific goals of democracy, equality and dignity. These goals are pronounced in the Preamble to the Constitution:

We . . . adopt this Constitution . . . so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person.<sup>44</sup>

The Preamble is followed by a comprehensive Bill of Rights which lists a range of civil and political rights as well as social, economic, and cultural rights that are all justiciable — with some limitations.<sup>45</sup>

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42. Makau Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 63–65 (2009).

43. *Id.* at 65.

44. S. AFR. CONST., 1996, 1243.

45. “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.” *Id.* § 36.

Provision is made for the right to life,<sup>46</sup> equality,<sup>47</sup> dignity,<sup>48</sup> and freedom and personal security, including the right to be free from torture, as well as public and private violence.<sup>49</sup> Significantly, "bodily and psychological integrity" and reproductive rights are also enshrined in the constitution.<sup>50</sup> Freedom from slavery and forced servitude is protected,<sup>51</sup> as are the rights to privacy,<sup>52</sup> freedom of religion and opinion,<sup>53</sup> and freedom of expression and association.<sup>54</sup> The constitution also incorporates a range of political,<sup>55</sup> cultural,<sup>56</sup> environmental,<sup>57</sup> and social and economic rights.<sup>58</sup>

What is also unique about the constitution is the mandate that in its deliberations, a court, tribunal or forum *must consider international law* and *may consider foreign law*.<sup>59</sup> The South African government is therefore not just obligated to recognize the range of rights under various international human rights instruments but must consider those international obligations in their constitutional deliberations of national concern. A perusal of the decisions of the Constitutional Court in the first decade after its establishment in 1995 suggest considerable consideration of international and foreign law,<sup>60</sup>

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46. *Id.* § 11.

47. *Id.* § 9.

48. *Id.* § 10.

49. *Id.* § 12.

50. *Id.*

51. *Id.* § 13.

52. *Id.* § 14.

53. *Id.* § 15.

54. *Id.* §§ 16, 18.

55. *Id.* § 16 (Freedom of expression); § 17 (Right to assembly, demonstration, picket, and petition); § 18 (Freedom of association); § 19 (the right to form political parties, to participate in and to campaign for political parties; right to vote; to free and fair elections and to stand for public office); § 20 (right to citizenship); § 21 (freedom of movement and residence); § 22 (freedom of trade, occupation and profession); § 23 (right to form and join trade unions and employer organizations; right to collective bargaining); § 32 (Access to information).

56. *Id.* § 30. ("Everyone has the right to use the language and to participate in the cultural life of their choice. § 31. Persons belonging to a cultural, religious or linguistic community may not be denied the right . . . to enjoy their culture, practice their religion and use their language . . .").

57. *Id.* § 24. ("Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected."); § 27 (right to have access to health care, food, water, and social security); § 29 (right to education).

58. *Id.* § 26 (right to have access to housing); § 27 (right to have access to health care, food, water, and social security); § 29 (right to education).

59. *Id.* § 39 (emphasis added).

60. Celumusa Delisile Zungu, *The Role, Relevance and Application of International Law in South Africa*, 8 OIDA INT'L J. SUSTAINABLE DEV. 85 (2015); see also Lucky Mathebe, *The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial*

even though such consideration did not necessarily determine the ultimate decision of the Court. So, for example, in considering the right of access to housing, the court preferred to adopt an approach of reasonableness, as opposed to the requirement of establishing a minimum core content for satisfaction of the right.<sup>61</sup> Similarly, when the Court had to consider the constitutionality of the Truth and Reconciliation Commission on application by a group of victims' families, the Court eschewed an interpretation of international law for one based on a reading of South African law.<sup>62</sup> The Court held that international law is only relevant in the interpretation of the Constitution. The Court further stated that international conventions and treaties do not become part of the municipal law, "enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment."<sup>63</sup>

In light of the constitutional commitments, South Africa's approach to foreign policy is animated by human rights concerns. The Foreword to the 2011 *White Paper on South Africa's Foreign Policy*<sup>64</sup> notes South Africa's past struggle for democracy and how that "liberation history" resulted in an "international engagement" steeped in the "spirit of internationalism, Pan-Africanism, South-South solidarity, the rejection of colonialism and other forms of oppression".<sup>65</sup> The White Paper elucidates a range of premises that

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*Activism*, 56 J. ASIAN AND AFRICAN STUD. 18 (2021).

61. *Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46. The Court confronted the issue of enforceability of social and economic rights, specifically the state's obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing. The Court applied a test of reasonableness, namely whether the measures taken by the state to realize the rights afforded by section 26 are reasonable. See Christiansen, *supra* note 41, at 367; see also Malcolm Langford, *Housing Rights Litigation: Grootboom and Beyond*, in *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE?* 187 (Malcolm Langford et al. eds., 2013).

62. *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 672. The applicants in this case approached the Court for a declaration that the Promotion of National Unity and Reconciliation Act 34 of 1995 was unconstitutional, because it permitted the Truth and Reconciliation Commission, which was established by the Act, to grant amnesty to the perpetrators of gross human rights violations. The Court upheld the constitutionality of the section even though the families argued that South Africa was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions which authorised amnesty for such offenders constituted a breach of international law. The Court held that international law is only relevant in the interpretation of the Constitution.

63. *Id.*

64. The White Paper is a policy paper that is subject to public and government input; a Green Paper is its draft version.

65. Building a Better World: The Diplomacy of Ubuntu, White Paper on South Africa's Foreign Policy, at 11 (May 13, 2011) [hereinafter *White Paper*],

further South Africa's national interests, including the recognition that countries are interdependent and that a cooperative and collaborative approach will be pursued, as opposed to a competitive or confrontational one.<sup>66</sup>

The Preamble to the *White Paper* outlines South Africa's approach to foreign policy.<sup>67</sup> It declares that South Africa is a multifaceted, multicultural, and multiracial country that embraces the concept of *ubuntu*.<sup>68</sup> The White Paper further states that *ubuntu*, affirming both the humanity of South Africans and others, has been vital in the process of nation building and the construction of the newly democratic state. Regarding South Africa's global role, the White Paper notes that since the first democratic elections in 1994,

... the international community has looked to South Africa to play a leading role in championing values of human rights, democracy, reconciliation and the eradication of poverty and underdevelopment. South Africa has risen to the challenge and plays a meaningful role in the region, on the continent and globally.<sup>69</sup>

South Africa's foreign policy therefore appears to be animated (at least rhetorically) by *ubuntu* and a commitment to the broad principles of human rights.

This is briefly the legal, constitutional and policy backdrop to South Africa's decision to lodge a complaint with the International Court of Justice against Israel.

### III. CIVIL SOCIETY INFLUENCE AND THE SOUTH AFRICAN GOVERNMENT'S DECISION TO APPROACH THE ICJ

Where did the political decision to lodge the complaint come from? Was this a reflection of the growing populism in South Africa? The Application by the South African government at the ICJ, influenced by popular movements in support of the political claims of

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[https://www.gov.za/sites/default/files/gcis\\_document/201409/final-draft-white-paper-sa-foreign-policy.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/final-draft-white-paper-sa-foreign-policy.pdf).

66. *Id.* at 12.

67. *Id.* at 4.

68. *Id.* "The philosophy of Ubuntu means 'humanity' and is reflected in the idea that we affirm our humanity when we affirm the humanity of others. It has played a major role in the forging of a South African national consciousness and in the process of its democratic transformation and nation-building."

69. *White Paper*, *supra* note 65.

Palestinians, is in line with the way that popular movements in South Africa have used their own courts, and especially the Constitutional Court, to pursue local political claims.<sup>70</sup> In fact, in the past two decades, and especially the decade of the Presidency of Jacob Zuma, the Court was consistently approached by various civil society groups to either pressurize Parliament to carry out their legislative functions, or to mandate them to do so.<sup>71</sup> The decision to take the complaint to the ICJ is therefore unsurprising.

A large proportion of South Africans saw the eradication of apartheid as an important goal, and now see themselves in solidarity with the struggle of the Palestinian people.<sup>72</sup> During the apartheid years, Israel was an ally of the Nationalist government, including engaging in strategic security and military collaboration with the apartheid state.<sup>73</sup> By designating Israel an apartheid state, as some, including the South African government, have done,<sup>74</sup> South Africans connect their own struggle to the struggle of the Palestinian people. This is particularly the case with the minority Muslim community (designated as “Coloured” in South Africa’s racial mosaic) – whose minority status has resulted in their increasing disaffection with the ruling party.<sup>75</sup> Arguably this provided the ANC, a few months before the national election, to appear responsive to this constituency,<sup>76</sup> a

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70. Tshepo Madlingozi, *Social Movements and the Constitutional Court of South*, in TRANSFORMATIVE CONSTITUTIONALISM COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 532 (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013).

71. LE ROUX & DAVIS, *supra* note 22 (exploring the issue further); *see also* Mathebe, *supra* note 60.

72. Human Sciences Research Council of South Africa, *Occupation, Colonialism, Apartheid?: A Re-Assessment of Israel's Practices in the Occupied Palestinian Territories under International Law* (May 2009), [hereinafter *Occupation, Colonialism, Apartheid?*] <https://www.hlrn.org/img/documents/HSRC%20study%20-%20Occupation,%20Colonialism,%20Apartheid%20-%20full.pdf>.

73. SASHA POLAKOW-SURANSKY, *THE UNSPOKEN ALLIANCE: ISRAEL'S SECRET RELATIONSHIP WITH APARTHEID SOUTH AFRICA* (2011).

74. *Occupation, Colonialism, Apartheid?*, *supra* note 72. *See also* Gerald Imray, *Nelson Mandela's Support for Palestinians Endures with South Africa's Genocide Case Against Israel*, AP NEWS (Jan. 11, 2024), <https://apnews.com/article/south-africa-palestine-israel-genocide-mandela-arafat-39d222b9dd65994c4c13730efabe8815>; Thabi Myeni, *South Africa Calls for Israel to be Declared an 'Apartheid State'*, AL JAZEERA (July 26, 2022), <https://www.aljazeera.com/news/2022/7/26/south-africa-calls-for-israels-proscription-as-apartheid-state>.

75. *Id.*; Lynsey Chutel, *South African's Young Democracy Leaves its Young Voters Disillusioned*, N.Y. TIMES (May 28, 2024), <https://www.nytimes.com/2024/05/28/world/africa/south-africa-election-youth-vote.html>. (“Like many other Coloured South Africans, Ms. Davids feels left behind by a majority-Black government . . .”).

76. Several scholars have suggested that the ANC has leveraged its success at the International Court of Justice to sway the Muslim community to vote for the party in

tactic which may not have yielded the results that the ANC sought.<sup>77</sup>

In addition, there are deep historic connections between the PLO and the ANC, the former ruling party. The liberation movements in South Africa, especially the ANC, have historically been allied to the PLO.<sup>78</sup> In this they have found common cause with the Palestinian people. A much-quoted statement, attributed to Nelson Mandela, states that, "We are not free until all Palestinians are free."<sup>79</sup> South Africa's solidarity with the PLO also extends to Hamas. In November 2023 as host of the Fifth Global Convention of Solidarity with Palestine, only one month after Hamas' attack on Israel and its hostage taking, the ANC government welcomed a Hamas delegation to the convention in Johannesburg.<sup>80</sup> Some critics then accused South Africa of supporting the Hamas attack.<sup>81</sup> But South Africa's then International Relations minister, Naledi Pandor, denied it.<sup>82</sup> Her engagement with Hamas, she said, was strictly to ensure the provision

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the upcoming national and provincial elections. See Qaanitah Hunter, *Will Israel's War on Gaza Sway South Africa's Election?*, AL JAZEERA (May 13, 2024),

<https://www.aljazeera.com/features/2024/5/13/will-free-palestine-issue-sway-voters-in-south-africa-election>; Carien du Plessis, *South Africa: Could ANC's Palestine Stance Win Over Voters?*, AFR. REP. (Apr. 15, 2024),

<https://www.theafricareport.com/344265/south-africa-could-ancs-palestine-stance-win-over-voters/>.

Ilham Rawoot, *South African Muslims Didn't Vote for Pro-Palestine Parties. Why Not?*, NOVARA MEDIA (June 11, 2024),

<https://novaramedia.com/2024/06/11/south-african-muslims-didnt-vote-for-pro-palestine-parties-why-not/>.

78. Asher Lubotzky, *Israel-Palestine Conflict Divides South African Politicians—What their Responses Reveal About Historical Alliances*, THE CONVERSATION (Oct. 10, 2023), <https://theconversation.com/israel-palestine-conflict-divides-south-african-politicians-what-their-responses-reveal-about-historical-alliances-215349>.

79. In a social media post on the first day of the trial at the ICC, the Nelson Mandela Foundation extended support to the South African legal team as they appeared before the Court, "[W]ishing them strength and success in their pursuit of truth, justice and peace." Gugu Ndima, *Win or Lose, South Africa Has the High Moral Ground*, WEEKLY MAIL & GUARDIAN (Jan. 18, 2024), <https://mg.co.za/thought-leader/opinion/2024-01-18-win-or-lose-south-africa-has-the-moral-high-ground/>. Victoria O'Regan, *Rallies in Photos—SA Govt's Genocide Case Hailed for Being a 'Madiba Moment' While Pro-Israelis Cry 'AntiSemitism'*, DAILY MAVERICK (Jan. 11, 2024), <https://www.dailymaverick.co.za/article/2024-01-11-world-rallies-in-support-as-sa-argues-genocide-case-against-israel/>.

80. Peter Fabricius & Queenin Masuabe, *Hamas Leaders' Presence in SA for a Palestine Solidarity Convention Stirs Controversy*, DAILY MAVERICK (Nov. 30, 2023), <https://www.dailymaverick.co.za/article/2023-11-30-hamas-leaders-presence-in-sa-for-a-palestine-solidarity-convention-stirs-controversy/>.

81. Peter Fabricius, *Naledi Pandor Denies Supporting Hamas Attack on Israel*, DAILY MAVERICK (Oct. 18, 2023), <https://www.dailymaverick.co.za/article/2023-10-18-naledi-pandor-denies-supporting-hamas-attack-on-israel/>.

82. *Id.*



of humanitarian assistance to Palestinians.<sup>83</sup>

Solidarity with Palestinians is not exclusive to the non-Jewish population. Ronnie Kasrils, who is Jewish, and served as the Minister of Intelligence in President Mandela's cabinet, sent out a tweet after the October 7th massacre, describing the Hamas action as a "brilliant, spectacular guerilla warfare attack."<sup>84</sup> On November 15, 2023, an open letter from five hundred Jewish individuals was published in South Africa, calling for "an end to the Israeli occupation of the Palestinian territories and for the release of all hostages and detainees unjustly held both in Gaza and in Israeli prisons."<sup>85</sup> Jewish citizens in South Africa have, however, have been divided on the issue of Israel/Palestine, with many struggling amid strong familial and other ties to Israel, while also being uncomfortable with some of the policies of the Israeli government.<sup>86</sup>

At the dawn of South Africa's democracy, South Africans imagined that they would be "a resounding voice" in the pursuit of human rights and democracy.<sup>87</sup> The euphoria following the election of Nelson Mandela as the first democratically elected President of South Africa, and arguably the most popular leader around the globe at that time, gave South Africans a sense of themselves as an example to the rest of the world, embracing the mantle as the moral conscience of the world.<sup>88</sup> For many South Africans, this confident "moral" assertion on

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83. *Id.* "During the call, and in line with the government's position, Minister Pandor reiterated South Africa's solidarity and support for the people of Palestine and expressed sadness and regret for the loss of innocent lives both Palestinians and Israelis."

84. Kasrils went on to note that "[t]hey swept on them and they killed them and damn good. I was so pleased and people who supported the resistance applauded." David Benatar, *Denying 7 October: The Case of Ronnie Kasrils*, POLITICS WEB (Mar. 7, 2024); see also Greg Mills, *Ronnie Kasrils' Grotesque Commentary on Hamas' Attack Reveals his Lack of a Moral Compass*, DAILY MAVERICK (Dec. 11, 2023), <https://www.dailymaverick.co.za/article/2023-12-11-ronnie-kasrils-grotesque-commentary-on-hamas-attack-reveals-his-lack-of-a-moral-compass/>.

85. Liezl Human & Nathan Geffen, *South African Jews Call for Ceasefire in Gaza*, GROUNDUP, Nov. 15, 2023, <https://groundup.org.za/article/south-african-jews-call-for-ceasefire-in-gaza/>.

86. Shirli Gilbert & Deborah Posel, *Israel, Apartheid, and a South African Jewish Dilemma*, 20 J. MOD. JEWISH STUD. 1 (2021).

87. "[O]ur efforts to build open democracies and respect human rights, to improve efficiency and implement sustainable policies, will be a resounding voice which compels the North to listen . . ." Address by President Nelson Mandela at the United Nations World Summit for Social Development, Mar. 12, 1995, [http://www.mandela.gov.za/mandela\\_speeches/1995/950312\\_socdev.htm](http://www.mandela.gov.za/mandela_speeches/1995/950312_socdev.htm).

88. In the words of South Africa's first deputy-President, Thabo Mbeki, in 1995, A distinguishing feature of South Africa is the sustained interest of the rest of the world in the future of South Africa. The depth of this interest is not only confined to government, but includes ordinary people and especially

the global stage, through the Application to the ICJ, reiterated South Africa's solidarity with the Palestinians in particular, and the global South more generally.<sup>89</sup>

#### IV. THE APPLICATION TO THE ICJ

South Africa lodged its Application with the ICJ on the basis that it had standing to do so and that there existed a dispute between South Africa and Israel.<sup>90</sup> South Africa's Application accused Israel of engaging in genocidal acts against the Palestinian people in Gaza, "to destroy Palestinians in Gaza" who are part of "the broader Palestinian national, racial and ethnic group."<sup>91</sup> South Africa argued that Israel was in violation of its obligations under the Genocide Convention, including Articles I,<sup>92</sup> III,<sup>93</sup> IV,<sup>94</sup> and VI,<sup>95</sup> read in conjunction with Article II.<sup>96</sup> In summary, not only was Israel allegedly committing

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those who were involved in the anti-apartheid movement abroad... the strength and persistence of the international focus on South Africa puts the South African Government of National Unity under pressure to contribute positively and constructively to the global community.

*Foreign Policy for South Africa: Discussion Document*, S. AFR. GOV., <https://www.gov.za/documents/other/foreign-policy-south-africa-discussion-document-01-jun-1996> (last visited Mar. 11, 2025).

89. Sean Jacobs, *South Africa Sees its Moral Conscience in a Genocide Case*, N.Y. TIMES, Jan. 26, 2024, <https://www.nytimes.com/2024/01/26/opinion/south-africa-israel-genocide.html>.

90. South Africa's Application, *supra* note 1.

91. *Id.*

92. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Jan. 12, 1951, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951) ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.") (Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948) [hereinafter The Genocide Convention].

93. "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." *Id.* art. III.

94. "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." *Id.* art. IV.

95. "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." *Id.* art. VI.

96. "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily

genocide, but it was inciting genocide, attempting to commit genocide, and/or failed to prevent or punish genocide.

In its Application, South Africa listed the many steps it had taken between October and December, 2023, before lodging the Application with the ICJ. These steps included a statement by the South African Department of International Cooperation calling on the international community to hold Israel accountable for breaches of international law, a meeting at the Presidential residence with the leadership of the South African Jewish Board of Deputies, and various announcements both within South Africa and internationally, that South Africa was referring Israel to the International Criminal Court.<sup>97</sup> In addition, members of BRICS (Brazil, Russia, India, China, and South Africa), invited non-BRICS members to a meeting to discuss “a matter of grave global concern in the Middle East,”<sup>98</sup> where South Africa’s President stated that “[t]he deliberate denial of medicine, fuel, food and water to the residents of Gaza is tantamount to genocide.”<sup>99</sup>

Immediately prior to lodging the Application with the ICJ, the South African government sent a *Note Verbale*<sup>100</sup> to the Embassy of Israel in South Africa, in which South Africa raised its concerns that “credible reports that acts meeting the threshold of genocide or related crimes as defined in the 1948 Convention on the Prevention and Punishment of Genocide, have been and may still be committed in the context of the conflict in Gaza.”<sup>101</sup>

South Africa’s Application stated that Israel did not respond to the *Note Verbale*,<sup>102</sup> an allegation which is disputed by the former

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or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” *Id.* art. II.

97. South Africa’s Application, *supra* note 1, ¶ 13.

98. *Id.*

99. *Id.* On 12 December 2023, at the 10th Emergency Special Session of the United Nations General Assembly—at which Israel was represented — the South African Ambassador to the United Nations stated that “[T]he events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention.” *Id.*

100. South Africa’s Application, *supra* note 1, ¶ 13 (citing South Africa, DIRCO, “Note Verbale,” Dec. 21, 2023).

101. *Id.*

102. Israel relied on jurisprudence of the ICJ which provides that in the case of a state making an assertion regarding the conduct of another state, the latter must be given a reasonable opportunity to respond before the initiation of litigation. See Juliette McIntyre, *Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility Before the International Court*, 19 MELBOURNE J. INT’L L. 546 (2018).

Israeli Supreme Court Chief Justice, Aharon Barak.<sup>103</sup> According to Justice Barak, Israel did in fact respond to the *Note Verbale*, “with an offer to engage in consultations at the earliest opportunity.”<sup>104</sup> South Africa rejected the offer, choosing instead to launch the case against Israel at the ICJ. Justice Barak noted with regret that had South Africa accepted the offer, “fruitful diplomatic talks” might have ensued.<sup>105</sup>

Israel also rejected any suggestion that it has violated international law in its military campaign in Gaza and has dismissed the assertion that Israel’s military attacks on Gaza meet “the legal definition of genocide”<sup>106</sup> as “outrageous and false.”<sup>107</sup>

Because there clearly was “a disagreement on a point of law or fact”<sup>108</sup> as well as “a conflict of legal views or interests”<sup>109</sup> between South Africa and Israel on the issue of genocide, a dispute as to the interpretation of the Genocide Convention existed which triggered the jurisdiction of the ICJ. South Africa’s Application regarding the jurisdiction of the ICJ was brought pursuant to Articles 36 (1)<sup>110</sup> and 40 of the Statute of the Court<sup>111</sup> as well as Article 38 of the Rules of the Court.<sup>112</sup> South Africa also based its application on Article IX of the

103. South Africa’s Application, *supra* note 1, ¶ 14.

104. Aaron Poris, *Facts Ignored: Reactions to ICJ Ruling Divide Along Political, Social Lines*, THE MEDIALINE (Feb. 25, 2024), <https://themedialine.org/top-stories/facts-ignored-reactions-to-icj-ruling-divide-along-political-social-lines/>.

105. *Id.*

106. South Africa’s Application, *supra* note 1, ¶ 14. The Application notes Israel’s denial that its activities in Gaza violates its obligations under the Genocide Convention: “[T]he accusation of genocide against Israel is not only wholly unfounded as a matter of fact and law, it is morally repugnant and antisemitic.” *Id.*

107. *Id.*

108. *Id.* ¶ 15.

109. *Id.*

110. Charter of the United Nations and Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1031; T.S. No. 993 [hereinafter ICJ statute] (“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”).

111. Article 40 states that

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated. 2. The Registrar shall forthwith communicate the application to all concerned. 3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

112. Article 38 sets out the procedural rules for lodging the application, including the names of the parties and the subject of the dispute. It also requires that parties state the basis of the court’s jurisdiction and the precise nature of the claims; the requisite signatures, as well as notification to the responding party.

Genocide Convention, which provides that:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.<sup>113</sup>

In terms of Article 41<sup>114</sup> of the ICJ Statute, South Africa's application included a request that the ICJ indicates provisional measures "to prevent any aggravation or extension of the dispute,"<sup>115</sup> while the ICJ determines the merits of the issues raised by the application.

South Africa's Application lists a litany of human rights violations ranging from the killing of Palestinian civilians to the wholesale destruction of Gaza's infrastructure. Examples listed include:

- By October 29, it was estimated that 6,000 bombs per week had been dropped on Gaza.<sup>116</sup>
- At least 21,110 Palestinians have reportedly been killed and over 55,243 have been injured, many severely. This includes more than a third of children (over 7,729). There are thousands of women and children still missing, presumed to have died under the rubble.<sup>117</sup>
- Some 85 per cent of the population of 2.2 million people have been internally and forcibly displaced because their homes have been destroyed (more than

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113. The Genocide Convention, *supra* note 92.

114. ICJ Statute, *supra* note 110, art. 40 (mandating communication to all the parties concerned, as well as to the members of the United Nations via the Secretary-General).

115. South Africa's Application, *supra* note 1, ¶ 115.

116. *Id.* ¶ 18 ("In just over two months, Israel's military attacks had "wreaked more destruction than the razing of Syria's Aleppo between 2012 and 2016, Ukraine's Mariupol, or proportionally, the Allied bombing of Germany in World War II.") (stating the amount of bombs dropped on Gaza).

117. *Id.* ¶ 18-19 (citing the UN Secretary-General's letter of December 6, which had then stated that more than 15,000 people had reportedly been killed, as well as noting how the numbers have risen. between the Secretary-General's Report and the lodging of the Application).

60 percent of all homes totaling 355,000).<sup>118</sup>

- The destruction is so extreme that Gaza now is of a different color (from space), and it is of a “different texture.”<sup>119</sup>
- The health care system has “all but collapsed” with the majority of hospitals (thirteen out of thirty-six) only “partially functioning,” with reports of major operations taking place without anesthetic. There have been warnings from experts “that silent, slow deaths caused by hunger and thirst” might surpass “those violent deaths already caused by Israeli bombs and missiles.”<sup>120</sup>

From the South African perspective, if these violations are not immediately stopped by the international community, it will lead to the decimation of Gaza and its population.<sup>121</sup>

The Application situates the current crisis in Gaza in its historical context, by describing the position of the Palestinian people since the creation of the State of Israel in 1948 and the occupation of the West Bank and Gaza after the 1967 war, also known as the Arab-Israeli war.<sup>122</sup> Although the United Nations only granted the state of Palestine Permanent Observer Status in 2012, South Africa has recognized the state of Palestine since 1995.<sup>123</sup>

118. *Id.* ¶ 18 (“[M]ore than 1.1 million people have sought refuge in UNRWA facilities across Gaza, creating overcrowded, undignified, and unhygienic conditions. Others have nowhere to shelter and find themselves on the street. Explosive remnants of war are rendering areas uninhabitable. There is no effective protection of civilians.”).

119. *Id.*

120. *Id.* ¶ 18–19 (covering, *inter alia*, the degradation of Gaza’s hospital system, which is all occurring while the hospitals shelter thousands of displaced persons (according to the Secretary-General’s letter of December 6)).

121. *Id.* ¶ 20 (stating that U.N. officials have called to end the decimation of Gaza’s people).

122. JEROLD S. AUERBACH, *HEBRON JEWS: MEMORY AND CONFLICT IN THE LAND OF ISRAEL* (2009).

123. G.A. Res. 67/19, ¶ 2 (Nov. 28, 2012), [https://digitallibrary.un.org/record/739031/files/A\\_RES\\_67\\_19-EN.pdf](https://digitallibrary.un.org/record/739031/files/A_RES_67_19-EN.pdf); South Africa’s Application, *supra* note 1, ¶ 21, n.71 (citing the Permanent Observer Mission of the State of Palestine to the United Nations New York Diplomatic Relations to state that the State of Palestine is now recognized by 138 States). South Africa, in contrast, protested the admission of Observer Status to Israel to the African Union in 2021. See also Naledi Pandor Opinion, *We Stand with Palestine: Unjust Actions by Israel Offend Letter and Spirit of AU Charter*, THE STAR (Aug. 12, 2021), <https://dirco.gov.za/opinion->

In its Application, South Africa listed a range of reports that have attempted to address the issues in Palestine and to highlight the ongoing suffering of the Palestinian people and their continued struggle for a two-state solution.<sup>124</sup> The Application also includes reports by United Nations bodies which have “repeatedly found Israel to have acted in serious violation of international law in its previous military attacks on Gaza.”<sup>125</sup> The examples provided allege the destruction of homes and farms, which “has caused untold human suffering to persons unconnected with the present violence”<sup>126</sup> and that the Israeli Defense Force (IDF) had engaged in “excessive force at the expense of life and property.”<sup>127</sup> Another example provided was the UN Human Rights Council report written by the late Archbishop Desmond Tutu and the noted international law scholar Professor Christine Chinkin after the shelling at Beit Hanoun on November 8, 2006, which killed 19 people and several more were injured.<sup>128</sup> Several more reports are included in the Application to bolster the claims that Israel has consistently violated international law, through the actions of the IDF, as well as the treatment of detainees held by Israel.<sup>129</sup>

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pieces/.<https://dirco.gov.za/opinion-pieces/> (stating that the author of that article protested the admission of Observer Status to Israel to the African Union on behalf of the South African government).

124. See South Africa’s Application, *supra* note 1, ¶ 26-27, n.100-106 (listing the various reports cited); Hum. Rts. Council, *Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/HRC/44/60 (2020); Hum. Rts. Council, *Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Michael Lynk, U.N. Doc. A/HRC/49/87 (2022); *Fatalities All Data, Main Data*, B’TSELEM (Oct. 6, 2023), <https://statistics.btselem.org/en/all-fatalities/by-date-ofincident?section=overall&tab=overview>; *The Question of Palestine, Two Years On: People Injured and Traumatized During the “Great March of Return” Are Still Struggling*, U.N. THE QUESTION OF PALESTINE (Apr. 6, 2020), <https://www.un.org/unispal/document/two-years-on-people-injured-and-traumatized-during-the-great-march-of-return-are-still-struggling/>; Hum. Rts. Council, *Rep. of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, U.N. Doc. A/HRC/40/74 (2019); Hum. Rts. Council, *Rep. of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2 (2019).

125. South Africa’s Application, *supra* note 1, ¶ 30.

126. See *id.* ¶ 30 (citing U.N. Econ. & Soc. Council Comm’n on Hum. Rts., *Rep. of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, ¶ 50–51, U.N. Doc. E/CN.4/2001/121 (2001)).

127. *Id.*

128. *Id.* (citing Hum. Rts. Council, *Rep. of the High-Level Fact-Finding Mission to Beit Hanoun Established Under Council Resolution S-3/1*, ¶ 72, 75–76, U.N. Doc. A/HRC/9/26 (2008)).

129. South Africa’s Application, *supra* note 1, ¶ 30 (including excerpts from several

South Africa also utilized the words of several Israeli public figures to bolster its claim that Israel was in fact harboring genocidal intent. For example, on October 28, as Israeli forces began their military response in Gaza, Prime Minister Benjamin Netanyahu invoked "the Biblical story of the total destruction of Amalek by the Israelites,"<sup>130</sup> declaring that, "you must remember what Amalek has done to you, says our Holy Bible. And we do remember."<sup>131</sup> And on November 3rd, in a letter addressed to military personnel, he again invoked the biblical passage: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses."<sup>132</sup>

Another example provided is the statement by the Israeli President Isaac Herzog on October 12 at a press conference that "It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware not involved. It's absolutely not true . . . and we will fight until we break their backbone."<sup>133</sup> South Africa alleged that these statements (and similar rhetoric) proved that Israel "was not distinguishing between militants and civilians in Gaza" and particularly since many civilians are children.<sup>134</sup> South Africa also pointed to the imposition of a "complete siege of Gaza" with the statement by Israeli Minister of Defence Yoav Gallant on October 9th that everything would be shut off in Gaza: electricity, food, water, fuel. The Minister stated that "[E]verything is closed. We are fighting human animals and we are acting accordingly."<sup>135</sup>

By listing the activities of the IDF in Gaza and the statements from the President and Prime Minister, Cabinet officials, and military personnel, the South African government endeavors in the Application to establish genocidal intent on the part of the Israeli government.<sup>136</sup>

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United Nations reports detailing Israeli violations of international law).

130. *Id.* ¶ 101.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* ("[T]o be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy—they're all terrorists, and they should also be destroyed."); *id.* ("All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world."); *id.* ¶ 101-07 (listing more statements from Israeli officials).

136. See generally South Africa's Application, *supra* note 1, ¶ 101-07 (discussing assertions of genocidal intent); see also The Genocide Convention, *supra* note 92, art. 2

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:



In the pleadings, and during oral argument by its legal team, South Africa provided details to further its claim of genocidal intent, namely that Israel is engaged in killing Palestinians in Gaza “in large numbers,”<sup>137</sup> including children, and “causing serious bodily and mental”<sup>138</sup> harm, and is imposing on Palestinians “conditions of life intended to bring about their destruction as a group.”<sup>139</sup> The conditions alluded to include “expulsions from homes and mass displacement, alongside the large-scale destruction of homes and residential areas”<sup>140</sup> accompanied by the “deprivation of access to adequate food and water”<sup>141</sup> as well as “access to adequate medical care . . . adequate shelter, clothes, hygiene, and sanitation.”<sup>142</sup> They also include “the destruction of the life of the Palestinian people in Gaza and imposing measures intended to prevent Palestinian births.”<sup>143</sup>

The South African government requested that the ICJ order a series of provisional measures, including that Israel “immediately suspend its military operations”<sup>144</sup> and to take preventive measures to prevent further destruction, death, and dislocation of Palestinian people in Gaza, and to “take all reasonable measures” to “prevent genocide.”<sup>145</sup> Other measures sought was that Israel desist from denying Palestinians access to “adequate food and water” as well as access to “humanitarian assistance.”<sup>146</sup> South Africa also requested that the Court direct that Israel takes “effective measures to prevent the destruction and ensure the preservation of evidence”<sup>147</sup> and not “deny or otherwise restrict access by fact-finding missions, or international mandates and other bodies to Gaza.”<sup>148</sup>

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- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

137. South Africa's Application, *supra* note 1, ¶ 43.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* ¶ 144.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* The South African government also requested the Court to order Israel to submit a report to the Court on all measures taken within one week and thereafter at

The Application notes that Israel did not respond directly to South Africa's overtures before the latter launched its application to the ICJ. Instead, Israel has rejected the claims that it has violated international law in its military campaigns in Gaza.<sup>149</sup>

In its response in oral argument, Israel insisted that South Africa was presenting "a sweeping counter-factual description" of the Israeli-Palestinian conflict.<sup>150</sup> Israel denied that its conduct in Gaza violates its obligations under the Genocide Convention, asserting that South Africa's application had decontextualized the conflict, by not mentioning Hamas in its pleadings.<sup>151</sup> In fact, the Application by South Africa served to delegitimize the 75 years of existence of Israel, erasing both Jewish history and any "Palestinian agency or responsibility."<sup>152</sup> Counsel for the Israeli government also pointed out how the attempts by South Africa to "weaponize" genocide, "empt[ies] the word of its unique force and special meaning,"<sup>153</sup> in effect subverting the purpose of the Genocide Convention. While Israel recognized that the civilian suffering in Gaza was tragic, Hamas, through its strategy, had sought "to maximize civilian harm to both Israelis and Palestinians, even as Israel seeks to minimize it."<sup>154</sup> Invoking Israel's right to defend itself, counsel for Israel stated that:

If the claim of the applicant now is that in the armed conflict between Israel and Hamas, Israel must be denied the ability to defend its citizens, then the absurd upshot of South Africa's argument is this: Under the guise of the allegation against Israel of genocide, this court is asked to call for an end to operations against the ongoing attacks of an organization that pursues an actual genocidal agenda. An organization that has violated every past ceasefire and used it to rearm and plan new atrocities. An organization that declares its unequivocal

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such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court. *Id.* "The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve." *Id.*

149. *Full Text of Israel's Opening Address Against South Africa Genocide Case at World Court*, THE TIMES OF ISRAEL (Jan. 12, 2024), <https://www.timesofisrael.com/south-africa-genocide-case-is-a-libel-aimed-to-deny-israel-the-right-to-defend-itself/>.

150. *Id.* See also Raffi Berg & Anna Holligan, *Israel Says South Africa Distorting the Truth in ICJ Genocide Case*, BBC (Jan. 12, 2024), <https://www.bbc.com/news/world-middle-east-67944903>.

151. *Full Text of Israel's Opening Address Against South Africa Genocide Case at World Court*, *supra* note 149.

152. *Id.*

153. *Id.*

154. *Id.*

resolve to advance its genocidal plans.<sup>155</sup>

It was further pointed out that in all armed conflicts there is civilian suffering, and this is particularly the case when Hamas not only attacks Israeli civilians but is unconcerned about the safety and welfare of its own civilians.<sup>156</sup>

Remarkably, counsel for the applicant described the suffering in Gaza as unparalleled and unprecedented, as if they are unaware of the utter devastation wrought in wars that have raged just in recent years around the world. Sadly, the civilian suffering in warfare is not unique to Gaza. What is actually unparalleled and unprecedented is the degree to which Hamas has entrenched itself within the civilian population and made Palestinian civilian suffering an integral part of its strategy.<sup>157</sup>

Israel therefore argued that the legal framework that ought to be applied to the conflict in Gaza is international humanitarian law and not the law of genocide.<sup>158</sup> Israel further contended that, “in situations of urban warfare, civilian casualties may be an unintended consequence of lawful use of force against military objects” but they “do not constitute genocidal acts.”<sup>159</sup>

Israel insisted that it has recognized the plight of the Palestinians in Gaza and had “facilitated the provision of humanitarian assistance throughout the Gaza Strip.”<sup>160</sup> These facts, according to the Israeli

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155. *Id.*

156. *Id.*

157. *Id.*

158. Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures (S. Afr. v. Isr.), Order of 26 January 2024, ¶ 40 [hereinafter ICJ Order], <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

159. *Id.*

160. *Id.* ¶ 64. Israel contends that “with the assistance of the World Food Programme, a dozen bakeries have recently reopened with the capacity to produce more than 2 million breads a day.” *Id.* Israel noted that “it continues to supply its own water to Gaza by two pipelines,” and that it also “facilitates the delivery of bottled water in large quantities, and that it repairs and expands water infrastructure.” *Id.* Israel’s further claims were that it had increased access to medical supplies and medical services, and “that it has facilitated the establishment of six field hospitals and two floating hospitals and that two more hospitals are being built. It also contends that the entry of medical teams into Gaza has been facilitated and that ill and wounded persons are being evacuated through the Rafah border crossing. According to Israel, tents and winter equipment have also been distributed, and the delivery of fuel and

government, "serve to dispel— or at the very least, militate against— any allegation of genocidal intent."<sup>161</sup>

In sum, Israel's contention was that South Africa had not succeeded in demonstrating that the Court had jurisdiction under Article IX of the Genocide Convention. Moreover, Israel argued that there is no dispute because South Africa "did not give Israel a reasonable opportunity to respond to the allegations of genocide before South Africa filed its Application."<sup>162</sup>

Israel submits that, on the one hand, South Africa's public statements accusing Israel of genocide and the referral of the situation in Palestine to the International Criminal Court and, on the other hand, the document published by the Israeli Ministry of Foreign Affairs, which was not addressed directly or even indirectly to South Africa, are not sufficient to prove the existence of a "positive opposition" of views, as required by the Court's jurisprudence.<sup>163</sup>

The Court listed and analyzed the various actions and responses taken by South Africa and Israel, and concluded that indeed, a dispute existed that bestowed jurisdiction on the Court in this matter, stating:

In light of the above, the Court considers that the Parties appear to hold clearly opposite views as to whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention. The Court finds that the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.<sup>164</sup>

The ICJ also confirmed its jurisdiction, since it was not required at this stage to judge whether Israel had indeed violated the Genocide Convention.<sup>165</sup> Such a determination would only occur when the Court examines the merits of the case, at a later stage. The Court saw its task in South Africa's request for provisional measures to "establish

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cooking gas has been facilitated." *Id.*

161. *Id.* ¶ 40.

162. *Id.* ¶ 23.

163. *Id.*

164. *Id.* ¶ 28.

165. *Id.* ¶ 30.

whether the acts and omissions”<sup>166</sup> alleged by South Africa by “appear to be capable of falling within the provisions of the Genocide Convention.”<sup>167</sup> From the perspective of the ICJ, at least some of Israel’s activities in Gaza “appear to be capable of falling within the provisions of the Convention.”<sup>168</sup>

#### V. PROVISIONAL ORDER OF THE ICJ

Satisfied that South Africa had standing to bring the Application,<sup>169</sup> and that it had satisfied the jurisdictional elements both with respect to the Court’s statute and rules, as well as the requirements set out in the Genocide Convention, the ICJ issued its provisional order on January 26, 2024.<sup>170</sup> The Court stated that Palestinians were protected within the meaning of Article II of the Genocide Convention, in that they constituted a distinct “national, ethnical, racial or religious group.”<sup>171</sup> Israel argued that the ceasefire that South Africa was seeking could not be granted by the Court in the situation of an ongoing military conflict, especially since the Court had stated so in the case of *Bosnia v Yugoslavia*.<sup>172</sup> The Court noted that the legal conditions for the issuance of provisional measures had been met.<sup>173</sup> From the Court’s perspective, it was “plausible” that genocide

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166. *Id.*

167. *Id.*

168. *Id.*

169. *See generally id.*

170. *Id.* Citing its decision in *The Gambia v. Myanmar*, the Court found that “any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations erga omnes partes under the Convention and to bringing that failure to an end. *Id.* ¶ 33.

171. Article II provides as follows: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The Genocide Convention, *supra* note 92, at art. II. The Court noted that the Palestinian population of Gaza comprises over 2 million people and that Palestinians form a substantial part of the protected group. ICJ Order, *supra* note 158, at 45.

172. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. and Herz. v. Yugoslavia (Serb. and Montenegro)) Request for Indication of Provisional Measures, 1993 I.C.J. 3 (Apr. 8).

173. It is important to note that the ICJ provisional order is not a decision on the merits, that is, whether Israel has committed genocide. That decision is likely to take a few years. Nor is the provisional order an indication that South Africa will prevail at the merits state of the case. This order is more akin to a motion for summary judgement, that is, an order from a judge to stay a particular situation to prevent any further harm before a final decision can be reached. *See Preliminary Injunction*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/preliminary\\_injunction](https://www.law.cornell.edu/wex/preliminary_injunction) (last visited Mar. 11, 2025).

was being committed in Gaza.<sup>174</sup> The Court cited its recent rulings on the standard of plausibility, which has been relatively well settled in its jurisprudence.<sup>175</sup> The plausibility standard arguably is a lower bar at the application for provisional measures, than the standard that would be applied at the merits stage. As the Court stated in its 2020 Provisional Order in *Gambia v Myanmar*,<sup>176</sup>

The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.<sup>177</sup>

For provisional orders, the applicant has to prove the essential elements of the claim, whereas at the merits claim, the Court requires that claimants must demonstrate “a pattern of conduct from which the ‘only reasonable inference to be drawn is that of genocidal intent.’”<sup>178</sup>

The Court reached its conclusions by examining the claims made by South Africa, with reference to a variety of reports issued by the United Nations, the World Health Organization, and others. The Court

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174. ICJ Order, *supra* note 158.

The Court considers that, by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving the plausible rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention. Therefore, a link exists between the rights claimed by South Africa that the Court has found to be plausible, and at least some of the provisional measures requested.

175. See Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.) Request for Indication of Provisional Measures, 2020 I.C.J. 2 (Jan. 23); Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ, Federation) Request for Indication of Provisional Measures, 2022 I.C.J. 211 (Mar. 16).

176. Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. V. Myan.) Request for Indication of Provisional Measures, 2020 I.C.J. 3, ¶ 43 (Jan. 23).

177. *Id.*

178. Juliette McIntyre, *Telling Stories at the International Court of Justice: The Provisional Measures Hearings in South Africa v. Israel*, VOELKERRECHSBLOG (Jan. 16, 2024), <https://voelkerrechtsblog.org/de/telling-stories-at-the-international-court-of-justice/>.

also cited the words of Israeli officials, which were included in the South African Application to demonstrate genocidal intent.<sup>179</sup> The Court took particular note of the press release issued on November 16, 2023 by 37 UN Special Rapporteurs, Independent Experts and Members of UN Working Groups who collectively voiced alarm over what they regarded as “discernibly genocidal and dehumani[s]ing rhetoric” uttered by Israeli government officials.<sup>180</sup> The Court also referred to the October 7, 2023 statement of the UN Committee on the Elimination of Racial Discrimination “about the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October.”<sup>181</sup> From the ICJ’s perspective,

“[T]he facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention.”<sup>182</sup>

The Court therefore made the following order:

- Israel “must . . . take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group.”<sup>183</sup> [Two judges voted against this measure.]
- The State of Israel shall ensure with immediate effect that its military does not commit any acts described

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179. The Court only cited three statements, those of Isaac Herzog, the President, Yoav Gallant, the Defense Minister and the Minister of Israel Katz, former Minister of Energy and Infrastructure. The Court did not refer to Prime Minister Netanyahu’s “Amalek” speech.

180. ICJ Order, *supra* note 158, ¶ 53.

181. *Id.*

182. *Id.* ¶ 54.

183. *Id.* ¶ 78.

in the measure above.<sup>184</sup> [Two judges voted against this measure.]

- Israel must take “all measures within its power to prevent and punish the direct and public incitement to commit genocide” towards Palestinians in Gaza.<sup>185</sup> [One judge voted against this measure.]
- Israel must “take immediate and effective measures” to provide “urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians.”<sup>186</sup> [One judge voted against this measure.]
- Israel must “take effective measures to prevent the destruction and ensure the preservation of evidence” related to ongoing and future allegations of genocide in Gaza.<sup>187</sup> [Two judges voted against this measure.]
- Israel “must submit a report to the Court on all measures taken” to comply with the Court’s Order within one month from the date of the Order, a copy to be “communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.”<sup>188</sup> [Two judges voted against this measure.]

The Court concluded its order by noting that Israel and Hamas are “bound by international humanitarian law” and the Court stated its grave concern, “about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release.”<sup>189</sup> The near unanimity of the ICJ in delivering its Order has several implications. First, from South Africa’s perspective, although the Court did not grant all its requests, the Court’s Order did provide a sense of vindication for South Africa in bringing this case against

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184. *Id.*

185. *Id.* ¶ 79.

186. *Id.* ¶ 80.

187. *Id.* ¶ 81.

188. *Id.* ¶ 82.

189. *Id.* ¶ 85.



Israel under the Genocide Convention.<sup>190</sup> Second, the Court's order might have considerable impact on Israel's global reputation.<sup>191</sup> Third, Israel's need to provide security for Israeli citizens has raised vexed questions about the ongoing war with Hamas and how best to ensure safety within Israel's borders.<sup>192</sup> Fourth, the Court's Order may also influence governments that have and continue to cooperate with Israel regarding its military operations against Hamas in Gaza.<sup>193</sup> Fifth, Israel may feel vindicated because the Court did not order a ceasefire.<sup>194</sup> But of course, the most significant implication involves the question, what to do once the fighting stops.<sup>195</sup>

## VI. EVALUATING SOUTH AFRICA'S HUMAN RIGHTS RECORD IN FOREIGN POLICY

What are the ramifications of the Application to ICJ for South Africa's foreign policy and human rights? How does one evaluate the continuities and inconsistencies on the part of the South African government in its application of human rights to foreign policy? South Africa's approach to foreign policy and the role that it envisioned for itself on the global stage was set out in an article that President Nelson Mandela penned a few months before the South African elections in

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190. *ICJ Ruling Vindicated Us: South African President Ramaphosa After UN Court's Decision in Genocide Case*, DECCAN HERALD (Jan. 26, 2024, 21:06 IST), <https://www.deccanherald.com/world/icj-ruling-vindicated-us-south-african-president-ramaphosa-after-un-courts-decision-in-genocide-case-2867092>.

191. Chloe Hadavas, *The World Reacts to South Africa's ICJ Case*, FOREIGN POL'Y (Feb. 4, 2024), <https://foreignpolicy.com/2024/02/04/south-africa-icj-case-ruling-israel-hamas-war-palestinians-genocide/>; Frederick Decnatel, *The Global Impact of the ICJ Ruling on Israel: A Democracy in Exile Roundtable*, DAWN (Feb. 9, 2024), <https://dawnmena.org/the-global-impact-of-the-icj-ruling-on-israel-a-democracy-in-exile-roundtable/>.

192. Jim Zamotti, *Israel: Major Issues and U.S. Relations* (Dec. 5, 2024), <https://crsreports.congress.gov/product/pdf/R/R44245>; see also Naama Lazimi, *I believe in Another Israel—One Not Defined by Benjamin Netanyahu and His Cronies*, THE GUARDIAN (Apr. 13, 2024), <https://www.theguardian.com/commentisfree/2024/apr/13/israel-benjamin-netanyahu-peace>.

193. *Reaction to World Court's Order for Israel to Halt Rafah Assault in Gaza*, REUTERS (May 25, 2024), <https://www.reuters.com/world/reaction-world-courts-order-israel-halt-rafah-assault-gaza-2024-05-24/>.

194. Ian Woodbridge, *Is the ICJ's Ruling a Verdict or a Vindication?*, THE JERUSALEM POST (Jan. 31, 2024), <https://www.jpost.com/opinion/article-784407>.

195. Daniel Kurtzer, *What Needs to Happen When the Fighting Stops in Gaza*, THE ATLANTIC (Dec. 14, 2023), <https://www.theatlantic.com/international/archive/2023/12/plan-day-after-gaza-israel-palestinian-peace/676326/>.

1994.<sup>196</sup> President Mandela noted that under an ANC government, South African foreign policy would be “based on the belief that human rights should be the core concern of international relations.”<sup>197</sup> President Mandela noted that “human rights will be the light that guides our foreign policy.”<sup>198</sup> South Africa saw itself as ready to “play a role in fostering peace and prosperity in the world we share with the community of nations.”<sup>199</sup> President Mandela’s words were welcomed in a world that increasingly saw South Africa’s transition to democracy as a “miracle” and as a beacon of hope for the globe.<sup>200</sup>

This commitment to human rights and ubuntu translated into a “philosophy of non-alignment” and of “friendly, constructive relations with all nations.”<sup>201</sup> At times this approach may even have displeased South Africa’s allies; for example, when President Mandela made it clear that he intended to remain “loyal to ‘old friends,’ Cuba and Libya.”<sup>202</sup> South Africa pursued various initiatives on the rest of the African continent as well as the global south more generally, positioning itself more and more as a leader.<sup>203</sup> For instance, in the 1990s South Africa played a pivotal role in promoting peace in the Democratic Republic of Congo and Burundi.<sup>204</sup> President Mandela’s successor, President Thabo Mbeki, played a leading role in transitioning the Organization of African Unity to the new African Union and its New Partnership for Africa’s Development.<sup>205</sup> At the

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196. Nelson Mandela, *South Africa’s Future Foreign Policy*, FOREIGN AFFS. (Dec. 1, 1993), <https://www.foreignaffairs.com/articles/south-africa/1993-12-01/south-africas-future-foreign-policy>.

197. *Id.*

198. CHRIS ALDEN & GARTJ LE PERE, *SOUTH AFRICA’S POST-APARTHEID FOREIGN POLICY: FROM RECONCILIATION TO REVIVAL?* 284 (2004).

199. Mandela, *supra* note 196.

200. Christi van der Westhuizen, *South Africa’s 1994 ‘miracle’: what’s left?*, THE CONVERSATION (Apr. 25, 2021), <https://theconversation.com/south-africas-1994-miracle-whats-left-159495>.

201. *Foreign Policy for South Africa: Discussion Document*, *supra* note 88.

202. “Exhibiting the moral authority he draws from his extraordinary personal history, South African President Nelson Mandela on Friday pointedly told President Clinton to follow his lead and negotiate face-to-face with his enemies to solve conflicts peacefully . . . ‘The United States as the leader of the world should set an example to all of us to help eliminate tensions throughout the world,’ an energized Mandela said at a joint news conference with Clinton. And the best way of doing so is to call upon its enemies to say, ‘Let’s sit down and talk peace.’” Elizabeth Shogren, *Mandela Gives Clinton a Lecture on Libya, Cuba*, L.A. TIMES (Mar. 28, 1998), <https://www.latimes.com/archives/la-xpm-1998-mar-28-mn-33490-story.html>.

203. Chris Landsberg & David Monyae, *South Africa’s Foreign Policy: Carving a Global Niche*, 13 S. AFR. J. INT’L AFF. 131 (2006).

204. Joseph Makanda & Maheshvari Naidu, *The South Africa’s Peace-building Interventions in the Democratic Republic of Congo*, 6 J. AFR. AFFS. 65 (2019).

205. Kathryn Sturman, *Intervention in Africa? The Mbeki Presidency’s Role in*

same time, as South Africa's economy was burgeoning and South Africa rejoined the world economy after decades of economic sanctions, South Africa was invited to join the G20.<sup>206</sup> As a member of this powerful bloc, South Africa appeared to see its role as promoting not just the interests of South Africa, but also the interests of Africans more generally.<sup>207</sup> South Africa also pursued the idea of reforming global economic governance, while it hosted major global meetings, including the UN Conference on Racism in Durban in 2001,<sup>208</sup> the UN World Conference on Sustainable Development in Johannesburg in 2002<sup>209</sup> and the UN Climate Change Conference in Durban in 2011.<sup>210</sup>

In addition, the 1995 World Rugby Cup provided a huge global boost for the country by relaying a positive global image of South Africa to the world.<sup>211</sup> In fact, the victorious South African rugby team ("the Springboks"), headlined by the warm embrace of President Mandela and Francois Pienaar, the white Afrikaner captain of the Springboks, demonstrated a "masterful act of statecraft conducted squarely in the international spotlight."<sup>212</sup> This event led to the publication of a best-selling book<sup>213</sup> and a multi award-nominated movie, *Invictus*, starring two of America's Oscar winning actors, Matt

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*Changing the OAU*, African Stud. Assoc. of Australia and the Pacific (AFSAAP) Annual Conference, Nov. 26–28 2004, <https://afsaap.org.au/assets/sturman.pdf>.

206. Abdur Rahman Alfa Shaban, *Only Four Africans Made it to the G20 Summit, Who Are They?*, AFRINews (Sept. 12, 2019), <https://www.africanews.com/2017/07/08/only-four-africans-made-it-to-the-g20-summit-who-are-they/>.

207. John Sifton, *South Africa at the G20—Its More than Just the 'Vibes'*, HUM. RTS. WATCH (Sept. 7, 2023), <https://www.hrw.org/news/2023/09/07/south-africa-g20-its-about-more-just-vibes>.

208. U.N. World Conference Against Racism, *Racial Discrimination, Xenophobia, and Related Intolerance*, 31 August–7 September 2001, Durban, U.N. CONFERENCES | RACISM, <https://www.un.org/en/conferences/racism/durban2001> (last visited Mar. 11, 2025).

209. U.N. World Summit on Sustainable Development, 26 Aug.–4 September 2002, Johannesburg, U.N. CONFERENCES | ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, <https://www.un.org/en/conferences/environment/johannesburg2002> (last visited Mar. 11, 2025).

210. *Durban Climate Change Conference—November / December 2011*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/conferences/past-conferences/durban-climate-change-conference-november-2011/durban-climate-change-conference-november/december-2011> (last visited Mar. 11, 2025).

211. Farrell Evans, *How Nelson Mandela Used Rugby as a Symbol of South African Unity*, HISTORY (July 29, 2021), <https://www.history.com/news/nelson-mandela-1995-rugby-world-cup-south-african-unity>.

212. *Id.*

213. JOHN CARLIN, *PLAYING THE ENEMY: NELSON MANDELA AND THE GAME THAT MADE A NATION* (2008).

Damon and Morgan Freeman.<sup>214</sup>

The moral authority of post-apartheid South Africa seemed self-evident. South Africa's relatively peaceful transition from apartheid to democracy was globally heralded and Nelson Mandela was arguably the most popular global political figure at the end of the 20<sup>th</sup> century.<sup>215</sup> In addition, South Africa's Truth and Reconciliation Commission, under the tutelage of the globally respected Archbishop Desmond Tutu, drew international praise.<sup>216</sup> President Mandela leading the "rainbow" nation provided hope and optimism during the last decade of the 20<sup>th</sup> century, with huge numbers of books and movies being produced, and global figures, including many celebrities, flocking to South Africa to meet with President Mandela.<sup>217</sup>

Despite several years of optimism, the reality is that once the Mandela period ended,<sup>218</sup> the ideals and possibilities of the "human rights state" soon faced considerable challenges.<sup>219</sup> In many ways and

214. *Full awards and nominations of Invictus*, FILMAFFINITY, <https://www.filmaffinity.com/en/movie-awards.php?movie-id=584053> (last visited Mar. 11, 2025).

215. See Phakamile Thwala, *The Leadership Dilemma In South African Presidency: A Focus on The Post Nelson Mandela Messiah Leadership Discourse* (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4351806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4351806); see also *Icons: Nelson Mandela*, BBC, <https://www.bbc.co.uk/programmes/profiles/1SbKXYrZy6qcTGd960hLjdG/nelson-mandela> (last visited Mar. 11, 2025).

216. Penelope Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155 (2004).

217. Books about Nelson Mandela include: ANTHONY SAMPSON, *MANDELA: THE AUTHORIZED BIOGRAPHY* (2000); MANDELA: THE AUTHORIZED PORTRAIT (Mac Maharaj and Ahmad Kathrada eds., 2006); TOM LODGE, *MANDELA: A CRITICAL LIFE* (2007); ROD GREEN, *MANDELA: THE LIFE OF NELSON MANDELA* (2013); RICHARD STENGEL, *MANDELA'S WAY: LESSONS FOR AN UNCERTAIN AGE* (2018). A sample of movies made about President Mandela include: *MANDELA* (HBO 1987); *MANDELA: SON OF AFRICA, FATHER OF A NATION* (Island Pictures 1997); *MANDELA AND DE KLERK* (Showtime Networks 1997); *THE COLOR OF FREEDOM* (Paramount Pictures 2007); *MANDELA: LONG WALK TO FREEDOM* (Pathé 2013); *MANDELA'S GUN* (Dearheart Productions 2016). On world leaders and celebrities, see Margaret Hartmann, *World Leaders, Celebrities Share Memories of Nelson Mandela*, N.Y. MAG. (Dec. 6, 2013), <https://nymag.com/intelligencer/2013/12/leaders-celebrities-mandela-memories.html>; see also Andrea Perez, *International Nelson Mandela Day: Celebrities That Had a Chance to Meet the Beloved Activist*, HOLA! (July 18, 2022), <https://www.hola.com/us/celebrities/20220718334939/nelson-mandela-celebrity-friends/>.

218. But even President Mandela's government, despite his foreign policy commitments, were accused of "appeasement" when the government failed to intervene in the execution of writer and environmental activist, Ken Saro-Wiwa, by the Nigerian military government. See *The Crisis in Nigeria*, MAIL & GUARDIAN (Nov. 17, 1995), <https://mg.co.za/article/1995-11-17-the-crisis-in-nigeria/>.

219. Noam Schimmel, *Commentary—The State of Human Rights in South Africa Approaching 30 Years of Post-Apartheid Democracy: Successes, Failures, And Prospects*, 186 WORLD AFFS. 1019 (2023). I use the term "Mandela period" to refer to the five years

due to a variety of factors, South Africa seemed at times unable to live up to the ideals embodied in its Constitution and the rhetoric that followed the first democratic elections.<sup>220</sup> This was most pronounced in the failure to address the unfolding crisis in neighboring Zimbabwe in which widespread human rights violations were committed by President Mugabe and his government.<sup>221</sup> Meanwhile, poverty and economic inequalities persisted, and the racial legacy of apartheid has been hard to eradicate.<sup>222</sup> Some have even argued, to the alarm of many, that the economic situation of the majority of South Africans is more dire than it was during the apartheid.<sup>223</sup> And the African National Congress, the ruling party until May 2024, has been mired in corruption, cronyism, incompetence, and indifference, as illustrated by a 2022 report authored by the Chief Justice, Raymond Zondo.<sup>224</sup> The almost decade long leadership of President Jacob Zuma, from 2009 to 2018, resulted in widespread looting of the state coffers, an institutionalization of state capture of key national resources, including state-owned enterprises, and the hollowing out of state institutions to serve the corrupt ends of the President and his allies.<sup>225</sup>

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of the President of Nelson Mandela. Although formally committed to the constitutional project, President Thabo Mbeki, President Mandela's successor, failed on two significant counts regarding human rights: first, his failure to recognize that the HIV virus caused AIDS, thereby permitted hundreds of thousands of South Africans to die from HIV/AIDS and second, his failure to condemn President Robert Mugabe of Zimbabwe after he had been involved in widespread suppression of dissent in that country.

220. "The impression of South Africa's moral high ground in previous years was based on the iconography and association with Mandela, a clear vision of what we wanted to achieve and leaders who were committed to the global imperative to assist South Africa. The world circumstances at the time favoured our rise; however, politically and ideologically this has now changed." Zukiswa Pikoli, *South Africa and the World in 2019*, THE CONVERSATION (Nov. 29, 2019), <https://www.dailymaverick.co.za/article/2019-11-29-south-africa-and-the-world-in-2019/>.

221. Dewa Mavhinga, *Robert Mugabe Leaves Behind Legacy of Abuse*, HUM. RTS. WATCH (Sept. 6, 2019), <https://www.hrw.org/news/2019/09/06/robert-mugabe-leaves-behind-legacy-abuse>.

222. Johannes G. Hoogeveen & Berk Özler, *Not Separate, Not Equal: Poverty and Inequality in Post-Apartheid South Africa* (2005), <https://ssrn.com/abstract=669147> or <http://dx.doi.org/10.2139/ssrn.669147>.

223. Colin Bundy, *Poverty and Inequality in South Africa: A History* (2020), <https://doi.org/10.1093/acrefore/9780190277734.013.659>. But see a more nuanced perspective from Haroon I. Bhorat and Ravi Kanbur, *Poverty and Well-Being in Post-Apartheid South Africa: An Overview of Data, Outcomes and Policy* (Oct. 2005) (unpublished manuscript) (available at SSRN).

224. *Final Reports*, COMM'N OF INQUIRY INTO STATE CAPTURE, <https://www.statecapture.org.za/site/information/reports> (last visited Mar. 11, 2025).

225. *Id.*; see also Penelope Andrews, *Why it's Taken So Long to Prosecute State*

Similarly, the alarming incidence of xenophobia, particularly against foreign-born Africans in South Africa, the overwhelming number who are refugees, has its roots in racist assumptions about the criminal proclivities of migrants.<sup>226</sup> These attitudes have severely tested South Africa's relationship with the United Nations and with some African governments, given South Africa's inability to stem xenophobic violence within its own borders.<sup>227</sup>

South Africa's foreign policy and its commitment to human rights and *ubuntu* have been uneven in its application over the past few decades. There are numerous examples that exhibit a contradiction of South Africa's practice with respect to human rights when measured against stated commitments. One occurred in 2014 when the Dalai Lama was forced to cancel a trip to South Africa because the South African government denied him a visa to attend a summit of Nobel Peace laureates.<sup>228</sup> This was despite a South African Court ruling in 2011 that the government had acted unlawfully in denying the Dalai Lama a visa to attend the 80<sup>th</sup> birthday celebrations of Archbishop Desmond Tutu.<sup>229</sup> The refusal was seen as an appeasement of China, with whom South Africa had close economic and historic ties.<sup>230</sup>

Another example is the visit of Sudanese President Omar Al-Bashir to South Africa to attend the 25th African Union Summit in June

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*Capture Cases in South Africa*, THE CONVERSATION (Jan. 22, 2018), <https://theconversation.com/why-its-taken-so-long-to-prosecute-state-capture-cases-in-south-africa-90394>.

226. Bastien Dratwa, *Xenophobia: A Pervasive Crisis in Post-Apartheid South Africa*, GEO. J. INT'L AFFS. (May 26, 2024), <https://gjia.georgetown.edu/2024/05/26/xenophobia-a-pervasive-crisis-in-post-apartheid-south-africa/>.

227. Tim Cocks, *Mandela's Vision of Black Unity Fades as South Africa Closes its Door to Migrants*, REUTERS SPECIAL REP. (May 23, 2024), <https://www.reuters.com/investigates/special-report/safrica-election-fire/>; see also *South Africa: UN Experts Condemn Xenophobic Violence and Racial Discrimination Against Foreign Nationals*, UNITED NATIONS (July 15, 2022), <https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence-and-racial>.

228. *Dalai Lama Denied South Africa Visa for Nobel Summit*, THE GUARDIAN (Sept. 4, 2014), <https://www.theguardian.com/world/2014/sep/04/dalai-lama-denied-south-africa-visa-nobel-summit>.

229. *Buthelezi and Another v. Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA) (S. Afr.).

230. Xan Rice, *Dalai Lama visit blocked by South Africa to please China, says opposition*, THE GUARDIAN (Sept. 27, 2011), <https://www.theguardian.com/world/2011/sep/27/dalai-lama-banned-south-africa>; see also Xu Wei, *China, South Africa to Bolster Relations*, CHINA DAILY (Aug. 22, 2023), <https://www.chinadailyhk.com/hk/article/347178>.

2015.<sup>231</sup> At the time of his visit, an arrest warrant for President Al-Bashir's arrest had been issued by the International Criminal Court (ICC) for genocide, crimes against humanity and war crimes.<sup>232</sup> The South African government refused to arrest Al-Bashir and instead permitted him to leave the country against the orders of the High Court.<sup>233</sup> South Africa's failure to arrest led to a finding by the International Criminal Court that South Africa had breached its obligations under international law.<sup>234</sup>

The values of human rights were absent when in 2019 South Africa, as a non-permanent member of the UN Security Council, joined China and Russia in voting against a United States-sponsored draft resolution calling for free and fair elections in Venezuela.<sup>235</sup> The purpose of the draft resolution was to recognize the leader of the Venezuelan National Assembly, Juan Guaido, as Venezuela's interim president until new elections were held.<sup>236</sup> The draft resolution followed in the wake of the political crisis that resulted when Nicholas Maduro was declared elected president by the National Electoral Council in a widely boycotted general election.<sup>237</sup> The South African government issued a statement to explain its vote, claiming that the US resolution "reflected a serious bias and partiality which goes against South Africa's Constitution and foreign policy."<sup>238</sup> The U.S.

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231. *ICC Rules Against South Africa on Shameful Failure to Arrest President Al-Bashir*, AMNESTY INT'L (Jul. 6, 2017), <https://www.amnesty.org/en/latest/news/2017/07/icc-rules-against-south-africa-on-shameful-failure-to-arrest-president-al-bashir/>.

232. *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09 Warrant of Arrest, ¶ 2 (Mar. 4, 2009), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF). The arrest warrant included a litany of alleged atrocities, including charges relating to murder, extermination, forcible transfer, torture, rape and genocide. *Id.*

233. For a thoughtful discussion of this case, see Angela Mudukuti, *Judicial Integrity and Independence: The South African Omar Al Bashir Matter*, in GOAL 16 OF THE SUSTAINABLE DEVELOPMENT GOALS: PERSPECTIVES FROM JUDGES AND LAWYERS IN SOUTHERN AFRICA ON PROMOTING RULE OF LAW AND EQUAL ACCESS TO JUSTICE 16, 16 (2016).

234. *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶ 136 (Jul. 6, 2017), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_04402.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF).

235. Gary Raynaldo, *U.S. Disappointed with South Africa Vote Against Venezuela Resolution of UN Security Council*, DIPLOMATIC TIMES (Mar. 13, 2019), <https://diplomatictimes.net/2019/03/13/u-s-disappointed-with-south-africa-vote-against-venezuela-resolution-in-un-security-council/>.

236. *Id.*

237. *Id.*

238. *Id.*; see also Explanation of Vote by South Africa at the UN Security Council Vote on the Situation in Venezuela, (Feb. 28, 2019) (Transcript available at the Permanent Mission of South Africa to the United Nations).

Assistant Secretary of State for the Bureau of African Affairs “called on South Africa to remember its own history of suffering,”<sup>239</sup> and suggested that South Africa “should have been more sympathetic to the plight of the Venezuelan people under President Nicolás Maduro.”<sup>240</sup>

In 2023 we observed how South Africa has abstained on several motions that condemned Russia’s illegal invasion of Ukraine, with the then International Relations Minister stating that it would be “simplistic and infantile” to demand Russia’s withdrawal.<sup>241</sup> Indeed, while President Ramaphosa has dismissed criticism of his government’s inconsistency in its human right-based approach to foreign policy, perhaps nowhere is this inconsistency more apparent than in its application—or lack thereof<sup>242</sup>—to human rights violations in neighboring Zimbabwe.<sup>243</sup> Even though South African citizens who invested in the agricultural economy in Zimbabwe suffered economic losses when disgruntled Zimbabwean war veterans embarked on a violent campaign of invading and occupying white-owned land and farms in 2000, the South African government appeared willing to overlook those losses.<sup>244</sup> Moreover, South Africa effectively “connived in the disbandment of the Southern African Development Community Tribunal after it had ruled against Zimbabwe.”<sup>245</sup> The Tribunal ruled that the Zimbabwean government had violated the rights of those harmed to access the courts and to receive a fair hearing, and stated that the policy of the Zimbabwean government was racially discriminatory.<sup>246</sup> As of the time of this writing, there is ongoing

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239. Raynaldo, *supra* note 235.

240. *Id.*

241. Peter Fabricius, ‘Simplistic and Infantile’ to Demand Russia’s Withdrawal from Ukraine, Says Pandor After Meeting Lavrov, DAILY MAVERICK (Jan. 23, 2023), <https://www.dailymaverick.co.za/article/2023-01-23-simplistic-and-infantile-to-demand-russias-withdrawal-from-ukraine-says-pandor-after-meeting-lavrov/>.

242. Peter Fabricius, ‘The World is Topsy-Turvy’—Ramaphosa Denies SA’s Foreign Policy on Human Rights is Unbalanced, DAILY MAVERICK (Feb. 16, 2024), <https://www.dailymaverick.co.za/article/2024-02-16-the-world-is-topsey-turvy-ramaphosa-denies-sas-foreign-policy-on-human-rights-is-unbalanced/>.

243. Peter Tatchell, *Zim’s bad neighbour*, THE GUARDIAN (Apr. 15, 2008), <https://www.theguardian.com/commentisfree/2008/apr/15/zimbadneighbour>; Zimbabwe: Appeal to President Mbeki on African Day on Human and Peoples Rights, AMNESTY INT’L (Oct. 21, 2002), <https://reliefweb.int/report/zimbabwe/zimbabwe-appeal-president-mbeki-african-day-human-and-peoples-rights>.

244. Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. QUARTERLY 870, 876 (2013).

245. Terrence Corrigan, *SA’s case at the ICJ was an ideological, not moral, cause*, DAILY MAVERICK (Jan. 31, 2024), <https://www.dailymaverick.co.za/opinionista/2024-01-31-sas-case-at-the-icj-was-an-ideological-not-moral-cause/>.

246. Nathan, *supra* note 244, at 876.



suffering perpetrated against Sudanese civilians, especially women and children, in the current war in Sudan.<sup>247</sup>

South Africa is, of course, not the only democracy that violates its formal commitment to the rule of law and human rights.<sup>248</sup> The United States in particular, and the West more generally, have been criticized for their ethical lapses in foreign policy, particularly surrounding the question of refugees.<sup>249</sup> The difference for South Africa, however, is that it has institutionally and purposively committed its foreign policy to human rights.

## CONCLUSION

The South African government intended in its ICJ application to put a spotlight on the death and destruction in Gaza in the face of Israel's insistence on destroying Hamas and the unwillingness of Hamas to release the hostages taken on October 7th. And, as I argue in this article, South Africa sought a legal solution where a political one had proven elusive. The question that surfaces is whether South Africa's Application to the ICJ signals a return to its role as the "moral conscience of the world."<sup>250</sup> As some have noted:

For the South African government, the case represented a return to its identity—a decision to finally incorporate the best, most distinctive elements of South Africa's post-apartheid political culture into its approach to the rest of the world. South Africa's challenge now is to make the ideas that

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247. Jonathan Pedneault, *There are Better Ways for South Africa to Assist South Sudan than Military Cooperation*, MAIL & GUARDIAN (Feb. 5, 2018), <https://mg.co.za/article/2018-02-05-there-are-better-ways-for-sa-to-assist-south-sudan-than-military-cooperation/>. Instead of using South Africa's privileged role to urge an end to war crimes and crimes against humanity and to demand accountability, government spokespeople have been intent on normalizing the military cooperation agreement between both countries. The official line is that it is merely "a product of long existing bilateral relations between the two countries dating back to the liberation struggles and South Sudan's independence, in which South Africa played a critical role." *Id.*

248. Ramesh Thakur, *Double Standards are Normal in Foreign Policy*, THE STRATEGIST (May 3, 2022), <https://www.aspistrategist.org.au/double-standards-are-normal-in-foreign-policy/>.

249. Ted Galen Carpenter, *Too Many Foreign Policy Double Standards Hurt U.S. Credibility*, CATO INST. (Apr. 26, 2018), <https://www.cato.org/commentary/too-many-foreign-policy-double-standards-hurt-us-credibility>; *Amnesty International Report Denounces the West's 'Double Standards'*, EURONEWS (Mar. 28, 2023), <https://www.euronews.com/2023/03/28/amnesty-international-report-denounces-the-vests-double-standards>.

250. Friedman, *supra* note 35.

drove its ICJ case a general policy—one which places principle above a desire to please. This could attract initial resistance by the world's power-brokers. But in the long term, it is the policy that will win the country the most respect—and influence.<sup>251</sup>

In the last election, the African National Congress lost its majority status and was forced to form a government in coalition with smaller political parties.<sup>252</sup> It is unclear at this time whether the ANC's loss of political dominance will ensure that a national unity government will return the country to its human rights ideals, which underpin both the framework of constitutional governance and South Africa's foreign policy.<sup>253</sup>

It would be unrealistic to underappreciate the political priorities and choices that all governments have to confront when conducting foreign policy.<sup>254</sup> These are considerations that the South African government will have to make as well. But in choosing to take the global center stage in the complaint against Israel, South Africa has paved the way to show moral leadership in other contexts. These urgently include the crisis in Afghanistan,<sup>255</sup> Sudan,<sup>256</sup> Ukraine,<sup>257</sup> and elsewhere.<sup>258</sup>

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251. *Id.*

252. John Eligon & Lynsey Chutel, *Ramaphosa Gets Second Term in South Africa, but Coalition Is Fragile*, N.Y. TIMES (June 14, 2024), <https://www.nytimes.com/2024/06/14/world/africa/south-africa-anc-coalition-ramaphosa.html>.

253. *See infra* Part II.

254. Sukhwant S Bindra, *Analysing Foreign Policy*, 23 WORLD AFFS.: THE J. OF INT'L ISSUES 26 (2019).

255. Karima Bennoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUMBIA HUM. RTS. L. REV. 1 (2022).

256. Press Release, Office of the High Commissioner for Human Rights, Sudan: Horrific Violations and Abuses as Fighting Spreads, U.N. Press Release (Feb. 23, 2024).

257. *The State of the World's Human Rights: April 2024*, AMNESTY INT'L (Apr. 23, 2024), <https://www.amnesty.org/en/documents/pol10/7200/2024/en/>.

258. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2024 (2024).