LITIGATING THE GAZA CRISIS: LEGAL AND POLITICAL STRATEGIES IN *SOUTH AFRICA V. ISRAEL*

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ABSTRACT

South Africa v. Israel represents the most prominent example to date of strategic litigation before the International Court of Justice (ICJ), a litigation model that seeks to use the Court to achieve the wider structural objective of altering the prevailing balances of power in a situation. Contrary to the classical approach of evaluating litigation impact— that is, focusing on whether the responsible state has complied with a ruling—strategic litigation warrants consideration of a wider set of factors. This includes the litigants' goals (both the applicant's and respondent's), the Court's strategic choices, and the impact of the litigation, both intended and unintended. The key point of evaluation here is how the linkage of a dispute to international law—and the solemnity of judicial proceedings before the "World Court"—can serve to mobilize the international community against a targeted state and its partner states, not only on the specific legal issues arising in the case but on the wider legitimacy of state conduct in such situation. In this regard, the Court's provisional measures jurisdiction, which was invoked in South Africa v. Israel, provides applicant states with a tool to promote a cause given the lower threshold needed to justify a judicial remedy and the relative speed in obtaining one. The purpose of this Article is to evaluate the efficacy of the Court's provisional measures order in South Africa v. Israel through an examination of the participants' goals, the Court's strategic choices, and the discernible impact of the decision in its immediate aftermath. More generally, this Article contributes to the scholarly literature on strategic litigation impact and the role of the ICJ in ongoing armed conflicts and humanitarian crises. It also provides a basic structure for future researchers to consider the longer-term impact of this case (as well as other strategic litigations) in the resolution of the Gaza conflict specifically and the Palestinian question more generally.

I. INTRODUCTION

The armed conflict between Israel and Hamas-led militant groups that commenced on October 7, 2023, has sparked a great deal of scrutiny over the legality of the military operations in the Gaza Strip.[1]

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It evoked a range of international responses from a broad spectrum of actors, with Israel being criticized in particular for using disproportionate force harmful to civilians.[2] As the humanitarian crisis intensified, however, it was the instituting of proceedings by South Africa against Israel at the International Court of Justice (ICJ) for alleged violations of the Genocide Convention that evoked the largest international response.[3] Invoking the Court's jurisdiction under the Genocide Convention, South Africa argued that Israel had, after commencing its military operations, perpetrated a genocide against the Palestinians in Gaza.[4] South Africa is not a party to the conflict, but it is, along with Israel, a party to the Genocide Convention, which entails obligations *erga omnes* and thus gives South Africa legal grounds to challenge Israel's actions in a territory far removed from its own.[5] While it will be many years until there is a decision on the merits, South Africa also sought provisional measures that, if successful, would produce various immediate legal implications for Israel and duties upon it to comply with the Court's interim orders.[6]

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1 For discussion on the events, see Dan Williams, *How the Hamas Attack on Israel Unfolded*, REUTERS (Oct. 7, 2023), https://www.reuters.com/world/middle-east/how-hamas-attack-israel-unfolded-2023-10-07/ [https://perma.cc/8KFS-VC9U].

2 *See, e.g.*, Press Release, United Nations Off. of the High Comm'n on Hum. Rts., Gaza Strip: States Are Obliged to Prevent Crimes Against Humanity and Genocide,UN Committee Stresses (Dec. 21, 2023), https://www.ohchr.org/en/press-releases/2023/12/gaza-strip-states-are-obliged-prevent-crimes-against-humanity-and-genocide [https://perma.cc/WH4S-29QH].

3 *See, e.g.*, *Genocide Case against Israel: Where Does the Rest of the World Stand on Allegations?*, EURONEWS (Jan. 14, 2024, 12:13 PM), https://www.euronews.com/2024/01/14/genocide-case-against-israel-where-does-the-rest-of-the-world-stand-on-allegations [https://perma.cc/GE32-PE6J]; *Charging Israel with Genocide Makes a Mockery of the ICJ*, THE ECONOMIST (Jan. 18, 2024), https://www.economist.com/leaders/2024/01/18/charging-israel-with-genocide-makes-a-mockery-of-the-icj [https://perma.cc/2YQH-CRGY].

4 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), 2023 I.C.J. 6, ¶ 1 (Dec. 29) [hereinafter South Africa's Application].

5 See Michael Ramsden, *Accountability for Crimes Against the Rohingya: Strategic Litigation in the International Court of Justice*, 26 HARV. NEGOT. L. REV. 153, 161-63 (2021) [hereinafter Ramsden, *Accountability for Crimes Against the Rohingya*] and the citations contained therein.

6 As to the obligations to prevent and punish genocide, see Orna Ben-Naftali, *The Obligation to Prevent and Punish Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 27, 35 (Paola Gaeta ed., 2009).

This case—*South Africa v. Israel*—represents the latest episode of states strategically using the ICJ to advance objectives that exceed the legal issues and requests before the Court.[7] In the past decade alone, the Genocide Convention, Convention on the Elimination of Racial Discrimination and the Torture Convention (three treaties over which the Court's jurisdiction is accepted by a large number of states) have been invoked in the context of conflicts involving Myanmar, Qatar, Russia and Syria.[8] "Strategic litigation," in this regard, is a common technique for lawyering for change in domestic legal systems, being a form of litigation brought with the goal of stimulating structural change beyond the courtroom on a complex societal issue.[9] There is also a growing recognition that a strategic approach in international courts, including the ICJ, can play a wider role in influencing the prevailing balances of power on a geopolitical situation.[10] In this way, litigation is intended to provide the foundation and portal through which more calculated political and economic machinations can be deployed for an outcome that may or may not be directly related to the relief or measures that are sought before the Court.[11] Strategic litigation before the ICJ in the context of inter-state conflicts is neatly encapsulated in Judge Bruno Simma's description of such practice as "juridical *Nebenkriegsschauplatz*," denoting collateral action within a wider conflict with the purpose of impacting the political direction of that dispute.[12] In this situation, the applicant state will seek to bundle aspects of a wider dispute into a legal regime

7 For analysis on other recent cases, see Michael Ramsden, *Strategic Litigation Before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights*, 33 EUR. J. INT'L L. 441 (2022) [hereinafter Ramsden, *Strategic Litigation Before the International Court of Justice*]; Michael Ramsden, *Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention*, 56 VAND. L. REV. 181 (2023) [hereinafter Ramsden, *Strategic Litigation in Wartime*].

8 *See supra* note 7 and accompanying text.

9 Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, 4 CIV. JUST. Q. 407, 411-12 (2019).

10 Ramsden, *Strategic Litigation Before the International Court of Justice*, *supra* note 7, at 442-43; HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION 3 (2018).

11 Iryna Marchuk, *From Warfare to "Lawfare": Increased Litigation and Rise of Parallel Proceedings in International Courts*, *in* THE FUTURE OF INTERNATIONAL COURTS: REGIONAL, INSTITUTIONAL AND PROCEDURAL CHALLENGES 217, 228–29 (Avidan Kent, Nikos Skoutaris & Jamie Trinidad eds., 2023).

12 Bruno Simma, *Human Rights before the International Court of Justice: Community Interest Coming to Life?*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 300, 310 (Christian J. Tams & James Sloan eds., 2013).

over which the Court has jurisdiction, with the aim of challenging the structural practice at issue.[13] The purpose in bringing such cases is not necessarily to obtain a favourable judicial remedy—although that might be an important component—but to exert pressure on a state (or group of states) to alter its behaviour in relation to a wider conflict.[14]

As will be shown in the context of *South Africa v. Israel*, the Genocide Convention provides ample latitude for South Africa to advance wider objectives beyond the treaty before the ICJ. This is so for procedural and substantive reasons. Procedurally, given that the Genocide Convention engenders obligations *erga omnes partes*, it enables a wider set of state actors to take calculated actions within a particular political and economic context, beyond those who are "direct" victims of international legal violations.[15] Substantively, too, given that genocide is typically linked to historical inequities and chasms within and among peoples and typically take place within a spectrum of human rights violations, there are considerable factors, narratives, and interests that can be manipulated and deployed to advance extralegal outcomes through legal means.[16] In all of these ways, as this Article will show, South Africa's application for provisional measures against Israel under the auspices of the Genocide Convention is emblematic of a strategic approach to litigation that seeks to use the ICJ and the Convention to influence the course of the Gaza conflict.

What precisely constitutes the "strategic" in strategic litigation and who might be said to be included as its participants? At a general level, a strategy refers to a plan that is formulated consciously with the aim to achieve a particular outcome.[17] Any such study into strategy formulation must identify the goals of strategists.[18] It is thus material, in the context of ICJ litigation, to consider the espoused goals of the applicant state in bringing the case. The applicant's goals, in this respect, might develop as they relate to different phases of the

13 *Id.*

14 Ramsden, *Strategic Litigation Before the International Court of Justice*, *supra* note 7, at 444-45.

15 Ramsden, *Accountability for Crimes Against the Rohingya*, *supra* note 5.

16 Ramsden, *Strategic Litigation Before the International Court of Justice*, *supra* note 7, at 461.

17 Henry Mintzberg, *The Strategy Concept I: Five Ps for Strategy*, CAL. MGMT. REV., Oct. 1987, at 11, 11-12.

18 Anthony D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 L. TRANSITION Q. 8, 17 (1967).

proceedings, from the case initiation to its conclusion. However, any study into strategic litigation would be impoverished if viewed only from the perspective of the applicant state's goals. Both the respondent and judges will also have their own strategic perspectives when engaging with the case, possibly with a view to influencing perceptions or outcomes in the wider dispute. The respondent state might see value in the Court proceedings in this way, and the ICJ itself—conscious of its place as the principal UN judicial organ—might perceive of its role in advancing the wider cause of peace beyond the narrower legal issues presented.[19] It follows that a more nuanced and fuller understanding as to the purpose and impact of strategic litigation must consider goals from the perspectives of all the participants in the case.[20]

At the same time, it is also necessary to differentiate the preconceived goals of the litigation participants from the actual impact that such a case produces.[21] This is so for two reasons. First, the ascertainable impact might very well not align with the goals of such participants: the case might produce unintended effects, good or bad depending on the perspective.[22] Therefore, while the goals of the litigant participants can be used as a baseline in which to evaluate the impact of a case, a more nuanced and holistic enquiry requires the net to be cast wider with all manner of identifiable impacts being included as part of the study.[23] Second, it must also be acknowledged that there are inherent limitations in being able to definitively attribute wider developments in a conflict to a court case, especially given the complexity in which such litigation is situated.[24] Nonetheless, such methodological limitations should not preclude an attempt to evaluate

19 This strategic dimension is present in other supranational courts. *See* James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770 (2008).

20 *See* D'Amato, *supra* note 18, at 11.

21 DUFFY, *supra* note 10, at 47.

22 *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969-71 (2011).

23 DUFFY, *supra* note 10, at 47.

24 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 7 (2d ed. 2008); Andreas Fischer-Lescano, *From Strategic Litigation to Juridical Action*, *in* TRANSNATIONAL LEGAL ACTIVISM IN GLOBAL VALUE CHAINS 299 (Miriam Saage-Maaß, Peer Zumbansen, Michael Bader & Palshava Shahab eds., 2021).

case impact, with the caveat that such impact also be appreciated in light of other causal factors.[25]

Set within this context, the following Article evaluates the impact of *South Africa v. Israel* on the Gaza crisis, from the initiation of proceedings to the Court's handing down of provisional measures. In turn, this Article focuses on the immediate responses to the litigation until the end of 2024. It might be said that longer-term studies into this litigation, and indeed other cases of this nature, are also needed, given the complexity of the wider geopolitical dispute in which *South Africa v. Israel* is situated. On this basis, litigation impact can only be truly appreciated as it relates to longer-term processes of change, especially given that it typically takes over a decade for a case to be decided on its merits. Be that as it may, there remains a distinct value in assessing impact over a shorter duration. First, the ICJ's ordering of provisional measures provide a focal point around which the case's immediate impact can be evaluated, given that the Court often acts quickly to make such interim orders during the early phase of a conflict. Second, studies into the immediate impacts of strategic litigation are valuable not only in and of themselves but also as part of a continuum of studies into the impact of such case over time.[26] Accordingly, this study, focused on the impact of the initiation of proceedings and issuance of provisional measures in *South Africa v. Israel*, is intended to be of assistance to future studies that seek to appreciate the longer-term impact of this case and the wider historical context of the Gaza crisis and contribute to the ongoing conversation on the strategic utility of requesting provisional measures from the ICJ in response to ongoing conflicts.

The following Article evaluates the impact of *South Africa v. Israel* in five parts, including this Introduction. Part II focuses on the goals of South Africa in the *South Africa v. Israel* litigation as identifiable from the declaratory remedies that South Africa sought from the ICJ and its extra-legal goals in seeking to influence the wider situation beyond the courtroom. Part III then shifts attention to Israel's goals, both in the content of its legal defense and its wider motives and preferences in engaging in the litigation. As will be shown, both litigating parties' goals will in turn form part of the relevant context in assessing the response of the ICJ and the extent to which these goals were met or are capable of being met in the future. In this respect, Part

25 ROSENBERG, *supra* note 24, at 108.

26 DUFFY, *supra* note 10, at 38.

IV then delves into the ICJ's response to the litigation insofar as can be ascertained from its strategic choices made in its provisional measures order. Part V seeks to evaluate the wider impact that the case had during 2024, from the initiation of proceedings to the ordering of provisional measures on January 26, 2024. Part VI concludes.

II. GOALS OF SOUTH AFRICA IN *SOUTH AFRICA V. ISRAEL*

A. Applicant's Goals in Strategic Litigations

Before delving into the goals pursued by South Africa in its case against Israel, it is instructive to note in general terms the various purposes informing a strategic litigation brought by an applicant to the ICJ. In this respect, a more specific and holistic insight can be gained by examining not only the applicant's legal requests in the case (be that in the form of legal arguments, declarations, and remedies sought) but also on how the litigation is used to advance the applicant's goals beyond the case.[27]

In relation to the goals deduced from the legal remedies sought, the most requested remedy in strategic litigation cases is provisional measures, which the Court has the power to order on an interim basis pending the conclusion of the dispute.[28] The reasons behind the popularity of provisional measures are obvious. In contrast to the extreme lengths of time for a case before the ICJ to conclude on its merits (a decade or more, typically), this interim order can be quickly obtained on the basis that urgent protection from the Court is required.[29] Furthermore, unlike the stricter evidentiary standard applied at the merits phase, the provisional measures' "plausibility" standard is more relaxed as the Court is prioritising the preservation of existing rights over the definitive adjudication of the case.[30] In this regard, it is also important to consider how the applicant's goals change over time: the mere initiation of proceedings and request for urgent injunctive relief does not mean that the applicant intends to litigate the case to the end of the merits phase. In turn, there have been

27 Ramsden, *Strategic Litigation in Wartime*, *supra* note 7, at 185.

28 *See, e.g.*, Michael Ramsden & Jiang Zixin, *The Dialogic Function of I.C.J. Provisional Measures Decisions in the U.N. Political Organs: Assessing the Evidence*, 37 AM. UNIV. INT'L L. REV. 901 (2023).

29 CAMERON MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 445-49 (2017).

30 *Id.*

instances where applicants have initiated proceedings, obtained provisional measures, and then discontinued proceedings thereafter.[31]

That applicants have terminated proceedings after obtaining provisional measures speaks to the varied, wider goals in using the ICJ beyond merely obtaining judicial remedies. It suffices to succinctly (albeit, non-exhaustively) list these goals here, including: (1) to advance the applicant's narrative on a situation in order to inform and shape international public opinion; (2) to assuage the demands of domestic constituencies; (3) to reframe a political controversy using the vocabulary of international law; (4) to acquire a favorable interpretation of international law that can be used to push for change in the political arena; (5) to inflict reputational damage and raise the stakes for recalcitrant states for their noncompliance with international law; (6) to obtain a judgment that can be used to support ongoing parallel cases in domestic or international courts; (7) to pressure disinterested or resistant third party states to support the litigated cause; and (8) to support or pressure international institutions, including the United Nations, into taking action.[32]

This final goal is particularly relevant in relation to a case brought before the ICJ, given that it serves as the principal judicial organ of the United Nations.[33] States will particularly hope that the case will add profile to the issue so as to secure the involvement of the Security

31 *See, e.g.*, Vienna Convention on Consular Relations (Para. v. U.S.), Order, 1998 I.C.J. 426 (Nov. 10) (Paraguay applying for discontinuance, with the United States concurring); *see also* Rebecca Elizabeth Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 105 (2005) (describing how Tuvalu threatened to commence proceedings against the United States for its failure to ratify the Kyoto Protocol, which generated substantial publicity).

32 Ramsden, *Strategic Litigation in Wartime*, *supra* note 7, at 186; Dana D. Fischer, *Decisions to Use the International Court of Justice: Four Recent Cases*, 26 INT'L STUD. Q. 251, 258 (1982); Marie Lemey, *Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process*", 20 L. & PRAC. INT'L CTS. & TRIBUNALS 5, 20 (2021); Teresa Barnes, *'The Best Defense is to Attack': African Agency in the South West Africa Case at the International Court of Justice, 1960-66*, 69 S. AFR. HIST. J. 162, 168-69 (2016); Timothy Meyer, *How Compliance Understates Effectiveness*, 108 AJIL UNBOUND 93, 95 (2014); Markus W. Gehring, *Litigating the Way out of Deadlock: the WTO, the EU and the UN*, *in* DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS 96, 101-02 (Amrita Narlikar ed., 2010); Cindy Wittke, *The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia 'Speak' International Law in International Politics Differently?*, 72 EUR.-ASIA STUD. 180, 196 (2020).

33 U.N. Charter art. 7, ¶ 1.

Council, particularly where the human rights abuses in a situation also pose a threat to international peace and security. This is especially so given the significant powers that the Security Council has to authorize coercive measures under Chapter VII of the UN Charter, including economic sanctions and the use of force.[34] Additionally or alternatively, the strategic litigation will be used by its supporters to press for the UN General Assembly or Human Rights Council (where there is a human rights element to the dispute) to adopt resolutions calling for action in the situation (be that from the Security Council or other states), including a strengthening of language in existing resolutions.[35]

B. South Africa's Goals

In a similar manner, South Africa's case against Israel can be understood both in terms of a wider set of extra-legal goals and the goals sought from the ICJ in its legal requests.

1. Broader Extra-Legal Motives

Gaining an appreciation as to why South Africa brought the case may be informed, at least in part, by its history. Independent South Africa was born in 1994 following the collapse of apartheid. Apartheid was widely abhorred because of its system of legally formalized racial segregation and its ensuant manifestations of violence, subordination, and dehumanization. The struggle to achieve its dismantlement in 1994 was the culmination of political movements and coalitions striving for postcolonial freedom, emancipation of the subaltern, and "Third World" or "Global South" solidarity.[36] This is the context and prism through which South Africa's case at the ICJ can be viewed, as the liberation struggles of the two nations, South Africa and Palestine, historically ran in parallel. As South African author Na'eem Jeenah notes: "The Palestinian struggle—particularly its armed struggle—had, since the 1970s, captured the imagination of South Africans."[37] In fact, Nelson Mandela considered the plight of the two peoples to be

34 *Id.* art. 41.

35 Ramsden, *Strategic Litigation Before the International Court of Justice*, *supra* note 7, at 458-59.

36 John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 EUR. J. INT'L. L. 867, 884 (2013).

37 Na'eem Jeenah, *Palestinian Solidarity in South Africa*, 4 ANN. REV. ISLAM S. AFR. (2001).

inseparable: "[W]e know too well that our freedom is incomplete without the freedom of the Palestinians."[38] The fraternity between the two nations has continued through to today, reinforced by the fact of Mandela's political party, the African National Congress (ANC), remaining in power since South Africa's independence. This relationship has extended to Hamas, with Hamas officials being hosted by ANC officials in South Africa while commemorating the tenth anniversary of Nelson Mandela's death.[39] It is thus apparent, as an important motivator, that South Africa brought the case against Israel to support the interests of its long-term ally.

However, state actions are rarely about advancing an international common good. States, comprising of a series of political individuals and groups, all have self-interests connected to the security of their own power and control. To that extent, the ANC had been navigating several domestic political challenges at the time when it initiated proceedings against Israel.[40] Faced with stubbornly high crime rates, perpetual load shedding, and allegations of inordinate levels of graft (all just before a pivotal national election), litigating injustice abroad was considered a shrewd way to divert attention from challenges at home and unify the nation around a shared campaign for justice.[41] Moreover, some commentators have noted how South African diplomats were seeking to restore the nation's image among the Global South following their initial muddled response to Russia's invasion of Ukraine.[42] It would do this by using the case to highlight a common criticism levied by the Global South against Western states: the selective use of international law to serve their interests. As the South African delegate in the Security Council noted, "the international community cannot proclaim the importance of

38 Gerald Imray, *Nelson Mandela's Support for Palestinians Endures with South Africa's Genocide Case Against Israel*, ASSOC. PRESS, https://apnews.com/article/south-africa-palestine-israel-genocide-mandela-arafat-39d222b9dd65994c4c13730efabe8815 [https://perma.cc/9BHE-M4MD] (Jan. 11, 2024, 2:28 PM).

39 *Id.*

40 *See, e.g.*, James A. Goldston, *Strategic Litigation Takes the International Stage: South Africa v Israel in its Broader Context*, JUST SEC. (Jan. 31, 2024), https://www.justsecurity.org/91688/strategic-litigation-takes-the-international-stage-south-africa-v-israel-in-its-broader-context [https://perma.cc/6F2N-95C4].

41 *South Africa's Support for the Palestinian Cause Has Deep Roots*, THE ECONOMIST (Jan. 11, 2024), https://www.economist.com/middle-east-and-africa/2024/01/11/south-africas-support-for-the-palestinian-cause-has-deep-roots [https://perma.cc/54ZS-N8T8].

42 *Id.*

international law and the importance of the United Nations Charter in some situations and not in others, as if the rule of law applied only to a select few."[43]

The nature of South Africa's legal requests to the Court also demonstrate other goals in bringing the case pretextually through the Genocide Convention and shaping international public opinion against Israel in relation to its general conduct in the Palestinian territories, including to hasten the process towards the withdrawal of Israel from Gaza.[44] This is not to say that South Africa did not make the case as to why Israel committed genocide, with an extensive analysis into evidence that allegedly establishes a pattern of conduct and specific intent.[45] But South Africa also addressed at length "the acts of genocide in the *broader context* of Israel's conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza . . . ."[46] Adopting this broader context provided South Africa with an opportunity to use the legal proceedings to present a wide range of human rights abuses to the international public under the auspices that they provide part of the context for violations of the Genocide Convention.[47] South Africa thus asserted the occurrence of genocide "against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and the ongoing denial of the right of the Palestinian people to self-determination . . . ."[48] It drew upon the commission of inquiry reports and observations from the Prosecutor of the International Criminal Court that Israeli Defense Forces had previously committed war crimes.[49] It is thus apparent that South Africa's aim was not only to press the claim that Israel had committed genocide. Instead, the

43 U.N. SCOR, 79th Sess., 9540th mtg. at 2-3, U.N. Doc. S/PV.9540 (Jan. 31, 2024) [hereinafter 9540th Security Council Meeting].

44 *See, e.g.*, Ellen Ioanes & Nicole Narea, *South Africa's Genocide Case Against Israel, Explained*, VOX (Jan. 12, 2024), https://www.vox.com/world-politics/24019720/south-africa-israel-genocide-case-gaza-hamas-palestinians [https://perma.cc/265H-GJ9D].

45 South Africa's Application, *supra* note 4, ¶ 117; *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, at 30 (Jan. 11, 2024, 10:00 a.m.) [hereinafter Jan. 11 Verbatim Record], https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/NSX3-N7YF].

46 South Africa's Application, *supra* note 4, ¶ 2 (emphasis added).

47 *Id.*

48 *Id.* ¶ 4; Jan. 11 Verbatim Record, *supra* note 45, at 17.

49 South Africa's Application, *supra* note 4, ¶¶ 31, 33.

Genocide Convention was a convenient device to publicly and generally condemn Israel's human rights record in Gaza, both past and present.

Similarly, as noted above, a litigant's goal might include reframing the narrative about a situation through the vocabulary of international law. In this regard, it can certainly be reasonably inferred that South Africa's purpose behind bringing the case was to shift the public narrative away from the focus on Israel's right to self-defense and towards the consequences of its military operations in Gaza. At the time of the October 7 Hamas attacks on Israel, there was considerable international sympathy towards Israel, with the imperative of self-defense frequently on the lips of world leaders, particularly those of Western states.[50] Conversely, while some of the excesses of Israel's military operation were raised publicly by states, self-defense remained a dominant narrative for the weeks immediately following October 7.[51] However, by pressing a claim under the Genocide Convention, South Africa sought to reframe the terms of international discourse away from Israel's rights to its responsibility under international law, arguing that "[t]he Palestinians have experienced systematic oppression and violence for the last 76 years, on 6 October 2023 and every day since 7 October 2023."[52]

2. Legal Requests

South Africa made a variety of requests that reinforce its desire to hold Israel to account for unlawful acts in Gaza, as well as to speak to the wider theatre in which this litigation was being pursued. Its request for a ceasefire thus reflected the failings of the UN principal political organs to appropriately uphold international peace and security. It was particularly apparent that South Africa desired for there to be an immediate ceasefire in Gaza. While the General Assembly demanded the cessation of hostilities, the Security Council was prevented by the United States from adopting a Chapter VII

50 *See, e.g.*, Cleary Waldo, Gabriel Epstein, Sydney Hilbush & Aaron Y. Zelin, *International Reactions to the Hamas Attack on Israel*, THE WASH. INST. FOR NEAR E. POL'Y (Oct. 11, 2023), https://www.washingtoninstitute.org/policy-analysis/international-reactions-hamas-attack-israel [https://perma.cc/R6N3-GWFU].

51 *Id.*

52 Jan. 11 Verbatim Record, *supra* note 45, at 19, ¶ 3; *see also* South Africa's Application, *supra* note 4, ¶¶ 18, 23-39 (noting historical violations).

resolution to compel a ceasefire.[53] The need for a ceasefire was an important context for South Africa's litigation and, as will be shown further in this Part, formed part of its legal requests. In this context, as the following analysis shows, South Africa sought numerous orders from the ICJ in relation to its dispute with Israel, both in the form of provisional measures and relief in the event that they succeeded on the merits.

In relation to its substantive requests for the merits phase, South Africa sought a declaration from the Court that Israel violated its obligations under the Genocide Convention to both prevent and abstain from the commission of genocide.[54] South Africa argued that acts of genocide proscribed under the Genocide Convention had taken place against the Palestinians in Gaza since October 7, 2023: namely, killings (with some 23,210 verified dead at the point of the hearing); the infliction of serious mental and bodily harm; the subjugation to conditions of life calculated to bring about the Palestinians' physical destruction in whole or in part; and reproductive violence.[55] It argued that the pattern of this conduct evinced specific genocidal intent, as too did various statements by Israeli officials (including senior figures in government and soldiers) that, they alleged, could be inferred as calling for the destruction of Palestinians.[56] The allegation made by South Africa was thus that Israel not only failed in its duty to prevent aberrant officials from carrying out genocide but also was directly responsible for the act.[57] Connected to this, South Africa also sought an order that Israel "collect and conserve evidence of genocide" and offer an assurance of non-repetition.[58]

However, of more significance from the perspective of strategic litigation to influence legal proceedings beyond this dispute was the generality of South Africa's request in relation to reparations for the Palestinian people. South Africa requested that Israel provide reparations to Palestinians, including allowing for the "safe and

53 *See* G.A. Res. 10/22 (Dec. 21, 2023); G.A. Res. 10/L.27 (Dec. 10, 2023); *US Vetoes Resolution on Gaza Which Called for "Immediate Humanitarian Ceasefire*," UNITED NATIONS (Dec. 8, 2023), https://www.un.org/unispal/document/us-vetoes-resolution-on-gaza-which-called-for-immediate-humanitarian-ceasefire-dec8-2023/ [https://perma.cc/Q25K-MLCR]; *see also* S.C. Res. 2728 (Mar. 25, 2024).

54 South Africa's Application, *supra* note 4, ¶ 111.

55 *Id.* ¶ 100.

56 *Id.* ¶¶ 101-02.

57 *Id.* ¶ 4.

58 *Id.* ¶ 111.

dignified return of forcibly displaced and/or abducted Palestinians to their homes, respect for their full human rights and protection against further discrimination, persecution, and provid[ing] for the reconstruction of what it has destroyed in Gaza . . . ."[59] Thus, bundled within South Africa's reparations request are numerous claims that might have only a loose connection to the Genocide Convention, particularly in imposing an obligation on Israel to respect the "full" human rights of Palestinians generally (without any apparent nexus to a genocidal policy) and fund the reconstruction of Gaza. The reference to "full" human rights here is evidently broader than the scope of the Genocide Convention, which is limited to the protection of protected groups from destruction rather than other human rights violations falling short of that, such as the destruction of homes or "democide."[60] Nonetheless, in pressing this claim, South Africa will be able to present at the merits phase why these reparations are connected to the Genocide Convention with the possibility—depending upon the strategic calibration of the Court —of some aspects being adjudged to be within the purview of the Convention.

A similar bundling strategy can be seen in relation to South Africa's request for provisional measures. In addition to seeking an interim order that required Israel to take "all reasonable measures" to prevent genocide and desist from carrying out acts within the scope of the Genocide Convention (including incitement), South Africa also sought provisional measures that went beyond the Convention to challenge the continuing lawfulness of Israel's use of force. Most significantly, South Africa sought for the Court to order Israel to "immediately suspend its military operations in and against Gaza" and ensure that any military units under its control take "no steps in furtherance" of any military operations.[61] South Africa also sought provisional measures that Israel take measures to prevent the expulsion and forced displacement of Palestinians from their homes and the deprivation of humanitarian assistance and medical supplies in Gaza.[62] It justified the inclusion of these requests as being "directly linked to the rights which form the subject matter of the dispute": to

59 *Id.*

60 *See* Patrick Wintour, *Widespread Destruction in Gaza Puts Concept of 'Domicide' in Focus*,THE GUARDIAN (Dec. 7, 2023), https://www.theguardian.com/world/2023/dec/07/widespread-destruction-in-gaza-puts-concept-of-domicide-in-focus [https://perma.cc/6TYH-F8GE].

61 South Africa's Application, *supra* note 4, ¶ 144.

62 *Id.*

ensure Israel's compliance with its obligations under the Genocide Convention.[63] However, some of these aspects likely fall outside the legal definition of genocide: the ICJ has previously confirmed that the prohibition on expulsion and forced displacement, to the extent that this amounts to ethnic cleansing, does not constitute genocide.[64] Whether a military operation evinces specific genocidal intent is a matter of evidence; at the same time, it is also seems to be the case that the military operation was initiated by Israel based upon its inherent right of self-defense following the October 7 Hamas attacks.[65] On this basis, some of South Africa's requests for provisional measures could be construed as seeking to advance wider objectives beyond the parameters of the Genocide Convention.

III. GOALS OF ISRAEL IN SOUTH AFRICA V. ISRAEL

A. Respondent's Goals in Strategic Litigations

It is also instructive to consider the objectives of respondent states in proceedings initiated against them at the ICJ and how these objectives might evolve.[66]

Generally, a respondent will seek to successfully overcome the applicant's challenge; however, the degree to which the respondent is prepared to engage with the case will depend upon the extent to which they regard it as being within their interests to do so. The nature of inter-state strategic litigations before the ICJ is that they will implicate an important sovereign interest of the respondent state, such as their right to engage in a military operation.[67] In turn, the respondent state is likely to perceive strategic litigation before the ICJ as a threat to such interests, thereby informing an avoidant approach where the respondent seeks to prevent the case from being examined substantively by the Court.[68] Respondents have thus previously

63 *Id.* ¶ 145.

64 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. v. Serb.), Judgment, 2007 I.C.J. 43, ¶ 190 (Feb. 26).

65 *See* Waldo et al., *supra* note 50.

66 *See generally* Tom Ginsburg, *The Institutional Context of the International Court of Justice*, *in* CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 86 (Carlos Esposito & Kate Parlett eds., 2022).

67 Andrew Coleman, *The ICJ and Highly Political Matters*, 4 MELB. J. INT'L L. 14, 18 (2003).

68 Ramsden, *Strategic Litigation before the International Court of Justice*, *supra* note 7, at 452.

objected to the Court's jurisdiction or put forth procedural challenges, such as to the non-existence of a dispute or to the applicant's standing, to avoid the case proceeding.[69] In an effort to portray the proceedings as illegitimate, respondent states have occasionally gone further, refusing to appear or engaging only partially in the proceedings.[70] Another permutation of the avoidant approach is to make tactical concessions, including in the form of unilateral declarations, in an effort to render the proceedings moot and minimize the reputational harm that would arise from the case continuing to public hearings and judicial determination. [71]

On the other hand, a respondent might choose to engage fully with the case. They may anticipate or hope that the Court will find in their favour (at the least, on issues of importance to the respondent state), thereby scoring a public relations victory and imparting a rule of law imprimatur onto its allegedly unlawful conduct.[72] Similarly, Court proceedings also provide the respondent with the opportunity to convey its narrative to an international and domestic audience on the litigated situation, especially when the state feels aggrieved over ways in which the situation has been portrayed in the media and international institutions.[73] The ICJ's composition and features help to facilitate the promulgation of the respondent's narrative in two ways. First, the respondent has the right to select an *ad hoc* judge, and the permanent judges themselves often disagree in particularly sensitive

69 *See, e.g.*, Henry Burmester, *Australia's Experience in International Litigation*, *in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 305, 326 (Natalie Klein ed., 2014).

70 *See* Stanimir A. Alexandrov, *Non-Appearance before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41, 54 (1995).

71 For the unilateral declaration usage, see Nuclear Tests (Austl. v. France), Judgment, 1974 I.C.J 253, ¶¶ 59-62 (Dec. 20). *See generally* Leslie Johns, *Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication*, 56 J. CONFLICT RES. 257, 273 (2012). *See also* Songying Fang, *The Strategic Use of International Institutions in Dispute Settlement*, 5 Q. J. POL. SCI. 108, 109 (2010).

72 Keith Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'L L. 992, 998 (1985); Marchuk, *supra* note 11, at 218; Ryan Irwin, *Apartheid on Trial: South West Africa and the International Court of Justice, 1960-66*, 32 INT'L HIST. REV. 619, 621 (2010); Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other Binding Delegation*, L. & CONTEMP. PROBS., Winter 2008, at 37, 40.

73 Fang, *supra* note 71; D'Amato, *supra* note 18, at 22.

cases.[74] The respondent will therefore likely be able to draw from an ICJ decision some aspects in their favour. A case in point is *Georgia v. Russia*, where the dissent by seven justices to a provisional measures decision was used by Russia to establish the legitimacy of its position.[75] Second, the Court (as Part IV will cover) is itself a strategic actor, balancing its ostensibly bilateral dispute-resolution function alongside UN institutional objectives of maintaining international peace and security. This can mean that the Court might choose (even if not publicly acknowledging this) to avoid controversial elements likely to provoke backlash, so as to promote the acceptability of its decisions; conversely, it may seek to use its judicial authority to exert some wider influence on a situation.[76] Within this environment, a respondent will use the ICJ proceedings to advance its narrative within the international arena.

B. Israel's Goals

The first point to note was that Israel sought to avoid the Court entering a decision on the matter. It did this by seeking to assuage the Court via a unilateral declaration, during the provisional measures hearing, that it would observe its obligations under the Genocide Convention.[77] The purpose of making this unilateral declaration was obvious: to avoid the adverse international publicity that would be associated with having a provisional measures order made against them. These avoidance tactics were combined with a robust defense of South Africa's allegations and the presentation of a broad approach to the dispute to include considerations of self-defense, the consequences of armed conflict, and the actions of Hamas. In this regard, a major aspect of Israel's presentation was to portray Hamas as the real perpetrators, both in initiating the conflict and pursuing a

74 U.N. Charter art. 31, ¶ 2; Hemi Mistry, *"The Different Sets of Ideas at the Back of Our Heads": Dissent and Authority at the International Court of Justice*, 32 LEIDEN J. INT'L L. 293 (2019).

75 U.N. GAOR, 64th Sess., 32nd plen. mtg. at 7, U.N. Doc. A/64/PV.32 (Oct. 30, 2009).

76 Ramsden, *Strategic Litigation before the International Court of Justice*, *supra* note 7, at 445-46.

77 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, at 54 (Jan. 12, 2024, 10:00 a.m.) [hereinafter Jan. 12 Verbatim Record], https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/SE4V-NW7R].

genocidal policy against Israelis.[78] This appeared to serve two purposes: one political, the other legal.

Israel's apparent political dimension was to challenge the narratives over the degree of its responsibility for the humanitarian crisis in Gaza.[79] Israel thus took the opportunity in the provisional measures hearings to present its account to the international public on the true cause of the events and consequences of the armed conflict in Gaza, out of an apparent concern over the misreporting of certain events in the international media.[80] Israel cast the net widely, drawing upon the history of Hamas's human rights abuses against its own population in Gaza and Hamas's turning "massive swathes of the civilian infrastructure into perhaps the most sophisticated terrorist stronghold in the history of urban warfare."[81] Israel thus sought to correct false media reporting that it had attacked hospitals and instead attributed this to the result of a failed rocket launch by Hamas in Gaza.[82] Furthermore, Israel argued that it was Hamas, and not itself, that was responsible for genocidal activity.[83] To this point, Israel shared some fraction of its horror into "the largest calculated mass murder of Jews in a single day since the Holocaust."[84] The second apparent inclusion of Hamas' conduct, from Israel's perspective, was to expose South Africa's double standard in purporting to bring the case as the "guardian of the interest of humanity" while simultaneously supporting the very group responsible for the upheaval: Hamas.[85] Israel in turn pointed out that South Africa's "delegitimization of Israel since its very establishment . . . sounded barely distinguishable from Hamas' own rejectionist rhetoric."[86] In turning the tables, in fact, Israel accused South Africa of complicity in genocide through supporting or failing to condone Hamas' attacks on October 7.[87]

The legal dimension of Israel's presentation of Hamas' conduct was designed to persuade the ICJ that the Israeli military operations

78 *Id.* at 16.
79 *Id.* at 18.
80 *Id.*
81 *Id.*
82 *Id.* at 42-44.
83 Jan. 12 Verbatim Record, *supra* note 77, at 38.
84 *Id.* at 14.
85 *Id.* at 13-14, 16-19.
86 *Id.* at 13.
87 *Id.* at 38.

took place in a context of self-defense and Hamas' "reprehensible strategy" that has exacerbated the loss of human life in Gaza.[88] On this basis, South Africa was "essentially asking the Court to substitute the lens of armed conflict between a State and a lawless terrorist organization, with the lens of a so-called genocide of a State against a civilian population."[89] According to Israel, the self-defense and armed conflict lenses not only provided an important context to justify judicial self-restraint but also served to negate the requisite specific intention needed to establish genocide. The validity of its inherent right of self-defense was used to challenge South Africa's requested order that Israel suspend its military operation.[90] It was therefore Israel's contention that the right of self-defense could not be ignored in the proceedings but necessarily meant that the military suspension order must fail.[91]

Unlike respondent states that adopt an avoidant strategy, Israel, by contrast, engaged in the tactic of widening the issues beyond the Genocide Convention so as to ensure that the Court was aware of the political and legal implications of any order to suspend military operations.[92] In turn, denying the right of self-defense amounted to a denial of Israel's "ability to meet its obligations to the defence of its citizens, to the hostages and to over 110,000 internally displaced Israelis unable to safely return to their homes."[93] The context of self-defence and an armed conflict was then used to challenge the notion that the death of civilians, even where there is "enormous suffering," would necessarily engage the Convention.[94] Israel thus did not dispute entirely the civilians deaths but challenged South Africa's claim that the suffering in Gaza was unprecedented: in reality, according to Israel, civilian casualties were a sad feature of warfare that was exacerbated by Hamas' military tactics.[95] Israel thus argued that the Court in provisional measures cannot meaningfully address the issue solely through consideration of the Genocide Convention: since the purpose of provisional measures is to preserve the rights of both

88 *Id.* at 12-13, 19.

89 Jan. 12 Verbatim Record, *supra* note 77, at 20.

90 *Id.* at 28-29.

91 *Id.* at 55-57.

92 *Id.* at 62-63.

93 *Id.* at 16.

94 *Id.* at 13 (quoting Legality of Use of Force (Yugoslavia v. Belg.), Order, 1999 I.C.J. Rep. 124, ¶ 40 (June 2)).

95 Jan. 12 Verbatim Record, *supra* note 77, at 19, 41.

parties, the Court must, in the present case, consider and "balance" the respective rights of South Africa and Israel.[96] On this basis, Israel claimed that its right to self-defense and adherence to international humanitarian law were critical factors to any evaluation of the present situation.[97]

As Israel argued, the "Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population . . . ."[98] Rather, the Convention was set apart from other human rights treaties to address "a malevolent crime of the most exceptional severity."[99] To Israel, it was therefore necessary that the Court be satisfied, even at the provisional measures stage, that there did not exist a plausible basis for finding on Israel's part a specific intention to commit genocide.[100] Accordingly, to order provisional measures on the basis of the acts listed in Article II of the Genocide Convention alone would be "Hamlet without the Prince; a car without an engine."[101] Israel's challenge to the genocidal intention allegation also came in the form of it explaining the steps it has taken to mitigate civilian harm in the armed conflict and to provide Gazans with humanitarian assistance.[102] Given its argument that specific intention could not be proven, Israel invited the Court to dismiss the request in order to maintain the integrity of the Genocide Convention, an instrument whose significance was being diminished by South Africa's pretextual and libellous use in the course of an armed conflict.[103]

At the same time, the case did lead Israel to respond to the allegations that its officials had publicly expressed views that evinced genocidal intent, leading Israel into making some concessions on the need for investigative action. Israel noted that several statements were taken out of context, erroneously interpreting fighting words against Hamas to include the civilian population in Gaza.[104] At the same time,

96 *Id.* at 37.
97 *Id.* at 24, 74.
98 *Id.* at 13.
99 *Id.* at 13.
100 *Id.* at 30.
101 Jan. 12 Verbatim Record, *supra* note 77, at 30.
102 *Id.* at 38, 44-45.
103 *Id.* at 21-22, 31.
104 *Id.* These various statements were extracted in South Africa's Application, *supra* note 4, ¶ 108. In response to these and other remarks, see President Herzog's rebuttal: *'A Blood Libel': Herzog Says ICJ 'Twisted My Words' to Support 'Unfounded' Contention*, TIMES OF ISR. (Jan. 29, 2024, 1:59 AM),

Israel also distanced itself from some of its officials' statements, noting that they did not reflect government policy and were being subject to criminal investigation.[105] Some thirty-six hours before South Africa instituted proceedings, Israel indicated that it would be investigating any alleged violations of international humanitarian law.[106]

IV. THE STRATEGIC ORIENTATION OF THE ICJ IN *SOUTH AFRICA V. ISRAEL* PROVISIONAL MEASURES

A. The ICJ as a Strategic Actor

Writers have conceived of the ICJ's objectives in different ways. From a broad perspective, the ICJ, as the UN's principal judicial organ, is a pivot to the attainment of institutional purposes of the United Nations - the maintenance of international peace and the promotion of human rights.[107] By contrast, a narrow perspective conceives of the ICJ's role as being to resolve non-polycentric bilateral disputes, with state consent defining strictly the parameters of dispute settlement.[108] This distinction is material when assessing the potential for ICJ-based strategic litigation. On this basis, the broader construction of the Court's goals would involve it acting strategically within its institutional design to vindicate broad public interests.[109] This might, for example, take the form of using the

https://www.timesofisrael.com/a-blood-libel-herzog-says-icj-twisted-my-words-to-support-unfounded-contention/ [https://perma.cc/49EK-VKUL].

105 Jan. 11 Verbatim Record, *supra* note 45, at 32 (noting that the Minister of Heritage's statement was "immediately repudiated by members of the War Cabinet and other ministers, including the Prime Minister").

106 Tova Zimuky, *Israel Mulls Investigating Lawmakers over Calls to Harm Gazan Civilians*, YNETNEWS (Jan. 9, 2024, 4:29 PM), https://www.ynetnews.com/article/h1tnwvjdp [https://perma.cc/7C9X-UPF7].

107 *See* Gentian Zyberi, *The Interpretation and Development of International Human Rights Law by the International Court of Justice*, *in* HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS, 208, 208 (Martin Scheinin ed., 2019).

108 Jean d'Aspremont, *The International Court of Justice and the Irony of System-Design*, 8 J. INT'L DISP. SETTLEMENT. 366, 374 (2017); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 184 (2008).

109 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3, ¶¶ 64, 80 (Jan. 23) [hereinafter The Gambia v Myanmar Provisional Measures Decision] (separate opinion by Trindade, J.) (stating that the ICJ must go beyond "the strict inter-State dimension" and pursue its "mission to keep on endeavouring to contribute to a humanized law of nations").

importance of the underlying substantive norms to remove impediments to its consideration of the dispute, such as by applying a liberal approach to the rules of jurisdiction, admissibility, standing, and remedies.[110] A broader strategic approach would also perceive of the Court as an interlocutor in resolving the wider dispute between the states, which might include balancing its decision in a manner that promotes its acceptability to both parties (and indeed, to players outside of the courtroom) while also avoiding backlash on more contentious elements.[111]

Based upon an extensive survey of the ICJ's constituent instrument, including the expectations of mandate holders and actors, Rotem Giladi and Yuval Shany attributed four interrelated goals to the Court.[112] The first has the clearest textual basis both in the UN Charter and the ICJ Statute: dispute resolution. Thus, according to Article 38 of the ICJ Statute, the Court's function is "to decide in accordance with international law such disputes as are submitted to it . . . ."[113] A second goal conceives of the Court, in the course of dispute settlement, as contributing to a rules-based international order; its development and clarification of the principles of international law in turn provide the basis for prospective peaceful dispute settlement.[114] Given the ICJ's place as the principal judicial organ of the UN, a third goal is the advancement of international peace and security.[115] Article 1 of the UN Charter thus enumerates a purpose of the UN as being to "bring about by peaceful means . . . adjustment or settlement of international

110 Ingo Venzke, *Public Interests in the International Court of Justice: A Comparison between Nuclear Arms Race (2016) and South West Africa (1966)*, 111 AJIL UNBOUND 68, 72 (2017); *see also* André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L. L. 769, 770, 778, 790 (2012); Guzman, *supra* note 108, at 183-84.

111 Irya Marchuk, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, 18 MELB. J. INT'L. L. 436, 443 (2017); Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 461 (2013).

112 Rotem Giladi & Yuval Shany, *Assessing the Effectiveness of the International Court of Justice*, *in* CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 161, 166 (Yuval Shany ed., 2014).

113 Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

114 *See also* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 244 (2012) ("[T]he ICJ . . . [was] created as part of an ideology-driven attempt to strengthen the rule of law in international affairs.").

115 Giladi & Shany, *supra* note 112.

disputes or situations which might lead to a breach of the peace."[116] This implies that the ICJ is designed not merely as a service institution for states but rather as a part of an overall international strategy aimed at maintaining peace.[117] This is more apparent with the Court's advisory jurisdiction, premised upon assisting the Security Council or General Assembly with legal questions, which often involve peace and security elements.[118] However, this assistance might also arise in the course of the ICJ's adjudication of contentious cases that concern situations with wider implications for international peace and security. The final interrelated goal is regime legitimization: the UN aims to operate by "peaceful means," based on "principles of justice and international law . . . ."[119] In turn, the very existence of the ICJ as a court of justice, with the status as a principal organ, symbolizes and underscores the centrality of justice, law, and peace to the UN system.[120]

The premise of the analysis in this Part is that the ICJ itself is a strategic actor who will use its jurisdiction, within permissible bounds, in a manner that best promotes compliance with international law and, more generally, the observance of the principles and purposes set out in the UN Charter.[121] In this regard, the Court has historically employed different tactics to ensure its relevance to the wider set of issues that are presented in a strategic litigation. This has involved the Court using the opportunity that a case presents to advance an interpretive vision of international law that goes beyond what is necessary to resolve the dispute at hand.[122] It also includes the Court giving its view on the steps that the parties should take to resolve their broader dispute beyond the scope of the litigated issues, with expressions on the parties' conduct ranging from disapprobation to encouragement.[123] For example, in ordering provisional measures in the dispute between Ukraine and Russia in relation to the International

116 U.N. Charter art. 1.

117 Giladi & Shany, *supra* note 112.

118 *Id.*

119 U.N. Charter art. 1; Giladi & Shany, *supra* note 112, at 167.

120 Giladi & Shany, *supra* note 112, at 167.

121 *See, e.g.*, Felix Fouchard, *Allowing Leeway to Expediency, Without Abandoning Principle? The International Court of Justice's Use of Avoidance Techniques*, 33 LEIDEN J. INT'L L. 767, 777–78 (2020).

122 *See, e.g.*, Marko Milanović, *State Responsibility for Genocide: A Follow Up*, 18(4) EUR. J. INT'L L. 669, 687 (2007); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 70-71 (2013).

123 *See, e.g.*, Marchuk, *supra* note 111; Dothan, *supra* note 111.

Convention for the Suppression of the Financing of Terrorism (CSFT) and the Convention on the Elimination of Racial Discrimination (CERD), the Court went beyond protecting rights under the CERD to encourage the parties to consider a broader settlement, with an expectation that the parties will work for the "full implementation" of the Minsk Agreements.[124] On the other hand, scholars have noted instances of the Court employing issue-avoidance and moderation tactics to avoid jurisprudential backlash and enhance the impact of its decisions.[125] Again, in *CSFT/CERD (Ukraine v. Russia)*, the Court only granted provisional measures in relation to the CERD and not concerning the more contentious allegations under the CSFT that Russia had sponsored terrorism.[126] Although it is only possible to speculate on the Court's avoidance motivation here, it is likely borne out of a concern to keep Russia engaged in the proceedings; by contrast, a finding that Russia was involved in the sponsoring of acts of terrorism would be corrosive towards future efforts to influence Russia's conduct.[127] With this analysis in mind, the next Part considers the Court's strategic choices in its Jan 26, 2024, provisional measures decision in *South Africa v. Israel*.

B. Provisional Measures in South Africa v. Israel

It is apparent that in *South Africa v. Israel*, the ICJ was similarly sensitive to the need to play a strategic role in advancing the cause of peace in relation to the wider conflict in Gaza. The Court thus ordered provisional measures, although not all as requested by South Africa and with some notable omissions with respect to the most contentious ones. The Court ordered Israel to: (1) take measures to prevent the commission of acts against the Palestinian group in the Gaza Strip falling within the scope of Article 2 of the Genocide Convention[128];

124 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, 2017 I.C.J. Rep. 104, ¶ 104 (Apr. 19) [hereinafter CSFT/CERD Provisional Measures Decision].

125 *See, e.g.*, Fouchard, *supra* note 121.

126 *See* Marchuk, *supra* note 111.

127 *Id.*

128 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2023 I.C.J. Rep. 192, ¶ 78 (Jan. 26) [hereinafter South Africa v. Israel Provisional Measures Decision].

(2) ensure with immediate effect that its military does not commit any such acts[129]; (3) prevent and punish incitement to commit genocide against Gazans[130]; (3) take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip[131]; (4) ensure non-destruction and preservation of evidence relating to offences under the Genocide Convention[132]; and (5) submit a report on all measures taken to give effect to the order.[133] Crucially, however, the Court did not accede to South Africa's requests that Israel immediately suspend its military operations in Gaza and desist from the displacement of the Palestinian population.[134] The ICJ avoided explaining these choices, instead restating its often-used phrase that "the measures to be indicated need not be identical to those requested."[135] Nonetheless, as this Part argues, the Court's choices reveal a strategy to incentivize continued engagement by the parties in the litigation and avoid orders that would likely provoke backlash and undermine its authority, while also providing a means for it to ensure its relevance in exercising general oversight over the ongoing armed conflict and humanitarian crisis in the Gaza Strip.

Its refusal to grant South Africa's order that Israel suspend its military operations was itself a tacit acceptance that Israel had the right to engage in military action and self-defense. This was certainly the view of Judge *ad hoc* Barak in his separate opinion, where he surmised that the Court had "reaffirmed Israel's right to defend its citizens . . . ."[136] If there was a plausible basis for concluding that the military action in Gaza was in pursuit of a genocidal policy, then there would be cause for the Court to order its suspension. There is precedent to support this, with the Court having ordered Russia to suspend its military operations in Ukraine when addressing provisional measures

129 *Id.* ¶ 86.
130 *Id.* ¶ 79.
131 *Id.* ¶ 86.
132 *Id.* ¶ 80.
133 *Id.* ¶ 82.
134 South Africa v. Israel Provisional Measures Decision*, supra* note 128, ¶ 5.
135 *Id.* ¶ 77.
136 *Id*. ¶ 1 (separate opinion by Barak, J.).

requested under the Genocide Convention.[137] However, unlike the stronger international opinion against Russian aggression in Ukraine, pursuing this course in relation to the Gaza crisis, prompted by the Hamas attacks on Israel, would have been unrealistic. As Judge Sebutinde noted in her dissenting opinion, it would have required Israel to suspend military operations in Gaza, regardless of whether Hamas continues to attack Israel or continues to hold Israeli hostages.[138] This order would have most certainly been ignored by Israel and would have disincentivized it (and its allies) from engaging with the Court in the next stages.

In a similar manner, the Court avoided in the provisional measures order specifying with much precision the types of acts that Israel was precluded from carrying out. Recall above that South Africa sought specific measures for Israel to prevent forced displacement, the deprivation of access to essential needs, and the destruction of "Palestinian life."[139] By contrast, the measures ordered by the Court were more general, directing that Israel not commit any acts falling within Article 2 of the Genocide Convention: "(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."[140] By doing so, the Court chose to avoid placing more specific controls on Israel (such as not to displace Palestinians) and instead generically restated the Convention's obligations. Ordering non-displacement would have been controversial and likely undermined the Court's authority, given that it had previously ruled that displacement (or ethnic cleansing) does not constitute genocide.[141] It would have also been potentially counterproductive and led to even more civilian casualties, given that the reason for the displacement, at

137 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures Order, 2022 I.C.J. Rep. 211, ¶ 86 (Mar. 16).

138 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 25 (Sebutinde, J., dissenting).

139 *See supra* note 62 and accompanying text.

140 South Africa v. Israel Provisional Measures Decisions, *supra* note 128, ¶ 78.

141 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2008 I.C.J. 118, ¶¶ 137-139 (Nov. 18); *see also* Martin Steinfeld, *When Ethnic Cleansing Is Not Genocide: A Critical Appraisal of the ICJ's Ruling in Croatia v. Serbia in Relation to Deportation and Population Transfer*, 28 LEIDEN J. INT'L L. 937, 937-44 (2015).

least according to Israel, was to protect civilians from the armed conflict.[142]

At the same time, the Court's focus on the Article II acts reflected a choice to avoid any consideration of the issue of genocidal intention at this stage. In this regard, what differentiates genocide from other grave violations of international human rights law is the presence of a specific intention on the part of the perpetrators to destroy, in whole or in part, a national, ethnic, racial, or religious group.[143] Precisely how the ICJ dealt with this issue at the provisional measures stage therefore mattered: the making of interim orders without assessing the plausible presence of specific genocidal intent could be construed as the Court going beyond the confines of the Genocide Convention and into other alleged violations of international human rights law. In *The Gambia v. Myanmar*, for example, the Court did address the issue of genocidal intent and appeared to find the allegations to be plausible.[144] By contrast, the Court in *South Africa v. Israel*, while abstractly referencing specific intention, did not seem to rest its plausibility finding on the existence of such intent.[145] Although the Court did refer to official Israeli statements that evinced "dehumanizing language," it did not appear to infer from these a plausible specific genocidal intention to destroy the Palestinian people.[146] Instead, the Court said rather ambiguously that "at least some of the rights claimed by South Africa and for which it is seeking protection are plausible."[147]

"At least some," it appeared, masked the disagreement among the judges on how to deal with the issue of specific intent at this stage.[148] Judge *ad hoc* Barak, in his separate opinion, noted that some proof of intent is necessary at the provisional measures stage, in an apparent

142 Wafaa Shurafa, Jack Jeffrey & Isabel Debre, *Israel Designates a Safe Zone in Gaza. Palestinians and Aid Groups Say It Offers Little Relief*, ASSOC. PRESS (Dec. 9, 2023), https://apnews.com/article/israel-hamas-war-refugees-displaced-muwasi-ca3860fafed03cb2333ad0bdf2379e31 [https://perma.cc/LRU9-VNXY].

143 Convention on the Prevention and Punishment of the Crime of Genocide art. 2, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *see also* South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 17 (Sebutinde, J., dissenting).

144 The Gambia v. Myanmar Provisional Measures Decision, *supra* note 109, ¶ 56.

145 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 78.

146 *Id.* ¶ 52.

147 *Id.* ¶ 54.

148 *See, e.g.*, *id.* ¶ 10 (separate opinion by Nolte, J.) ("In the present Order, the Court has noted the importance of the specific genocidal intent without, however, specifying its plausibility in the present case.").

criticism of the majority's silence on the issue.[149] Similarly, Judge Sebutinde was also of the view that the failure of the provisional measures order to be anchored in specific genocidal intent meant that it was, in effect, seeking to ensure that Israel observe its obligations under international humanitarian law (IHL) (given that the acts proscribed under Article II of the Genocide Convention are also proscribed under IHL).[150] Be that as it may, the Court made a strategic choice to ignore the issue of specific intent. By doing so, it was able to avoid a particularly contentious issue that, if found, would have lent support to the implication that Israel committed genocide in Gaza. Once again, doing so would only serve to alienate Israel and disincentivize its future engagement. It seemed likely that the Court avoided this contentious issue so that it could assert its authority over a more pressing issue: the escalating humanitarian crisis in the Gaza Strip.

In this regard, it was apparent that the Court had an overarching concern over a deteriorating humanitarian situation in Gaza. The Court thus "deem[ed] it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law."[151] Again, this statement has no obvious relationship to the actual dispute before the Court (i.e., Israel's obligations under the Genocide Convention) and illustrates the Court's perceived wider role in maintaining international peace and security. Moreover, it further reinforced the need to protect the civilian population by ordering Israel to "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip."[152] Although this obligation arises under international humanitarian law, its link to the Genocide Convention was not as obvious.[153] Despite the legal uncertainty of this link, the Court no doubt calculated that the backlash from its humanitarian assistance order would be minimal: a wide variety of states, including Israel's allies, had emphasized the need for humanitarian assistance in

149 *Id.* ¶¶ 17-19 (separate opinion by Barak, J.).

150 *Id.* ¶ 25 (Sebutinde, J., dissenting).

151 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 85 (majority opinion).

152 *Id.* ¶ 80.

153 *Id.*¶ 33 (Sebutinde, J., dissenting).

Gaza.[154] So too did the *ad hoc* judge appointed by Israel, Judge Barak, who voted for the order.[155]

Beyond the provisional measures ordered, it is also apparent that the Court made several general statements as *obiter dictum* that can also be understood as strategic and aimed at influencing wider matters in the Gaza conflict beyond the Genocide Convention.[156] The Court thus noted that Israel's large-scale military operation in Gaza "is causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza . . . ."[157] It noted that "the military operation conducted by Israel after 7 October 2023 has resulted, *inter alia*, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale . . . ."[158] In relation to Israel's interests, the Court noted that it was "gravely concerned 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."[159] This evidently falls short of identifying Hamas as a threat to Israel but nonetheless provided some acknowledgment that Hamas had committed wrongful acts. The extent to which this *obiter dictum* has assisted in relation to the wider dispute is considered in the next Part.

V. ASSESSING THE IMPACT ARISING FROM THE INITIATION OF PROCEEDINGS AND THE PROVISIONAL MEASURES DECISION IN *SOUTH AFRICA V. ISRAEL*

Having outlined the strategic considerations of the litigation actors, the following Part provides an early insight into the impact arising from South Africa's initiation of proceedings and the Court's

154 *Meeting Coverage, Security Council, Humanitarian Response in Gaza 'Completely Dependent' on Palestine Refugee Agency, Relief Chief Tells Security Council, Urging Countries to Restore Funding*, UNITED NATIONS (Jan. 31, 2024), https://press.un.org/en/2024/sc15575.doc.htm [https://perma.cc/2GH4-VASW].

155 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 10 (separate opinion by Barak, J.).

156 Here, the ICJ "exhibit[ed] a sense of balance." Marc Weller, *A Dilemma for the ICJ*, UNIV. OF CAMBRIDGE: LAUTERPACHT CTR. FOR INT'L L. (Feb. 5, 2024), https://www.lcil.cam.ac.uk/blog/dilemma-icj-marc-weller [https://perma.cc/7AAQ-HUU9].

157 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 13.

158 *Id.* ¶ 70.

159 *Id.* ¶ 85.

issuance of provisional measures in *South Africa v. Israel*. It first considers the various ways in which impact is to be evaluated in relation to strategic litigations, before considering some of the appreciable effects of the case that arose in 2024 from differing perspectives.

A. Evaluating Strategic Litigation Impact Before the ICJ

From a classical international litigation perspective, impact is understood to mean judgment compliance.[160] On this basis, litigation is seen as part of a linear process where litigation comes after negotiation or mediation has failed, thereby requiring a judgment to force a deviant party or parties into compliance with their international obligations as specified by the Court.[161] However, the classical approach does not wholly capture the purpose of strategic litigation: to produce impact that goes beyond the courtroom, which might then generate the need for diplomatic negotiation not merely as a precursor to the litigation but as an ongoing process towards achieving the structural change that the litigation was designed to stimulate. From the perspective of evaluating the efficacy of strategic litigation, it is thus unduly narrow to focus exclusively on the extent to which the respondent has complied with a judgment, even if such impact is an important objective in bringing the case.[162] Impact comes to be measured by effects unintended by its protagonists.[163] This unintended impact might be positive from the perspective of the litigated cause, with, for example, the case being rejected by the Court but energizing civil society and political institutions to take action and find solutions.[164] On the other hand, the case might end up being counterproductive to the litigated cause in a variety of different ways: undermining the bilateral diplomatic relations between the adversary states; framing a dispute through extreme allegations that might not be factually accurate (such as genocide); or contributing to outcomes in

160 Guzman, *supra* note 108, at 179.

161 *Id.*

162 *Id.*; Ramsden & Jiang, *supra* note 28, at 903 (noting examples where provisional measures decisions went beyond the narrow confines of what the Court ordered and led the deviant state to enter a negotiated settlement with the applicant state).

163 Ramsden, *Strategic Litigation Before the International Court of Justice*, *supra* note 7, at 468.

164 *Id.* at 450.

the respondent state (such as regime change) that weaken the capacity for the desired change.

Assessing impact therefore entails a contextual analysis of its different levels, from the perspective of all relevant actors. It follows that approaches in the literature for assessing the impact of supranational litigation, focusing on states' usage rates and judgment compliance, do not fully capture the range of sites or levels of impact produced by strategic litigation.[165] Nor, for that matter, is the literature measuring the impact of domestic litigation able to provide a complete methodological basis for their supranational counterparts. In this regard, Andrew Guzman noted the different conditions in which domestic and international courts operate: whereas a domestic court ruling is supported by coercive state authority, no overarching formal legal structure exists on the international plane to enforce the ruling (except, that is, the exceptional possibility of the Security Council taking Article 94 action to enforce an ICJ "judgment," returned to below).[166] In turn, if international courts are to be effective, it must be for reasons other than the system of coercive enforcement that accompanies a domestic court's decision.[167] The same point has been noted in relation to studies that measure litigation impact in liberal democratic states that have a built-in tendency to respect judicial decisions compared to international adjudication lacking such constitutional structures.[168]

The degree to which a respondent state changes its preference due to the litigation will undoubtedly be an important focus of inquiry into the impact of strategic litigation.[169] Nonetheless, it is equally material to consider how the litigation has impacted other actors, especially given that the goals in bringing the case include influencing actors beyond the courtroom. Such actors include third party states (e.g., in confirming opposition to the deviant state or in recruiting new members to a coalition against that state); international institutions (e.g., in having them adopt an official position, take measures, or

165 *See, e.g.*, Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMPAR. & INT'L L. 95, 147 (2003); Guzman, *supra* note 108, at 187.

166 Guzman, *supra* note 108, at 178-79; John C. Yoo & Eric A. Posner, *A Theory of International Adjudication*, 12-13 (John M. Olin Program in L. & Econ., Working Paper No. 206, 2004).

167 Guzman, *supra* note 108, at 178-79.

168 *Id.*

169 *See, e.g.*, DUFFY, *supra* note 10, at 50–80 (covering the impact of the litigation on the respondent).

exclude the deviant state from membership); other international or domestic courts (e.g., in supplying them with information and judicial findings that support their own determinations on collateral issues); media (e.g., in establishing a narrative and frame through which to report an event); and victims (e.g., in providing them with symbolic judicial recognition of their lived experiences and harm, including historical legacies of human rights abuse).[170]

In this regard, at its most generic, litigation serves to provide these actors with information (both factual and normative) to guide their interactions, actions, or perceptions on a situation.[171] The Court proceedings provide the litigants with the chance to formulate and express their respective factual characterisations, leading the Court to decide which version it prefers.[172] These proceedings might prise open information that has yet to be in the public light, including revealing the truth about the nature of violations.[173] In an attempt to control the narrative and information flow, and to perhaps decontextualise international law violations, a state party might propose a settlement, take steps towards meeting the requests of the applicant, or place on hold a domestic measure within the subject area of the complaint (this itself showing the influence of the litigation's shadow).[174] But where the Court makes a legal finding of responsibility or pronounces upon the validity of certain legal rights, this allows states to form a more accurate assessment of the offending state's conduct. According to Guzman, the reframing of a political dispute to one engaging an international court raises the stakes for the states concerned.[175] This might generate reputational consequences for a violation by imposing a legitimacy penalty on the offending state, thereby making reprisals more likely and acceptable to other states.[176] Where an offending state denies a court's determination or questions its informational

170 *Id.*; *see also* Markus Gehring, *Litigating the Way out of Deadlock: The WTO, the EU and the UN*, *in* DEADLOCKS IN MULTILATERAL NEGOTIATIONS 96, 96 (Amrita Narlikar ed., 2010); Guzman, *supra* note 108, at 179–80.

171 Guzman, *supra* note 108, at 179-82

172 Giladi & Shany, *supra* note 112, at 180.

173 DUFFY, *supra* note 10, at 50-80.

174 For example, there is evidence that South Africa's Bantustan proposals were delayed to avoid handing the applicant states the initiative to seek an interim remedy from the ICJ in South West Africa: D'Amato, *supra* note 18, at 30.

175 Guzman, *supra* note 108, at 174.

176 *Id.*; *see also* Erlend M. Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-Compliance Is to Be Expected*, 5 J. INT'L DISP. SETTLEMENT 306, 328-29 (2014).

legitimacy, this can lead to a refusal on the part of other states to comply with decisions of this court where the non-compliant state is the applicant in a future case (this point is particularly relevant to the ICJ given its broad jurisdictional reach over state disputes).[177] In short, the impact of ICJ strategic litigation turns upon the mobilisation of information produced in the litigation into broader processes of inter-state relations and dispute settlement.

In evaluating impact, it is also necessary to be cautious in making definite causative claims, particularly given that there will inevitably be multiple factors that shape the preferences of the various actors involved in the litigation.[178] On some occasions, litigation will directly cause certain action, such as legislative reform to bring domestic law into compliance with a ruling.[179] However, on other occasions, it is necessary to situate the case within this wider effort, acknowledging that multiple factors often contribute to any identified impact.[180] There is also the risk that the impact of a strategic litigation is overestimated, particularly by those bringing or supporting the case.[181] Still, these points serve as a caveat rather than a reason not to evaluate the extent to which a strategic litigation has produced impact.[182] Instead, the point is that the impact of litigation on wider processes often has to be understood in correlative rather than causative terms: the more evidence available to show impact, the stronger the causative claim will be.[183] A related point is that impact has to be considered temporally and understood to be subject to change over time.[184] In this regard, the distinct phases of the proceedings offer differing focal points for assessment, including the pre- and post-initiation of proceedings phases, the application for and issuance of provisional measures, and the merits phase.[185] While the bracing optics of a new case before the ICJ and provisional measures shortly thereafter offer a quick burst of activity in which to assess impact, it is also necessary

177 Guzman, *supra* note 108, at 191.

178 ROSENBERG, *supra* note 24; Fischer-Lescano, *supra* note 24.

179 DUFFY, *supra* note 10, at 40.

180 For information on the varied campaigns to hold Hissène Habré accountable, see for example Emanuele Cimiotta, *The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?*, 13 J. INT'L CRIM. JUST. 177, 184 (2015).

181 Fischer-Lescano, *supra* note 24.

182 ROSENBERG, *supra* note 24, at 108.

183 *Id.*

184 DUFFY, *supra* note 10, at 38.

185 *Id.*

to consider how a strategic litigation contributes to long-term processes of change, thereby evaluating how impact unfolds over time.[186]

B. Impact of South Africa v. Israel

Given that this Article considers the various forms of impact created by *South Africa v. Israel* as the events unfolded in 2024, it is obviously not yet possible to determine the case's longer-term effects. Nonetheless, the responses of a variety of relevant actors does allow for some observations to be made as to how the case has been used by these actors to shape their interactions, activity, and perceptions on the Gaza situation. Drawing upon the analysis in Part V(1) above, the impact of the *South Africa v. Israel* provisional measures decision calls for a multifaceted consideration in terms of rule compliance, stimulating diplomatic dialogue amongst states, influencing institutional decision-making, informing collateral litigation, and redrawing diplomatic relationships and cooperation amongst states. The following analysis will show that the impact of the provisional measures has produced mixed results. Although the degree to which the decision has altered Israel's conduct of hostilities in Gaza is unclear and contested, the decision has had an impact in other ways, particularly in creating a global dialogue amongst states and spurring previously supportive states to distance themselves from Israel and even cease the supply of arms thereto. These various forms of impact are analyzed in this Part.

1. Impact as Ruling Compliance

Following the issuance of the provisional measures order, there was broad endorsement of the ICJ's opinion. Much revolved around the importance of respecting international law and obligations. Three key provisions from the order pertained to the prevention of genocide, the facilitation of humanitarian aid, and the submission of a report one month after the issuance of the Court's order detailing all the measures that Israel would have taken to comply with the order.[187] While there are some accounts detailing how Israel complied with the Court's ruling, there are perhaps more that detail the opposite.

186 *Id.*

187 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶¶ 78-82.

In support of Israeli compliance, some observers noted that Israel modified its conduct upon South Africa's initiation of proceedings in December 2023 by way of ensuring greater levels of humanitarian access to the civilian population as well as to publicly declare that it had sought to avoid indiscriminate attacks on civilians.[188] However, South Africa's foreign minister, Naledi Pandor, accused the Israeli military of killing nearly 1,000 more civilians in the week immediately following the Court's provisional measures decision.[189] The Palestinian Ministry of Health reported that in the thirty days from the provisional measures decision, 3,523 people had been killed and at least 5,250 people injured.[190] In the weeks and months following, Israel's offensive intensified, with further attacks being extended into cities such as Rafah. In August 2024, the Gaza Health Ministry estimated the death toll to have exceeded 40,000 people since the conflict began.[191]

Accounts against Israel are particularly aggravating in respect to the humanitarian situation. The UN Special Rapporteur on the occupied Palestinian territories thus reported that civilian fatalities occurred not only due to bombings and sniper attacks but also due to a scarcity of medical supplies and treatment and inadequate access to food and water.[192] Further, the UN Office for the Coordination of Humanitarian Affairs reported on February 5, 2024, how humanitarian conditions in northern Gaza had come to an "exceedingly critical state," caused in large part by restrictions in access to essential aid on

188 Weller, *supra* note 156.

189 *One Week after ICJ Ruling, Is Israel Following the Court's Orders?*, AL JAZEERA (Feb. 2, 2024), https://www.aljazeera.com/news/2024/2/2/one-week-after-icj-ruling-is-israel-following-the-courts-orders [https://perma.cc/3AL5-BCV2]; *Data on Casualties*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., https://www.ochaopt.org/data/casualties [https://perma.cc/ZGE2-YV2S].

190 *Has Israel Complied with ICJ Order in Gaza Genocide Case?*, AL JAZEERA (Feb. 26, 2024), https://www.aljazeera.com/news/2024/2/26/has-israel-complied-with-icj-order-in-gaza-genocide-case [https://perma.cc/QNS5-6UM2].

191 Miriam Berger, *More Than 40,000 Killed in Israel's War in Gaza, Health Ministry Says*, WASH. POST (Aug. 15, 2024), https://www.washingtonpost.com/world/2024/08/15/gaza-death-toll-israel-hamas/ [https://perma.cc/Q6CE-7NGN].

192 Patrick Wintour, *Israel Appears to Be in Breach of ICJ Orders on Gaza, Senior UN Official Says*, THE GUARDIAN (Feb. 10, 2024, 12:00 AM), https://www.theguardian.com/world/2024/feb/10/israel-appears-to-be-in-breach-of-icj-orders-on-gaza-senior-un-official-says [https://perma.cc/8VC9-VNRT].

the part of Israeli officials.[193] An open letter from a group of former UN Special Rapporteurs captured much of the growing concern, by expressing how continued Israeli military strikes risked causing "irreparable prejudice to rights arising under the Genocide Convention and as such would violate the Court's orders. . ."[194] In response, a spokesperson for the Israeli Embassy in London responded by acknowledging Israel's international obligations but noting that the allegations against it were inaccurate and a diversion from the UN's own failings to handle and manage the distribution of aid to appropriate residents within Gaza.[195] On February 26, 2024, an Israeli official reported that Israel had submitted its report to the ICJ in accordance with the provisional measures order. The contents of the report, however, were not released to the public or the press.[196]

This contestation of competing claims over Israel's compliance with the January 26 provisional measures order was brought back to the fore when South Africa requested on March 6, 2024, that the Court review and revise its order due to Israel's non-compliance.[197] Israel contested this.[198] The Court noted that for any revisions to be made, the new situation would still have to meet the criteria for provisional measures in Article 41 of the Court's Statute.[199] After reviewing reports submitted by various international organizations and civil society actors, including the World Food Programme (WFP), the Food and Agriculture Organization of the United Nations (FAO), and the World Health Organization (WHO), the Court observed "with regret" how the living conditions in Gaza had deteriorated into much more

193 *Hostilities in the Gaza Strip and Israel*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS. (Feb. 5, 2024), https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-111 [https://perma.cc/8VKY-4ST7].

194 Former United Nations Special Rapporteurs, *The Time for Decisive Action Is Now": Former U.N. Experts Open Letter on Rafah*, JUST SEC. (Feb. 22, 2024), https://www.justsecurity.org/92586/the-time-for-decisive-action-is-now-former-u-n-experts-open-letter-on-rafah/ [https://perma.cc/5EZQ-36ZL].

195 Wintour, *supra* note 192.

196 *Israel Files Report with World Court on Gaza Measures, Israeli Official Says*, REUTERS (Feb. 26, 2024, 1:50 PM), https://www.reuters.com/world/middle-east/israel-files-report-with-world-court-gaza-measures-israeli-official-says-2024-02-26/ [https://perma.cc/MLJ3-93UE].

197 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order (Mar. 28, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf [https://perma.cc/4S34-YR7F].

198 *Id.* ¶ 12.

199 *Id.* ¶ 23.

catastrophic circumstances since its order in January 2024.[200] This was marked by reports noting a doubling in the number of children suffering from malnutrition, from 15.6% to 31%, with at least thirty-one people, including twenty-seven children, having died of malnutrition and dehydration, and not merely being at risk of famine as had been the case previously.[201] As such, the Court found the facts presented before it to constitute a change in the situation within the meaning of Article 76 of the Rules of Court and worthy of further examination to ensure that they met the criteria for the ordering of provisional measures in accordance with Article 41 of the Court's Statute.

The evidence reviewed by the Court, consisting of further reports from international organizations, including various UN bodies and representatives, was found to be of sufficient severity, manifested by dire humanitarian conditions.[202] These were found to result from, among other things, the restriction of humanitarian aid in various parts of Gaza (including Rafah), the spread of epidemic-prone diseases, and increasing famine and hunger.[203] This was notwithstanding Israel's defence against the allegations and its presentation of the humanitarian initiatives that it allegedly undertook.[204] Fatalities were also found to have increased by over 6,600 and injuries increased by 11,000 in the weeks since the Court's January 26 order.[205] Thus, the Court found that the situation entailed a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there was urgency in providing new provisional measures.[206]

As such, while the Court reaffirmed the need for Israel to abide by the original measures set out in January, it made a new set of orders, albeit not entirely aligned with what South Africa requested. Specifically, the Court ordered Israel to:

> (a) [T]ake all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and

200 *Id.* ¶¶ 18-19.
201 *Id.* ¶¶ 20-21.
202 *Id.*
203 *See* S. Afr. v. Isr., Order, ¶¶ 20-21.
204 *Id.* ¶ 33.
205 *Id*. ¶ 39.
206 *Id*. ¶ 40.

> humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary; and (b) ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.[207]

2. Stimulating Global Diplomatic Dialogue

Many states—including those parties to the case—saw the urgent need to position themselves in relation to the litigated issues in *South Africa v. Israel* and made public statements. These statements varied in nature and content, showing the value of ICJ proceedings as a factor both in shaping global public diplomacy and the interpretation of international law. When considered holistically, one cannot help but notice the considerable spectrum of diplomatic responses that South Africa's intervention has generated, all through the conduit of the Genocide Convention. Though it narrowed the scope of issues the judges could address, the Genocide Convention provided a common language with which to assess the highly contested facts in Israel and Palestine.[208] Indeed, as Goldston remarked, "[t]he extraordinary attention given to South Africa's submission, Israel's response, and the Court's ruling embodied the potential of what former German Constitutional Court Judge Susanne Baer has termed 'critical lawyering' to foster more informed public dialogue and understanding."[209] At the same time, the case evidently evoked heated debate and cast more light on fault lines, alliances, and accusations of hypocrisy, as the following analysis shows.

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207 *Id.* ¶ 45.

208 As of June 2024, 153 states have ratified or acceded to the treaty, most recently Zambia in April 2022. As to that common language, see generally Genocide Convention, *supra* note 143.

209 Goldston, *supra* note 40.

a. South Africa, Palestine, Hamas, and Israel

Dealing firstly with South Africa, the provisional measures ruling was welcomed as vindicating its legal claims and supporting its wider objectives in bringing the case.[210] South Africa noted that the Court's order established Israel's conduct to be "plausibly genocidal"; on this ground, it alleged, there was "no credible basis" for Israel to assert that "its military actions were in full compliance with international law, including the Genocide Convention, having regard to the Court's ruling."[211] South Africa further noted that the Court did not explicitly endorse the right of Israel to exercise self-defense in Gaza.[212] In doing so, South Africa advanced an additional legal claim beyond that which it raised in the case: that self-defense is unavailable to a state with regard to a territory it occupies.[213] South Africa noted this to challenge the view that Israel's military operation in Gaza was legitimate or made any more lawful under the right to self-defense.[214] South Africa thus used the Court's ruling to add credibility behind its allegations and challenge Israel's general denial of unlawful military activity, even beyond the Genocide Convention.[215] South Africa further used the ruling to challenge the legitimacy of third-party state assistance to Israel on the basis that they would now be complicit in genocide: "third States are now on notice of the existence of a serious risk of genocide against the Palestinian people in Gaza."[216] South Africa thus sought to use the order to publicly shame third states into no longer providing assistance, including funding and weapons, to Israel. In relation to its wider goals, South Africa saw the ruling as "a decisive victory for the international rule of law and a significant milestone in the search for justice for the Palestinian people," hopefully providing "a new impetus to the search for a lasting political solution and peace and stability in the Middle East."[217] South Africa thus saw the ruling

210 9540th Security Council Meeting, *supra note* 43, at 23.

211 *Id.*

212 *Id.*

213 *Id.* at 23-24.

214 *Id.*

215 *Id.*

216 Press Release, Dep't of Int'l Rels. & Coop., Republic of S. Afr., Statement by South Africa Welcoming the Provisional Measures Ordered by the International Court of Justice Against Israel (Jan. 26, 2024), https://dirco.gov.za/statement-by-south-africa-welcoming-the-provisional-measures-ordered-by-the-international-court-of-justice-against-israel/ [https://perma.cc/8T7D-9XWF].

217 9540th Security Council Meeting, *supra* note 43, at 24.

not only as a step towards achieving peace but possibly also of symbolic importance in providing judicial recognition of crimes perpetrated against Palestinians.

In this regard, Palestine (through the ruling Palestinian Authority) itself made various post-order statements that reiterated those of South Africa while also emphasizing the need for a ceasefire and Security Council action. Palestine noted that the Court's decision "offered a resounding rebuke to those who claim that the case of genocide against Israel is meritless and baseless."[218] In turn, Palestine argued that the provisional measures decision now justified the Security Council to adopt stronger measures, specifically requiring a ceasefire. According to Palestine, this was necessary so that Israel "has no excuse not to implement" the Court's order.[219] Palestine also sought to pressure those states who previously voted against a ceasefire to now do so: the "risk of genocide" recognized by the Court meant that it "would be criminal not to act to put an end to this war of atrocities."[220] Palestine thus sought to use the genocide label to provide an additional emphasis behind the ceasefire objective by attempting to impose a legitimacy penalty on those states who continued to support the continuation of the conflict and thus who frustrated the Security Council from exercising its functions.

Israel, by contrast, reacted to the ruling by indicating that it changed nothing in relation to its approach towards the Gaza conflict: in fact, the ruling added further legitimacy to the self-defense imperative. Israel thus stated its commitment to complying with international law: "[these] commitments are unwavering and exist quite independently of any [ICJ] proceedings."[221] Indeed, Israel noted that the "egregious provisional measures requested by South Africa were effectively and summarily dismissed by the Court," including suspension of its military operation.[222] The Court's ruling, on this view, was merely declaratory of Israel's pre-existing obligations and, owing to the stage of proceedings, carried nothing of any legal or factual significance: South Africa's claim that the ruling plausibly established genocide was a "distortion" and "a transparent attempt to

218 *Id.* at 18.
219 *Id.* at 19.
220 *Id.*
221 *Id.* at 21.
222 *Id.* at 22.

twist and misinterpret the decision of the Court . . . ."[223] Israel thus sought to minimise the significance of the order and therefore challenge the attempt on the part of South Africa to shame them into taking more drastic action such as to pause or suspend its military campaign. On the contrary, as far as Israel was concerned, the more significant aspect of the ICJ's ruling came in the recognition of Israel's right of self-defense against Hamas.[224] This in turn provided further justification for its continuation of the military campaign.

Despite seeking to minimise the significance of the Court's ruling, Israel did make a public commitment to protecting civilian life and to conducting investigations into any violations. Israel thus underlined its commitment "to mitigating civilian harm and to facilitating access to humanitarian aid" and working with "international stakeholders to further advance that objective."[225] This at least represented a shift away from the exclusive focus on Hamas to a clearer public acknowledgment of the need for mitigation of human casualties in its military operations. Israel also acknowledged that credible allegations of incitement will be investigated and prosecuted, noting that "any statement calling for intentional harm to civilians contradicts the policy of the State of Israel and could amount to a criminal offence . . . ."[226]

b. Third States Supportive of Israel

It is also clear that many states that are not a party to *South Africa v. Israel*—or directly affected by it as such—have seen it as necessary, such has been the global significance of the case, to publicly express a view on the legal or factual issues arising in the litigation. That states have engaged so specifically itself shows the early impact of *South Africa v. Israel* in focusing minds on the legal issues that have arisen in the case and their wider implications for the Gaza conflict. For those states that were supportive of Israel's right to defend itself after the Hamas attacks of October 7, the case has prompted a mixture of responses, from unconditional to conditional support for the continued military campaign.

On the one hand, various states in the pro-Israel coalition rejected the premise underlying South Africa's lawsuit and the suitability of

223 9540th Security Council Meeting, *supra* note 43, at 21.
224 *Id.* at 22.
225 *Id.*
226 *Id.*

the ICJ's involvement in the ongoing Gaza conflict. The U.S. National Security Council rejected the lawsuit as "meritless, counterproductive, and completely without any basis in fact whatsoever."[227] Rather, according to the U.S. State Department, "Israel is operating in an exceptionally challenging environment in Gaza, an urban battlespace where Hamas intentionally embeds itself with and hides behind civilians."[228] Germany argued that "self-defence against a terrorist regime that hides behind the civilian population as human shields to maximise suffering and to render defence against its actions impossible, is not genocidal intent."[229] Statements like these thus advance the legal interpretive claim that a state cannot possess the requisite genocidal intent when they exercise their inherent right of self-defense; whether right or wrong as a general point of law, this has nonetheless stimulated a debate concerning the intersections between self-defense, genocide, and international humanitarian law.[230] The wider concern here, though, was that the judicial process was ill-suited to an ongoing conflict and would, according to the British Prime Minister, thwart a "sustainable ceasefire" in Gaza.[231] Although not expanded upon, it is apparent that this view supports a political, rather than a legal, solution: that a genocide allegation, as a charge of exceptional gravity, was provocative and ultimately unhelpful in bringing the competing parties around the table to negotiate.

227 *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby*, THE WHITE HOUSE (Jan. 3, 2024), https://bidenwhitehouse.archives.gov/briefing-room/press-briefings/2024/01/03/press-briefing-by-press-secretary-karine-jean-pierre-and-nsc-coordinator-for-strategic-communications-john-kirby-36/ [https://perma.cc/5LNL-NSDT].

228 Press Release, Off. of the Spokesperson, U.S. Dep't of State, This Week's International Court of Justice Hearings (Jan. 10, 2024), https://2021-2025.state.gov/this-weeks-international-court-of-justice-hearings/ [https://perma.cc/4FEN-FGZY].

229 @GermanyinSA, X (Jan. 14, 2024, 4:29 PM), https://x.com/GermanyinSA/status/1746449402040897663 [https://perma.cc/2LR3-6F9Q].

230 *See, e.g.*, Gabor Rona & Natalie K. Orpett, *Can Armed Attacks That Comply With IHL Nonetheless Constitute Genocide?*, LAWFARE (June 5, 2024), https://www.lawfaremedia.org/article/can-armed-attacks-that-comply-with-ihl-nonetheless-constitute-genocide [https://perma.cc/NJY7-XZPY].

231 Press Release, Foreign, Commonwealth & Dev. Off., U.K. Gov't, International Court of Justice Interim Ruling on South Africa vs Israel: FCDO Statement (Jan. 27, 2024), https://www.gov.uk/government/news/statement-on-the-interim-icj-ruling-in-south-africa-vs-israel [https://perma.cc/67W2-ZGRA].

On the other hand, various statements of Israel's close partners were influenced by the provisional measures decision to the extent that they called for the Court's decision to be upheld. This included Germany, who, despite indicating their intention to intervene in the proceedings at a later stage, nonetheless stated that "Israel must adhere to the Court's order."[232] Here, then, even close partners have considered it necessary to distance themselves somewhat from Israel's conduct, probably out of fear for the reputational consequences in offering complete, unconditional support for the military campaign. In turn, partner states have also been forced to publicly declare the need for Israel to act with proportionality in Gaza and, with it, an acknowledgment that force used might well have been excessive. Despite U.S. support for Israel, President Biden on February 8, 2024, acknowledged that the conduct in Gaza "has been over the top," suggesting a shifting of position from unconditional support for the Israeli military campaign.[233] The German Vice-Chancellor, Robert Habeck, further noted that while Israel is not responsible for genocide, it is necessary to still "criticise the Israeli military for acting too harshly in the Gaza Strip."[234]

Recall that the Court itself made strategic use of *obiter dictum* of wider relevance to a conflict to call upon Hamas to free the hostages and for both parties to the conflict to respect international humanitarian law.[235] Various states drew upon this *obiter dictum* to advance propositions beyond the Genocide Convention, in focusing on the general obligations that parties to an armed conflict have to protect human life. Some partner states of Israel thus used these statements to support the proposition that there was a need, in the

232 Press Release, Fed. Foreign Off., Fed. Gov't of Ger., Foreign Minister Annalena Baerbock on the ICJ Interim Ruling on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Jan. 26, 2024), https://www.auswaertiges-amt.de/en/newsroom/news/-/2641614 [https://perma.cc/ZV42-UGTB].

233 Yasmeen Abutaleb, *Biden Says Israel's Military Conduct in Gaza Has Been 'Over the Top'*, WASH. POST, (Feb. 8, 2024), https://www.washingtonpost.com/politics/2024/02/08/biden-israel-gaza-speech-netanyahu/ [https://perma.cc/F6UN-FVLA].

234 Stefan Talmon, *Germany Rushes to Declare Intention to Intervene in the Genocide Case brought by South Africa Against Israel Before the International Court of Justice*, GERMAN PRACTICE IN INT'L L. (Jan. 15, 2024), https://gpil.jura.uni-bonn.de/2024/01/germany-rushes-to-declare-intention-to-intervene-in-the-genocide-case-brought-by-south-africa-against-israel-before-the-international-court-of-justice/ [https://perma.cc/86HG-SF5G].

235 South Africa v. Israel Provisional Measures Decision, *supra* note 128, ¶ 85.

words of Japan's delegate, for "*all parties* to comply with international law, thereby de-escalating the situation towards a possible ceasefire, which could pave the way for a lasting peace."[236] Korea similarly emphasized the duality of duties referenced in the order: that while "Hamas and other groups must immediately release all hostages without preconditions," Israel must "take immediate and effective measures, particularly to enable the provision of humanitarian assistance to Palestinians in Gaza."[237] Indeed, the British delegate also drew from these dual duties to support the need for an immediate pause to the conflict in order "to get vital aid in and hostages out," with a view then to building towards a "permanent, sustainable ceasefire."[238] This demonstrates the broad appeal of the ICJ ruling in being able to provide some element of support for the goals of third states in relation to the Gaza crisis.

c. Third states supportive of South Africa

A notable influence of the provisional measures' decision in *South Africa v. Israel* was to intensify the condemnation levied at Israel by numerous states in the Global South and to sharpen calls for immediate and longer-term solutions to the Gaza crisis. Much like the claims made by Palestine, many states used the decision as confirmation of the proposition that Israel has committed genocide in Gaza and continues to do so.[239] Algeria noted that "the provisional measures called for by the Court must be implemented to protect the Palestinian people from the genocide that they are currently facing."[240] States from the Global South also used the genocide characterisation to add impetus behind calls for a ceasefire. While the Court did not order a suspension of the military operation, Palestine nevertheless interpreted the provisional measures order as so requiring suspension given the presence of genocide and killing of civilians, arguing the measures "cannot be implemented in any other way than through a ceasefire."[241] Beyond this, the genocide characterisation was also used

236 9540th Security Council Meeting, *supra* note 43, at 12 (emphasis added).

237 *Id.* at 13.

238 *Id.* at 7.

239 *See, e.g.*, AJLabs, *Which Countries Have Joined South Africa's Case Against Israel at the ICJ*, AL JAZEERA (June 6, 2024), https://www.aljazeera.com/news/2024/6/6/which-countries-have-joined-south-africas-case-against-israel-at-the-icj [https://perma.cc/GYJ4-J5WR].

240 9540th Security Council Meeting, *supra* note 43, at 4.

241 *Id.*

to embolden demands for longer-term solutions, including the end of the Israeli occupation of Palestinian territories and the full implementation of a two-state solution.[242]

States in the Global South also used the provisional measures decision to challenge Western states' support of Israel. First, the genocide frame, given the gravity of such accusations, was used by Global South states to exert pressure on Western states to disassociate themselves from the Israeli military campaign.[243] Second, and as a corollary of this, these Global South states have also used this frame to argue that continued support of Israel amounts to complicity in genocide: in turn, Germany's support to Israel has become the subject of a subsequent lawsuit before the ICJ.[244] Third, various third states have also sought to use the provisional measures ruling to exert pressure on the Security Council to act and to condemn the inaction of its permanent members. Of particular interest here were the statements of the Chinese representative regretting the actions of a "certain country" (presumably the United States) in its obstruction of measures to secure a ceasefire.[245] This "passive attitude," according to China, was inconsistent with the need for the Security Council to act with the "greatest sense of responsibility and the strongest determination to safeguard justice, save lives, and achieve peace."[246]

It will be recalled that one of the objectives South Africa pursued in bringing the litigation was to expose Western double standards in its selection of human rights abuses. States in the Global South have thus called out certain Western states for their failure to respect the provisional measures ruling in *South Africa v. Israel*. Crucially, in this respect, Global South states drew from other precedent where the Genocide Convention was used to support provisional measures—in Myanmar and Ukraine—to augment their claim that Western states have adopted double standards when it comes to Israel. One example of this double standard, amongst Global South states, was Germany's

242 *Id.* at 7 (remarks from Guyana).

243 *Id*. at 15 (remarks from Russia); Press Release, Bangl. Ministry of Foreign Affs., Bangladesh Backs South Africa's ICJ Move Against Violation by Israel in Gaza (Jan. 14, 2024), https://mofa.gov.bd/site/press_release/2bd6b2da-c04d-48b7-a7c8-b32cf13a97fc [https://perma.cc/B63D-UJPM].

244 *See* Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Order (Apr. 30, 2024) [hereinafter Nicar. V. Ger. Order], https://www.icj-cij.org/sites/default/files/case-related/193/193-20240430-ord-01-00-en.pdf [https://perma.cc/2Y3C-A4LV].

245 9540th Security Council meeting, *supra* note 43, at 14.

246 *Id.*

support for an expansive interpretation of genocidal intent in *The Gambia v. Myanmar*, but its rejection of the Genocide Convention in relation to the Gaza conflict.[247] This led various Global South states to strongly condemn Germany, drawing from its own history of genocide. Thus, Namibia, who accused Germany of committing genocide on its territory, condemned Germany noting that it "cannot morally express commitment to the United Nations Convention against genocide, including atonement for genocide in Namibia, whilst supporting the equivalent of a holocaust and genocide in Gaza."[248] This example shows the scope for unresolved historical disputes—such as the alleged genocide in Namibia—to gain momentum as a live issue in international politics through the geopolitical cleavages exacerbated by *South Africa v. Israel*, including the possibility that Global South states use perceived colonial atrocities as a further frame in which to highlight Western double standards on the Gaza situation.

3. Influencing International Institutional Decision-Making

Within the UN system itself, it is apparent that the provisional measures decision has failed to contribute towards a change within the Security Council towards the issue of a ceasefire. The Security Council had, on December 8, 2023, weeks before the provisional measures order, failed to agree on a resolution that would have demanded "an immediate humanitarian ceasefire."[249] In the month after the provisional measures decision of January 26, Algeria sponsored a resolution that demanded "an immediate humanitarian ceasefire that must be respected by all parties."[250] In this regard, the draft resolution recalled in its preamble the ICJ's provisional measures order and the need for Palestinians in Gaza "to be protected from all acts within the scope of Article II and Article III of the [Genocide] Convention."[251] Indeed, Algeria noted that one of the purposes underpinning the draft resolution was to ensure "compliance with the provisional measures ordered by the International Court of Justice," alongside the need to secure humanitarian aid and the parties'

247 Talmon, *supra* note 234.

248 @NamPresidency, X (Jan. 14, 2024, 3:56 AM), https://twitter.com/NamPresidency/status/1746259880871149956 [https://perma.cc/3D3J-SKV9].

249 S.C. Res. 970, ¶ 1 (Dec. 8, 2023) (vetoed).

250 S.C. Res. 173, ¶ 1 (Feb. 20, 2024) (vetoed).

251 *Id.* pmbl.

compliance with "their obligations under international humanitarian law."[252] Yet, despite now being able to draw upon the ICJ's legal characterisation, Algeria's draft resolution was still vetoed by the U.S.[253]

Regional blocs have utilized the ICJ provisional measures decision in different ways. While individual European states, such as Germany, may have sided with Israel, the European Union took a more conciliatory approach by affirming its support for the ICJ.[254] Such a measured approach arguably enabled the bloc to navigate conflicting internal positions by giving a nod to key international institutions as means to remain neutral. On the other hand, some non-Western blocs have been much more explicit in using the ICJ decision to advance a political position on the Gaza crisis. Indeed, key regional non-Western blocs have a history of condemning Israeli actions in Palestine, and the ICJ provisional measures decision was no exception. The Arab League, the Organization of Islamic Cooperation (OIC) and the Gulf Cooperation Council (GCC) have thus all voiced their support for South Africa in this litigation.[255] This is consistent with previous support that they and others, such as the Non-Aligned Movement, the BRICS, and the G77 have all previously expressed in relation to Israeli actions and presence in Palestine.[256]

252 U.N. SCOR, 79th year, 9552nd mtg. at 2, U.N. Doc. S/PV.9552 (Feb. 20, 2024).

253 *US Vetoes Algerian Resolution Demanding Immediate Ceasefire in Gaza*, UN NEWS (Feb. 20, 2024), https://news.un.org/en/story/2024/02/1146697 [https://perma.cc/472U-59ZZ].

254 *ICJ: Joint Statement by the High Representative and the European Commission*, EUR. COMM'N (Jan. 25, 2024), https://ec.europa.eu/commission/presscorner/detail/en/statement_24_465 [https://perma.cc/L3WB-CAV3].

255 *OIC Supports South Africa's ICJ Case against Israel for Genocide*, ORG. OF ISLAMIC COOP. (Jan. 11, 2024), https://www.oic-oci.org/topic/?t_id=40224&t_ref=26858&lan=en [https://perma.cc/S6LY-583E]; *GCC Welcomes ICJ's Additional Interim Measures Regarding Israeli Occupation's Aggression on Gaza*, QATAR NEWS AGENCY (Mar. 30, 2024, 1:12 AM), https://thepeninsulaqatar.com/article/30/03/2024/gcc-welcomes-icjs-additional-interim-measures-regarding-israeli-occupations-aggression-on-gaza [https://perma.cc/5JUC-36JU].

256 Erin McCandless, *Israel, ICJ and the Movement for a Principled and Just World Order*, AL JAZEERA (Feb. 28, 2024), https://www.aljazeera.com/opinions/2024/2/28/israel-icj-and-the-movement-for-a-principled-and-just-world-order [https://perma.cc/ZAP9-LHZW].

4. Informing Collateral Litigation

Another vantage point to assess the impact of *South Africa v. Israel* is the collateral obligation upon states to avoid complicity in genocide and take measures within their power to prevent genocide. The ICJ has previously recognized this obligation in its 1996 *Bosnia v. Serbia* ruling, where it specified that states have the responsibility "to employ all means reasonably available to them, so as to prevent genocide so far as possible."[257] The ICJ further observed that "a state bore responsibility if it was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed."[258] The potential impact of the provisional measures decision in *South Africa v. Israel* should therefore also be evaluated according to the support it offers to collateral claims focused on a third state's prevention obligations under the Genocide Convention. In this regard, there has been a number of interesting developments on both the international and domestic planes.

In relation to international litigation, shortly after the provisional measures ruling, Nicaragua initiated proceedings against Germany. Nicaragua's claim was that Germany "has contributed to the commission of genocide" in Gaza, given that it has provided "political, financial and military support to Israel fully aware at the time of authorization that the military equipment would be used in the commission of great breaches of international law by this State and in disregard of its own obligations."[259] With all of the news, media, and public official statements of what was happening in Gaza, Nicaragua contended that there was no way that Germany could not deny having knowledge of Israel's illegal conduct in Gaza.[260] According to Nicaragua, Germany was complicit in the genocide through its provision of military aid to Israel and in cutting off funding to the humanitarian agency operating in Gaza, the United Nations Relief and

257 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26).

258 *Id.* ¶ 432.

259 Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Application Instituting Proceedings, ¶ 13 (Mar. 1, 2024) (footnote omitted), https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf [https://perma.cc/T787-UDAA].

260 *Id.* ¶ 12.

Works Agency for Palestinian Refugees (UNRWA). [261] In turn, Nicaragua requested a number of provisional measures, including that Germany shall "immediately suspend its aid to Israel . . . ."[262] While the ICJ rejected this request for provisional measures, the *South Africa v. Israel* provisional measures decision loomed large over the proceedings, with both sides forced to grapple with its implications for the related issue as to the responsibility of states putatively supporting genocide.[263]

Within domestic courts, too, there have been numerous developments spearheaded by civil society organizations seeking to test the implications of the *South Africa v. Israel* provisional measures ruling on that particular state's genocide prevention duty. Various cases which draw upon the ICJ case are pending, including in the United Kingdom and Denmark. In relation to the U.K., the High Court had rejected an application for judicial review on the basis that the applicant had been unable to overcome the "high hurdle" to establish the government's arms trade risk assessment to be "irrational."[264] The main thrust of the applicant's argument at first instance was based upon international humanitarian law, but, with the release of the ICJ's provisional measures decision, the appeal will likely centre on the implications of the ICJ's various "plausibility" findings as informing irrationality review. The civil society organization bringing the case, the Global Legal Action Network, thus noted that the High Court's decision was "difficult to reconcile with the interim ruling of the ICJ."[265] Other civil society organizations are also seeking to use the ICJ decision to mount strategic litigations in domestic courts, with Oxfam, Amnesty International, and Action Aid all bringing a lawsuit challenging Danish arms shipments to Israel.[266] Irrespective of the

261 *Id.* ¶ 67.

262 *Id.* ¶ 101.

263 *See generally* Nic. v. Ger. Order, *supra* note 244.

264 Geneva Abdul, *High Court Rejects Legal Challenge over UK Arms Sales to Israel*, THE GUARDIAN (Feb. 20, 2024, 4:45 PM), https://www.theguardian.com/uk-news/2024/feb/20/high-court-rejects-legal-challenge-against-uk-arms-sales-to-israel#:~:text=The%20high%20court%20has%20dismissed,Legal%20Action%20Network%20 [https://perma.cc/9RX2-C3AK].

265 *High Court Dismisses Case Challenging Export of British Weapons to Israel; Lawyers Launch Challenge to Overturn*, AL-HAQ (Feb. 19, 2024), https://www.alhaq.org/advocacy/22794.html [https://perma.cc/MHP2-VGE2].

266 *Denmark: NGOs Sue the Danish State to Stop Arms Exports to Israel*, AMNESTY INT'L (Mar. 12, 2024), https://www.amnesty.org/en/latest/news/2024/03/denmark-ngos-sue-the-danish-state-to-stop-arms-exports-to-israel/ [https://perma.cc/8B6T-Y233].

outcome of these cases, it is clear that the ICJ case has produced impact in catalysing civil society organizations to initiate domestic strategic litigations which themselves are likely to have a cascade effect within these societies, contributing to the debate on the legitimacy of arms trades by those states.

While cases are ongoing, it is clear that the ICJ case has already influenced the reasoning of domestic courts on the issue of arms trade with Israel. The Dutch appeals court was the first to pronounce upon the Netherlands' obligations, albeit in the context of the duty not to supply weapons in circumstances of breaches of IHL.[267] The Dutch court confirmed that such a duty existed and thereby injuncted the government from supplying arms to Israel.[268] According to the Court, this was premised on there being a "clear risk that the F-35 components exported to Israel will be used in committing serious violations of humanitarian law."[269] Although grounded in IHL reasoning, given that the case was actually heard before the ICJ's provisional measures decision, the genocide frame in the impending case played a backstage presence in the Dutch court's reasoning: the involvement of the ICJ—and the likelihood that it would order provisional measures—provided the court with more confidence to restrain the Netherland's future military dealings with Israel.[270] Indeed, this view was confirmed by Lex Takkenber of the Arab Renaissance for Democracy and Development, noting that "the ICJ's influence on the tribunal was undeniable, triggering a more sympathetic approach among judges and significantly influencing the Dutch court's proceedings."[271] A more direct influence—albeit with

267 Gerechtshof Den Haag, ECLI:NL:GHDHA:2024:191, 12 februari 2024, AB 2024, 132, m.nt. LM Nijenhuis en K. de Goede (Stichting Oxfam Novib, Stichting Vredesbeweging PAX Nederland, Stichting The Rights Forum/de Staat der Nederlanden (Ministerie van Buitenlandse Zaken)) (Neth.).

268 *Id.*

269 Branko Marcetic, *International Legal Rulings Are Helping Block Arms to Israel*, JACOBIN (Mar. 19, 2024), https://jacobin.com/2024/03/international-law-arms-israel-genocide [https://perma.cc/QW3K-VWUS].

270 Johnathan Fenton-Harvey, *How the ICJ Ruling Paved the Way to Banning Arms Sales to Israel*, NEW ARAB (Feb. 22, 2024), https://www.newarab.com/analysis/how-icj-paved-way-banning-arms-sales-israel [https://perma.cc/P46L-4AAC].

271 *Id.*; *see also* Molly Quell, *Dutch Appeals Court Orders Netherlands to Stop Exporting F-35 Parts to Israel amid Humanitarian Concerns,* PBS NEWS (Feb. 12, 2024), https://www.pbs.org/newshour/world/dutch-appeals-court-orders-netherlands-to-stop-exporting-f-35-parts-to-israel-amid-humanitarian-concerns [https://perma.cc/58BG-RALH].

the opposite result—was the ruling of the U.S. District Court for the Northern District of California.[272] District Judge Wright noted the ICJ's determination that "the current treatment of the Palestinians in the Gaza Strip by the Israeli military may plausibly constitute genocide."[273] Copying the standard at the provisional measures stage (i.e., plausibility), the judge further noted that Israel's military campaign was "intended to eradicate a whole people and therefore *plausibly* falls within the international prohibition against genocide."[274] Although unable to grant a remedy to restrain the U.S. executive due to this being a non-justiciable foreign policy issue, the judge nonetheless called upon the executive to "examine the results of their unflagging support of the military siege against the Palestinians in Gaza."[275] This position was later affirmed by a three-judge panel of the San Francisco-based Ninth Circuit Court of Appeals, finding that the lawsuit presented "political questions grounded in matters committed to those branches of our government that exercise military and diplomatic prerogatives."[276] Lawyers in Germany also launched a domestic lawsuit against senior German government officials, including the Chancellor, the Foreign Minister, the Economic Minister, and the Finance Minister. The European Legal Support Center, the Palestine Institute for Public Diplomacy and the U.K.-based Law for Palestine are among the civil society organizations backing the case.[277]

At the same time, the genocide framing has been avoided in litigation concerning the Gaza situation, perhaps because of the availability of alterative norms that suited the nature of violations at issue. In particular, it was open to the Prosecutor of the International Criminal Court to seek to charge Israeli officials with genocide; yet,

272 Def. for Child. Int'l-Palestine v. Biden, 714 F.Supp.3d 1160 (N.D. Cal. 2024).

273 *Id.* at 1163.

274 *US Federal Judge Says Israel Plausibly Committing Genocide, Biden Must Take Note*, TIMES OF ISR. (Feb. 1, 2024), https://www.timesofisrael.com/us-federal-judge-says-israel-plausibly-committing-genocide-biden-must-take-note/ [https://perma.cc/H7AK-5U8U].

275 *U.S. Court Concludes Israel's Assault on Gaza Is Plausible Case of Genocide*, CTR. FOR CONST. JUST. (Jan. 31, 2024), https://ccrjustice.org/home/press-center/press-releases/us-court-concludes-israel-s-assault-gaza-plausible-case-genocide [https://perma.cc/3WND-2T2E].

276 Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 931 (9th Cir. 2024).

277 Cathrin Schaer, *German Lawyers Sue Scholz, Alleging Complicity in Gaza 'Genocide'*, AL JAZEERA (Feb. 23, 2024), https://www.aljazeera.com/news/2024/2/23/german-lawyers-sue-politicians-including-scholz-over-complicity-in-gaza [https://perma.cc/35K8-ZT9B].

the arrest warrants against Israeli officials, including Prime Minister Benjamin Netanyahu, are concerned with the commission of war crimes and crimes against humanity, not genocide.[278] The closest offense to genocide charged, in this regard, was extermination as a crime against humanity, denoting killing on a large scale as part of a widespread or systematic attack directed against a civilian population.[279] While, therefore, the Prosecutor sought to charge the large scale death of civilians, he evidently did not consider this to rise to the level of a genocide or at least considered his investigation to be served by avoiding genocide as a contentious characterization. It was certainly open for him to conduct a further investigation into the genocide allegations, particularly given that the evidentiary standard applicable under the Rome Statute for the issuance of arrest warrants (that of "reasonable grounds to believe") bears some resemblance to the plausibility standard applied to the issuance of provisional measures by the ICJ.[280] This would suggest that the ICJ provisional measures decision did not influence the Prosecutor's choices. But equally, the timing of the arrest warrant decision, coming just four months after the ICJ provisional measures decision, was perhaps not uncoincidental, especially given that the ICC had been monitoring the Palestinian situation since 2014 without taking any tangible action.[281] Although the ICC Prosecutor would not articulate any such wider consideration as being relevant to seeking an arrest warrant, it seems plausible that the ICJ case did act as a catalyst for ICC action in creating a more acceptable international environment (at least amongst a large group of states supportive of South Africa's case) for this institution to take the bold move of issuing an arrest warrant against a serving head of state.

278 *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*, INT'L CRIM. CT. (May 20, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state [https://perma.cc/495T-C8WR].

279 *Id.*

280 Alexandre Skander Galand & Wim Muller, *The ICJ's Findings on Plausible Genocide in Gaza and Its Implications for the International Criminal Court*, OPINIO JURIS (Apr. 5, 2024), http://opiniojuris.org/2024/04/05/the-icjs-findings-on-plausible-genocide-in-gaza-and-its-implications-for-the-international-criminal-court/ [https://perma.cc/2MNU-6VVG].

281 As to the history of investigations, see *State of Palestine*, INT'L CRIM. CT. https://www.icc-cpi.int/palestine [https://perma.cc/V4PX-AX69] (last visited Mar. 16, 2025).

5. Redrawing Diplomatic Relationships and Ceasing Cooperation with Israel

The potential legal implication of the ICJ's provisional measures ruling in *South Africa v. Israel*—that states should not support Israel given the plausibility of the genocide allegations—has also had some impact on the extent to which states continue to support Israel even in the absence of collateral domestic litigation.[282] In this regard, it is possible that the case has produced impact in leading supporting states to no longer provide arms to Israel. The ruling might have also led to impact in other ways, including to provide cover for some partner states to distance themselves from Israel or being more forthright in the conditions that they impose upon it for their continued support. Elements of the latter are present in some of the speeches by states that have been generally supportive of Israel (see above), with many of its close partners emphasizing the need for the provisional measures to be implemented.[283] The present Part will focus more specifically on how the ICJ case has led some states to stop supplying arms to Israel and to exert pressure in other ways, such as through the possible imposition of sanctions.

Sanctions against Israel for non-compliance with the provisional measures ruling have been noted as one option open to states to exert pressure on it to comply with the Court's binding orders.[284] The provisional measures ruling, in this context, can serve two purposes. First, it provides legal cover for the imposition of sanctions that might otherwise be inconsistent with international law. For example, a state might violate an agreement that it has with Israel, with sanctions being imposed as a countermeasure thereby precluding an international wrongful act.[285] In this respect, the provisional measures order can serve to act as legal and factual support for the imposition of sanctions, even if only provisional in character. Second, aside from legal impact,

282 *See supra* Part D.

283 *See World Reacts to ICJ Interim Ruling in Gaza Genocide Case against Israel*, AL JAZEERA (Feb. 20, 2024, 5:55 AM), https://www.aljazeera.com/news/2024/1/26/world-reacts-to-icj-ruling-on-south-africas-genocide-case-against-israel [https://perma.cc/6XCZ-SZ7L].

284 *Impose Targeted Sanctions and Arms Embargo to Prevent Atrocities Statement on High Commissioner Report*, HUM. RTS. WATCH (Feb. 29, 2024), https://www.hrw.org/news/2024/02/29/impose-targeted-sanctions-and-arms-embargo-prevent-atrocities [https://perma.cc/CGY3-UNDQ].

285 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 49, U.N. Doc. A/56/83 (Jan. 28, 2002).

the ICJ's ruling might act as a catalyst for sanctions to be imposed. In relation to the latter, however, there have been only few instances where a state has sanctioned Israel, let alone through reliance on the provisional measures ruling. One example was Malaysia's decision to block an Israeli-based shipping company "from docking at any Malaysian port," in response to "Israel's actions that ignore basic humanitarian principles and violate international law through the ongoing massacre and brutality against Palestinians."[286] Malaysia also barred ships with the Israeli flag from docking at its ports and banned "any ship on its way to Israel from loading cargo in Malaysian ports."[287]

However, the severity of the current conflict and litigation brought by South Africa seems to have galvanized a wholly new wave of sanctions against Israel, even from some of its traditional supporters. For example, the U.S., France, the U.K., and Canada have taken this opportunity to impose sanctions against "several Israeli settlers" in the West Bank for increasing violence and destabilization in the region.[288] France has taken this one step further by "considering the idea of sanctions to pressure Israel to pull back its troops from Gaza and allow more humanitarian aid to reach displaced Palestinians."[289] Turkey announced that it would halt trade with Israel until a permanent ceasefire and humanitarian aid are secured in Gaza.[290] Chile blocked Israel from participating in the 2024 Internation Air and Space Fair, FIDAE, and halted all cooperation or training activities with Israel on Chilean territory.[291]

286 *Malaysia Bans Israel-Flagged Ships from Its Ports in Response to Gaza War*, AL JAZEERA (Dec. 20, 2023), https://www.aljazeera.com/news/2023/12/20/malaysia-bans-israeli-affiliated-and-israel-bound-ships-from-its-ports [https://perma.cc/7WZ6-Y9DL].

287 *Id.*

288 Nik Martin & Burak Ünveren, *Israel Sanctions: Who Has Imposed Curbs over Gaza War?*, DW (May 3, 2024), https://www.dw.com/en/israel-sanctions-who-has-imposed-curbs-over-gaza-war/a-68792324 [https://perma.cc/R4DY-TN6J].

289 *French Foreign Minister Suggests Sanctions on Israel to Get Aid into Gaza*, REUTERS (Apr. 9, 2024), https://www.reuters.com/world/french-foreign-minister-suggests-sanctions-israel-get-aid-into-gaza-2024-04-09/ [https://perma.cc/U86G-QUJ8].

290 *Turkey Halts All Trade With Israel, Cites Worsening Palestinian Situation*, REUTERS (May 3, 2024), https://www.reuters.com/world/middle-east/israel-says-turkeys-erdogan-is-breaking-agreements-by-blocking-ports-trade-2024-05-02/ [https://perma.cc/7K44-PL4P].

291 Martin & Ünveren, *supra* note 288.

The ICJ has also led some partner states of Israel to review its policies to provide arms support, with some notable instances of suspension in Belgium, Canada, Italy, Spain, the Netherlands, and the Japanese company Itochu Corporation.[292] The latter example—the Itochu Corporation—demonstrates how the impact of inter-state human rights litigation can also lead private actors to review its contracts given the potential harm to its reputation in being seen to have undermined the provisional measures ordered. The need to be seen to be acting consistently with the ruling was foremost in the mind of the Itochu Corporation's Chief Financial Officer, when "[t]aking into consideration the International Court of Justice's order on January 26, and that the Japanese government supports the role of the Court, we have already suspended new activities related to the MOU, and plan to end the MOU by the end of February."[293] Other instances of arms export suspension also quoted the ICJ provisional measures ruling, including Belgium, where "a regional government suspended two licences for the export of gunpowder to Israel" on the basis that "Israel might 'plausibly' be committing genocide in Gaza."[294] A key aspect in appreciating these decisions has been grassroots pressure. Itochu Corporation's divestment followed protests in Tokyo and the Belgium regional government's decision came after a campaign by various civil society organizations

292 *Arms Exports to Israel Must Stop Immediately: UN Experts*, OFF. OF UNITED NATIONS HIGH COMM'R FOR HUM. RTS. (Feb. 23, 2024), https://www.ohchr.org/en/press-releases/2024/02/arms-exports-israel-must-stop-immediately-un-experts [https://perma.cc/9266-EE98]; *Informal Foreign Affairs Council (Development): Remarks by High Representative Josep Borrell at the Press Conference*, EUR. UNION EXTERNAL ACTION (Feb. 12, 2024), https://www.eeas.europa.eu/eeas/informal-foreign-affairs-council-development-remarks-high-representative-josep-borrell-press_en [https://perma.cc/VJM4-2MCT]; *Canada Stops Arms Sales to Israel: Who Else Has Blocked Weapons Exports?*, AL JAZEERA (Feb. 15, 2024), https://www.aljazeera.com/news/2024/2/15/which-countries-have-stopped-supplying-arms-to-israel [https://perma.cc/5HNQ-G376].

293 *Japan's Itochu to End Cooperation with Israel's Elbit amid Gaza War*, REUTERS (Feb. 5, 2024), https://www.reuters.com/business/japans-itochu-end-cooperation-with-israels-elbit-over-gaza-war-2024-02-05/ [https://perma.cc/Y97J-RZHM].

294 *Canada Stops Arms Sales to Israel: Who Else Has Blocked Weapons Exports?*, *supra* note 292; Branko Marcetic, *International Legal Rulings Are Helping Block Arms to Israel*, JACOBIN (Mar. 19, 2024), https://jacobin.com/2024/03/international-law-arms-israel-genocide [https://perma.cc/FYJ9-M26L].

pressuring them to comply with the ICJ provisional measures ruling.[295]

To be sure, the United States—Israel's biggest arms supplier—remained unwavering in its commitment to supply weapons, but this has not prevented legislative campaigns in various jurisdictions to push for a general moratorium on arms exports.[296] In this regard, more than two hundred legislators from thirteen countries signed a pledge to "take immediate and coordinated action in our respective legislatures to stop our countries from arming Israel."[297] Legislative chambers, too, have also sought to pressure the executive branch into taking action, such as the upper house of the Irish legislature (the Seanad Éireann), which called for a ban on the U.S. using Irish airspace to transport weapons to Israel: in doing so, the motion makes specific reference to the ICJ ruling "that Israel must punish those inciting genocide," and that the Court's "imposition of provisional measures . . . means that Israel is credibly accused of committing genocide in Gaza and must take measures to prevent further damage while the case is ongoing."[298]

VI. CONCLUSION

South Africa v. Israel represents the latest episode in a growing number of cases before the ICJ that can be classified as strategic litigation: using the Court as part of a wider objective in international relations to alter the prevailing balances of power on a situation. Unlike the classical approach to appreciating litigation impact –

295 伊藤忠、イスラエル軍事企業との協力打ち切り [*Itochu Ends Cooperation with Israeli Military Company*], CNN.CO.JP (Feb. 6, 2024, 8:24 PM), https://www.cnn.co.jp/world/35214907.html [https://perma.cc/VQW3-YSZP]; *Exportation de Poudre Wallonne Vers Israël: Des Efforts Sont Encore Nécessaires* [*Export of Walloon Powder to Israel: Efforts Are Still Necessary*], AMNESTY INT'L (Feb. 6, 2024), https://www.amnesty.be/infos/actualites/article/exportation-poudre-wallonne-israel-efforts-necessaires [https://perma.cc/2V76-C8J9].

296 As to continued US arms support, see *Canada Stops Arms Sales to Israel: Who Else Has Blocked Weapons Exports?*, *supra* note 292.

297 *Europe Risks Losing Credibility Over Silence On Israel's War On Gaza: MP*, AL JAZEERA (Mar. 2, 2024), https://www.aljazeera.com/news/2024/3/2/europe-risks-losing-credibility-over-silence-on-israels-war-on-gaza-mp [https://perma.cc/3JHX-Q3NZ].

298 *Motion*, IR. PALESTINE SOLIDARITY CAMPAIGN (Feb. 2024), https://www.ipsc.ie/wp-content/uploads/2024/02/CEGPalestineMotionFeb2024.docx?__cf_chl_tk=X8l55IdErR2WYkyO2uB8gbi_kOdluxqs41XYRIRBbCo-1711018846-0.0.1.1-1407 [https://perma.cc/84SM-MHRM].

focusing on whether the responsible state has complied with a ruling – case studies into strategic litigation require an evaluation of a wider set of factors. This warrants consideration of the litigants' goals (both for the applicant and respondent), the Court's strategic choices, and the impact of the litigation, both intended and unintended. The key point of evaluation here is how the linkage of a dispute to international law—and the solemnity of judicial proceedings before the "World Court"—can serve to mobilize the international community against the targeted state and its partner states, not only on the specific legal issues arising in the case but on the wider legitimacy of state action. In this regard, the Court's provisional measures jurisdiction provides applicant states with a tool to promote a cause given the lower threshold needed to justify a judicial remedy, alongside the relative speed in obtaining one.

In this regard, during 2024, it was noted that the provisional measures ruling itself did not lead to Israel's compliance as such, with South Africa (and many of its partner states) still aggrieved over the continued large number of civilian casualties and failure to provide humanitarian aid. Furthermore, South Africa's genocide framing, and the provisional measures ordered, did not appear to have an appreciable impact in hastening progress towards a pause in fighting or a ceasefire. Yet, the case did help to shape international (and domestic) public opinion on the Gaza conflict, shifting emphasis away from Israel's necessity of self-defense towards the proportionality of force it was using in pursuit of that goal. This in turn had a knock-on effect to Israel's partners who, in the face of this public opinion, felt the need to distance themselves somewhat from the military campaign in Gaza, including in some instances to publicly declare its intention not to export arms to Israel. Even where the ruling did not lead to an official change in state policy, it did influence actors within that state—both judicial and political—to exert pressure on the executive to so alter its relations with Israel. From the perspective of South Africa and its partner states, many became emboldened by the provisional measures ruling, intensifying and sharpening its condemnation of Israel and using the case to challenge prevailing western attitudes (and perceived double standards) towards Palestine. The case served to further entrench geopolitical divisions of the West and Global South, a byproduct being to reignite memory of colonial human rights abuses, as with the German genocide in Namibia which

it had "yet to fully atone for."[299] In this regard, in addition to securing redress for Palestinians, the case may be seen as one prong of a multifaceted push on the part of the Global South to challenge western hegemony and to democratize power away from the Security Council.[300] As the full implications of *South Africa v. Israel* continue to play out, this Article lays the foundation for future research into these issues and the longer-term impact of this strategic litigation on the Palestine question, as well as wider geopolitical divides in this era of the so-called "new Cold War."

299 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, 1:00 PM), https://www.theguardian.com/commentisfree/2024/jan/15/israel-trial-south-africa-icj-palestine [https://perma.cc/M2EK-KUPL].

300 Goldston, *supra* note 40.