

INTERNATIONAL COURT OF JUSTICE

South Africa

Applicant State

and

Israel

Respondent State

RECORD OF THE APPLICANT

B'nai B'rith International

B'nai B'rith Canada

B'nai B'rith World Center – Jerusalem

B'nai B'rith Office of United Nations Affairs

(collectively "B'nai B'rith International")

B'NAI B'RITH INTERNATIONAL

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APPLICATION

This is an application for a Court order to allow B'nai B'rith International, B'nai B'rith Canada, B'nai B'rith World Center – Jerusalem and B'nai B'rith Office of United Nations Affairs (hereinabove and hereinafter collectively "B'nai B'rith International") to make a submission in these proceedings.

The grounds for the application are:

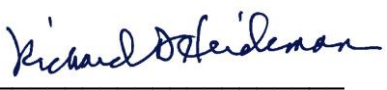
- 1) The Court has jurisdiction to grant the order requested.
- 2) The submission of B'nai B'rith International is likely to be able to furnish information on the questions at issue in these proceedings which will be helpful to the Court.

This application will be supported by the following material:

- 1) the affidavit of Richard D. Heideman, Honorary President of B'nai B'rith International and counsel of record.
- 2) the proposed Submission of B'nai B'rith International.

January 9, 2024

B'NAI B'RITH INTERNATIONAL

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INTERNATIONAL COURT OF JUSTICE

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AFFIDAVIT of RICHARD D. HEIDEMAN

I, Richard D. Heideman of Washington, DC, USA, make oath and say:

1. I am an Honorary President of B'nai B'rith International. B'nai B'rith International has ECOSOC NGO status at the United Nations.

2. The proposed submissions of B'nai B'rith International to this Court in these proceedings are attached as Exhibit A to this my affidavit.

State of Maryland

)



Sworn before me

)

Richard D. Heideman

On this 9th day

)

of January 2024

)


Keyauna C. Fogle

Notary Public

KEYAUNA CHANTEL FOGLE
Notary Public - State of Maryland
Prince George's County
My Commission Expires Oct 15, 2024

This is Exhibit A to the Affidavit of Richard D. Heideman

**Submission to the International Court of Justice in the case of South Africa v.
Israel**

By

**B'nai B'rith International, B'nai B'rith Canada, B'nai B'rith World Center –
Jerusalem and B'nai B'rith Office of United Nations Affairs**

Submitted By David Matas, Esq., Senior Counsel, B'nai Brith Canada
Richard D. Heideman, Esq. and Honorary President, B'nai B'rith International
Joseph H. Tipograph, Esq. of Heideman Nudelman & Kalik, PC

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Preamble

The Government of South Africa has filed a case with the International Court of Justice against the State of Israel, which matter is pending before the Court.

B'nai B'rith International is the oldest Jewish human rights organizations with accreditation at the United Nations since 1947 and has previously submitted filings to the International Court of Justice, specifically with regard to the referral of Questions by the UN General Assembly, therein requesting an Advisory Opinion which matter is pending before this Court as action [insert]. The submission of B'nai B'rith International, B'nai Brith Canada, B'nai B'rith World Center – Jerusalem and the B'nai B'rith Office of United Nations Affairs (collectively "B'nai B'rith International" herein), are all parties to said submission.

B'nai B'rith International has unique standing, and an interest, duly qualified to appear before this Court with regard to the matters asserted by the government of South Africa in the pending matter against the State of Israel; and seeks leave of court for permission to do so.

I. Overview

1. The South African Application notes the October 7th attack by Hamas on Israel, the Israeli response and the Palestinian suffering following on the Israeli response. South Africa draws from that sequence, plus some statements from Israeli public figures who are either not part of the Israeli war cabinet or who assert no more than that they will respond forcefully to the October 7th Hamas genocidal attacks, that Israel is guilty of genocide. South Africa requests this Court to order provisional measures.

2. B'nai B'rith International applies to make written and oral submission to the Court. B'nai B'rith International submits that this Court may allow this application, that it is incumbent upon the Court in the interest of justice to also address the barbaric, heinous conduct by the Islamic Resistance Movement aka Hamas as claimed genocides by Hamas inflicted on both the Jewish People residing in neighboring Israel and also upon the Gazan-resident Palestinians who have lived under the oppressive control of Hamas. B'nai B'rith International asserts that Hamas has inflicted genocide both on the Jewish people for decades, consistent with its mantra of hate against those of the Jewish religion who reside in Israel and elsewhere, and particularly demonstrated by its terrorist attack on October 7th; and on the residents of Gaza who are Arab-Palestinians, by engineering and instrumentalizing their victimization during the Israeli response to the October 7th attack in order to shift the blame to Israel.

3. B'nai B'rith International submits that the request for Provisional Measures should be rejected on the basis that it would allow Hamas to rearm and relaunch its genocidal attack on the State of Israel, the Jewish people, and citizens, residents and visitors of Southern Israel. B'nai B'rith International further requests as a remedy, if the Court assumes jurisdiction, to require South Africa and all other states parties to the Genocide Convention, in fulfilment of their duty to prevent and punish genocide, to (i) determine that Hamas has committed genocide against the Jewish people resident in Israel, and to (ii) ban Hamas as a criminal organization.

II. Jurisdiction

4. B'nai B'rith International asserts that Hamas is responsible both for the genocide of the Jewish people on October 7th and for the suffering of the residents of Gaza, being Arab-Palestinians detailed in the Application of South Africa which Application submits amount to acts of genocide. That assertion raises a jurisdictional issue for this Court.

5. Hamas is located in Gaza but not based in Israel, although it supports terror activities against Israelis, Jewish people and others both within the borders of the State of Israel and in the area under the jurisdiction of the Palestinian Authority on the West Bank of the Jordan River. Gaza is territory that the PA claims is part of Palestine. The members of Hamas are not nationals of Israel.

6. The PA/Palestine is not obligated to participate in these proceedings and may choose not to do so. In these circumstances, does this Court have jurisdiction to consider the claimed genocides inflicted by Hamas on both the Jewish and Gazans who are Arab-Palestinian people residing in Gaza?

7. B'nai B'rith International submits that the Court should also assume jurisdiction over the claimed genocides by Hamas of (i) the Jewish People residing in Israel and (ii) Gazans who are Arab-Palestinians residing in Gaza, even if Palestine may choose not to appear in these proceedings.

8. For the claimed responsibility of Hamas for the genocide of the Palestinian people which South Africa attributes to Israel, the relevance of that claim to the South African Application is obvious. It is impossible to determine attribution of cause without considering alternative explanations for the cause.

9. Even for the claimed genocide by Hamas of the Israelis, Jewish people and people from more than forty countries on October 7th, there is relevance to the South African application. That claimed genocide, if the Court finds it exists, would help explain the rationality of the Israeli response.

10. The South Africa Application provides extensive background information focusing in

on claimed victimization of Palestinians before the Israeli response to the October 7th barbaric terror attacks of Hamas and Palestinian Islamic Jihad (PIJ), also designated by many countries as a Foreign Terror Organization. This background information is incomplete and needs supplementing by the attacks of Hamas and other terrorist organizations on Israel both before and during October 7th.

11. As well, as set out below, the request for Provisional Measures is, in substance according to B'nai B'rith International, a request to allow Hamas to rearm to continue its genocide of the Jewish people. It is impossible and discriminatory to assess this request for Provisional Measures without assessing this position of B'nai B'rith International.

12. For the Court to determine that it has jurisdiction to consider the Application of South Africa that Israel is guilty of genocide, and also to determine that it has no jurisdiction to consider whether Hamas is guilty of genocide of either the Jewish or Palestinian people amounts to taking one side in a dispute without relevant fact finding, without examining the merits of the dispute and only on a jurisdictional basis.

13. Determining the merits of the dispute after hearing only one side is fundamentally unjust. To be fair, the Court must hear both sides. To be fair, if the Court is to assume jurisdiction over the Application of South Africa, the Court must consider and determine submissions that Hamas is guilty of genocide inflicted on both the Jewish and Palestinian people, even if Palestine chooses not to participate in the proceedings.

14. Should the Court have any reluctance to consider and determine submissions that Hamas is guilty of genocide inflicted on both the Jewish and Palestinian people if Palestine chooses not to participate in the proceedings, the only appropriate conclusion to draw in those circumstance would be that the Court has no jurisdiction to determine the South Africa Application at all.

III. Hamas genocide of the Jewish people

A. The facts

15. The Application of South Africa to the Court, though it refers to Hamas 55 times, and otherwise engages in an extensive background, gives no description of what Hamas is. Hamas is an antisemitic genocidal force determined to destroy Israel through the killing of Jews in Israel and to expel and remove Israel and the Jewish People from the lands of the sovereign State of Israel. South Africa does not contest that description.

16. The antisemitism of Hamas and its religious war is evident. The 1988 Covenant of Hamas identified its stand as "our struggle against the Jews."¹

17. In its 2017 Hamas Document of General Principles and Policies, Hamas wrote: "Hamas does not wage a struggle against the Jews because they are Jewish."² Hamas is here making a distinction between Jewish identity and Jewish behavior. However, the 2017 document rejects none of the antisemitic tropes railing against concocted Jewish behavior set out in the 1988 Covenant. The 2017 Document does not repeal or reject the 1988 Covenant.

18. The antisemitism is explicit in the 1988 Hamas Covenant. The Covenant compares Jews to Nazis, writing, "In their Nazi treatment, the Jews made no exception for women or

¹ "Hamas Covenant 1988" https://avalon.law.yale.edu/20th_century/hamas.asp and <https://irp.fas.org/world/para/docs/880818.htm>"

² "Hamas: General Principles and Policies (2017)" (last visited 04 January 2024), online: *Jewish Virtual Library – A project of AICE* <jewishvirtuallibrary.org/hamas-2017-document-of-general-principles-and-policies>.

children."³ The Covenant also refers to "warmongering Jews."⁴

19. The Covenant states "We should not forget to remind every Moslem that when the Jews conquered the Holy City in 1967, they stood on the threshold of the Aqsa Mosque and proclaimed that 'Mohammed is dead, and his descendants are all women.'"⁵ There is no historical record of this being said by anyone. It certainly was not said by every Jewish person worldwide nor by any person with authority to do so in the name of the State of Israel.

20. Hamas accuses Zionist organizations of infiltrating "Freemasons, Rotary Clubs, espionage groups and others"⁶ to educate women "far from Islam,"⁷ thereby subverting and sabotaging the role of Islamic women in making Islamic men. The Hamas Covenant claims that,

"The enemies have been scheming for a long time, and they have consolidated their schemes, in order to achieve what they have achieved. They took advantage of key-elements in unfolding events, and accumulated a huge and influential material wealth which they put to the service of implementing their dream. This wealth [permitted them to] take over control of the world media such as news agencies, the press, publication houses, broadcasting and the like. [They also used this] wealth to stir revolutions in various parts of the globe in order to fulfill their interests and pick the fruits. They stood behind the French and the Communist Revolutions and behind most of the revolutions we hear about here and there. They also used the money to establish clandestine organizations which are spreading around the world, in order to destroy societies

³ *Supra* note 1.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

and carry out Zionist interests. Such organizations are: the Free Masons, Rotary Clubs, Lions Clubs, B'nai B'rith and the like. All of them are destructive spying organizations. They also used the money to take over control of the Imperialist states and made them colonize many countries in order to exploit the wealth of those countries and spread their corruption therein. As regards local and world wars, it has come to pass and no one objects, that they stood behind World War 1, so as to wipe out the Islamic Caliphate. They collected material gains and took control of many sources of wealth. They obtained the Balfour Declaration and established the League of Nations in order to rule the world by means of that organization. They also stood behind World War II, where they collected immense benefits from trading with war materials, and prepared for the establishment of their state. They inspired the establishment of the United Nations and the Security Council to replace the League of Nations, in order to rule the world by their intermediary. There was no war that broke out anywhere without their fingerprints on it".⁸

21. The Hamas Covenant states that Zionists "aim at undermining societies, destroying values, corrupting consciences, deteriorating character and annihilating Islam."⁹ The Covenant adds that Zionism "is behind the drug trade and alcoholism in all its kinds so as to facilitate its control and expansion."¹⁰ The Covenant refers to "Zionist Nazi activities."¹¹

22. The Covenant continues "After Palestine, the Zionists aspire to expand from the Nile to the Euphrates ... Their plan is embodied in the 'Protocols of the Elders of Zion.'"¹² The "Protocols of the Elders of Zion" is a 1905 Russian fabrication of minutes of a meeting of

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

Jewish leaders which never took place. The concocted minutes document a plan for Jews to rule the world.¹³

23. What is being advocated, spread and practiced by Hamas is hatred in its worst form. What is being demonized here are not just Jews in Israel or Jews since the creation of Israel. Freemasons were founded in June 1717. The French revolution was 1789. Anti-Zionists demonize Jews worldwide castigating imagined Jewish behavior from before 1717. The accusations of Hamas against Zionists are ugly, dangerous, threatening and traditional antisemitic tropes, designed to rile up its followers and others to engage in murderous attacks against the Jewish people in Israel and elsewhere.

24. One quote in the 1988 Hamas Covenant is this: "Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it" (The Martyr, Imam Hassan al-Banna, of blessed memory).¹⁴ Hassan al-Banna was the founder of the Muslim Brotherhood. Hamas is an extension of the Brotherhood.

25. Al-Banna was an admirer of Hitler and Nazism. Al-Banna had Hitler's "Mein Kampf" translated into Arabic, changing the title to "My Jihad." He also had copies of Julius Streicher' Nazi journal *Der Sturmer* adapted to suit the Arab world, including its antisemitic cartoons.¹⁵

26. Al-Banna did not just want to obliterate Israel as a state. He wanted to obliterate Jews. He stated: "If the Jewish state becomes a fact, and this is realized by the Arab

¹³ "Protocols of the Elders of Zion" (last visited 4 January 2024), online: *United States Holocaust Memorial Museum – Holocaust Encyclopedia* <encyclopedia.ushmm.org/content/en/article/protocols-of-the-elders-of-zion>.

¹⁴ *Supra* note 2.

¹⁵ "ANALYSIS: The Nazi roots of Muslim Brotherhood" (last visited 4 January 2024), online: *Alarabiya News* <english.alarabiya.net/features/2018/06/27/ANALYSIS-The-Nazi-roots-of-Muslim-Brotherhood>.

peoples, they will drive the Jews who live in their midst into the sea."¹⁶

27. Al-Banna has written:

"Allah ... has placed upon their shoulders the highest of duties which is the guidance of humanity to the truth, leading mankind to good, and the illumination of the entire world with the light of Islam ... This means that the Noble Qur'an appoints the Muslims as guardians over humanity in its minority, and grants them the right of supervision and rule over the world in order to carry out this sublime command."¹⁷

28. What starts with Jewish victims does not end with Jewish victims. The threat that Hamas represents is not just a threat to Israel. It is a threat to all humanity.

29. A quote set out in the 1988 Hamas Covenant is this:

"The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews."¹⁸

30. Hamas attributes the quote to "al-Bukhari and Moslem." Yet, that is not the source of the quote. The source is Abu Hurayra.¹⁹

¹⁶ "Muslim Brotherhood Threatens Jews Refuses to Accept Israel (August 2, 1948)" (last visited 4 January 2024), online: *Jewish Virtual Library – A project of AICE* <jewishvirtuallibrary.org/muslim-brotherhood-threatens-jews-refuses-to-accept-israel>.

¹⁷ The Complete Works of Imam Hassan al-Banna 1906 - 1949
<https://thequranblog.files.wordpress.com/2008/06/2-to-what-do-we-invite-humanity.pdf>

¹⁸ *Supra* note 2.

¹⁹ "In the battle between the Jews and the Muslims at the end of time, the aggressors will be the Jews" (last visited 05 January 2024), online: *Islam Question & Answer – General Supervisor: Shaykh Muhammad Saalih al-Munajjid* <islamqa.info/en/answers/223275/in-the-battle-between-the-jews-and-the-muslims-at-the-end-of-time-the-aggressors-will-be-the-jews>.

31. The report is a hadith, that is to say, a report by a companion of the Prophet Muhammad of something Muhammad supposedly had said. Al-Bukhari is a source for a hadith that says, in substance, that the Jews will attack the Muslims and the Muslims will prevail and kill the attacking Jews. Yet, that hadith is quite different from the one quoted by Hamas which calls for the gratuitous mass killing of all Jews - And that is genocide, which must be recognized by this Court. .

32. Hadiths by Abu Hurayra are widely regarded as fabrications, which may be the reason for the Hamas attribution of the quote to someone else.²⁰

33. Whatever one can say about Abu Hurayra generally, this particular hadith has to be, as a report of something Muhammad said, wrong, because the hadith is contradicted by the Koran.²¹

34. This advocacy has led to a Hamas inflicted genocide, on October 7th. Legally genocide requires the commission of one of five acts plus an intent to destroy the targeted group in whole or in part.²²

35. One of the five acts is mass killing. The intent is manifested by the quotes in the 1988 Hamas Covenant as well as the behavior of Hamas terrorist operatives and attackers who set out to murder, maim, behead, rape and desecrate all Jews and sympathizers found in Southern Israel on October 7th. One killer sent photos of ten victims to his family, using a

²⁰ Yasin T. al-Jibouri, "Abu Hurayra and the Falsification of Traditions (Hadith)" (last visited 05 January 2024), online: *Al-Islam.org* <al-islam.org/articles/abu-hurayra-and-falsification-traditions-hadith-yasin-t-al-jibouri>.

²¹ Mohammed Dajani, "On the Significance of Dialogue" (13 May 2016, last visited 05 January 2024), online: *Fikra Forum* <washingtoninstitute.org/policy-analysis/significance-dialogue>.

²² *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

phone he stole from a victim, and was recorded as boasting to them: "Look how many I killed with my own hands! Your son killed Jews!"²³

36. One can see this intent also from the identity of the victims. One example of 1,200 killed by Hamas on October 7th was Vivian Silver, originally from Winnipeg, Canada, residing in Southern Israel. She was a peace activist who helped Gaza residents access medical care, working with a group that drove patients from Gaza to Israeli hospitals.²⁴

37. For Hamas, it did not matter who she was, what she believed, how much she had helped Palestinians in Gaza, how much she would have continued to help Palestinians. All that mattered to Hamas was that she was Jewish and found in Israel. Because of that and only that, Hamas wanted her dead.

38. Although realistically, the mass killings of October 7th had no basis other than racial and religious hatred, as part of its religious war – Jihad – against Israel and the Jewish people, Hamas nonetheless accuses Israel of a wide variety of imaginary crimes. Indeed, one strategic component of anti-Zionism is demonization through delegitimization and delegitimization through concocted claims against Israel of violating virtually every existing international human rights standard, regardless of the facts and contrary to the facts.²⁵

B. The Law

²³ Tuhin Das Mahapatra, "I killed 10 with my own hands,' IDF reveals how a Hamas terrorist brags about killing Jews to parents on victim's phone", *Hindustan Times* (25 October 2023), online: <hindustantimes.com/world-news/i-killed-10-with-my-own-hands-idf-reveals-how-a-hamas-terrorist-brags-about-killing-jews-to-parents-on-victim-s-phone-101698198333004.html>.

²⁴ Katherine DeClerq, "Walked the talk': Canadian peace activist killed in Hamas attack remembered", *CP24* (14 November 2023), online: <cp24.com/news/walked-the-talk-canadian-peace-activist-killed-in-hamas-attack-remembered-1.6644851>.

²⁵ For a detailed elaboration see David Matas, *Aftershock: Anti-Zionism and Anti-Semitism*, (Toronto: Dundurn Group, 2005).

39. Yet, let us suppose that all these imaginary claims of Hamas against Israel were true. That would still not have justified the massacre of October 7th. There is a prohibition against collective punishment found in Protocol I²⁶, Protocol II²⁷ and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.²⁸

40. If indeed we entered into a fantasy world where all the claims that Hamas has made against Israel were true, then the events of October 7th would be collective punishment for the supposed wrongs Hamas alleges to the court of public opinion as it strives to demonize, castigate, blame and destroy Israel. Even if we imagined those concocted wrongs existed, the people killed on October 7th, particularly including the innocent children who were murdered, burned or illegally taken hostage, were not responsible for them. The violation by Hamas of the prohibition against collective punishment is blatant, even if one naively accepts the false Hamas anti-Zionist narrative.

41. So, the violations by Hamas of relevant international legal standards are apparent, straightforward, incontestable. Hamas violates these standards deliberately.

42. The Genocide Convention sets out both the acts and the intent which constitute genocide. Two of the acts which constitute genocide are killing members of a national, ethnical, racial or religious group and causing serious bodily or mental harm to members of such a group. The requisite intent is the intent to destroy in whole or in part such a group.²⁹

²⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 12 January 1951) [*Protocol I*], art 75(2)(d).

²⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 12 January 1951) [*Protocol II*], art 4(2)(b).

²⁸ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

²⁹ *Supra* note 26.

43. The Hamas act of slaughtering an estimated 1,200 innocent Israeli Jews in Israel on October 7th was genocidal. So was the intent. If this Court undertakes to review the South African Application, it must in truth, fact and fairness consider the full applicable picture of the conduct of Hamas upon both Israelis and Palestinians residing under its control in Gaza.

C. The Hamas defense

44. Hamas attacked Israel, killed 1,200 innocents, kidnapped approximately 240 people, and then retreated behind Palestinian shields, leading to the deaths of thousands of their supporters, friends, neighbors and relatives, including their own children, after the anticipated Israeli response. What possibly could have motivated Hamas to engage in such murderous and self-destructive behavior?

45. The simple answer is all-consuming antisemitic hatred. They would rather die and have everyone around them they know, including their immediate family, die rather than allow Jews to live in Israel. Yet, that answer does not tell us very much. What has generated this hatred?

i) The Hamas explanation

46. Hamas is an acronym for an Arabic phrase which means in English "Islamic Resistance Movement." What are they resisting?

47. The assertions of Hamas that Zionists formed the Freemasons (started in 1717), were behind the French Revolution (of 1789), formed the Rotary Clubs (started in 1905), formed the Lions Clubs (started in 1917), were behind the Communist Revolution (of 1917), were behind World War I, formed the League of Nations (created in 1920), instigated the replacement of the League of Nations with the United Nations and the Security Council

(began in 1945), were behind World War II (in which six million Jews were killed in the Holocaust), or that the 1905 "Protocols of the Elders of Zion" reflects a real meeting, are all implausible and defamatory *per se*.

48. There is no evidence to back any of these assertions. These assertions are all contrary to well established facts. Yet, they are all found in the 1988 Hamas Covenant³⁰.

49. Within their blizzard of antisemitic, anti-Zionist diatribes, Hamas refers to occupation, colonialism, racism, aggression, expansion and settlements. This parallels the UN's own resolution equating Zionism with racism and its efforts to castigate Israel notwithstanding Israel's standing in the family of nations. The 2017 Hamas Document of General Principles and Policies refers to occupation ten times, settlements six times, aggression five times and colonialism four times.³¹

50. When a clock strikes thirteen, it throws into question all the prior strokes. Hamas makes so many implausible assertions about Zionism and Israel that all their assertions about Zionism and Israel must be questioned. Nonetheless South Africa repeats several of them.

ii) Occupation

51. The South African Application refers to occupied Palestinian territory 112 times and to Israeli occupation of those territories 19 times. What, to South Africa, is occupied? It can not be Gaza. After Israel unilaterally withdrew from Gaza in 2005, there were many statements by Hamas leaders that Gaza had been liberated, and that the occupation of Gaza had ended. In truth and in fact, since 2005 no Israelis, no Jewish people, no one other than

³⁰ *Supra* note 2.

³¹ "Document of General Principles & Policies" (last visited 06 January 2024), online (pdf): *Palestinian Media Watch* <palwatch.org/storage/documents/hamas%20new%20policy%20document%20010517.pdf>.

Arab-Palestinians have resided in Gaza, under the ruling control of Hamas, which defeated Fatah in elections and then staged a brutal coup and ruled Gaza with an iron fist. For Hamas, it is the West Bank, and Israel proper that Hamas considers occupied.³²

52. Outside of Hamas, some would say that the West Bank and Gaza are occupied, and some would not. On its face, Gaza territory does not look occupied. There were, before the Israeli response to the October 7th, 2023 attack, no Israeli forces in Gaza. There were Egyptian and Israeli forces at the border of Gaza. Yet, every state controls its borders. That control does not make it an occupier of the neighboring territory.

53. The West Bank, according to the Oslo accords, is divided into three components - area A under the control of the Palestinian Authority, area B under joint Israeli - Palestinian control and area C under Israeli control.³³

54. The phrase "Occupied Palestinian territory" on its face refers to territory the Palestinian Authority claims as territory for its future state but does not control. That could be area C. Yet, even area C, which is under sole Israeli control, is controlled by Israel because of Palestinian Authority agreement. It is not occupied against the will of the Palestinian Authority. So, the phrase "Occupied Palestinian Territory," if it is meant to refer to the West Bank and Gaza, appears to refer to an empty category.

55. The claim of occupation is even more puzzling when one considers the history of the

³² "Investigation report no. BI-613" (last visited 06 January 2024), online: *Australian Communications Authority* https://www.acma.gov.au/~/media/ACMA/Files/Investigation%20report%20no.%20BI-613%20-%20Australian%20Communications%20Authority%20-%20p.%2016&rlz=1C1TKQJ_jaJP1049JP1049&oq=Investigation+report+no.+BI+613%2C+Australia+n+Communications+and+Media+Authority%2C+p.+16&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBCDE0NTNqMGo3qAIAAsAIA&sourceid=chrome&ie=UTF-8 at 16.

³³ "The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip: Annex I (September 28, 1995)" (last visited 06 January 2024), online: *Jewish Virtual Library – A project of AICE* <https://www.jewishvirtuallibrary.org/oslo-ii-annex-i>.

West Bank and Gaza. Except for basic human rights standards which require certain minimum treatment of everyone, the Geneva Conventions on the Laws of War apply to international armed conflict. When there is an occupying power, there is also an occupied State. The Fourth Geneva Convention uses the phrases "Occupying Power" and "Occupied State".³⁴

56. Protocol I to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflict, does recognize the possibility of the occupation of a people.³⁵

57. As noted, Israel is not a party to the Protocol. A treaty binds only signatory states. Because Israel is not a party to the Protocol, it is not bound by its terms.

58. Before the 1967 war, the West Bank and Gaza were under the control of Jordan and Egypt. When those territories were controlled by Jordan and Egypt, they were never labelled "Occupied Palestinian Territory."

59. The notion that the territory transformed to "Occupied Palestinian Territory" the moment it shifted from two controlling states to a third controlling state is discriminatory as is its attempt and intent to label Israel and Jews as violators, which neither Jordan nor Egypt were so considered, and is untenable. If the West Bank, Gaza and East Jerusalem were not occupied Palestinian territory before 1967, they should not be occupied Palestinian territory after 1967 merely because the state controlling the territories, insofar as Israel has control of these territories, has changed.

60. Moreover, the International Court of Justice, when it gave its 2004 Advisory Opinion on the Israeli security barrier—an opinion with which we disagree—identified Jordan as the

³⁴ *Supra* note 28.

³⁵ *Supra* note 26, art 1(4).

occupied power of the West Bank.³⁶

61. The judgment moved on from this legal reasoning to labelling the West Bank as Palestinian occupied territory rather than Jordanian occupied territory. But this labelling was based on the claims of the Palestinian Authority and not on its legal status.

62. The notion that territory can be considered occupied if the residents of that territory form a people and claim a right to self-determination is not a component of international law. The notion, if a legal reality, would apply to a wide range of regions throughout the world.

63. It is wrong to consider the West Bank today as the occupied territory of Jordan. Jordan and Egypt do not today lay claim to the West Bank and/or to Gaza. They have signed peace treaties with Israel that assert no continuing claim to the West Bank and Gaza. Even if Jordan and Egypt were once partially occupied States, they are no longer.

64. Judge Kooijmans of the International Court of Justice, in his separate reasons which form part of the advisory opinion on the Israeli security barrier, called the West Bank before 1967 Jordanian controlled territory or territory under the authority of Jordan.³⁷

65. Similarly, one can call the West Bank today, by virtue of the Oslo Accords, at least partially Israeli controlled territory or partially territory under the authority of Israel. Judge Kooijmans shifted terminology calling the West Bank controlled territory when Jordan was in possession and occupied territory when Israel is in possession. The Judge wrote that he

³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 101.

³⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, [2004] ICJ Rep 219 at para 10.

failed to understand why the Court in its majority opinion omitted consideration of the legal status of the West Bank before 1967 though the Court majority purported to engage in a legal historical review of the West Bank.³⁸

66. But Judge Kooijman's own reasoning, which filled in its gap, should explain the Court's omission. The legal status of the West Bank both before and after 1967 is almost the same. Israel has less control over the West Bank since the implementation of the Oslo Accords in 1993 than Jordan had before 1967. For those parts of the West Bank where Israel, under the Oslo Accords, has sole control, the state in control has changed. But that is all.

67. If Israel is going to be considered the occupier of the Palestinian people after the 1967 war, then Jordan must be considered to have been the occupier of the Palestinian people before the 1967 war. If Jordan is not considered to be the occupier of the Palestinian people before the 1967 war, then Israel can not be considered to be the occupier of the Palestinian people after the 1967 war. The Court avoided and presumably wanted to avoid either of those conclusions. So, the Court just did not discuss the subject.

68. In any case, the view that Israel occupies Palestinian territory is not a position of the Government of Israel. Whether Israel occupies Palestinian territory is a matter of controversy. The phrase "Occupied Palestinian Territory" is bandied about as if it were a name. But it is not. It is a judgment and a faulty one at that. At the very least, it is a judgment which is controversial and contested.

69. Be that as it may, the belief that Israel occupies the West Bank, even if tendentious and legally unfounded, is widespread. So, surprisingly, is the belief that Gaza is occupied by Israel, which it is not, and despite many Hamas statements that it is not occupied. The belief is based on the fact that the border controls on Gaza by Egypt and Israel are stricter

³⁸ *Ibid* at para 9.

than normal. This is so even those controls have been spectacularly ineffective in preventing the Hamas smuggling of arms into Gaza, the purpose of these controls.

70. Let us assume, contrary to what is just written, that Israel is occupying the West Bank and Gaza. Even if that is so, not every occupation is illegal.

71. Generally, territory occupied in self-defense, in response to an attack, is not considered occupied illegally. There is an exception where the occupier, during the occupation, engages in illegal use of force.³⁹

72. Insofar as Israel occupied Gaza and the West Bank initially, in 1967, it did so legally, in response to a planned and then actual attack from Jordan and Egypt. The occupation ceased once Jordan and Egypt, through peace treaties, abandoned claims to those territories. Insofar as the occupation continued, a legally problematic concept where there is no occupied state, that occupation remained legal, as Israel did not engage in these territories in the illegal use of force.

73. Here too there is a division of opinion. Israel denies that it has used force illegally in the West Bank and Gaza. Its critics demur or aggressively assert otherwise. But such criticism does not constitute proof of any violation of applicable principles of international law, particularly as viewed through the truth, facts, documented history and treaties between the parties.

74. Yet these disagreements, whether Gaza and the West Bank are occupied or not, and, if so, whether the occupation is illegal, do not explain the position of Hamas. They claim all of Israel is occupied. There is no basis for such a claim. So, one must look at how they

³⁹ Ariel Zemach, "Can Occupation Resulting from a War of Self-Defense Become Illegal?" (2015), online: *Minnesota Journal of International Law* <scholarship.law.umn.edu/mjil/316>.

get to that assertion.

iii) Colonialism

75. The answer of Hamas is colonialism. Again, the position is not only puzzling, but wrong-headed. Typical colonialism is the establishment of colonies sent from the metropolis by an imperial state. There is no Jewish imperial state which has sent colonies to Israel or to the Palestinian territories in the West Bank of the Jordan River, or Gaza.

76. Typical colonialism consists of colonies which come from outside the region. There are, indeed, many Jewish Israelis who came to Israel from outside the region. Yet, the majority of Jewish Israelis either are those or descendants of those who were living in Israel before the establishment of the State or those who came from the region or are the immediate descendants of Jews who came from the region - Jews expelled from Arab countries after the creation of the State of Israel and because of the creation of the State.

77. Typical colonialism consists of colonies which historically have had little or no association with the region prior to the colonization. Yet, Jews are indigenous to Israel. They have lived in Israel continuously from pre-historic times to the present. Israel is indeed the ancestral homeland of the Jewish people. Indeed, it is appropriate to describe Muslims as colonizers in the Middle East rather than Jews, since Islam began centuries after Judaism.

78. The 2004 the International Court of Justice majority advisory opinion⁴⁰ on the Israeli security barrier referred to the West Bank as Occupied Palestinian Territory an amazing 184 times. The number of references to Israel as colonialist or colonizer was zero. The basis for the epithet of occupation the Court used so frequently was that this territory was, prior to 1967, under the control of Jordan. Yet, that basis did not and does not apply to Israel

⁴⁰ *Supra* note 36.

proper.

79. How, in light of these realities, does Hamas sustain a claim to colonialism? The answer is that Hamas anthropomorphizes land. The 2017 Hamas Document of General Principles and Policies refers to Israel as an Arab or Islamic or Palestinian land nineteen times.⁴¹

80. Yet, land has no ethnic or religious characteristics. Rocks, sand, mud, dirt, mountains, valleys and so on, are neither Islamic nor Arab nor Palestinian nor, for that matter, Jewish. There is nothing specifically ethnic or religious about land.

81. Land, of course, can be owned and inhabited by people of a specific ethnicity or religion and many jurisdictions have territory in which a specific ethnic or religious majority lives. Yet, the territory of Palestine to which the Hamas Document refer has had varying ownership, inhabitants and sovereigns. Some of the owners, inhabitants and sovereigns have historically been Arabic and Muslim. And some have not. Indeed, many have been Jewish.

82. The territory of British Mandate Palestine, mandated to the British by the League of Nations, was the name of a territory, not a people, and, at the time of the grant of the mandate, included Jordan. Britain and the League of Nations, in its final assembly, in 1946 separated out Jordan from the Mandate, from which Great Britain withdrew in 1948 following the UN's adoption in November 1947 of the Resolution creating the Partition Plan, which envisioned two states: one Jewish, one Arab, with special status for Jerusalem, and which coincided with Israel's Declaration of Independence on May 14, 1948.

83. The most commonly accepted international human rights instruments do not prohibit colonialism, as such. What is asserted in these instruments is the right to

⁴¹ *Supra* note 3.

self-determination of peoples. Colonialism frustrates realization of the right to self-determination of colonized peoples.

84. The right to self-determination applies to all peoples, not just colonized peoples. It applies to Palestinians. It also applies to Jews. Zionism is the expression of the right to self-determination of the Jewish people. Hamas, if they truly believed in the right to self-determination of peoples, would be Zionist.

85. One can say of colonialists generally that their right to self-determination is realized elsewhere than in the colony. It is realized in the imperial metropolis. There is no elsewhere for the global Jewish community. The only state for and by the Jewish people is the State of Israel. Jews outside of Israel are the diaspora.

86. South Africa does not claim in its Application that Israel is colonialist. The Application takes no note of the fact that Hamas does claim that Israel is colonialist and Hamas claims all of Israel as occupied Palestinian territory. This failure to take note of who Hamas is and the threat that Hamas poses to Israel diminishes further not only the seriousness of the South African application but also its entitlement to review by the Court. .

iv) Racism

87. The claim that Israel is racist is equally ill-founded. The 1948 Declaration of Independence of the State of Israel declared that Israel "will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex."⁴²

88. One can point to instances where Israel does not live up to that ideal. Yet, one can

⁴² "Declaration of Israel's Independence, 1948" (last visited 6 January 2024), online: *PBS: Public Broadcasting Service* <pbs.org/wgbh/americanexperience/features/truman-israel/>.

do so as well for every other state.

89. Whatever one can say about Israeli equality, Hamas is far worse. Hamas does not even hold out equality as an ideal. Its Document of General Principles and Policies does not use the word. Arabs and Muslims can live in peace in Israel. Jews in Gaza risk their lives simply by being there. When Israeli forces left Gaza in 2005, they had to evacuate all Jews for their own safety. Indeed, both Hamas and the PA itself demand that their territories be “Judenrein,” free of Israeli Jews.

90. Anti-Zionist condemnations of Israel work backwards. Anti-Zionists move from opposition to Israel to charges against Israel rather than from wrongdoings by Israel to anti-Zionism. Their starting point is the vocabulary of condemnation rather than the practices of Israel. Any unsavory verbal weapon that comes to hand is used to club Israel and its supporters. The reality of what happens in Israel is ignored. What matters is the condemnation itself. For anti-Zionists, the more repugnant the accusation made against Israel the better, because the more that accusation supports the anti-Zionist cause.

91. A good example of this phenomenon is accusations of apartheid made against Israel. South Africa in their Application to this Court makes this accusation.⁴³

92. Apartheid is universally condemned. Its onetime supporters, primarily in South Africa, have long since abandoned it. There was a global coalition opposed to apartheid which helped to bring about its downfall.

93. Anti-Zionists saw and remembered this global anti-apartheid effort. They dream of constructing a similar global anti-Zionism effort. The simplest and most direct way for them

⁴³ “Application instituting proceedings and request for the indication of provisional measures” (29 December 2023), online (pdf): *International Court of Justice* <[icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf](https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf)>, at para 34.

to do so is to label Israel as an apartheid, racist and criminal state, something Israel-haters attempt to do at every turn and in every place, including in and on the grounds of the United Nations itself. The fact that there is no resemblance whatsoever between true apartheid and the State of Israel have not stopped anti-Zionists for a moment.

94. Basic to apartheid was the denationalization of blacks, because they were black and allocation of nationality in state created bantustans or homelands. Blacks assigned to bantustans were subject to influx controls and pass laws. The objective of apartheid was to denationalize all blacks, to assign every black to one of ten bantustans. Blacks were forcibly removed from where they lived to their designated bantustans.

95. Israel has not since its inception taken away vested Israeli citizenship of even one Palestinian for the sole reason that the person is ethnic Palestinian. Israel has not created designated territories within its borders to which it has forcibly removed its own citizens who are ethnic Palestinian. Indeed, when one starts to look at what apartheid really was, any comparison between Israel today and South Africa at the time of apartheid does not bear scrutiny.⁴⁴

96. The charge of apartheid against Israel is so defamatory and harmful that Jean-Christophe Rufin, in a report to the French Ministry of Interior, recommended that it be criminalized.⁴⁵

97. Rufin wrote (in French):

"Certainly, there is no question of penalising political opinions that are critical, for example, of any government and are perfectly legitimate. What should be penalised

⁴⁴ See David Matas, "Apartheid as a root cause of human rights violations", *No More: The Battle against Human Rights Violations*, (Toronto: Dundurn Group, 1994), ch 8.

⁴⁵ "Chantier sur la lutte contre le racisme et l'antisemitisme" (19 October 2004) online (pdf): *République Française – Ministère de l'intérieur de la sécurité intérieure et des libertés locales* <medias.vie-publique.fr/data_storage_s3/rapport/pdf/044000500.pdf>.

is the perverse and defamatory use of the charge of racism against those very people who were victims of racism to an unparalleled degree. The accusations of racism, of apartheid, of Nazism carry extremely grave moral implications. These accusations have, in the situation in which we find ourselves today, major consequences which can, by contagion, put in danger the lives of our Jewish citizens. It is legitimate to require by law that these accusations are not made lightly. It is why we invite reflection on the advisability and applicability of a law... which would permit the punishment of those who make without foundation against groups, institutions or states accusations of racism and utilise for these accusations unjustified comparisons with apartheid or Nazism."⁴⁶

98. The South African Application is a downplaying, distortion and trivialization of apartheid. South Africa should be the last country to engage in this behavior. Instead, in this case, it has become the lead.

99. Nonetheless, the South Africa misrepresentation of apartheid should not be a license to the Court to do the same. Those concerned about the horrors of apartheid should remember apartheid for what it truly was.

v) Aggression and expansion

100. As for the aggression and expansion of which Hamas accuses Israel, it does not exist. Israel has not expanded to include either the West Bank and Gaza within its borders.

101. Israel in 2000, when Yasser Arafat headed the Palestinian Authority and met at Camp David with President Clinton and then-Israeli Prime Minister Barak, and in 2008, when Mahmoud Abbas was its head, offered to the Palestinian Authority, in peace negotiations,

⁴⁶ *Ibid.*

Palestinian statehood with control over both the West Bank and Gaza. In both instances, the Palestinian Authority did not accept the offer. If Israel were aggressive and expansionist, those offers would never have been made.

102. The problem here is not Israeli aggression and expansion. The problem rather is that the Palestinian Authority is not prepared to accept "yes" for an answer. Why that is so, one can only speculate, and there has been lots of speculation. One plausible, albeit speculative, answer is that the Palestinian Authority is so intimidated by Hamas and its supporters that it does not want to put itself into direct confrontation with them by ending anti-Zionist efforts. Another plausible answer is it does not want to be viewed as having legitimized the very State of Israel it at one time vowed to defeat and remove from all areas in the region, including the West Bank of the Jordan River to the Mediterranean Sea, as they say "From the River to the Sea."

vi) Settlers

103. As for the concern about settlers, that too is superficially puzzling. South Africa repeats this concern in their Court Application, referring to settlers and settlements thirty times. There are more Arabs and Muslims in Israel, both in absolute and in percentage numbers than there are Israelis living in the West Bank.

104. As of September 14, 2023, Israel's population stood at 9,795,000. The Jewish population was 7,181,000 (73.3%), and 2,065,000 (21.1%) were Arabs. Those identified as others were 5.6% of the population or 549,000 people.⁴⁷

105. For the West Bank, the estimated population as of July 2021 was 2,949,246. That

⁴⁷ "Vital Statistics: Latest Population Statistics for Israel (4 January 2024)" (last visited 6 January 2024), online: *Jewish Virtual Library – A project of AICE* <jewishvirtuallibrary.org/latest-population-statistics-for-israel>.

figure included approximately 432,000 Israeli citizens, referred to by many as “settlers,” living in the West Bank as of 2019. The settlers were accordingly 14.6% of the West Bank population.⁴⁸

106. If there is ever to be peace, Palestinians and Jews are going to have to live side by side as neighbors. Why that should be so only in Israel and not in the West Bank and Gaza can, realistically, be explained only by bigotry.

107. A small number of settlers today in the West Bank, some would say, are not the best of neighbors. Yet, anyone who wants a good neighbor should be a good neighbor. The hostility of Palestinians in the West Bank to their Jewish Israeli neighbors may generate, it should not be surprising, an unfriendly response. Only a genuine peace treaty between Israel and the PA, in accordance with terms and steps agreed to by the parties themselves through the Oslo Accords, can establish the borders and terms for the establishment of the Arab State that was envisioned by the UN Partition Resolution.

D. From rhetoric to killings

108. Even if this reasoning is all incorrect, that does not get us very far. Even if everything said here in response to the charges of occupation, colonialism, racism, aggression, expansion and settlements is rejected, it does not necessarily follow that Hamas should feel compelled to slaughter 1,200 innocent Israeli Jews, abduct over 200 and engineer the deaths of innocent Palestinians in the thousands through using them as human shields and tools of terror. How does Hamas get from its rhetoric, even if truly believed, to these mass killings?

⁴⁸ “West Bank Demographics Profile” (last visited 6 January 2024), online: *Index Mundi* <https://www.indexmundi.com/west_bank/demographics_profile.html>.

109. The answer is threefold. The explanations are religious fervor, combined with bigotry and hatred, leading to jihad-related religious war against Israel and the Jewish people, the impact on Israelis and antisemitism.

i) Religious fervor against Israel

110. Religious fervor is notable in the 1988 Hamas Covenant⁴⁹ and the 2017 Document of General Principles and Policies.⁵⁰ In the 1988 Hamas Covenant, the word "Islam" or its variations is repeated 136 times. The word "Allah" is repeated 92 times. The word "Moslem" is repeated 57 times. The word "Prophet" or "Prophets" is repeated twelve times. The word "Koran" is repeated five times.

111. The Hamas Document of General Principles and Policies mentions Islam 21 times and Allah six times.⁵¹ In the Hamas Document, Palestine is not just called an Arab land. It is called an Arab Islamic land.

112. When it comes to the emphasis on religion, Hamas and Israel are notably different. For Hamas, Islam is part of its name. Its Document of General Principles and Policies is replete with references to Islam and Allah. Hamas is essentially a religious movement.

113. Israel is legally secular. One of its Basic Laws is titled "Israel - The Nation State of the Jewish People." That Basic Law makes no references to God or Judaism. It refers to the Jewish religion only obliquely, stating

"The state of Israel is the nation-state of the Jewish people, in which it actualizes its natural, religious, and historical right for self-determination."

This provision could be rephrased to state that "The state of Israel is the nation-state of the

⁴⁹ *Supra* note 2.

⁵⁰ *Supra* note 3.

⁵¹ *Ibid.*

Jewish people, in which it actualizes its right for self-determination" and the substantive content would remain the same.⁵²

114. The Basic Law provides for religious holidays of every religion. The Law states: "Saturday and the Jewish Holidays are the official days of rest in the state. Those who are not Jewish have the right to honor their days of rest and their holidays." The law actively contemplates a non-Jewish population in Israel.⁵³

115. The law refers to Israel as "the historical homeland of the Jewish people" but does not refer to Israel as "Jewish land." This stands in stark contrast to the Hamas Document which proclaims that Israel is "Islamic land."⁵⁴

ii) The impact on Israelis

116. The second reason Hamas has for the mass killings for which they are responsible is the impact on Israelis. Instructions found on dead Hamas fighters after the October 7th attacks stated, "Kill as many people and take as many hostages as possible." The instruction was not limited to killing Israeli Defense Forces, or to adults. Hamas is a terrorist organization, designated as such in Canada, the United States and several other countries.⁵⁵

117. The purpose of terrorism is terror. The intent of Hamas in launching a mass murder attack on Israeli Jews is to terrorize the survivors, to prompt them to flee Israel.

⁵² "Israel's Basic Laws: Israel – The Nation State of the Jewish People (19 July 2018)" (last visited 6 January 2024), online: *Jewish Virtual Library – A project of AICE* <<https://www.jewishvirtuallibrary.org/israel-s-basic-laws-the-israel-nation-state-law>>, art 1(b).

⁵³ *Ibid*, art 10.

⁵⁴ *Ibid*, art 1(a).

⁵⁵ Daniel Byman & Mackenzie Holtz, "Why Hamas Attacked When It Did" (6 December 2023, last visited 6 January 2024), online: *Center for Strategic and International Studies* <[csis.org/analysis/why-hamas-attacked-when-it-did](https://www.csis.org/analysis/why-hamas-attacked-when-it-did)>.

118. Hamas leader Abdel Aziz Rantisi stated: "we will not leave one Jew in Palestine. ... This is our land, not the Jews..." Hamas official Halil Al-Hayya stated "Palestine is Islamic ... from the river to the sea ... Jews have no right in it, with the exception of those who lived on the land of Palestine before World War I."⁵⁶

iii) Antisemitism

119. Antisemitism is a shape shifting monster. The various forms of antisemitism - for instance, claims of Jewish double loyalty, blood libel (the accusation Jews kill Christian babies for the blood to make Matzoh unleavened bread for Passover), the belief that Jews killed Christ, the Jewish world control conspiracy theory, and the myth of Jewish racial inferiority - have nothing in common except blatant hate, bigotry and antisemitism.

120. Antisemitism is a virus for which any theory, ideology and belief can become the host. There is no vaccine against this infection, other than alertness and a commitment to stand against bigotry.

121. Yet many people are not aware of the risk of infection. Whatever the ideology is, its believers can all too easily succumb to the virus, because of inadequate defenses against it. Any "ism," other than Judaism and Zionism, can all too easily become, in addition, antisemitism, unless safeguards are put in place.

122. That observation applies as much to anti-colonialism and anti-racism as any other "ism." For the antisemite who is also anticolonialist, anticolonialism and antisemitism blend together. Jews are rejected as neighbors on the pretext that their proximity is colonialism, when the real concern is that they are Jewish.

⁵⁶ "Hamas in Their Own Words" (2 May 2011, last visited 6 January 2024), online: *Anti-Defamation League* <[adl.org/resources/news/hamas-their-own-words](https://www.adl.org/resources/news/hamas-their-own-words)>.

123. Anti-Zionism is a sub-species of antisemitism - the hatred of the Jewish state of Israel because it is Jewish. If Israel were Arab and Moslem, anti-Zionism would not exist.

124. Anti-Zionism, like its parent, antisemitism is a virus attacking otherwise benign "isms." A classic example is the undermining of the "ism" anti-racism. In an Orwellian inversion, the United Nations, with the combined votes of the anti-Zionists states and anti-democratic states in search of reciprocating support, in 1975 passed a resolution that declared that Zionism is racism.

125. The resolution, because it was so obviously mistaken, did more harm to the UN than to Israel, and was repealed in 1991. The antisemitic onslaught, nonetheless, continued with, for example, the UN Conference on Racism, also known as the UN Durban Conference, a hatefest against Israel and the Jewish People. (At that Conference, B'nai B'rith International played a pivotal leadership role in combatting hate in all its forms.) This antisemitism carries on today with Hamas. Anyone who thinks that there is something other than antisemitism going on with the Hamas attacks and Hamas blame-shifting for the Palestinians it victimizes as human shields just is not paying attention.

IV. Genocide of the Palestinian people

126. Determining whether either Israel or Hamas has committed genocide on the Palestinian people requires consideration of all relevant international legal standards. As long as either Israel or Hamas acted legally, it is impossible to say that the party to the conflict who acted legally committed genocide.

127. Determining the legally relevant standards requires first determining whether the conflict is international or non-international. Israel would consider the conflict

non-international. 139 UN member states have recognized Palestine as a state, (although most democratic, free state members of the United Nations have not done so). For these 139 countries, including South Africa, the conflict would be international. For others, the conflict is regional in nature; and local in its need for resolution.

128. The Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I)⁵⁷ and The Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)⁵⁸ are therefore both relevant. Palestine is a party to both Protocol I and Protocol II. Israel is a state party to neither Protocol. Nonetheless, at least some of the standards in the Protocols arguably are customary international law binding on all states, parties to the Protocols or not.

A. Responsibility of Hamas

i) Legal standards

129. The Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts under the heading "Protection of medical units" provides:

"Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety."⁵⁹

130. The Protocol defines the term "medical units".

"For the purposes of this Protocol: 'medical units' means establishments and other units, whether military or civilian, organized for medical purposes, The term

⁵⁷ *Supra* note 30.

⁵⁸ *Supra* note 31.

⁵⁹ *Supra* note 26, art 12(4).

includes, for example, hospitals ..."⁶⁰

131. The Protocol further provides:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."⁶¹

132. The Protocol also provides:

"The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."⁶²

133. Before World War II there was no international legal instrument prohibiting the use of human shields generally, as there is now with Protocol I to the Geneva Conventions on the Laws of War. There was, nonetheless, a prohibition against the use of prisoners of war as human shields.

134. The Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929 provides:

"No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment."⁶³

⁶⁰ *Ibid*, art 8(e).

⁶¹ *Ibid*, art 48.

⁶² *Ibid*, art 51(7).

⁶³ "Convention relative to the Treatment of Prisoners of War" (27 July 1929, last visited 6 January 2024), online (pdf): *International Humanitarian Law Databases* <ihl-databases.icrc.org/assets/treaties/305-IHL-GC-1929-2-EN.pdf>, art 9.

135. The US Military Tribunal Nuremberg High Command Trial charged and convicted German Army Commander Hermann Hoth, amongst other charges, with war crimes and crimes against humanity involving crimes against prisoners of war. The judgment read, in part:

"Under date of 29 October 1941, in the war diary of the Oberquartiermeister of Hoth's 17th Army, appears the following:

'The billeting of PW's captured in the city and some of the inhabitants of the country in the building used by our own troops has proved to be a useful countermeasure against the time bombs put there by the enemy. It has been our experience, that, as a result of this measure, the time bombs were found and rendered harmless in a very short time by the prisoners and/or the inhabitants of the country.'

To use prisoners of war as a shield for the troops is contrary to international law.

Hoth said he gave no orders that this be done and he did not think it was done in his army. However, he admits knowing that prisoners of war were used as a shield for German troops in another army and states that he thought his Oberquartiermeister was reporting on that."⁶⁴

Hoth was convicted of the crimes for which he was charged and sentenced to fifteen years in prison.

136. Hamas violates all legal obligations quoted above. Hamas has violated international law in a large number of ways - by its kidnapping of innocents; by its taking those innocents across the Israel-Gaza Border into Gaza; by holding those innocents as hostages; by denying access by the International Committee of the Red Cross to those hostages; by killing, maiming and raping. Hamas has violated international law not least by using Gaza resident

⁶⁴ *The United States of America vs. Wilhelm von Leeb et al. High Command Trial* US Military Tribunal Nuremberg, Judgment of 27 October 1948
<https://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf>

Palestinians as human shields. The Nuremberg proceedings provide a precedent for that position.

137. In principle, the armed forces of a state should be used to protect its civilian population. Hamas reverses that principle, using the civilian population of Gaza to protect its armed forces.

ii) Hamas behavior

138. Hamas has used medical units including hospitals in an attempt to shield military objectives from attack. Hamas does not distinguish between the civilian population and combatants. Hamas operatives do not consistently wear uniforms. Hamas directs the movement of the civilian population and individual civilians, in order to attempt to shield its operatives, its arms supplies and its arms smuggling tunnels. Hamas denies access to its tunnels for Palestinians who could be saved by using the tunnels as bomb shelters.

139. The Meir Amit Intelligence and Terrorism Information Center reports:

"A weapons warehouse was ... discovered inside the al Shaheed Mosque, where ... children's and youth movement activities were held (IDF spokesman, July 27, 2022)"

"Senior Hamas terrorists in the Gaza Strip, led by Yahya al Sinwar, consistently appear at public events with small children, secure in the knowledge that the IDF would not attack them. Al Sinwar has been photographed accompanied by children several times, not only at public events, but also on his street patrols in Gaza, with children deployed alongside him to prevent him from being targeted."

"For example, on October 1, 2022, Hamas held a mass rally in Gaza City whose theme was "al Aqsa [Mosque] is in danger." Al Sinwar appeared at the rally with two

young children at his side (Hamas website, October 1, 2022). On May 26, 2021, a few days after Operation Guardian of the Walls, Yahya al Sinwar was seen walking the streets of Gaza under tight security. Wherever he was, children were seen close by."

"On November 13, 2023, the IDF spokesman revealed evidence that Rantisi Children's Hospital in the north of Gaza City was used by Hamas for military terrorist purposes. A Hamas command center operated in the basement of the hospital, where large quantities of weapons, explosive devices and explosive belts, were found. A terrorist tunnel was also located."

"IDF forces located rocket launchers placed near a children's swimming pool, and launch pits and rocket launchers placed in an old playground ... (IDF spokesman, November 5, 2023)"

"On November 29, 2022, UNRWA reported the discovery of a tunnel near one of its schools in Gaza. The agency immediately blocked off the area and took measures to ensure the safety of the school, including permanently sealing off the entrance. The agency strongly protested to the [Hamas] authorities in Gaza. UNRWA argued that the presence of a man made space under UNRWA school grounds constituted a serious violation of the agency's neutrality and a violation of international law. Moreover, it exposed the children and agency staff to significant security and safety risks."

"a post uploaded by a Gazan named Khalil Amar Abu Ibrahim ... criticized the terms of the distribution of financial aid to the families of shaheeds [martyrs] in the Gaza Strip on behalf of the al Ansar Charitable Association, which excluded children under the age of 15 and residents over the age of 60. He wrote there were dozens of

families who lost their children because PIJ [Palestine Islamic Jihad] terrorist operatives barricaded themselves in their buildings. He personally lost his three children in the same attack, and they had served as human shields to protect where 'so and so' from the 'resistance' was staying (Facebook page of the al Ansar Charitable Association, June 2, 2023)."⁶⁵

140. The use by Hamas and fraternal terrorist organizations of children as shields is systematic. Hamas death statistics from the Israeli response to the October 7th attack do not indicate how many of the children killed died as the result of being used as human shields.

141. Some of the shields that Hamas uses are voluntary. Hamas actively recruits human shields. The fact that some human shields are voluntary does not exculpate Hamas. Hamas remains responsible for their deaths.⁶⁶

142. The NATO Strategic Communications Centre of Excellence publication of 2014 wrote: "Hamas thus responds to the IDF's [Israeli Defence Forces'] military and technological supremacy by creating an asymmetric equation, - using civilian populations to protect their military assets."⁶⁷

143. Hamas is guilty of the act of genocide of causing mass bodily and mental harm to both

⁶⁵ "Hamas use of the civilian population as human shields and Gaza's civilian facilities for terrorism reports" November 18, 2023 <https://www.terrorism.info.org.il/en/hamas-use-of-the-civilian-population-as-human-shields-and-gaza's-civilian-facilities-for-terrorism/>

⁶⁶ Stéphanie Bouchié de Belle, "Chained to Cannons or Wearing Targets on their T-Shirts: Human Shields in International Humanitarian Law", (2008) 90:872 Int'l Red Cross 883, 889.

⁶⁷ James Pamment et al, "Hybrid Threats: Hamas' use of human shields in Gaza" (2019), online (pdf): *NATO Strategic Communications Centre of Excellence* <stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf>.

Israeli hostages and Gazan - Palestinians by using them as shields for its armaments, its arms supplies and its arms smuggling tunnels. Moreover, the fact that the shields are Palestinian is intentional. The intent is an intent to destroy the part of the group that is used as human shields.

144. According to the NATO Strategic Communications Centre of Excellence publication quoted earlier, the Hamas strategy of using Palestinian shields

"accepts the possibility of civilian casualties, and even leverages these for internal and external propaganda. ... Hamas uses human shields as a military practice to earn points in the global and regional arena."⁶⁸

145. Hamas engineers the victimization of the Palestinian people behind whom it hides in order to generate anti-Israel propaganda. Hamas instrumentalizes the death of Palestinians through blame shifting, accusing Israel of their deaths as part of its ongoing demonization and delegitimization against Israel.

146. Everyone who criticizes Israel for the deaths of Palestinians does the work of Hamas, not only engaged in their blame shifting but also, even worse, incentivizing Hamas to continue to harm Palestinians through using them as shields. Those who innocently parrot Hamas propaganda become unwitting accomplices in Palestinian deaths. Anyone who wants to stop the victimization of Palestinians should make clear their disapproval of the use by Hamas of Palestinians as human shields and should allocate blame where it properly belongs for the death of Palestinians, to Hamas for their use of Palestinians as human shields.

iii) Religious fervor against Palestinians

147. The religious fervor of Hamas is not just directed against Israel and Jewish Israelis. It

⁶⁸ *Ibid.*

is also directed against Palestinians. Hamas and their surrogates have had a long history of attacks on Israel. Rocket and balloon attacks from Gaza to Israel have been an almost daily occurrence since Israel withdrew from Gaza in 2005. Mostly Israel has tried to shoot down the rockets and escape their impact through bomb shelters. Occasionally Israel has responded with air strikes on Hamas targets in Gaza, at various points of time in 2004, 2006, 2012-14, 2021 and May 2023.^{69 70}

148. Hamas could hardly have been surprised by the most recent Israeli response to the October 7th attack. The response was predictable. Indeed, in light of the history of Hamas attacks and Israeli responses, the October 7th Hamas attack ought to be considered a deliberate provocation, intended to elicit the very response that Israel generated. Why Hamas would want to provoke that response is explained by Hamas themselves.

149. One Hamas leader, Khaled Mashal, stated: "We know very well the consequences of our operation on October 7 . . . No nation is liberated without sacrifices." Another Hamas leader stated: "We are called a nation of martyrs, and we are proud to sacrifice martyrs." Atallah Abu Al-Subh, former Hamas minister of culture, "Whoever is killed by a Jew receives the reward of two martyrs."⁷¹

iv) Global public opinion

150. One reason Hamas has for the mass killings for which they are responsible is the impact on global public opinion. Fanatical, murderous religious hatred, the determination to kill *en masse* not only non-believers, but also to engineer the killing of believers, in pursuit

⁶⁹ "Hamas and Israel: a history of confrontation", *Reuters* (14 May 2021), online: <[reuters.com/world/middle-east/hamas-israel-history-confrontation-2021-05-14/](https://www.reuters.com/world/middle-east/hamas-israel-history-confrontation-2021-05-14/)>.

⁷⁰ Nidal Al-Mughrabi, "Israel kills three Islamic Jihad leaders, 10 civilians in Gaza", *Reuters* (9 May 2023), online: <[reuters.com/world/middle-east/israeli-jets-strike-islamic-jihad-targets-gaza-military-2023-05-08/](https://www.reuters.com/world/middle-east/israeli-jets-strike-islamic-jihad-targets-gaza-military-2023-05-08/)>.

⁷¹ *Supra* note 55.

of religious goals is, to the global secular population so strange, that they do not see it happening even when it is plainly in front of them. One of the greatest difficulties in combatting human rights violations is the inability to appreciate the reality of what is happening.

151. Today the Holocaust, in addition to being arguably the most grave atrocity in history, is the best documented, and most widely known. Yet, while it was happening, it was met with incredulity. There was a disconnect between evidence and knowledge.

152. Efforts to react against genocides generally are met with denial, attempts at impunity, cover-up, obfuscation, counter-narratives and propaganda directed against the victim group. Compounding these difficulties is the phenomenon of disbelief even by those sympathetic to the plight of the victim community and by the victim community themselves, in the face of a wealth of information, particularly when the genocide takes a novel form.

153. Knowledge combines evidence with belief. A person can be presented with irrefutable evidence that something is true. However, as long as the person does not believe the information is true, there is no knowledge.

154. This phenomenon of disbelief was a particular problem in attempts to mobilize efforts to escape, counter the Holocaust when it was occurring and is a problem in combatting denial of the Holocaust even today. Many did not believe the Holocaust was happening even when presented with eye-witness testimony, even when they themselves witnessed direct evidence.

155. U.S. Supreme Court Justice Felix Frankfurter in 1943 in reaction to being told by a Polish undercover agent Jan Karski about the Holocaust said: "I do not believe you." When a Polish diplomat told Frankfurter that Karski was telling the truth, Frankfurter responded:

"I did not say that this young man was lying. I said that I was unable to believe what he told me. There is a difference. My mind and heart are made in such a way that I can not accept it."

156. Rudolf Vrba and Alfred Wetzler, who escaped from Auschwitz in April 1944, wrote and circulated a detailed account of the mass killings there. Their report was consistently disregarded and disbelieved, even by those who could have saved their own lives by believing it.

157. Georg Klein, then living in Budapest, recounts that he believed the report and escaped. Before he escaped, he showed the report to his uncle who said: "How could you believe such nonsense?"⁷²

158. Philosopher Hannah Arendt, when reading the initial reports of the Holocaust in the New York Times, stated that she did not believe them, because the killing of civilians did not make any military sense. French philosopher Raymond Aron said about the Holocaust: "I knew it, but I didn't believe it. And because I didn't believe it, I did not know."

159. What is striking about this disbelief from Frankfurter, Arendt and Aron was that they were educated well informed people, who were also all Jewish and well familiar with antisemitism. The widespread disbelief in the Holocaust while it was happening, though not the only cause for the failure to react immediately to evidence of the Holocaust, was surely a contributing factor.

160. More than a year before it happened, Israeli intelligence personnel had obtained, in

⁷² Jonathan Freedland, *The Escape Artist: The Man Who Broke Out of Auschwitz to Warn the World*, (New York: HarperCollins, 2022) at 306.

specific exact detail, the attack plan Hamas launched on October 7th, 2023.⁷³

161. Despite this prolonged advance warning, Israel engaged in virtually no preventive activity and its forces were taken by surprise. Those in charge did not believe either that Hamas would or that Hamas could execute such a dastardly, hateful, destructive plan.

162. If anyone should have learned the lessons of the Holocaust, it should have been the Jewish community. In light of lived experience, the Jewish community should not discount any detailed, specific advance warning of their own intended destruction at the hands of rabid hate-filled antisemites. The failure to do so for the October 7th attack reminds us yet once again of the powerful force of disbelief faced with a horror outside the boundaries of expectations.

163. Ismail Haniyeh, the head of the Hamas Political Bureau, two days after the mass killings of 1,200 innocents simply because they were Jewish, the systematic atrocities against Jewish women, and the abduction of over 200 Jewish innocents, gave a triumphalist speech in religious terms describing the horrors Hamas inflicted as a "Great Victory" of "Ummah," that is to say the global Islamic community.⁷⁴

164. Many outsiders who express support for Hamas do not know who Hamas is and what they are doing. They ignore the Hamas claim that genocide of the Jews, systematic atrocities against Jewish women and abduction of over 200 Jews was a "Great Victory," a "dazzling

⁷³ Ronen Bergman & Adam Goldman, "Israel Knew Hamas's Attack Plan More Than a Year Ago", *New York Times* (30 November 2023, last modified 2 December 2023), online: [nytimes.com/2023/11/30/world/middleeast/israel-hamas-attack-intelligence.html](https://www.nytimes.com/2023/11/30/world/middleeast/israel-hamas-attack-intelligence.html).

⁷⁴ <https://www.middleeastmonitor.com/20231009-haniyeh-outlines-context-and-objectives-of-hamas-operation-al-aqsa-flood/>

triumph” and a “glory.” They show no appreciation of the fact that to Hamas, the Islamic religion means mass killing of Jews, systematically inflicting atrocities on Jewish women and abducting innocent Jews. They accept at face value Hamas claims that Israel is responsible for the deaths of Palestinians in Gaza. They show no awareness that Hamas has engineered Palestinian deaths as a form of religious martyrdom to evoke the gullible sympathy that outsiders express.

165. Even told that this is happening - and Hamas statements about what they are doing is public - many outsiders find that behavior so outside their frame of reference, they react as if this martyrdom strategy of Hamas did not exist. The Court Application of South Africa makes no reference to the Hamas statement that the atrocities they inflicted on October 7th are a “Great Victory” for Islam or their calls to martyrdom of the Palestinian people.

166. Those focused on the Hamas attack on Israel are sometimes criticized for not showing equal concern for Palestinians. That criticism either fails to appreciate that the two concerns are the same - a concern about Hamas, or knowingly sides with the murderous, religious fanaticism of Hamas.

167. In considering how best to react to Palestinian victimization, it is worth noting or remembering these contextual factors:

- Hamas is a terrorist organization. It is designated as such many countries.
- Hamas is anti-Zionist. It is opposed to the very existence of Israel as Jewish state and is determined to remove it. Its sole basis of opposition to the existence of Israel is its Jewish character. Hamas is unequivocally, blatantly, overtly anti-Israel, anti-Zionist and antisemitic.
- Hamas is genocidal. The recent mass atrocities against Jews in Israel is a reflection of its

ideology, that Jews should not live in a Jewish Israel and, if they insist on doing so, they should be killed.

- Hamas anti-Zionist strategy is two pronged - terrorism and demonization of Israel which in turn leads to efforts in delegitimization. Hamas engages in terrorist attacks. Israel responds. Hamas then decontextualizes the response from the attacks and claims that the response is either gratuitous or disproportionate. Hamas then claims that the Israeli response, decontextualized from the terrorism which generated the response, is morally wrong and violates international law.
- Hamas operatives disguise themselves as civilians. They do not consistently wear uniforms. When they are killed in combat, they claim that Israel is killing civilians.⁷⁵
- Hamas uses innocent Palestinians as human shields. Hamas hides behind civilians to launch their armed attacks. When Israel goes after Hamas targets hiding behind human shields, Hamas blames Israel for the victimization of its Palestinian shields, claiming that Israel is killing innocent civilians.
- Hamas stores arms and rockets and launches armed and rocket attacks from or near civilian sites, including mosques, residences, hospitals, schools and office buildings. When Israel responds, again Hamas claims that Israel is killing innocent civilians.
- Hamas hold Palestinians, Israelis and citizens of many other countries hostage . It denies, through terrorism directed against the Palestinian population, any opportunity for Palestinian refugees to seek resettlement. It either attempts to prevent Palestinians from fleeing locations from which Hamas is launching armed and rocket attacks, so that

⁷⁵ Warren Kinsella, "KINSELLA: Ordinary Palestinian citizens aided and abetted Hamas on Oct. 7" *Toronto Sun* (30 Dec 2023), online: <torontosun.com/opinion/columnists/kinsella-ordinary-palestinian-citizens-aided-and-abetted-hamas-on-oct-7>.

Palestinians can remain as human shields, or blends in with fleeing Palestinians so that Hamas can continue to use them as shields.

- Hamas prevents innocent fleeing Palestinians from accessing its tunnel network and using them as bomb shelters.⁷⁶
- Hamas uses schools in Gaza, including those run by the UN itself through UNRWA, to indoctrinate children in hatred towards Israel and the Jews then trains them to attack Israel.
- Hamas abuses border controls imposed by Egypt and Israel pretending to import food and medical supplies, but in fact, importing armaments and rockets.
- Hamas diverts international donor humanitarian aid to the purchase of armaments, rockets and building materials intended for civilian use but actually used to build and maintain terror infrastructure, including tunnels.
- Hamas within Gaza does not allow a free press, an independent judiciary or free and fair elections. The only views allowed in Gaza are those of Hamas.
- Hamas shifts the blame to Israel for the victimization of Palestinians it engineers, attempts the delegitimization of Israel for the victimization of Palestinians which Hamas causes, and demonizes Israel through this blame shifting.

168. Now that Israel is responding to the latest, most serious Hamas attacks, Hamas goes into overdrive engineering the victimization of Palestinians, and then instrumentalizing that victimization to add fuel to its anti-Zionist campaign. Unfortunately, this strategy works. In

⁷⁶ "Iran Brags About Hamas Tunnels As Weapons Of War" *Iran International Newsroom* (30 Oct 2023), online: <iranintl.com/en/202310301314>.

the chorus of claims that concern for Israeli victims fails to acknowledge concern for Palestinian victims in Gaza are not only people who share the Hamas antisemitic genocidal agenda, but also those not fully cognizant of Hamas history, ideology and strategies. All too many, including South Africa, fall into the Hamas trap and blame Israel for the victimization of Palestinians that Hamas itself engineers.

169. Hamas could easily and immediately end victimization of both Israelis and Palestinians by surrendering unconditionally to Israeli forces, including, most importantly, releasing the more than one hundred people still held hostage, even after all this time since October 7th. Needless to say, that is not going to happen except by military response or a negotiated end of conflict under conditions that include an end of Hamas brutal rule in Gaza. In the absence of that behavior, anyone assessing Israeli behavior needs to take into account and address the factors listed here before making any pronouncements about the Israeli response.

170. Israel knows better than to pay any attention to Hamas propaganda. Those who suffer from it are the Palestinians, because global ignorance which echoes that propaganda prods Hamas to continue and increase their engineered victimization of Palestinians in order to continue and increase the blame on Israel. Also, victims are the Jewish community worldwide demonized as actual or presumed supporters of what Hamas pretends is a demon state.

171. People who oppose the victimization of the innocent, whether Israeli or Palestinian, need to understand who Hamas is and what they are doing. Knee-jerk claims that Israel is behaving badly and violating international law in its response to Hamas terrorism help only Hamas. Anyone who gives credence to these claims, as South Africa has done, is harming both Palestinians and Jews.

B. Innocence of Israel

i) Claimed indiscriminate attacks

172. Protocol I provides that "Indiscriminate attacks are prohibited."⁷⁷

173. South Africa claims that the Israeli response to the October 7th Hamas attack was indiscriminate.⁷⁸

174. The Protocol adds:

"Among others, the following types of attacks are to be considered as indiscriminate: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁷⁹

175. The Protocol elaborates on that provision in a way relevant to Israeli responsibility in the current conflict. It states:

"The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations."⁸⁰

176. The provision in the Protocol about excessive attacks is sometimes referred to as a standard preventing disproportionate responses. Yet, the provision does not do that. Excessive is different from disproportionate. Disproportionate means too much. Excessive

⁷⁷ *Supra* note 30, art 51(4).

⁷⁸ *Supra* note 43 at paras 48, 88, 108.

⁷⁹ *Supra* note 26, art 51(5)(b).

⁸⁰ *Supra* note 26, art 51(7).

means way too much.

177. More importantly, what is to be compared is not the attack with the response, but rather the response with "the concrete and direct military advantage anticipated."⁸¹ The relevant military advantage is not the advantage determined after the response. It is the military advantage anticipated before the response. Though assessments of legality are made after the fact, they must be based on what was anticipated by the responders before the response.

178. It may be that, after the fact, it can become apparent that the attack did not produce a concrete and direct military advantage. Yet, that reality can not be the basis of a legality finding. As long as, before the attack, it was reasonable to anticipate a concrete and direct advantage, the attack is legal even if, after the attack, one can see that no concrete and direct military advantage resulted.

179. Those critical of the Israeli response to the Hamas attack of October 7th point to the large difference between the number of Israeli victims on October 7th and the number of Palestinian victims subsequently, claiming, based on this numerical variation, that the response is disproportionate. Yet, comparing the two fatality figures is legally irrelevant. What, legally, has to be compared is the number of Palestinian victims with "the concrete and direct military advantage anticipated" from the Israeli response to the Hamas attacks.

180. As noted above, Hamas uses Palestinians as shields for its operatives, its store of arms and its arms smuggling tunnels. The Protocol is explicit that this shielding activity can not render Hamas immune from attack.

181. The application of South Africa claiming that Israel has violated the Genocide

⁸¹ *Supra* note 26.

Convention by its response to the October 7th attack does not mention this shielding activity at all. The word "shield" and its variations are not to be found even once in the South African application, other than in a quotation from a 2009 UN report.⁸²

182. The South African application is 84 pages long in Times New Roman font 10.5 letter size, single spaced lines, with almost 50,000 words. In assessing any document, one must consider not only what is there, but also what is not there. The fact that the South African application, in such a massive document, does not refer to shielding even once, even if only to dismiss or explain it, means that the document has a gaping hole in its center.

183. The failure of South Africa even to address the explanation of shielding means that South Africa does not deny that shielding has occurred and is occurring. South Africa has no answer to the submission made here that the victimization of Palestinians is attributable to the use by Hamas of innocent Palestinians as shields. This omission of any reference to the explanation for the victimization of Palestinians that has occurred since October 7th guts the application of South Africa of any substantive meaning.

184. An author wrote in 2009 in an International Committee of the Red Cross publication: "Military objectives protected by human shields do not cease to be legitimate targets for attack simply because of the presence of those shields."⁸³

185. When civilians or civilian sites are used as shields, there remains an obligation on a responder to attempt to minimize civilian casualties, by choosing, when there are alternative means of response, the form of response which minimizes civilian casualties. Yet, with the

⁸² "Application instituting proceedings and request for the indication of provisional measures" (29 December 2023), online (pdf): *International Court of Justice* <[icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf](https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf)>.

⁸³ *Supra* note 64.

Israeli response to the Hamas attacks, despite the huge volume of material condemning Israel for its response to the October 7th attack, there have been no suggestions made by South Africa of any alternative response available which would allow Israel both to respond to the Hamas attacks and yet have fewer civilian casualties than the response they have to date generated.

186. Again here, the South African application, despite its length and detail is striking in its silence. The words "alternative" or "alternatives" like the words "shield" or "shields" are not used even once in addressing the Israeli response to the Hamas genocidal attack of October 7th.

187. Because of this silence, South Africa does not deny that Israel had no alternative response to the response that they did make. The implication of the South African position, in the absence of a suggested viable alternative, is that Israel should accept passively the genocide of its own people at the hands of Hamas, who initiated and launched its heinous terror attack upon innocent Israelis living and enjoying their lives within sovereign Israel territory. That position is untenable.

188. What is the military advantage to be anticipated before the response is best determined by military expertise. There is no independent military expert to whom the application of South Africa refers who has stated that the Israel response to the October 7th attacks is excessive in relation to the military advantage anticipated by that response.

189. Here too the silence of the South African application is remarkable. The phrases "military expert" and "military expertise" are also not used even once in their extremely lengthy application. Here too, the silence of South Africa means that South Africa does not deny that the Israel response to the October 7th attacks is not excessive in relation to the military advantage anticipated by that response. The application, despite its length, fails

to address one relevant legal exculpatory standard after another, gutting the application of persuasive content.

190. The military significance of the Israeli response, in light of Hamas genocidal aims and the unprovoked, unwarranted, illegal and heinous terror attack launched by Hamas cannot be understated. The dispute between Hamas and Israel is not territorial, a controversy over borders. The dispute is existential. At stake is the very existence, indeed the survival of the Jewish state and the Jewish people.

191. Israel is not a target which Hamas may justifiably attack; Israel's citizens and those living, working, visiting and enjoying Southern Israel from all walks of life, all religions, all nationalities, from more than 42 countries around the world, are not worthless targets of a terror organization determined to kill, maim, behead, burn, rape, and take hostage. The victims of Hamas are not people against whom any conduct of Hamas can under any interpretation of any applicable law be acceptable or justifiable.

192. South Africa's application disregards facts and the legal entitlements of Israel and its people to enjoy their freedoms, and rights within democratic Israel. The application denies the rights of those people to be safe and secure in their homes, communities, gatherings and with their families and friends. This Court should take a firm decision that the application of South Africa is not plausible and presents non-justiciable issues that have been presented only in a manner unworthy of the serious attention of this Court.

193. Every Hamas operative, every Hamas weapon, every Hamas tunnel is a cog in a genocidal machine Hamas has dedicated to the extermination of the Jewish people in Israel. The concrete and direct military advantage anticipated from the Israeli response to the Hamas attacks is the elimination of various cogs in this genocidal machine.

194. The genocidal aims of Hamas are not a subject of realistic debate in light of their slaughter on October 7th of 1,200 innocents for no other reason that they were Jewish and located in Israel. How does one weigh the threat of genocide against an incidental loss of civilian life? When does the incidental loss of civilian life outweigh the threat of genocide? The answer depends on the seriousness of the threat.

195. In light of the October 7th attack it is impossible to overstate the seriousness of the threat. The recent experience shows us that, given the opportunity, Hamas would kill every Jew in Israel, and for that matter every Jew in the world, if they could. That is genocide. Israel's response to Hamas terror is not genocide: it is a legitimate exercise of Israel's right, and indeed her obligation, to defend her people.

196. Here the South African Application, though it does not condone the October 7th attack, fails to appreciate its significance. South Africa condemns the October 7th attack, the taking of hostages and the renewed unleashing of a large barrage of Hamas rocket attacks from Gaza. Yet, that is as far as the Application goes.⁸⁴

197. The South African application treats the October 7th attack and subsequent rocket shootings from Gaza as regrettable facts rather than as an ongoing genocidal threat to the people of Israel as long as Hamas remains a viable force. South Africa addresses the October 7th and following wrongdoing of Hamas in only two paragraphs and a sentence in the introduction in an Application totaling 151 paragraphs.

198. The Hamas October 7th attack was not an isolated event. It was a statement of intention, a precursor and a warning. Hamas has repeatedly attacked Israel, both from Gaza and the West Bank, inside Jerusalem and elsewhere for many decades. These attacks, as found by numerous US Federal Court decisions, are sheer evil acts of international terror.

⁸⁴ *Supra* note 43 at paras 1, 40, 41.

The need for Israel to have responded in the past, and to have responded forcefully to October 7th is also, in the South African application, nowhere to be found.

ii) Voluntary shields

199. According to a news report dated January 1st, 2024, the Israeli response to the Hamas attacks of October 7th has resulted in the deaths of almost 22,000 Palestinians. The figure comes from health officials in the Hamas-run territory. Although the loss of every life is a tragedy, the blame falls on Hamas not on Israel. The PA health officials do not give a breakdown between civilians and combatants or between those killed by the Israeli response and those killed by friendly fire. The Hamas health officials say that roughly 70% of the dead have been women and minors.⁸⁵

200. Distinguishing between civilians and terrorists is not as clear cut as distinguishing between armed forces and those not in the armed forces. Being a member of the armed forces of a country is a full time job. A person can be a civilian in the morning and a terrorist in the afternoon.⁸⁶

201. Women and children, after a certain age, can be combatants. Hamas has been using women in combat roles.⁸⁷

202. If one only compares the 1,200 deaths inflicted by Hamas with the claimed almost 22,000 deaths resulting from the Israeli response, the response, viewed out of context,

⁸⁵ "21,978 Palestinians killed in Israeli strikes on Gaza since Oct. 7 – Gaza health ministry", *Reuters* (1 January 2024), online: <[reuters.com/world/middle-east/21978-palestinians-killed-israeli-strikes-gaza-since-oct-7-gaza-health-ministry-2024-01-01/#:~:text=CAIRO%2C%20Jan%201%20\(Reuters\),in%20Gaza%20said%20on%20Monday](https://www.reuters.com/world/middle-east/21978-palestinians-killed-israeli-strikes-gaza-since-oct-7-gaza-health-ministry-2024-01-01/#:~:text=CAIRO%2C%20Jan%201%20(Reuters),in%20Gaza%20said%20on%20Monday)>.

⁸⁶ *The Public Committee against Torture in Israel v. The Government of Israel*, HCJ 769/02 Judgment of Vice President E. Rivlin paragraph 2, https://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM

⁸⁷ <https://www.mako.co.il/news-military/6361323ddea5a810/Article-8aaa9b45a3a4c81027.htm>

might on its face seem disproportionate. Yet, legally, that is the wrong comparison. The comparison, as noted, has to be made between the Gaza deaths and the anticipated Israeli military advantage.

203. Some of the human shields are voluntary. The Israel High Court in a 2006 case wrote:

"What is the law regarding civilians serving as a 'human shield' for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities (see Schmitt, at p. 521 [Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. Fischerr (ed.), *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (2004)] and Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *Chicago Journal of International Law* 511, 541 (2004))."⁸⁸

204. Legality, as noted, is determined by what is expected and anticipated, before the response, rather than by what is determined to have happened after the response. How does one determine whether, before the response, a human shield is voluntary or not?

205. Israeli Defense Forces engage in extensive warnings before attacks, with phone calls, text messages, leaflets and roof knocking - loud but non-lethal bombs that warn civilians that they are in the vicinity of a target.⁸⁹

⁸⁸ *The Public Committee v The Government of Israel* (2006) HCJ 769/02 at para 36.

⁸⁹ "How is the IDF Minimizing Harm to Civilians in Gaza?" (16 July 2014, last visited 6 January 2024), online: *The Israel Defence Forces (IDF) Official Website* <idf.il/en/mini-sites/the-hamas-terrorist-organization/how-is-

206. Hamas urges Palestinians to ignore these warnings and acts to prevent their flight to freedom and safe ground. They suffer at the hands of Hamas, not Israel. Those who act on the urgings of Hamas rather than on the warnings of the Israeli Defense Forces can, in advance of the Israeli response, be considered to be voluntary supporters of Hamas, acting on Hamas urgings, and reasonably be seen as persons taking a direct part in the hostilities.

207. Even if the warnings are as comprehensive as they reasonably could be, there may still be some Palestinian civilian casualties. Nonetheless, we need to extract from the number of Palestinians killed, in addition to Hamas operatives, those who willingly ignored Israeli warnings because they supported Hamas and acted on Hamas urgings to stay in spite of the warnings.

208. As well, we have to consider the concrete and direct military advantage to Israel in destroying the target. Where there is that advantage and it is significant, it is unreasonable to say that the Palestinian civilian casualties who remained despite the warnings but without supporting Hamas are excessive in relation to the military advantage anticipated.

209. Why is the eradication of Hamas taking so long? One reason is that Israel aborts attacks whenever they see an unexpected civilian presence.⁹⁰

210. Another reason is the combination of Israeli warnings and the flight of Palestinians. Warnings eliminate the advantage of surprise. By warning, Israel forfeits a military advantage to protect civilians.

[the-idf-minimizing-harm-to-civilians-in-gaza/>](#)

⁹⁰ <https://idfanc.activetrail.biz/ANC1812202303768789>

211. Hamas blocks the flight of Palestinians, delaying their departure and then flees with the Palestinians, blending in with them. Accordingly, the whole sequence of Israeli warnings, Palestinian flight, and Israeli response directed to those who remain has to be repeated again and again until Hamas is completely removed from Gaza – removed from power, removed from presence, removed from perpetrating its attacks upon Israel and removed from inflicting its oppressive control over the lives of Gazans, who are entitled to live in peace, including peace with the neighboring sovereign State of Israel.

iii) Claimed collective punishment

212. The South African Application to the Court refers to Israeli response to the October 7th attack as collective punishment.⁹¹

213. This accusation has no factual basis. Although many Palestinians have been killed by the Israeli response to the Hamas attacks, the reason for their deaths is the deliberate use by Hamas of Palestinians as shields, as well as preventing Palestinian civilians either to access Hamas tunnels to use them as bomb shelters or to escape to southern Gaza, not the deliberate intent of Israel to punish innocent Palestinians for what Hamas has done. This accusation is blame shifting, blaming Israelis for what Hamas has done.⁹²

214. To the uninformed, the Hamas attack and the Israeli response may seem roughly symmetrical. A superficial glance at the conflict may leave the impression that Hamas has killed Israeli civilians and that Israel in response has killed Palestinian civilians in even greater numbers.

215. This impression is misleading for a number of different reasons. Israel does not use

⁹¹ *Supra* note 43 at paras 12, 13.

⁹² *Supra* note 74.

human shields. Hamas does. Israel does not target civilians; it targets Hamas. Civilians are killed only because Hamas uses civilians as human shields. Hamas deliberately targeted civilians.

216. Hamas operates out of religious fervor; Israel does not. Israel protects the rights of all religions. Hamas does not. The Israel response to the Hamas attack is motivated only by secular considerations of self-defense.

217. It is unreasonable to expect the Israeli forces to accede to the genocide of the Jewish people. Consequently, when one considers the relevant legal standards and applies them to the facts of the situation, the Israeli response to the October 7th attacks is legal.

iv) Intent

218. The requisite intent for genocide, the intent to destroy a group in whole or in part, may be found in state policy.⁹³

219. There is no express Israeli state policy to destroy Palestinians as a group, in whole or in part. Indeed, Israeli policy is the opposite. The stated Government of Israel policy is this:

"Israel is committed to conducting its military operations in accordance with international law. ... Israel is operating against Hamas and other terrorist groups in Gaza, not against the civilian population. It is directing its attacks only at military objectives ... Israel wishes no harm to civilians and is committed to addressing the humanitarian needs of those suffering...."⁹⁴

⁹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement, [2015] ICJ Rep 3 at para 143.

⁹⁴ "Hamas-Israel Conflict 2023: Key Legal Aspects", *Israel National Digital Agency* (2 November 2023), online: <gov.il/en/departments/news/hamas-israel-conflict2023-key-legal-aspects>.

220. Intent to destroy can also be inferred from acts. Yet, for such an inference to be reasonable, there must be no other reasonable inference possible from the acts.⁹⁵

221. So, for instance, acts of killing members of a group do not establish intent to destroy the group when it is reasonable to infer that the acts were committed to force the group to leave the regions concerned so that an ethnically homogenous region could be created. To take another example, the act of genocide or ill treatment of members of a group does not have the necessary intent to destroy the group where the ill treatment can reasonably be inferred to be to punish members of the group because of their status as enemies in a military sense.⁹⁶

222. The Government of Israel expresses their intent on attacking Gaza to be "destroying enemy military assets, targeting militants, degrading and denying enemy ability to command and control operations, neutralizing underground tunnels and infrastructure used for military purposes, and denying positions (such as sniper, anti-tank and surveillance posts) which endanger IDF ground forces, securing the release of the hostages, and removing Hamas's capability to attack Israel and its citizens."⁹⁷

223. The Government of Israel notes: "Hamas's unlawful strategy of systematically embedding its military activity and assets in populated areas (including residential and commercial buildings, places of worship and hospitals), many ostensibly civilian objects may become legitimate targets."⁹⁸

⁹⁵ *Supra* note 88 at para 148.

⁹⁶ *Supra* note 88 at paras 426, 430, 435.

⁹⁷ *Supra* note 89.

⁹⁸ *Ibid.*

224. Even though, in Gaza, the tragic loss of lives of Gaza resident Palestinians have occurred, it can not reasonably be inferred from those acts that Israel has the necessary intent to destroy the group. This is so because the loss of lives can reasonably be attributed to the Israeli intent to remove Hamas's capability to attack Israel, but cannot be attributed to any claimed genocide by Israel as there is no such intent or acts of genocide committed by Israel, particularly as viewed in light of the Hamas strategy, plan, design and implementation of embedding its military activity and assets in civilian objects.

225. For there to be an intent to destroy a group, there must be actual destruction of a substantial part of the group when there is an opportunity to do so. Failure to take advantage of such an opportunity negates the intent to destroy the group.⁹⁹

226. The Government of Israel policy states:

".. precautionary measures include providing effective advance warnings of attacks where circumstances permit. The IDF [Israel Defense Forces] has dropped leaflets over areas of expected attacks with instructions to evacuate and how to do so, broadcasted over radio and through social media messages warning civilians to distance themselves from Hamas operations, and in some cases made individual phone-calls to occupants of targets, warning them of impending attacks."¹⁰⁰

227. The Government of Israel has a policy and engages in practices of precautionary measures. These measures negate the intent to destroy Palestinians living in Gaza as a group. Precautionary measures foreclose or lessen opportunities to destroy the group which would otherwise be open to Israel.

228. For Israel to be guilty of genocide, the genocidal acts, insofar as they exist, have to

⁹⁹ *Supra* note 88 at para 437.

¹⁰⁰ *Supra* note 89.

be attributable to Israel. Yet, in the Israeli response to the heinous Hamas terror attack of October 7th, whatever genocidal acts occur in Gaza are attributable to Hamas because of their attack on Israel and their embedding themselves in civilian objects when Israel responds.

229. The Israeli response to the October 7th attack, targeting Hamas behind Palestinian shields, was and is not intended to kill the shields. It was and is intended to eradicate the continuing genocidal threat from Hamas.

230. The Israeli war cabinet since October 7th consists of five people, three members and two advisers, who are responsible for the war against Hamas. The members are Prime Minister Benjamin Netanyahu, Defense Minister Yoav Gallant, and former Deputy Prime Minister and Minister of Defense Benny Gantz. The advisers are former military Chief of Staff Gadi Eisenkot and Israel's Minister of Strategic Affairs Ambassador Ron Dermer. All the members and advisers are people of esteem, experience and determination to provide protection for all the people of Israel.

231. The Application of South Africa claims to identify Israeli genocidal intent by quotes from various Israelis. Benny Gantz, Gadi Eisenkot and Ron Dermer are not quoted.¹⁰¹

232. Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant are quoted. Their quotes stand in stark contrast to the statements of Hamas. None of the quotes from Prime Minister Netanyahu and Defense Minister Gallant are directed against Palestinians, or a Palestinian state, or the Palestinian people or even anti-Zionism. In contrast, Hamas both verbally and physically attacks Jews because they are Jewish, Israel because it exists, and Zionism, in a fantasized version of what it really is. The contrast between the two sets of quotes and absence of quotes illustrates graphically that Hamas has a genocidal intent and

¹⁰¹ *Supra* note 43 at para 101.

Israel does not.

233. Take one example. The South Africa Application states:

On 15 October 2023, when Israeli airstrikes had already killed over 2,670 Palestinians, including 724 children, the Prime Minister stated that Israeli soldiers “understand the scope of the mission” and stand ready “to defeat the bloodthirsty monsters who have risen against [Israel] to destroy us”.¹⁰²

234. The South Africa quoted statement, through juxtaposition is suggesting that the monsters to whom the Prime Minister is referring are the 2,670 Palestinians, including 724 children. Yet, the Prime Minister is referring to Hamas genocidal killers.

235. South Africa is at the very least suggesting that Israel is responsible for the deaths of the 2,670 Palestinians, including 724 children in going after Hamas. Yet, legally, Hamas is responsible for those deaths - by using Palestinians, including children, as shields, by hiding among and behind them, by storing arms in their residences, schools and hospitals, by shooting guns and rockets from their premises, by calling on them to stay despite repeated Israeli warnings to evacuate, by denying them access to Hamas tunnels which could be used as protective bomb shelters and means of egress, and by exhorting and justifying the killing of Palestinians which Hamas engineers as martyrdom. South Africa mentions none of this.

236. “Monsters” is admittedly a metaphor. Hamas operatives are, after all, human beings. Yet, they have acted monstrously, through maiming, killing, beheading, burning of children and people in their homes, rapes, kidnappings and desecration of human life. Hamas, as an organized and vicious terrorist organization is very different, as human beings, from the public at large. Indeed, they are so different, it is hard for the public at large to appreciate

¹⁰² *Ibid.*

how different they are. Hamas, for instance, engaged systematically in the genital mutilation of women they killed before they killed them.¹⁰³ And, they raped women both before and after killing them.

237. Hamas operatives are a group of people who believe that the Jews of 1789 were behind the French revolution and move on from that and similar beliefs to the mass genital mutilation and killing of Jewish women today. Unless this Court is prepared to stare the horror of Hamas in its face, it will be impossible to understand what is happening now in Gaza. South Africa does a disservice to the Court by ignoring this horror and bringing their application to this Court.

238. Israel has its own religious ultra-orthodox. Yet, they are the antithesis of Hamas. Hamas extols resistance and militancy. It is aggressive and terrorist. The Israeli ultra-orthodox are largely pacifist in the extreme.

239. Whether the ultra-orthodox should serve in the Israeli army has been an issue which has roiled Israel for decades. Before the Hamas attack, Israel was bitterly divided over proposed and enacted judicial reform. The only component of the proposed reform which was enacted was the repeal in July 2023 of the Israeli specific standard of review of reasonableness for Government decisions,¹⁰⁴ overturned by Israel's High Court of Justice, Israel's Supreme Court, in its decision announced January 1, 2024.¹⁰⁵

240. While the merits of that legislation or the decision of the High Court of Justice can be addressed in isolation, what lay behind it was several surrogate issues decided by the Courts

¹⁰³ Jeffrey Gettleman et al "Screams Without Words': How Hamas Weaponized Sexual Violence on Oct. 7", *The New York Times* (28 Dec 2023), online: <[nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html](https://www.nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html)>.

¹⁰⁴ Amichai Cohen "The Supreme Court Hearing on the Revocation of the Reasonableness Doctrine", *The Israel Democracy Institute* (7 September 2023), online: <en.idi.org.il/articles/50753>.

¹⁰⁵ <https://www.timesofisrael.com/in-historic-ruling-high-court-strikes-down-key-judicial-overhaul-legislation/>

using the Israel specific standard of review of reasonableness. Most notable of these issues was whether the ultra-Orthodox had to serve in the military.¹⁰⁶

241. Hamas did not attack Israel because the ultra-orthodox were not in the Israeli military, did not want to be in the military and were a significant component of the Government. Hamas attacked Israel because of its intent and determination to remove Israelis from Israel; to remove Israel from all land between the Jordan River and the Mediterranean Sea; and to cause intentional, destructive and genocidal harm to all the Jewish People, religious, less-religious and non-religious. What the non-military stance of the Israeli ultra-orthodox does show is that there is no necessary connection between religiosity and militancy, that it is possible, indeed not uncommon to be both profoundly religious and pacifist, and that Israeli and Hamas religious orthodoxy are very different.

v) Prematurity

242. Israel is a democratic country subject to the rule of law, with a free press, an independent judiciary and an independent prosecutorial process. The obligation on Israel under the Genocide Convention is to prevent and punish genocide. In light of the legal history and legal institutions in Israel, insofar as any Israeli is guilty of any act of genocide, that person will be prosecuted and punished. However, to expect that prosecution and punishment to have been completed before the end of the ongoing Israeli response to the Hamas terror attack is premature.

243. Israel has a long history of holding its own wrongdoers to account. In September 1982, during the Lebanese Civil War, hundreds of innocent civilians were massacred at Sabra and Shatila by a Christian militia. In February 1983, an Israeli Commission found that the Israeli

¹⁰⁶ See David Matas "Reasonableness: Israeli Judicial Reform", Winnipeg Jewish Review, August 1, 2023 https://www.winnipegjewishreview.com/article_detail.cfm?id=7792&sec=2&title=David_Matas:_Reasonableness:_Israeli_judicial_reform

military had failed to take serious steps to stop the killings. Because of the findings, Israeli defense minister Ariel Sharon resigned.

244. Israel is a robust democracy, as indicated by its repeated elections over the past decades and its public debates and permitted demonstrations by people advocating one position over another. Israel's courts oversee the rights and claims of all in Israel, including aggrieved Arab-Israelis or Palestinians who bring matters to the attention of the courts, seeking redress on various issues. No public or private official is beyond criticism or accountability.

245. The Attorney General of Israel in September this year asked the High Court of Justice to strike down the law mentioned earlier in this application, enacted after presentation to the Knesset by the Government, limiting judicial review. The Attorney General, though part of the Government, argued in Court against the position of the Government.¹⁰⁷—

246. The judicial review application was successful, despite the position of the Government to the contrary. The judgment was released, January 1st, 2024.¹⁰⁸

247. This Court should find Israel has violated its duty to prevent and punish genocide only if local justice systems are either unable or unwilling to act. For Israel, that is not the case.

248. Hamas, since it established control over Gaza in 2005, has not set up an independent Court system. If Hamas is to be brought to justice, the justice effort will have to come

¹⁰⁷ Jeremy Sharon "Attorney general asks court to strike down law curtailing oversight of government", *The Times of Israel* (3 September 2023), online: <[timesofisrael.com/attorney-general-asks-court-to-strike-down-law-curtailing-oversight-of-government/](https://www.timesofisrael.com/attorney-general-asks-court-to-strike-down-law-curtailing-oversight-of-government/)>.

¹⁰⁸ Jeremy Sharon "In historic ruling, High Court strikes down key judicial overhaul legislation", *The Times of Israel* (1 January 2024), online: <[>.](https://www.timesofisrael.com/in-historic-ruling-high-court-strikes-down-key-judicial-overhaul-legislation/#:~:text=In%20a%20deeply%20controversial%20landmark,its%20quasi%2Dconstitutional%20Basic%20Laws>)

from outside Gaza. That is not true of Israel, which has a functioning Court system subject to the rule of law. The Government of Israel is subject to criticism and critique by the people, the press and even the other branches of the Israeli government. Insofar as Israeli Defense Forces have done anything legally wrong in responding to the Hamas attack on October 7th, the independence of the Israeli prosecution and courts should give the Court confidence that this illegality will be addressed.

249. In World War II, the exclusive focus of the Nuremberg International Military Tribunal on the Nazi perpetrators did not mean that the wrongdoers in the Allied forces were given immunity. There were many court martials by the UK and US Allied forces of wrongdoers in their midst.

250. Israel similarly is capable of addressing its own wrongdoers internally without the need for the International Court of Justice to address them. For this Court to focus only on Hamas, as in our view it should, does not mean that Israel is exonerated in advance.

251. Another feature of the International Military Tribunal worth noting is that all charges were laid against elements of the Nazi regime. No charges were laid against any component of the Allied regime.

252. That, of course, made eminent sense. American Supreme Court Justice and US Chief of Court Robert H. Jackson's in his opening statement at Nuremberg for the prosecution stated:

"That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

253. From the perspective of reasonableness, the Nazis had ignored and violated

egregiously international law and the individual human rights of the more than six million Jewish people and others murdered during the Holocaust. The Allied powers were innocents acting in self-defense. To put the Allied and Axis powers on an equal footing would have made mockery of reality and the law.¹⁰⁹

254. The same can be said of the conflict between Israel and Hamas. Legally there are not two sides to this conflict. When it comes to rights and wrongs, Israel is the defender and Hamas is the attacker. To put them on an equal footing would harm, not help, the rule of law and is wrong on its face.

255. Israel is now engaged in a conflict on two fronts. One is military; the other is legal. Although the terrain of armed conflict is limited, the struggle, in its legal component, has global significance.

256. The demonization and attempts at the delegitimization of Israel that anti-Zionism has pursued has become so widespread it has undermined the international legal order established after World War II. One international instance after another, both inter-governmental and non-governmental alike, has abandoned respect for the rule of law to succumb to this discriminatory, hateful and bigoted anti-Zionist delegitimization agenda.

257. The task of holding Hamas to account is as important as the Nuremberg tribunal itself. Hamas is not just holding Israelis Americans and citizens of multiple other countries hostage. It is holding international law hostage. A judgment in this Court to hold Hamas to account could seek to rescue international law and its contemporary institutions from the entrenched anti-Zionist hateful agenda of those determined to demonize and delegitimize Israel. The current Application is consistent with the current South African government's distancing of

¹⁰⁹ "Opening Statement before the International Military Tribunal", online: *Robert H. Jackson Center* <roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

its diplomatic affairs with Israel. That distancing is properly a matter of political discourse and not properly justiciable by this Court.

vi) Clean Hands

258. South Africa does not come to the International Court of Justice with clean hands. Its own past behavior undermines the current application.

259. The International Criminal Court in 2010 issued an arrest warrant against former President Omar Al Bashir of Sudan on the basis that

"there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co perpetrator, under article 25(3)(a) of the Statute [of the International Criminal Court], for:

- ii. Genocide by killing, within the meaning of article 6(a) of the Statute;
- ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
- iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute;" ¹¹⁰

260. South Africa is a state party to the Rome statute of the International Criminal Court. In May 2015, the International Criminal Court learned that Omar Al Bashir was intending to travel to South Africa. The Registrar of the Court requested that South Africa arrest Omar Al Bashir and surrender him to the Court should he enter South Africa.

261. The Embassy of South Africa in the Netherlands sought a consultation meeting with the Court. The Presiding Judge, at the meeting of June 12, 2015 pointed out that

"the consultations had no suspensive effect on South Africa's outstanding

¹¹⁰ https://www.icc.cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF

obligations under the Statute to cooperate with the Court and proceed with the arrest and surrender of Omar Al Bashir."

262. Al-Bashir entered South Africa on June 13th. During that day, the Chief State Law Adviser of the Republic of South Africa met with representatives of the Office of the Prosecutor.

263. The Prosecutor then sought a clarifying order from the Court. The Presiding judge, also on June 13 rejected the request for a clarifying order,

"observing that the position of the Court maintaining that South Africa had an obligation to arrest and surrender Omar Al Bashir to the Court had already been made sufficiently clear and that no further reminder or clarification was necessary."

264. Al Bashir left South Africa 15 June 2015. Despite the Court's request for his arrest and surrender to the Court, South Africa did not arrest and surrender him while he was on the territory of South Africa.

265. A Pre Trial Chamber of the International Criminal Court on July 6, 2017 found that South Africa failed to comply with its obligations under the Statute of the International Criminal Court by not executing the Court's request for the arrest of Omar Al Bashir and his surrender to the Court while he was on South African territory between 13 and 15 June 2015.¹¹¹

266. In the case of Certain Iranian Assets (Islamic Republic of Iran v. United States of America) 30 March 2023, the International Court of Justice noted that the clean hands doctrine could not be used as a ground of inadmissibility of a claim, but could be used as

¹¹¹ https://www.icc.cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF

an objection on the merits of the claim. In that particular case the Court held that there was not a sufficient connection between the wrongful conduct imputed to Iran by the United States and the claims of Iran.¹¹²

267. In this case, B'nai B'rith International claims that there is that sufficient connection. Both the Al Bashir case and the present case relate to genocide.

268. South Africa wishes to enforce obligations to prevent and punish genocide on another state, Israel, while not itself complying with its own obligations to prevent and punish genocide. South Africa in the current a case is acting hypocritically, seeking to impose a higher standard on Israel than it imposed on itself.

269. For the Court to allow South Africa to succeed in such a claim would undermine the International Criminal Court's past order that South Africa violated its duty to prevent and punish genocide by not complying with a Court order to arrest and surrender a wanted alleged genocidal killer. The behavior of South Africa in the Al-Bashir case was egregious because the Government of South Africa did not just ignore an arrest warrant from the Court. It also ignored two prior Court determinations that it must comply with the arrest warrant.

270. By bringing the current proceedings, South Africa is attempting to approbate and reprobate, to invoke the international law of genocide when it suits South Africa and ignore the international law of genocide when it is inconvenient for South Africa to do so. The rule of law can not properly function on such a basis. Complying with the request of South Africa in these circumstances would bring the administration of justice into disrepute.

¹¹² Paragraph 83, <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf>

V. Provisional measures

271. In order for a request for provisional measures by an applicant in a claim of genocide to be granted against a respondent, that applicant must establish that

- a) there are reasonable grounds to believe that the acts of claimed genocide were caused by the respondent,
- b) there are reasonable grounds to believe that the respondent has an intent to commit genocide, and
- c) there is a real and imminent risk of irreparable prejudice to the rights invoked by the applicant before the Court gives its final decision.¹¹³

272. In this case, there are not reasonable grounds to believe that the acts of claimed genocide were caused by Israel. All the evidence points to Hamas as being the cause of the genocide claimed by South Africa both by reason of the Hamas attack on October 7th and its use of human shields in reaction to the response of Israel.

273. There are also not reasonable grounds to believe that Israel has an intent to commit genocide. The claim of intent by South Africa is contrary to the express intent of Israel. The claim of intent by South Africa is also contrary to a myriad of forms of warning and precautions taken by Israel which unequivocally negate the intent to destroy Palestinians as a group, even in part.

274. The criterion of real and imminent risk of irreparable prejudice militates against the claim of South Africa. United States Secretary of State Anthony Blinken, on November 4th,

¹¹³ See Mona Rishmawi "The Plausibility test in the Recent Provisional Measures Orders of the International Court of Justice" December 18, 2023
<https://www.ejiltalk.org/the-plausibility-test-in-the-recent-provisional-measures-orders-of-the-international-court-of-justice/>

in speaking against a ceasefire, stated:

"A ceasefire now would simply leave Hamas in place, able to regroup and repeat what it did on Oct. 7, ... No nation, none of us would accept that ... So it is important to reaffirm Israel's right and its obligation to defend itself."¹¹⁴

275. Former US Secretary of State Hillary Clinton negotiated a ceasefire between Israel and Hamas in 2012 which Hamas broke on October 7th, as well as earlier. She wrote:

"Hamas cannot be allowed to once again retrench, re-arm, and launch new attacks - while continuing to use people in Gaza as expendable human shields. Second, a full cease-fire that leaves Hamas in power would be a mistake. ... They [Hamas] have proved again and again that they will not abide by cease-fires, will sabotage any efforts to forge a lasting peace, and will never stop attacking Israel. ... the Biden administration is correct not to seek a full cease-fire at this moment, which would give Hamas a chance to re-arm and perpetuate the cycle of violence. ... A cease-fire now that restored the pre-October 7 status quo ante would leave the people of Gaza living in a besieged enclave under the domination of terrorists and leave Israelis vulnerable to continued attacks. It would also consign hundreds of hostages to continued captivity. ... It is possible that if Israel dismantles Hamas's infrastructure and military capacity and demonstrates that terrorism is a dead end, a new peace process could begin in the Middle East. But a cease-fire that leaves Hamas in power and eager to strike Israel will make this harder, if not impossible."¹¹⁵

276. What United States Secretary of State Anthony Blinken and former US Secretary of State Hillary Clinton said about a cease fire could be equally said about the provisional

¹¹⁴ Simon Lewis & Suleiman Al-Khalidi "Blinken rebuffs Arab states' push for immediate Gaza ceasefire", *Reuters* (4 November 2023), online: <[reuters.com/world/arab-states-press-blinken-gaza-ceasefire-2023-11-04/](https://www.reuters.com/world/arab-states-press-blinken-gaza-ceasefire-2023-11-04/)>.

¹¹⁵ Hillary Rodham Clinton, "Hamas Must Go", Editorial, *The Atlantic* (14 November 2023), online: <[theatlantic.com/ideas/archive/2023/11/hamas-israel-ceasefire-humanitarian-pause-gaza/675992/](https://www.theatlantic.com/ideas/archive/2023/11/hamas-israel-ceasefire-humanitarian-pause-gaza/675992/)>.

measures requested by South Africa.¹¹⁶ The provisional measures requested by South Africa would allow Hamas to rearm and recommence its genocide of the Jewish people in Israel and the Palestinian people in Gaza.

277. Hamas spokesman Ghazi Hamad on October 24th stated:

"Israel is a country that has no place on our land ... We must remove that country ... We must teach Israel a lesson, and we will do this again and again. ... Will we have to pay a price? Yes, and we are ready to pay it. We are called a nation of martyrs, and we are proud to sacrifice martyrs. nobody should blame us for the things we do. On Oct. 7, Oct. 10, Oct. 1,000,000 - everything we do is justified."¹¹⁷

These are not our words. These are the words of Hamas. Hamas commits itself to the continued genocide of both Jews and Palestinians, Jews to teach them a lesson, Palestinians to sacrifice them as martyrs. In these circumstances, for this Court to honor the provisional measures request would be unconscionable and a grossly inappropriate exercise of the jurisdiction of this Court.

VI. Remedy proposed

278. The Genocide Convention has a duty to prevent and punish genocide. In this case that means punishing the genocidal actions of Hamas, already a designated foreign terror organization in many countries, and preventing their continuation. It means punishing the heinous attacks of murder, maiming, beheading, burning, raping and taking hostage innocent people from their homes in the sovereign State of Israel.

279. If we consider the Nuremberg Trial of the Major War Criminals and the subsequent

¹¹⁶ *Supra* note 43 at paras 114, 115.

¹¹⁷ Chris Enloe "'We must remove that country': Top Hamas official's honesty undermines argument for a ceasefire" Blaze News November 01, 2023 <https://www.theblaze.com/news/ghazi-hamad-hamas-wont-stop>

Allied Nuremberg specialized trials in relation to the events of October 7th in Israel and the aftermath in Gaza, there are a few elements worth singling out - the criminalization of organizations as well as individuals. When an organization was criminalized, every member of the organization, simply by virtue of being a member, was also a criminal.

280. The Nuremberg indictment charged seven organizations. They were the Leadership Corps of the Nazi Party, the Gestapo, the S.D., the SS, the SA, the Reich Cabinet, and the General Staff and High Command. The International Military Tribunal found, with the Leadership Corps of the Nazi Party and the Gestapo, some persons were criminal and others were not. With the SD, all members were criminal. With the SS, all were found by the Tribunal to be criminal, other than those who joined under duress and committed no crimes. The SA was not declared to be a criminal organization. Neither was the Reich cabinet nor the General Staff and High Command, each of whose membership was so small that the Tribunal held that the members could be tried individually.¹¹⁸

281. The International Military Tribunal judgment is a precedent for finding Hamas to be a criminal organization. The result would be that every person who is a member would be a criminal simply by reason of membership in Hamas, other than those who functioned under duress and committed individually no crimes.

282. Genocidal membership organizations do not sell membership cards. How does one determine whether a person is a member of such an organization? The answer the Canadian courts give is that the concept of membership is broad.

283. In Canada, a person, to be a member of terrorist organization, does not have to be complicit or knowingly participate in an act of terrorism. Informal participation or support

¹¹⁸ "Nuremberg Trial Proceedings Vol. 1 Indictment" (last visited 6 January 2024), online: *Yale Law School - Lillian Goldman Law Library* <avalon.law.yale.edu/imt/count.asp>.

for the group may suffice depending on the nature of that participation or support. To determine membership, three criteria need to be considered - the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives.¹¹⁹


284. The same criteria could and should be used to criminalize and prevent membership in Hamas. South Africa, other state parties to the Genocide Convention and in particular all states participating in the application should be required, pursuant to their obligation to prevent and punish genocide,

- a) to ban Hamas and its activity,
- b) to prohibit the financing of Hamas,
- c) to deny admission of Hamas members to the territory under the jurisdiction of the party,
- d) to forbid promotion and glorification of Hamas
- e) to take all necessary and appropriate steps to prevent Hamas as a terror organization from continuing their acts of genocide, murder, maiming, beheading, burning, raping and desecrating innocent people of the Jewish faith and all others residing, or visiting, in the State of Israel and elsewhere in world, and
- f) taking all necessary steps to hold Hamas legally accountable for its barbaric, savage, unconscionable and unthinkable acts against the Jewish people, citizens, residents, and visitors to, the sovereign State of Israel, and all humanity.

Respectfully submitted.

¹¹⁹ *Kanapathy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 459, CarswellNat 1937.

B'NAI B'RITH INTERNATIONAL

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MEMORANDUM OF THE APPLICANT

B'nai B'rith International, B'nai B'rith Canada, B'nai B'rith World Center – Jerusalem and B'nai B'rith Office of United Nations Affairs (hereinabove and hereinafter collectively "B'nai B'rith International")

1. B'nai B'rith International contends that this Court has jurisdiction to grant this application. The Court statute distinguishes between public international organizations and international organizations.¹²⁰

2. The Court statute provides that:

"The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."¹²¹

3. An international organization may be an international non-governmental organization.

¹²⁰ Articles 34(2), 34(3), 66(2), 67.

¹²¹ *Ibid*, art 66(2).

The sub-Article quoted applies to advisory opinions. Literally, this sub-Article indicates what the Registrar shall do. Nonetheless, the sub-Article presupposes that the Court has determined that an international organization is likely to be able to furnish information on the question asked in the advisory opinion. There are no procedures set out for how the Court would make that determination.

4. The determination could, in principle, be the result of an initiative by the Court. The determination could also, in principle, be the decision on an application by the international organization that the organization is likely to be able to furnish information on the question asked in the advisory opinion.
5. The Rules of Court provide that public international organizations are international organizations of States. There is no similar rule for international organizations.¹²²
6. The Practice Directions of the Court provide that statements or documents submitted by international non-governmental organizations to the Court in advisory proceedings
 "shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain."¹²³
7. There is no provision in either the Statute or the Rules or the Practice Directions explicitly allowing applications by international non-governmental organizations to the Court for a determination that the organization is likely to be able to furnish information on the questions at issue in contentious proceedings. There is also nothing in any of these legal instruments prohibiting such applications.

¹²² *Ibid*, art 69(4).

¹²³ Practice Direction XII

8. The Court accordingly is free to allow and also to decline to allow applications by international non-governmental organizations for a determination that the organization is likely to be able to furnish information on the questions at issue in contentious proceedings. If such an application were granted, the Court, as in advisory proceedings, would indicate that it would be prepared to receive a written statement of a Submission from the international organization, and to receive, at a public sitting, an oral statement from the organization relating to the questions at issue in the contentious proceedings.

9. There is a practical consideration militating against engaging this procedure, the large number of international non-governmental organizations. Yet, there is an answer to this concern. The number of eligible international non-governmental organizations could be limited to those international non-governmental organizations given United Nations Economic and Social Council (ECOSOC) status. B'nai B'rith International is one such organization.

10. The International Court of Justice is an organ of the United Nations. Since other components of the UN system recognize international non-governmental organizations with ECOSOC status, this Court should as well.¹²⁴

11. As well B'nai Brith is specifically mentioned in the 1988 Hamas Covenant. That specific mention gives B'nai Brith International a specific interest in this particular case which it should be allowed to address.

12. If the Court decides that it does have jurisdiction to grant this application, B'nai B'rith International submits that the Court, in its discretion, should grant the inclusion of the within Submission. The reason, we submit, is that B'nai B'rith International would likely to be able to furnish information on the matters in contention in these proceedings which would be

¹²⁴ UN Charter, art 92.

useful to the Court. This Submission is based on Exhibit A to the Affidavit of Richard D. Heideman included in this Record.

Respectfully submitted.

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