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Also, a new Executive Committee was elected, as well as a Board of Governors.

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President's Message

Meir Linzen

October 7, 2023 is a day that will go down in infamy as one of the most terrible dates in the history of the State of Israel and the Jewish People.

The atrocities committed by Hamas-led terrorists – including murder, rape, torture, kidnapping, wounding, desecration of bodies, the burning of people and their homes, represent one of the worst acts of terror in the modern era.

In their severity, these events recall the pogroms of Eastern Europe and the horrors of the Holocaust. During the perpetration of the atrocities, more than 1,200 people were slaughtered and more than 250 kidnapped and taken hostage – men, women, children and elderly persons. We bore witness to some of the worst war crimes and crimes against humanity.

Immediately following the events of October 7, Israel declared a state of war in order to eliminate the military capabilities and political regime of the Hamas terror organization, and to free those who were kidnapped and taken hostage.

The Gaza Strip is one of the most densely populated areas in the world. More than two million people live in an area of only a few hundred square kilometers. Hamas uses the local population as a human shield. There is almost no public institution (hospital, school, mosque) that does not serve as a military installation or for military purposes. Many residential homes are also used for these purposes.

The suffering of Palestinian civilians in Gaza cannot be ignored. The tragic casualty toll and scenes of massive

destruction that are seen in Gaza may appear both incomprehensible and disproportionate, unless we look at the facts and see the undeniable direct intertwining between military infrastructure and civilian population deliberately made by Hamas and the other terrorist organizations in Gaza.

Israel's actions since October 7, 2023, are not acts of vengeance for the events of that infamous day, but rather, clearly and unequivocally, acts of self-defense.

Meanwhile, in parallel to the events of October 7, Iran's proxy organizations, foremost among them Hezbollah in Lebanon, as well as pro-Iranian militias in Syria and Iraq, the Houthis in Yemen, and even Iran itself, are engaging in hostile activities against Israel.

Perhaps October 7 will open the eyes of the world to the fact that Iran and its proxies are committed and determined to destroy the State of Israel, the state of the Jewish People. There is no doubt that the purpose behind these events is the genocide of the Jewish People. There is a shameful level of cynicism in the "inversion" made by those who see the acts of self-defense of the State of Israel as acts of genocide against the Palestinians.

The events of October 7 and the war in Gaza have stirred up a massive and repugnant wave of antisemitism around the world. The masks are off, and the distinction between the State of Israel and Jews has been blurred. Even though the State of Israel failed in protecting its citizens on October 7, the Jews of the Diaspora still see Israel as a place of refuge against present or future persecution. I hope that the enlightened world, and enlightened individuals, will fight against any attempt to undermine the legitimacy of the State of Israel as the state of the Jewish People.



Photo: Ami Erlich

Due to the war, our Conference, which was planned to focus on Freedom of Religion, has been postponed until later in the year. In all likelihood, we will then focus on the pressing issues that are currently on the public agenda.

During the course of the war, the IJL held elections for our 18th Congress, and I was elected to an additional term as President of the Association. I am grateful for the renewed confidence placed in me and in the members of our Executive and Board, and I hope that we will justify your trust.

Our relevance as the leading legal organization in the Jewish world is greater than ever. We must act through all legal means available against those who commit such heinous crimes and to promote the safe return of all the hostages still held captive.

We must fight attempts to undermine the legitimacy of the State of Israel and its right to defend itself and its citizens.

We must fight by all legal means the immense and appalling wave of antisemitism that we are currently witnessing.

I hope and pray that the civil New Year will usher in a better year than the last, a year of peace and revival for the Jewish People, for the people of Israel, and for all humanity. ■

January 1, 2024

In the Shadow and Aftermath of October 7*

Justice Elyakim Rubinstein

I am pleased to be able to return to activity in the International Association of Jewish Lawyers and Jurists (now the "IJL"), an organization in which I had the privilege of working many years ago. I wish the organization and its President, Adv. Meir Linzen, success in the important tasks called for in this era. We are in a difficult and distressing time for both Israel and Jews in other countries. The challenges of the times are known to all, and the many lives lost since October 7, among both civilians and soldiers, are an inexhaustible source of sadness. This immeasurable grief is not solely borne by the many bereaved families which, of course, bear the principal burden of grief, but for each of us, Israeli, Jew, and indeed every decent person. Israel is caught in a war that I have no doubt any country would resort to after the massacre of some 1,200 citizens, along with kidnapping, rape and looting. The agony of our kidnapped persons is so deeply on our minds.

I will briefly discuss three points: the war on Hamas, the struggle against antisemitism, and the fight for peace and relations with the Arabs of Israel.

The War with Hamas: Legal Challenges

As scrupulous jurists, we often say that there are two sides to every coin. But there is no ambivalence about this war. It is a war justified like no other, both in terms of self-defense and in every other legal aspect. To the best of my knowledge, despite the difficult conditions, the IDF is making an effort, with the aid of the Military Judge Advocate General's office, to operate in accordance with the laws of war. Dealing with this issue in the international arena is complex, and extends over a variety of matters, and falls within the expertise of Col. (Res.) Pnina Sharvit Baruch, Vice President of the IJL.

Here, I will focus only on the secondary challenge created by the war, whose main goals are familiar: defeat of Hamas, release of those kidnapped, and bringing general security to Israelis in the border areas. This challenge concerns the handling of the many terrorists who were captured by the IDF and security forces over the course of the war. They are presently detained as illegal combatants, in accordance with a

law regulating this category, as they are not entitled to be considered prisoners of war.

What is the offense for which they could be prosecuted, is it the crime of genocide? In which legal forum would this matter be addressed – the civilian courts or a military court re-established under the Defense (Emergency) Regulations (1945)? What evidence has been collected that may be used in the trials, if a decision is made to go to trial? These and other questions are on the desk of the Attorney General of Israel and the Judge Advocate General (which are both, for the first time, posts held by women). It is safe to assume that the IJL will also have to consider these matters in due course. By the way, during my time as Attorney General, I insisted – in the face of opposing views – on bringing the terrorist leader, Marwan Barghouti, to trial in the civil District Court, rather than a military court, after his arrest in 2002. I have great respect for the military courts (I myself served as a judge in the military reserve), but I thought that terrorist leaders should be tried in civil courts, for public visibility reasons. Barghouti was sentenced to five life sentences and another 40 years for his role in multiple murders and acts of terrorism.

At this point in time, I will not address the difficult dilemma once again before us regarding the exchange of prisoners convicted for acts of terrorism for our kidnapped civilians and soldiers – to whom we have a duty to bring home.

On Antisemitism

Antisemitism may be traced back in history to the biblical days of Pharaoh and Haman. There is no rational explanation for its existence, given the tiny size of the Jewish people, and it seems that it cannot be completely eradicated. Back in the 1930s, Rabbi

* This is a slightly edited version of an address at the IJL Board of Governors meeting, December 12, 2023. Some of the comments were published in Hebrew: "We Are No One's Punching Bag," YEDIOTH AHARONOT (Sept. 13, 2023).

Menachem Zamba, who later perished in the Warsaw ghetto, explained the words of Rabbi Shimon bar Yochai, “It is a known halacha that Esav hates Jacob,” and described antisemitism as a phenomenon without explanation.

Midrash Lamentations Rabbah (Chapter 3, p. 200) tells about the Roman emperor Hadrianus, who suppressed the Bar Kochba rebellion, was venerated by the Romans, but who is described in our tradition as “the one whose bones should be crushed.” When a Jew passed in front of him and greeted him, Hadrianus ordered him to be killed. When another Jew passed by and saw what happened to the first, he did not greet him; the emperor also ordered him to be killed. His counselors asked him: we do not understand your actions, both the one who greeted you and the one who did not were killed. He answered them: “what, you want to tell me how I should kill my enemies?” Put simply, he had a policy to kill Jews, what did it matter what they did or did not say?

One hundred and forty years ago, the Zionist leader Nahum Sokolow wrote the book *Eternal Hatred for the Eternal People* (Hebrew), the name of which bears witness to such hatred.

Nevertheless, we must not give up. The struggle is necessary, even if it achieves only partial results. It is also necessary in the wake of modern exhibitions of antisemitism that operate under the guise of reasonableness and intellectualism.

For example, I watched the horror show of the three presidents of the prestigious universities: Harvard University, University of Pennsylvania, and the Massachusetts Institute of Technology (whose president is Jewish). Their failure to simply say that on a basic moral level, calling for genocide against Jews is against their university’s regulations and codes of conduct, was shocking to me. Apparently, on the advice of lawyers, whether out of fear of the “progressives” in the universities or out of fear of the donors from the Arab world, the presidents shamefully twisted and turned their logic and stated that the answer “is context dependent.” There is no context in the world – whatever it may be – in which it is possible to believe that calling for genocide could be sanctioned. Viewing the testimonies given by the university presidents before Congress in Washington, D.C., I asked myself if they knew the meaning of the term “genocide.” Based on the forced tone of their words, I had the impression that they “understand” that the

individual Jew on campus should not be subjected to heavy harassment. But genocide is much broader than that – it is the extermination of a people.

The Jewish jurist Raphael Lemkin, who was a Holocaust refugee from Poland, coined the term during the Holocaust and knocked on every possible door lobbying in support of a Sisyphean task: to convince his listeners of the need for an international convention to combat genocide. This week, December 9, 2023, commemorates the 75th anniversary of the adoption of the Genocide Convention by the United Nations.

We have already mentioned a fear of “progressive” circles. Previously, this term signified tangible progress, advancements, and developments. Today, it conceals uncontrolled hostility, ignorance, and unexplained hatred for bodies, personalities, and institutions that supposedly make up a strong ruling establishment and elite class that harm the weak. Harassment of Jews (who are supposedly part of the elite and the “powerful”) is the result of this conduct and rationale, which is built on old foundations of “classical” antisemitism. The words of the university presidents pour fuel on a fire ignited by antisemites who have raised their heads in the same way as haters of Israel have in every generation, and exploit the Palestinian struggle as a platform for refining their antisemitism. This includes the lie that Israel has committed genocide against Palestinians in Gaza, something which is completely untrue; Israel is now dragged to The Hague International Court of Justice by South Africa.

In the past, when I served as the Government Secretary from 1986-1994 in the Yitzhak Shamir and Yitzhak Rabin governments, I was the Chairman of the Inter-Ministerial Forum for Monitoring the Phenomena of Antisemitism, which I initiated in 1987. The editor of *JUSTICE*, Dr. Mala Tabory was my good colleague on behalf of “Nativ,” the governmental body that deals with the Jews of the former Soviet Union and now the Commonwealth of Independent States. But Shimon Peres, the Foreign Minister at the time, always an optimist, said to me, “Ely, governments should deal with the present and the future, antisemitism is a thing of the past, why deal with it?” Subsequently, he changed his mind.

In those years, we identified three forms of combat: first, the political-diplomatic route, whether through classic diplomacy vis-à-vis governments or public diplomacy, which used to be called *hasbara*

(“advocacy” or “explanation”). The second was the legal means; a war through both legislation (of which the Tel Aviv University project headed by Prof. Dina Porat was in charge) and by advocating for court rulings against the phenomena of antisemitism and the enforcement of such rulings. The third and more long-term method is the educational one: we learned firsthand how injecting antisemitic poison from a young age spurs wild growth later. In recent decades, a new element has joined the mix and affected all of its predecessors: the social media networks. Within social media, there are both the antisemitic contents, and those who promote it, which must be fought, no matter how hard that war is. Moreover, quite a few of the “legal” attacks in the international arena are tainted by antisemitism.

In my opinion, the guiding line in all of these should be boldness and assertiveness, and the IJL has a role to play among the countries of the world: “We, the Jews and Israel, are not anyone’s punching bag – whoever seeks to punch you – punch him first.” As mentioned, it seems that antisemitism cannot be rooted out, because of the depth of its malignant roots in cultures and religions. But it must remain in the sewers and its flag bearers should be ashamed. In Israel we must work hand in hand with our brothers and sisters in the Diaspora, and decent non-Jews. This is not impossible, but patience and perseverance are necessary; Jews too have human rights.

The Struggle for Peace and the Arabs in Israel

Among the IJL’s goals should be the reminder that one should not forget the hope of peace even on gloomy days. Such messages can help the fighter on the front know that in Jerusalem there are those who think of better days than these, even if at present they may seem far away.

The fight against Hamas does not contradict the hope for peace, and it may even strengthen it. To that end, a victory over Hamas may strengthen our relationships with Arab countries that made peace with us yet suffer from Islamic fundamentalism themselves, even if these countries publicly criticize Israel. With its Declaration of Independence, Israel extended a “hand of peace and good neighborliness” to our neighbors and proved this by making peace with Egypt and Jordan. This sentiment also exists in agreements with Lebanon and the Palestinians even if they completely failed or only partially succeeded.

I was at Camp David in 1978, and I remember

how Menachem Begin agonized over the issue of the Sinai settlements, until he finally decided to bring before the Knesset the decision to dismantle them – for the sake of peace. Nonetheless, equally we cannot err on the side of illusions. In his 1956 eulogy for Roy Rotberg, a resident of Nahal Oz who was murdered by terrorists from Gaza, Moshe Dayan, who was Chief of Staff at the time, said that “The longing for peace deafened him and he did not hear the sound of murder waiting in ambush.”

The minorities in Israel make up over 20 percent of the country’s citizens and many of them bear the burden of fighting. This is particularly true among Druze and Circassians, but it also occurs among Muslims and Christians. I visited the families of two Druze lieutenant colonels who fell in the current war, Salman Habka and Alim Saad, in their village in the Galilee; my heart overflowed with Israeli pride. Many Israeli Arabs make up a significant part of our medical establishment and stand shoulder to shoulder in treating all the wounded. Without ignoring problematic phenomena, we must strengthen the effort to achieve equality for minorities mentioned in the Declaration of Independence, for the benefit of all. In the past I joined several esteemed professors and a Druze Brigadier General in a proposal to amend Basic Law: Israel, the Nation-State of the Jewish People, by addressing civil equality without harming the core of the Basic Law which affirms the national Jewish role of Israel. This effort unfortunately failed, but perhaps its time will come. In the meantime, let us all wish that the war will come to a victorious end, that the kidnapped hostages will return home, that the wounded will recover, and we will add a word of comfort and encouragement to the families of the fallen: that the unity with which they fought should be our legacy. ■

Justice Professor Elyakim Rubinstein retired in 2017 from his position as Deputy President of the Israeli Supreme Court. Prior to that, he served as Legal Advisor to the Ministries of Foreign Affairs and Defense, Government Secretary and Attorney General. He was involved in peace negotiations with all of Israel’s neighbors, including the Camp David Accords and the Peace Treaty with Egypt. He chaired the Israeli delegation to the Treaty of Peace Negotiations with Jordan. He is an associate professor in public policy and political science at the Hebrew University in Jerusalem. In 2023, he was elected to the IJL Board of Governors.

The International Criminal Court: Twenty Years of its Existence*

Claus Krefß*

It is an immense privilege for a German scholar to speak at the Hebrew University in Jerusalem. This is particularly so in the case of an invitation from an institute named after the eminent Jewish jurist, Jacob Robinson, and devoted to the preservation of his legacy. The legacy of Jacob Robinson is intimately connected with unspeakable and unimaginable crimes committed by Germans against Jews and the Jewish people. I am deeply appreciative of the special invitation by the Jacob Robinson Institute to appear before you.

I have chosen to look at the International Criminal Court (also known as the “ICC”) after twenty years of its existence. I am aware of the many legal and political controversies surrounding the International Criminal Court – something which is true for the situation of Palestine, but also beyond. We cannot exclude critical issues from scholarly exchange just because such an exchange is likely to spark controversies. I present here reflections on the first twenty years of existence of the International Criminal Court.

I. Difficult Birth

In Rome, on the night of July 17, 1998, it proved necessary for the diplomats to stop the diplomatic clock. At the end of five weeks of intensive negotiations, the creation of the first permanent international criminal court in legal history was hanging by a thread. The United States insisted throughout that the officials of States not party to the Rome Statute be categorically excluded from the Court’s jurisdiction. The final compromise package did not comply with this demand, and this prompted the United States to put the draft of the Rome Statute (or the “Statute”) – the document that created the International Criminal Court – to a vote. When in the very early hours of July 18, 1998, the lights on the large board in the main conference room revealed an overwhelming majority in favor of the Statute, thunderous applause erupted among most of the completely exhausted negotiators and members of civil society.

The tough struggle about the Court’s jurisdictional regime made one thing abundantly clear: the International

Criminal Court would have to sail in rough waters. The reason for this was – and remains – obvious: even today, genocide, crimes against humanity, war crimes, and crimes of aggression are frequently committed by the highest organs of States. It is hence inevitable that a court entrusted with the mandate to adjudicate such crimes will attract the rage of the most powerful actors and their political allies.

II. Magic of the Beginning

Initially, it felt like a honeymoon. The first 60 ratifications were deposited at such high speed that the Statute of the ICC entered into force on July 1, 2002. Luis Moreno Ocampo, the Court’s first Prosecutor, made sure that the judicial newcomer had a harmonious appearance on the world stage. He refrained from acting upon the suspicion that British soldiers could have committed war crimes in Iraq. Instead, in the first two situations presented before the Court, Prosecutor Moreno Ocampo chose to act in smooth concert with the governments concerned. The Democratic Republic of the Congo and Uganda had

* This is an edited version of a lecture delivered on January 4, 2023, at the Jacob Robinson Institute for the history of individual and collective rights of The Hebrew University in Jerusalem. An initial version of the text was published in German under the title “*Gigant ohne Glieder. Der Internationale Strafgerichtshof muss weiter reformiert werden,*” in *FRANKFURTER ALLGEMEINE ZEITUNG*, 28 July 2022, p. 6. A more elaborate and slightly updated version was published under the title “*Der Internationale Strafgerichtshof nach 20 Jahren,*” in P. B. Donath *et al.* (eds.), *DER SCHUTZ DES INDIVIDUUMS DURCH DAS RECHT. FESTSCHRIFT FÜR RAINER HOFMANN ZUM 70. GEBURTSTAG* (Springer: Berlin, Heidelberg, 2023), pp. 103-113.

The following issue of *JUSTICE* (also devoted to October 7 as the legal issues evolve) will feature an article based on the reflections by Prof. Krefß on the conflict, as broadcast on Germany’s national radio.

requested the Prosecutor to become active and, in both situations, the Prosecutor only went after the armed opponents – both times fulfilling the hope of the government in place. In 2005, China, Russia, and the United States all refrained from vetoing a resolution by which the UN Security Council would refer atrocities allegedly committed in the Sudanese province of Darfur to the ICC. This was tantamount to the implicit recognition of the ICC's existence by the three permanent Council members that were not Parties to the Statute.

III. Storm Clouds

The Security Council's Sudan mandate marked the peak of the ICC's meteoric rise in international affairs. The Sudan referral, however, sowed the seeds of the end of the honeymoon. Importantly, the central suspicion in the Sudan situation was not about crimes committed by rebellious non-state actors. Rather, and for the first time, the Court's core mission was at stake: the supra-national investigation into allegedly State-sponsored criminality. In 2009, the ICC issued an arrest warrant against the sitting Head of Sudan, Omar Hassan Ahmad al-Bashir. Shortly afterwards, proceedings commenced against the then-acting President of Kenya, Uhuru Kenyatta. Quite a few African governments, having been court-friendly until that moment, now chose to attack the ICC and to denounce it as a neocolonial instrument. Sudan categorically refused to cooperate with the Court, and in Kenya, the Court's work met with grave interference. In the absence of sufficient evidence, the proceedings against Kenyatta had to be terminated. Al-Bashir, who is now in custody in Sudan, was able to freely enter and leave several States that were parties to the ICC Statute, although those States were under a legal duty to arrest al-Bashir and to surrender him to The Hague. Despite this, the ICC received no backing from the UN Security Council.

These heavy setbacks brought the Court's structural vulnerability to light for the world to see. The ICC's core ambition is bold indeed: to act in the interest of the international community against state organs if they are under suspicion of having committed international crimes. When it comes to implementing this benign mandate, however, the Court looks like a small supra-national island emerging from a vast and deep ocean of nations. In more prosaic terms, to carry out its vertical mandate, the ICC, in the absence of vertical enforcement power, must operate within an essentially horizontal structure where the principle of State consent remains its key currency. Antonio Cassese, first President of the International Tribunal for the former Yugoslavia, called his tribunal "a giant without

limbs." This metaphor is even more appropriate with respect to the ICC.

IV. Tempest

In 2012, the second Prosecutor of the Court, Fatou Bensouda, took office. During her tenure, the situation worsened for the Court. One main reason for this is that Prosecutor Bensouda went beyond her predecessor's course of action in one crucial respect: on a number of occasions, and each time with judicial concurrence, she decided to exercise the Court's jurisdiction over nationals of non-States Parties. In the Situation of Afghanistan, Bensouda opened an investigation which included allegations of war crimes against soldiers and secret service members of the United States. In the Situation of Palestine, apart from allegations in connection with the 2014 Gaza war, the Prosecutor decided to investigate Israeli settlements in occupied territories which are widely considered to be contrary to international law. At the time, Israel's Prime Minister Benjamin Netanyahu spoke of "pure antisemitism." The Trump administration went beyond strong rhetoric and placed the ICC at the same level as transnational terrorist organizations. On that basis, Prosecutor Bensouda was subjected to financial sanctions.

The Situation of Palestine provides a useful illustration of the inevitability by which the Court comes under political fire. The legal issue, which is central to the Court's jurisdiction, is extremely complex and controversial – namely whether Palestine is a State, be it generally or at least for the specific purposes of the Rome Statute's jurisdictional regime. One can imagine that the Court would have been confronted with allegations of "neocolonialism" had it reached an opposite decision.

During that difficult time, the Court's situation was not aided by the fact that much of the support which States Parties held for the Court remained rather lukewarm. Take Germany, my own country, by way of example. When faced with complex questions of jurisdiction, Germany usually accepts that the final word (the "*Kompetenz-Kompetenz*") lies with the competent international judges. In the Situation of Palestine, however, the then-German Foreign Minister Heiko Maas left it with the observation that Germany disagrees with the Pre-Trial Chamber's decision. Also, since 2015, only Palestine, El Salvador, and Kiribati acceded to the ICC Statute, while Burundi and the Philippines have withdrawn. For a while, the number of States Parties to the ICC Statute had not gone beyond 123. Without doubt, the imperfect cooperation by States, the complexity of international criminal proceedings, and the novelty of significant parts of the

Court's procedural law, all add to the formidable challenges facing the Court.

There is more to the story. Since the first Prosecutor's term of office, the Court has been experiencing superfluous internal quarrels. There have even been signs that charges were brought in undue haste more than once. The ICC could thus not avoid the question of whether its limited output after almost two decades of existence was perhaps also due to certain homemade problems.

Against this background, the prevailing mood vis-à-vis the Court underwent a significant change compared with the honeymoon phase: increasingly often, there was talk of a crisis or of the Court having arrived at a crossroads. At times, the pendulum swung a bit too heavily towards a sense of crisis and many lost sight of the fact that the ICC, which was still in an early stage of its existence, had already made a number of significant contributions to the consolidation of international criminal law. Consider, for example, the law against the abuse of children for war purposes, the law against the violation of reproductive rights, and the law against the destruction of cultural property.

V. Weather Lights

And then came February 24, 2022. At the end of her term in 2021, Fatou Bensouda left a file for her successor, Karim Khan, resulting from her preliminary investigation which enabled the opening of a formal investigation into the Situation of Ukraine. It is telling that Prosecutor Bensouda left it to her successor to decide whether to make this Situation one of his priorities, even in light of the Court's budgetary restraints. It is likely that President Putin's escalation of Russia's violence against Ukraine to the extent that it became an outright war of aggression, would by itself have left the new Prosecutor with no choice other than to act. Then, all of a sudden, the States Parties rediscovered the purpose of the Court. On February 28, 2022, Prosecutor Khan confirmed that he would seek authorization from the Pre-Trial Chamber to open an investigation into the Situation of Ukraine. In doing so, he underlined that an ICC State Party's referral of the Situation to the Office would allow for investigations to begin without delay. Only 48 hours after this statement, 39 states collectively responded, referring the situation to the Prosecutor and allowing him to immediately open an active investigation.

Currently, a total of 43 States Parties have referred the Situation of Ukraine to the ICC, representing more than one third of all parties to the Statute. It is of note that, with respect to events unfolding since February 24, 2022,

the opening of the investigation by Prosecutor Khan was done in parallel to national investigations, not only in Ukraine.

This revitalization of support for the Court's work is particularly striking considering that the Court's investigative activity in the Situation of Ukraine is essentially directed against nationals of a non-State Party. In the skeptical years before, one repeatedly heard that States Parties should conceive of themselves as a "club of likeminded States" which should better confine their appetite for international criminal justice among themselves. With the Situation of Ukraine, however, the Court's original mission has powerfully resurfaced. The establishment of the first permanent international criminal court in legal history, vested by its institutional design with a credible universal orientation, was now entrusted with the mission of reconfirming core rules of the international legal order in case of violation and to provide victims of grave offenses with some measure of relief. Interestingly, the United States has repeatedly welcomed the Court's activity in the Situation of Ukraine. Yet if the United States wishes to act consistently, this can only mean that it is willing to reconsider its opposition to the Court exercising jurisdiction over nationals of non-State Parties.

VI. Lightning

None of the aforementioned developments give reason for exuberance or even nonchalance. States Parties must not only provide the ICC with a sufficient budget but also insist on the highest professional standards for selecting judges. In addition, a rigorously professional spirit within the Court's judiciary will help the Court work through the long list of recommendations compiled by a group of independent experts and submitted to improve the Court's conduct of proceedings.

Irrespective of what is already a remarkable jurisprudential *acquis* (inevitable imperfections notwithstanding), the ICC's judiciary will continue to be confronted with demanding challenges in the foreseeable future. This is true for both new legal questions that will almost certainly arise, as well as familiar legal issues of quite considerable practical importance. One primary challenge is that the Court has not fully consolidated its own case law, often because of deeply rooted differences in the various legal cultures operating within the ICC. One may think of legal aspects in the areas of evidence, appeals, and substantive criminal law, as the proper delineation between the different forms of individual criminal responsibility. Yet when it comes to the ICC Statute's novel approach to providing reparations, it is

probably fair to say that we are still in the early stages of development.

Another fundamentally important issue in need of further discussion is how the ICC will handle the crime of aggression. On two separate occasions – one in 2010 in Kampala and again in 2017 in New York – the diplomatic clock had to be stopped in order to approve the Court’s jurisdiction over crimes. The conditions for the Court’s exercise of jurisdiction are far more stringent when it comes to the crime of aggression relative to the other three core crimes handled by the ICC – genocide, crimes against humanity, and war crimes. In the Situation of Ukraine, even though the Prosecutor is taking action in relation to war crimes, crimes against humanity, and genocide, his hands are regrettably tied with respect to the core allegation directed against President Putin: the continuing commission of a crime of aggression.

It is a historical irony that this restrictive jurisdictional regime is by no means due only to a desire of the Russian Federation. It is equally or even more so the result of the insistence by France, Great Britain and the United States. This means that all four States have established what Hans Kelsen called the “creative Nuremberg” precedent, which makes the very waging of a war of aggression an international crime. Yet these same States have simultaneously remained opposed to fully embracing this precedent on a practical level. One can only hope that the three major Western powers will reconsider this policy, now that Russia’s war of aggression against Ukraine is shaking what the International Court of Justice has rightly called a cornerstone of the UN Charter: the prohibition of the use of force. As reflected in Prosecutor Khan’s address before the 2022 Assembly of States Parties of the ICC in the Hague, “Now may be a moment in which we may act collectively, in a principled way, to reinvigorate

action in relation to the crime of aggression under the Rome Statute.”

VII. Signs on the Horizon

At the end of my cursory reflections, I wish to highlight a question that is important not only for the ICC, but also for the larger legal community: where are the roots of the jurisdiction that this Court is exercising? Is the Court the mere recipient of a bundle of national jurisdiction titles which States Parties have chosen to delegate for the purpose of their collective exercise? Or is international criminal law *stricto sensu*, that is, a narrowly defined body of crimes anchored in customary international law? If so, doesn’t this imply the existence of an *ius puniendi* (“right to punish”) within the international community, which may be exercised by the ICC as one of this community’s fiduciaries? This truly fundamental question has not yet received the direct attention of the ICC’s judiciary. When the day comes for the Court to pronounce a clear vision of the underpinnings of its own existence, it will be imperative that the judges turn their closest attention to Israel’s Supreme Court Judgment in the *Eichmann* case – a case, by the way, in which Jacob Robinson contributed to its preparation. It is impossible to find a more emphatic and powerful articulation of a truly universal vision of international criminal law and justice than that espoused in one strand of the reasoning of this historic judgment. I sincerely hope that, underneath the surface of the political controversies of today, any future work toward the ICC’s vision for global justice will be guided by such a genuinely cosmopolitan spirit. ■

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International Law Tailor-Made for Israel*

Robbie Sabel

Israel has a good record of complying with international law. However, there are rules that seem to have been tailor-made and applied only to Israel, some of which I would like to highlight here. A legitimate preliminary question, however, could be whether international law is at all relevant in a situation in which Israel faces an opponent such as Hamas, a murderous terrorist group that ignores every legal norm, as demonstrated by its attack on Israel's sovereign territory on October 7, 2023. Hamas carried out heinous acts of murder and torture against thousands of peaceful citizens. Hamas takes hundreds of innocent persons hostage and murders babies and children by slitting their throats. Under international law, the perpetrators of such crimes are international criminals who can be tried by courts of every country in the world.

Despite the behavior of Hamas, international law remains relevant for Israel. Israel is a democratic, law-based society where customary international law is part of the fabric of the Israeli legal system and is enforced by impartial courts. Moreover, international law is politically relevant since legitimacy gives political power. As a tiny state dependent on trade and relations with other states, Israel has a problem the moment something is branded as illegitimate under international law. Our Arab opponents are perfectly aware of this, and that is why they exert tremendous effort to brand Israel's activities as illegal under international law. To do so, they warp international law and propose laws that are only applicable to Israel. I will present here nine examples of rules that have either been warped or entirely invented, solely regarding Israel.

The first issue is the nature of UN resolutions. There is a claim that UN General Assembly resolutions create international law, but this is not so. No state accepts a UN General Assembly resolution as binding, except with regard to Israel. You may have heard that "Israel is violating UN resolutions." This is nonsense. UN resolutions are political statements, and do not create international law. In fact, the drafters of the UN Charter very carefully refrained from granting any UN body the right to create international law. International law is created by state actions, not by the UN. Nevertheless, we

still hear, "Aha, they violated UN resolutions," but only with regard to Israel.

The second issue is the nature of armistice demarcation lines. When a state signs an armistice agreement it includes the definition of what is called an "armistice demarcation line." Such a line marks the boundary from beyond which troops should not move. In 1949, Israel signed armistice agreements with all its Arab neighbors. These agreements contained definitions of the armistice demarcation lines. There is a clause in all the agreements, inserted at the demand of the Arab states, that the lines are temporary, and not permanent boundaries. The temporary armistice demarcation line between Israel and Jordan (commonly referred to as the "Green Line" because the line was created on a map using a green crayon), is the line that demarcated what is currently referred to as Judea and Samaria or the "West Bank." Yet, somehow, the application of tailor-made "international law" rendered the Green Line into a permanent boundary. A temporary armistice demarcation line magically became an established political boundary – magic that only seems to apply to Israel.

The third issue is military occupation. It is not a pleasant phenomenon, but it is an inextricable aspect of the laws of war that apply when a state occupies the sovereign territory of an enemy state. Whether Israel is in fact occupying the territory of a foreign state in Judea and Samaria is a moot point. Israel's position is that Judea and Samaria do not constitute the territory of a foreign state. The territory was not legally Jordanian, and Jordan subsequently renounced any claim to the territory after the 1967 war. It may be slated as the location of a future Palestinian state, but at present, this is certainly not the case. It is not occupied territory; it is *disputed* territory.

In fact, Israel did something for which I do not believe it has received credit. The Palestinian population in the West Bank is not comprised of Israeli citizens, and there

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is no other state that could look after them, including Jordan, which has renounced its claim to the West Bank. Israel granted the Palestinian population the rights of protected persons in an occupied territory even though Israel does not regard the West Bank as occupied territory. As such, the Palestinian population has all the rights which the Geneva Conventions and the Hague Regulations grant to protected persons in occupied territory. Israel allows the Red Cross to be present at trials and grants the population the unprecedented right to appeal to the Israel High Court of Justice against acts conducted by the Israeli Government and by its armed forces. Israel has claims to this territory, but Israel is also aware that there are other existing claims.

That issue aside, somehow for Israel, the very word “occupation” is deemed “illegal.” Why? Because it relates to Israel. Occupation is legal under the laws of war. The U.S. occupation of Japan after World War II was perfectly legal. The Allied occupation of Germany after World War II and the U.S. occupation of Iraq after the Gulf War were also considered perfectly legal. It is interesting that the UN Security Council, which has previously proven not to be the friendliest of bodies towards Israel, has never referred to the Israeli occupation as “illegal.” This is because the powers themselves recognize that under the laws of war, occupation is legal. It is not something permanent, and Israel does not want it to be permanent. Nevertheless, the phrase “illegal occupation” is repeated in any conversation regarding Israel. Another fact the world also chooses to ignore is that since the Oslo Agreements in the early 1990s, over 90% of the Palestinians in the West Bank live under the civilian control of the Palestinian Authority, and not under Israeli administration.

The fourth issue is the use of the word “apartheid.” The attempt to brand Israeli policy as “apartheid” is particularly nefarious. The moment one is smeared with the word “apartheid,” their actions are inadmissible; they are taboo, and illegal. It evokes immediate condemnation in the third world based on their historic emotions regarding this issue. Our Arab opponents are perfectly aware of this, and this is precisely why they intentionally use the term. Israel built a security barrier separating Israel from Judea and Samaria (the West Bank) to combat terrorist attacks that are committed by terrorists located across the demarcation line. The barrier separated Israel’s sovereign territory from territories in dispute. To pass the barrier, one must go through border control. Indeed, fences and barriers are often unpleasant, but good fences can sometimes make good neighbors. When it comes to Israel, people treat the barrier as an “Apartheid Wall.”

No other country that has built a fence around its borders has ever had it called an Apartheid Wall.

I was very disturbed to see an Amnesty report a few weeks ago claiming that Israel’s use of facial identification at the border is representative of “apartheid.” Anybody who has gone through Heathrow Airport – or many other airports in the world – is aware that the airports utilize facial identification. You must present your passport, and if your face does not look like the face printed on your passport, you are in trouble. This is exactly what Israel does at checkpoints located along the border. We use facial identification only when inspecting people who want to travel from Gaza or Judea and Samaria into Israel. Somehow Amnesty decided this behavior is “apartheid.” We cannot ignore this extreme warping of the concept. It is increasingly harmful because when people throughout the world hear the word “apartheid,” they will impulsively say, “That is abhorrent. We reject any country that does that.”

The fifth issue is civilian casualties, which are always a tragedy. However, when an enemy embeds its forces amongst the civilian population, it is impossible for a state to conduct military activities without incurring some civilian casualties. When reading about D-Day, I remember learning that approximately 40,000 French civilians were killed on the first day of the operation. Yet, no one argued that the Allies were committing a war crime.

I recently attended a conference of Advocates General from different armies, and these very senior legal officers stated that Israel takes more precautions to ensure it does not harm civilians than any other army. We do so for several reasons – for humanitarian considerations, but also out of self-interest. Simply put, killing civilians harms Israel, regardless of the legality. It enables Hamas to say, “Look, they are attacking civilians.” It does not provide Israel with any military advantage. Hamas is well aware of Israel’s caution and deliberately places its military installations, including rockets, in or adjacent to civilian dwellings, schools, and hospitals. Nevertheless, you must have read: “Oh, civilians were killed: it is a war crime.” It is a war crime if you deliberately attack civilians or even if citizens are harmed through negligence. If you are attacking Hamas’s rockets, which are placed next to and amidst civilians, the commander, on the spot, must consider whether the foreseeable harm to civilians is excessive compared to the military advantage of attacking the target. Is it proportional? Clearly there are cases, such as in the recent war in Gaza, that Hamas placed a military command post underneath a hospital. Under the laws of war, Israel could have destroyed the hospital. Yet Israel

did not do so, as the Israel Defense Forces concluded that the harm to the hospital would be disproportionate even to the military advantage of taking out the command post.

When a rocket is about to be fired towards Israel, we must take into account not only the enemy's civilian casualties but also our possible casualties. Clearly this dilemma becomes most acute when we discover a rocket that is about to be launched. These decisions are made by military commanders on the spot when they themselves are under fire. As stated, Israel takes these precautions for several reasons, including humanitarian considerations, such as our pilots not wanting to kill civilians, and because Israel does not want to offer its opponents the opportunity to happily claim, "Ah, Israel has killed civilians!"

The sixth issue revolves around Palestinian self-determination. The innumerable international declarations supporting Palestinian self-determination do not stipulate that the Palestinians must also respect Israel's right to self-determination and sovereignty. Self-determination, apparently, is a right only considered relevant for the Palestinians.

The seventh issue is the ever-present claim of a rule that has been invented regarding a "right of return" for descendants of people who fled or were expelled from the area. This so-called right "applies" to people even though they are not, nor have they ever been, your citizens or even domiciled in your country. According to this invented rule, it is sufficient that if your grandfather came from British Mandate Palestine in 1948, you have a right under international law to "return" to Israel. There is no such right in international law, and no other country states that such a right exists. Sometimes states offer preferential treatment to certain groups. For example, Ireland gives priority to return and receive citizenship to people of Irish descent. Germany has similar provisions. However, determining which individuals are eligible for such priority decisions is an internal decision. Israel grants priority to people of Jewish descent but somehow for Israel, "Under international law, there is an automatic 'right of return' for Arab descendants to the nth generation." While no other country has such a rule imposed upon it, such an imposition is seen to be valid in the context of Israel.

The eighth issue is the handling of questions by the International Court of Justice. The UN General Assembly has asked the International Court of Justice in The Hague for an advisory opinion on the legality of Israel's occupation of the Palestinian territories in Gaza and the West Bank. The International Court of Justice can give advisory opinions to United Nations bodies, although

normally, these are rendered on technical issues of international law. However, the Court has previously ruled that it will not render an opinion on the merits of a dispute between two states. The rationale behind this is that states must agree to appear before an international legal body; they cannot be forced to do so. By extension, the Court cannot determine the merits of a case when a party has not consented to the Court's involvement. However, the Court seemingly forgets this ruling when handling issues regarding Israel. In a previous case, the International Court of Justice reneged on this rule by arguing that it can give an opinion on the merits of a case when requested to do so by the UN.

When the activities of other states are involved, the UN asks the Court to determine an action's legality. When addressing Israel's actions, the question of legality is completely bypassed, and instead the Court is asked, "What are the results of Israel's illegal activities?" In other words, any action by Israel is presumed to be illegal without any inquiry. At law school, one is taught about the question posed to the accused: "Have you stopped beating your wife, answer yes or no." The framing of the question obliterates any presumption of innocence. Similarly with Israel, the Court operates under the UN's assertion that Israel's actions are illegal and it is now required to outline the consequences. In any other scenario, a court operating under the presumption of guilt rather than innocence would be considered a miscarriage of justice. However, when it comes to Israel, it is par for the course.

The ninth and final issue is evaluating proportionality in warfare. You may have heard that "Israel has used disproportionate force against military targets." Anybody who has had any experience in armed conflict knows that you want to hit the enemy's armed forces harder than they hit you. They should know that playing around with you is dangerous. There was once a cartoon regarding Israel in a French magazine that showed an animal in a cage. Underneath it was the caption: "Be careful! This animal is dangerous: When attacked, it defends itself." Our enemies should know that if they attack us, we will hit back, harder, if possible, than they did! I think that one of the problems is that the criticism does not come from foreign military personnel who are familiar with the law. The criticism comes from people who have no experience with actual military conflict.

Once again, my experience with the Advocates General from other countries highlights that they have no problem whatsoever with Israel's actions during wartime. But there are Foreign Ministry officials who, luckily perhaps for

some European states, have not been involved in war, nor have they had any experience with an armed conflict. These same officials say, "Oh no, you've got to use proportionality. If they only attack you with one cannon, you cannot shoot back with two cannons." This is rubbish; however it creates a very real public relations problem. Every army in the world knows that if you are attacked with a rifle, there is no requirement that, "You can only shoot back with a rifle. You cannot use a machine gun, that's not fair." Yet again and again, we hear accusations that "Israel is using disproportionate force in warfare," and I think the answer is "yes." Sometimes that is the entire point. During the 2006 war against Hezbollah,

Hezbollah apparently learned that when it attacks Israel, Israel will respond forcefully. There has not been a full war with Hezbollah since 2006, in part because Hezbollah are choosing to be very careful not to repeat its mistake. I hope Hamas learns the same lesson.

In summation, Israel respects international law, and it is in our interest to respect international law. Israeli courts adhere to and enforce international law, but only law as it exists, not as it is tailor-made for Israel. ■

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The United Nations and International Law in the Hamas-Israel War

Matthijs de Blois

Introduction

On October 7, 2023, the holiday of Simchat Torah, Hamas terrorists and other Palestinian Islamist groups, such as the Palestinian Islamic Jihad, launched a brutal surprise attack on Israel. The cruelty of the violence against soldiers and innocent civilians, including babies, children and elderly people, is almost beyond comprehension. It was a pogrom directed against the Jewish people with no precedent after the Shoah. Immediately after the Hamas attack, which included rockets fired at population centers across southern and central Israel, Israel responded with a major military operation in the Gaza Strip, while at the same time having to be prepared for attacks in the North, on the West Bank (Judea and Samaria) and in the South. In doing so, Israel exercised its right to self-defense under the UN Charter.

Without doubt, the acts committed by Hamas and the other Palestinian terrorist groups on October 7, 2023, must be qualified as serious violations of international humanitarian law (IHL). The core of IHL can be found in the Common Article 3 of the Geneva Conventions of 1949, which provides that persons who do not take active part in hostilities, “shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.”¹ What we have seen is that Hamas deliberately acted inhumanely vis-à-vis Israeli civilians, civilians of other nationalities, and civilians of all ages from small babies to people of old age. Article 3 specifies the acts that are prohibited without exception to ensure humane treatment. The first is “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” The terrorists perpetrated all these acts; they engaged in killing, maiming and raping people. The number of fatalities is about 1,200.

The second type of inhumane behavior mentioned in Article 3 is the taking of hostages. About 240 men and women of all ages were taken hostage and brought to the Gaza Strip. All this deserves unequivocal condemnation by all relevant organs of the United Nations (UN), the world’s most prominent institution “to maintain international peace and security...and to bring about by

peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes...”² Its purpose is also “to develop friendly relations...based on the respect for the principles of equal rights and self-determination of peoples...”³ The UN, finally, is supposed to promote and encourage “respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴

In this article, I focus on the reaction to the October 7 pogrom and its aftermath by three major UN organs: the General Assembly, the Security Council, and the Secretary-General. I survey these responses and then reflect on them within the broader context of the attitudes adopted by the UN towards Israel.

UN Responses

A. Initial Inaction of the Security Council

It might have been expected that the organ with the primary responsibility for the preservation of peace and security, the UN Security Council (UNSC), would respond immediately. Indeed, the UNSC held an emergency meeting behind closed doors on October 8, 2023. In that meeting, Israel’s Ambassador to the UN, Gilad Erdan, demanded the condemnation of Hamas’s war crimes against Israeli citizens.⁵ The emergency meeting, however, did not result in a public condemnation of Hamas *cum suis*, although according to the U.S. deputy ambassador, “a good number of countries” (members of the UNSC)

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1. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 Aug. 1949, 75 UNTS 135, Art. 3.
 2. UN Charter, Art. 1(1).
 3. *Id.*, Art. 1(2).
 4. *Id.*, Art. 1(3).
 5. Margaret Besheer, “Israel Demands UN Security Council Condemn Hamas ‘War Crimes’,” VOICE OF AMERICA, Oct. 8, 2023, available at <https://www.voanews.com/a/israel-demands-un-security-council-condemn-hamas-war-crimes/7302112.html>

did condemn Hamas.⁶ Yet that “good number” was apparently not sufficient to support a resolution condemning the Palestinian terrorist organizations.

This is in sharp contrast with the attitude of the UNSC after the terrorist attacks against the U.S. on September 11, 2001. The following day, the UNSC adopted Resolution 1368 (2001) unequivocally condemning the attacks in the strongest of terms.⁷ But not so in the case of the attack by Hamas. Since October 8, the UNSC has convened several times, without being able to obtain sufficient support for a resolution on the Hamas-initiated conflict. On October 16, 2023, the UNSC rejected a draft resolution proposed by the Russian Federation that condemned violence and terrorism against civilians, without condemning Hamas. Russia voted in favor, as did China, Gabon, Mozambique and the United Arab Emirates (UAE). France, Japan, the UK and the U.S. voted against, while six others abstained.⁸

B. The Secretary-General’s Remarks

During one of the UNSC meetings, UN Secretary-General Antonio Guterres remarked “that the attacks by Hamas did not happen in a vacuum.” Although he also stated that “the grievances of the Palestinian people cannot justify the appalling attacks by Hamas,” his remark can be reasonably seen as a kind of understanding for the perpetrators. This led to outrage in Israel. The UN Ambassador Gilad Erdan demanded Guterres’ resignation; Foreign Minister Eli Cohen cancelled a meeting with Guterres; and War Cabinet member Benny Gantz declared that “dark are the days when the United Nations Secretary-General condones terror.”⁹ It has to be feared that the Secretary General gave expression not only to a personal lack of moral discernment, but also to a widely shared opinion within the UN community.

C. The General Assembly’s First Resolution

As a result of the inaction of the UNSC, the General Assembly stepped in by using the “Uniting for Peace”¹⁰ mechanism that allows the General Assembly to essentially take over when the UNSC fails to exercise its primary responsibility of maintaining international peace and security. This capability was created in 1950 during the Korean War when the Soviet Union obstructed the functioning of the UNSC. This led the General Assembly to adopt the Resolution on Uniting for Peace, which created the ability to convene an emergency special session of the General Assembly. In 1997, at the request of Qatar, it convened the Tenth Emergency Special Session on “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory.” This session

has been convened many times since then, already twice during the present war between Hamas and Israel.¹¹

On October 27, 2023, the General Assembly adopted a resolution that condemns “all acts of violence aimed at Palestinian and Israeli civilians.”¹² There were 121 votes in favor, including Belgium, France, and Ireland. However, some of the members who supported the resolution did not try to hide their anti-Israel sentiments or motivations. The representative of Pakistan declared that the crime originated with Israel, while his Syrian colleague had problems with equalizing what he called the Israeli aggressor and murderer with the occupied and victimized Palestinian people.¹³ Forty-four UN Member States abstained, including Canada, Australia, India, and the Netherlands. Only fourteen States voted against, including Austria, Israel, Papua New Guinea, and the U.S.

The order of the sentence in the resolution is remarkable: first, Palestinians are mentioned as victims and the Israelis are mentioned subsequently. This formulation at least suggests that Israel started the hostilities. The resolution calls for an immediate, durable and sustained humanitarian truce leading to a cessation of hostilities. It demands that “all parties” comply with international humanitarian law and international human rights law. It calls for the

6. Edith M. Lederer, “U.S. demands condemnation of Hamas at UN meeting, but Security Council takes no immediate action,” PUBLIC BROADCASTING SERVICE, Oct. 9, 2023, available at <https://www.pbs.org/newshour/world/u-s-demands-condemnation-of-hamas-at-un-meeting-but-security-council-takes-no-immediate-action>
7. UN SC Res. S/RES/1368, Sept. 12, 2001.
8. United Nations, “Security Council rejects Russian resolution on Gaza,” UN NEWS, Oct. 16, 2023, available at <https://news.un.org/en/story/2023/10/1142427>
9. ToI Staff, “Israel demands UN chief resign after he says Hamas attacks ‘did not occur in vacuum,’” TIMES OF ISRAEL, Oct. 24, 2023, available at <https://www.timesofisrael.com/israel-livid-after-un-chief-says-hamas-attacks-did-not-occur-in-vacuum/>
10. UN GA Res. A/RES/377(V) Nov. 3, 1950.
11. It has been reconvened in 1998, 1999, 2000, 2001, 2002 (two times), 2003 (two times), 2004, 2006 (two times), 2009, 2017, 2018, and 2023 (two times).
12. UN GA Res. A/RES/ES-10/21, Oct. 27, 2023.
13. United Nations, “General Assembly Adopts Resolution Calling for Immediate, Sustained Humanitarian Truce Leading to Cessation of Hostilities between Israel, Hamas,” UN NEWS, Oct. 27, 2023, available at <https://press.un.org/en/2023/ga12548.doc.htm>

protection of civilian and humanitarian facilities and access to essential goods and services. The resolution completely omits the entities responsible and therefore fails to characterize them as terrorists.

An attempt was made by Canada to name the perpetrator of the atrocities in a proposed amendment that: “Unequivocally rejects and condemns the terrorist attacks by Hamas that took place in Israel starting on 7 October 2023 and the taking of hostages, demands the safety, well-being and humane treatment of the hostages in compliance with international law, and calls for their immediate and unconditional release.”¹⁴ The amendment was not adopted since a few votes were missing from the required two-thirds majority: 88 States voted for; 55 were opposed; and 23 abstained.

Even in light of such a critical omission, many supporters of the amendment continued to vote in favor of the original proposal resulting in the resolution’s adoption. It is relevant to note that the General Assembly is silent on Israel’s right to self-defense. The resolution further asks for the “release of all civilians who are being illegally held captive” as if both sides kidnapped innocent civilians. Of course, only the Palestinian terrorist organizations kidnapped civilians; Israel did no such thing. The hostages are almost all Israeli and Jewish babies, children, adults, and elderly who were abducted from Israeli soil. The resolution finally refers to the “Two-State” solution based on UN resolutions and public international law as the way to bring an end to the Israeli-Palestinian conflict. This first resolution set the tone for all subsequent texts adopted by UN bodies.

D. The Security Council Resolution

After multiple attempts, it wasn’t until November 15, 2023 – five and a half weeks after the October 7 attack – that the UNSC succeeded in promulgating its own resolution. It adopted Resolution 2712 (2023) which “[c]alls for the immediate and unconditional release of all hostages held by Hamas and other groups, especially children, as well as ensuring immediate humanitarian access.”¹⁵ Although it may be deplored that “calls” was used in lieu of the stronger term “demands,” the resolution distinguishes itself positively from the earlier General Assembly resolution because Hamas is mentioned explicitly. The resolution also calls for humanitarian pauses and corridors throughout the Gaza Strip. Absent in this resolution is a clear condemnation of Hamas for the cruel lethal attacks on October 7. There were twelve votes in favor of the resolution and not less than three abstentions, all by Permanent Members: the Russian Federation, the

UK, and the U.S.

Notwithstanding Article 27 of the UN Charter, which requires the concurring votes of the Permanent Members, these abstentions do not prevent the adoption of a resolution. U.S. Ambassador Linda Thomas-Greenfield was horrified that some members of the UNSC could not bring themselves to condemn Hamas. She stated, “What are they afraid of? Let’s be crystal clear: Hamas set this conflict in motion.”¹⁶ The UK, France, Switzerland, and Albania regretted the omission of a clear condemnation of Hamas.¹⁷ Except for the UK, these concerns were apparently not sufficient enough to compel them to abstain. Like the General Assembly, the UNSC does not mention the State of Israel’s inherent right to self-defense, as recognized in Article 51 of the UN Charter. It also fails to address, let alone condemn, Hamas’ well-known practice of using civilians as human shields and using civilian facilities such as apartment buildings, schools, mosques, and hospitals, as well as ambulances, for military purposes.

Finally, as to the legal value of Resolution 2712, it has been suggested that it is binding under international law.¹⁸ It is sometimes even assumed that all UNSC resolutions are binding. This is not the case. Only resolutions adopted under Chapter VII of the UN Charter are binding. There is no indication in its text that Resolution 2712 was adopted under Chapter VII. If the UNSC wanted the resolution to become binding under Chapter VII, the resolution must state that the conflict constitutes “a threat to the peace, breach of the peace, or an act of aggression” (Article 39 UN Charter). In the resolution we find no such determination; this in contrast to Resolutions 1368 and 1373 that were adopted after 9/11. The conclusion, then, is that Resolution 2712 is not binding on UN Member States.

14. Canada, Amendment to Draft Resolution, UN GA Res. A/ES-10/L.26, Oct. 26, 2023.

15. UN SC Res. 2712 (2023), Nov. 15, 2023.

16. <https://press.un.org/en/2023/sc.15496.doc.htm>

17. United Nations, “Adopting Resolution 2712 (2023), Security Council Calls for ‘Urgent and Extended’ Humanitarian Pauses in Gaza, Immediate Release of Hostages,” Nov. 15, 2023, available at <https://press.un.org/en/2023/sc15496.doc.htm>

18. Maria Antonia Sánchez-Vallejo, *El País* (USA Edition) Nov. 16, 2023, available at <https://english.elpais.com/international/2023-11-16/un-security-council-calls-for-urgent-and-extended-humanitarian-pauses-for-aid-to-reach-gaza>

E. The Use of Article 99 by the Secretary-General

On December 6, 2023, Secretary General Guterres used Article 99 of the UN Charter to bring the Hamas-Israel war to the attention of the UNSC. Article 99 grants this political power to the Secretary General if he thinks that a situation may threaten the maintenance of international peace and security, but this power is seldom used. The last time a Secretary General invoked Article 99 was in 1989, and Secretary General Guterres' December 6, 2023, letter was the seventh application of Article 99 in the entire history of the UN. After declaring that the Secretary General had repeatedly condemned the abhorrent acts of terror by Hamas and other Palestinian groups, the focus of his letter is on the effect of the Israeli military operations in Gaza. He mentions the high number of fatalities, the forcible displacement of people, the collapse of the health care system, the breakdown of public order and the insufficient delivery of supplies. He urges the members of the UNSC to demand a humanitarian ceasefire. This move by the Secretary General led to a fierce reaction from Israel's Foreign Minister, Eli Cohen. He accused the Secretary General of supporting Hamas and asked for his resignation. According to Israel's Ambassador to the UN, Gilad Erdan, the Secretary General has "reached a new moral low."¹⁹ A former Israeli ambassador to the UN, Gabriela Shalev, spoke of a very low point in the relations between Israel and the UN. She observed, "We have the feeling that organizations of the UN all over the world don't understand that Israel is now at war for its existence as a Jewish and democratic state, it is (facing) an existential threat from all sides."²⁰

F. The Failure of the Security Council to Adopt a Second Resolution

The UNSC discussed the Secretary General's letter in an emergency meeting on December 8, 2023. On the previous day and with the support of the Islamic and Arab states, the United Arab Emirates (UAE) submitted a draft resolution calling for an urgent humanitarian ceasefire, the release of all hostages, and humanitarian access. The resolution was supported by thirteen members of the UNSC, the UK abstained, and the U.S. used its veto to prevent the adoption of the resolution. It was unacceptable for the U.S. because the drafters declined to condemn the Hamas terrorist attack, failed to demand that the International Committee of the Red Cross have access to the hostages to provide medical treatment, and failed to acknowledge Israel's right to self-defense. Several Member States that voted in favor, as well as the UK which abstained, would have preferred a condemnation of Hamas.

The position of the Russian Federation was particularly remarkable in that it unabashedly castigated both Israeli bombings and U.S. diplomacy by claiming they created "a cemetery of Palestinian children," and obviously ignored its own tactics in Ukraine.²¹ Israeli Ambassador Erdan was clear in his criticism of the Secretary General for initiating the meeting of the UNSC, using his power under Article 99 of the UN Charter, something he had not done in respect of the war between Russia and Ukraine. Moreover, the proposed resolution sent the message "that Hamas is forgiven for their deliberate atrocities, and Hamas' oppression of Gazans is given green light by the international community."²²

G. The General Assembly's Second Resolution

As was to be expected, the General Assembly again used the "Uniting for Peace" procedure. The General Assembly met on December 12, 2023, in the continued Tenth Emergency Special Session. It adopted a resolution that shows strong similarities with the rejected UNSC resolution. It demands an immediate humanitarian ceasefire, the release of all hostages, and humanitarian access. Resolution (A/ES-10/22) was adopted and the

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19. Agence France-Presse (AFP), "As UN chief uses rare clause to urge truce, Israeli envoy says he 'reached a new moral low'," *TIMES OF ISRAEL*, Dec. 6, 2023, available at https://www.timesofisrael.com/liveblog_entry/as-un-chief-uses-rare-clause-to-urge-truce-israeli-envoy-says-he-reached-a-new-moral-low/
 20. Abbas Al Lawati and Nadeen Ebrahim, "Israel-UN relations at historic low as secretary-general invokes rare diplomatic measure," *CNN*, Dec. 8, 2023, available at <https://edition.cnn.com/2023/12/08/middleeast/israel-un-diplomatic-showdown-hamas-war-mime-intl/index.html>
 21. United Nations, "Security Council Fails to Adopt Resolution Demanding Immediate Humanitarian Ceasefire in Gaza on Account of Veto by United States," *UN NEWS*, Dec. 8, 2023, available at <https://press.un.org/en/2023/sc15519.doc.htm>; see also Ambassador Robert Wood, "Explanation of Vote on a United Arab Emirates-Drafted UN Security Council Resolution on the Situation in the Middle East," United States Mission to the United Nation, Dec. 8, 2023, available at <https://usun.usmission.gov/explanation-of-vote-on-a-united-arab-emirates-drafted-un-security-council-resolution-on-the-situation-in-the-middle-east/>
 22. United Nations, "US vetoes resolution on Gaza which called for 'immediate humanitarian ceasefire'," *UN NEWS*, Dec. 8, 2023, available at <https://news.un.org/en/story/2023/12/1144562>

support, compared to the earlier General Assembly resolution, was rather overwhelming.²³ One hundred and fifty-three States voted in favor, among them no fewer than seventeen EU Member States. One remark made during the debate deserves special attention. Egypt, one of the sponsors of the resolution, responded to Members who stressed the right of Israel to self-defense, by observing that Israel, as occupying power, did not have that right.²⁴ Only ten States voted against the resolution, including Israel, the U.S., Austria and the Czech Republic. Both an American amendment to include a condemnation of Hamas and an Austrian amendment to mention Hamas explicitly as responsible for the keeping of hostages, failed to be adopted with the required two-third majority. Finally, there were 23 abstentions, including Germany, the Netherlands, and Ukraine.

Reflective Analysis

Reflecting on the texts produced by the three major UN organs, the General Assembly, the UNSC, and the Secretary General, leads to some observations.

A. No Condemnation of Hamas

First, what is completely absent in the resolutions adopted by both the General Assembly and the UNSC is a clear and unequivocal condemnation of Hamas and its proxies who perpetrated the October 7 pogrom and started the war. This is shocking to believe considering the UN was created in 1945 as a direct response to the atrocities of Nazi-Germany, whose primary objective was to annihilate the Jewish people. This is also strikingly different from the response to the Islamist terrorist attacks in 2001 on the U.S., the atrocities of the Islamic State in Iraq and the Levant (ISIL) and the Al Nushra Front (ANF), and the brutal Russian invasion of Ukraine.

UNSC Resolution 1368 (2001) “[u]nequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania.”²⁵ Thirteen years later, the UNSC adopted Resolution 2170 (2014)²⁶ on the terror attacks in Iraq and Syria, which identified ISIL, ANF and other individuals, groups, undertakings, and entities associated with Al-Qaida as perpetrators of criminal terrorist acts. The resolution stated that the UNSC, “Strongly condemns the indiscriminate killing and deliberate targeting of civilians, numerous atrocities, mass executions and extrajudicial killings...persecution of individuals and entire communities on the basis of their religion or belief, kidnapping of civilians ...” Notably, both resolutions depict the perpetrators as terrorists, a

term that is *not* used in the resolutions on the Hamas-Israel war in respect of Hamas and similar Islamist groups. Additionally, the 9/11 resolutions call for the full implementation of the relevant international anti-terrorist conventions and resolutions, which is completely missing in the resolutions addressing the present war between Hamas and Israel. The latter strongly suggest that Hamas and its proxies should not be portrayed as terrorist organizations. Similarly, on March 2, 2022, when the General Assembly addressed a “classical” inter-state war with Resolution A/RES/ES-11/1 on the “Aggression against Ukraine,” they made it unequivocally clear that the Russian Federation was the aggressor. Yet in the context of the October 7 attacks and Israel’s war against Hamas, such clarity is completely absent.

To conclude, the focus of the debates within the major UN bodies and the adopted resolutions on the present war between Hamas and Israel is not the brutal attack of terrorist groups but the military response of Israel to these attacks. The UN seems to agree with mainstream opinions in prominent political circles and the media that the main legal issue to address is whether Israel’s response will be in conformity with international humanitarian law (IHL), thereby shifting the focus from the liability of the perpetrator to the counteraction of the victim.

B. No Recognition of Israel’s Right to Self-Defense

Also missing in the current UN approach is a clear recognition of Israel’s right to self-defense under international law, notwithstanding Article 51 of the UN Charter. This provision guarantees “the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.” It is an indispensable legal instrument in a world of sovereign states, especially when such states do not comply with the ideals of universal peace and security that inspired the drafters of the UN Charter. The Charter confirms a right that already existed under customary international law. The right to self-defense justifies the military response by Israel to the massive terrorist attack by Hamas *cum suis*, yet we do not read anything about this in the

23. UN GA Res. A/ES-10/22, Dec. 12, 2023.

24. United Nations, “UN General Assembly votes by large majority for immediate humanitarian ceasefire during emergency session,” UN NEWS, Dec. 12, 2023, available at <https://news.un.org/en/story/2023/12/1144717>

25. *Supra* note 7.

26. UN SC Res. S/RES/2170, Aug. 15, 2014.

resolutions. This is in sharp contrast to the resolutions adopted by the UN Security Council after the 9/11 terrorist attacks in New York. Resolutions 1368 (2001) and 1373 (2001) recognize without reservation the right of the U.S. to use self-defense which justified its military actions against the Al-Qaeda terrorist network in Afghanistan.

Here, a large majority of UN Members seem to deny that Israel, as a sovereign state, has the inherent right to defend itself. I fear, however, that the theory that Israel does not have the right to self-defense against Gaza-based attacks because it “occupies” Gaza—*quod non*—looms not only within some academic circles, but also in the halls of the UN headquarters in New York. As we have seen throughout this analysis, there are indications that this is the case. To combat this opinion, the UN must emphasize that the right of self-defense may be invoked in all cases of an armed attack against a member of the United Nations, irrespective of the attack’s source or whether the attack is from another state or non-state actors. It is notable that a leading precedent on self-defense is the *Caroline* case regarding an incident in 1837 which concerned the defense (by a state) against an action not by a state, but by rebels.²⁷

C. No Criticism of Human Shields Practice

A third point is that the resolutions do not condemn or even address the practice of Hamas and other Palestinian terrorist movements operating in Gaza to use civilians as human shields. Hamas’ tactics and strategy over the years, and in this war, include the use of civilians and civilian infrastructure to shield their military installations and devices. It goes without saying that this creates complexities for the Israel Defense Forces (IDF). Additionally, these Hamas practices are a major contributor to the high number of civilian fatalities in the Gaza Strip and are in clear contravention of IHL. This is clear from Articles 51 (7) and 58 of Protocol I Additional to the Geneva Conventions of 1949 and Article 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court (ICC). Considering the importance that both the General Assembly and the UNSC presumably attach to international humanitarian law, it is surprising that they do not pay any attention to the use of human shields.

D. No Change in the Habitual UN Attitude Towards Israel

As a final observation, I submit that the responses given by the major UN organs on the Hamas-Israel war thus far fit the general approach of the State of Israel and the Arab/Palestinian-Israeli conflict over the years, and possibly since the establishment of the State of Israel in

1948. It has been aptly observed that, “The UN did not establish Israel in 1947-1948, nor did it come to its rescue afterwards.”²⁸ If we look at the number of resolutions adopted by the major UN organs, as well as by its human rights organs, we observe an exceptional and disproportionate negative attention to the policies of the Jewish State. The singling out of Israel within the UN is a standing practice. This is of course contrary to the basic ideas of justice and fairness that should characterize any legal system, including the international legal order, of which the UN so proudly presents itself as a guardian. The unfair treatment of Israel was also recognized by former UN Secretary-General Ban Ki-moon who was quoted as having said (after his retirement): “Decades of political maneuverings have created a disproportionate volume of resolutions, reports and conferences criticizing Israel. In many cases, rather than helping the Palestinian cause, this reality has hampered the ability of the UN to fulfill its role effectively.”²⁹ The most recent illustration is that during the current session of the General Assembly, thirteen resolutions have been adopted on Israel – among these the two on the Hamas-Israel war – and only seven on the rest of the world.³⁰ It is a sad observation that not even the atrocious nature of the Hamas attack of October 7, 2023 on the Jewish State and its population changed the habitual but blameworthy approach of the UN. ■

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27. Martin Dixon & Robert McCroquodale, *CASES & MATERIALS ON INTERNATIONAL LAW* (3d ed., London, Blackstone Press Limited, 2000), 561-562.
28. Yehuda Z. Blum, “Israel and the United Nations: A Retrospective Overview,” in A. E. Kellermann, K. Siehr and T. Einhorn eds., *ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL’S 50TH ANNIVERSARY* (Kluwer Law International, 1998), pp. 69-77, at 71.
29. Danielle Ziri, “Ban Ki-moon Recognizes Bias against Israel in last Security Council Speech,” *JERUSALEM POST*, DEC. 16, 2016, available at <http://www.jpost.com/Israel-News/UN-chief-urges-Israeli-lawmakers-to-reconsider-settlement-bill-475617>
30. “2023 UNGA Resolutions on Israel vs. Rest of the World,” *UNWATCH*, Dec. 19, 2023, available at Unwatch.org/2023-unga-resolutions-on-israel-vs-rest-of-the-world/

Advisory Opinion Request to the ICJ about Israel: Submission Goals

David Matas

The purpose of this article is to set out the goals and arguments I had in mind by contributing to a submission to the International Court of Justice (ICJ) on the December 2022 request from the UN General Assembly for an advisory opinion about Israel.¹ I was a member of the group that drafted a submission to the ICJ on behalf of B'nai B'rith International.²

Israel is the realization of the right to self-determination of the Jewish people. Anti-Zionism, which is opposed to that realization, initially took the form of armed invasion of Israel. Since the invasion failed, anti-Zionists turned to the twin strategies of terrorism and delegitimization of the Jewish enterprise – the State of Israel.

The December 2022 UN General Assembly Resolution (the “Resolution”) is a request to the ICJ for a second advisory opinion aimed against Israel, as part of that delegitimization campaign.³ The first opinion was the 2004 Advisory Opinion on the construction of a security wall along the border between Israel and the West Bank.⁴ Any delegitimization of the State of Israel is both fueled by, and the genesis for, demonization of the global Jewish population due to its actual or presumed support for the existence of a supposedly demon state. Anyone concerned about antisemitism must care about the concerted efforts to delegitimize the existence of Israel. Delegitimization occurs through the distortion and misrepresentation of international law. The delegitimization efforts against Israel must be countered citation by citation, quote by quote, reference by reference.

Emotions, especially hatred, play an important role in the process of delegitimization fueling actions that are extreme and persistent against the target group. The effort to combat hatred must be as diligent and systematic as the hatred itself, as open to reality as hatred is closed to it. This requires combating hatred on every level, including on the legal terrain.

The Resolution, though formally posing only two questions, raises many more issues. A review of all of them is beyond the scope of this article. To illustrate the problems posed by the Resolution, this article focuses on the question of whether Israel occupies Palestinian territory.

The Resolution used the word “occupation,” or its variation, 32 times. In its previous advisory opinion on the Israel security barrier,⁵ the ICJ used that term 184 times. Yet, as one can see from the legal texts, the history of the region, and the facts on the ground, there is no “occupation” by Israel, as explained in the following paragraphs.

Whether Israel occupies Palestinian territory is a matter of controversy. First, the view that Israel occupies Palestinian territory is not a position held by the Israeli government. It would therefore be inappropriate for the ICJ to deliberate the issue in the absence of an Israeli representative or to expect Israel to appear before the Court. As a result, the Resolution’s requests become an exercise in a non-consensual imposition of the jurisdiction of the Court upon unwilling parties.

Second, the material in the Resolution, which supports a presumption that Israel occupies Palestinian territory, is in large part self-referential. The supporters of Resolution A/RES/77/247 are notorious for going from one UN agency to another and engineering the appointment of one friendly expert after another to create support for their positions. What the supporters of the Resolution assert as authority is in fact gratuitous quoting of themselves or their sympathetic colleagues – it does not reflect an impartial survey of opinions conducted in good faith.

Third, the parameters of Israel’s occupation are

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1. UN GA Res. A/RES/77/247, Dec. 30, 2022.
 2. B’nai B’rith International, Written Statement Submission, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Case No. 2023/7, Feb. 8, 2023 [2023] I.C.J. available at <https://www.bnaibrith.org/wp-content/uploads/2023/07/BBI-ICJ-Brief-7.21.2023.pdf>. The B’nai Brith International submission is analyzed by Richard Heideman and Joseph Tipograph in this issue.
 3. *Supra* note 1.
 4. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, [2004] I.C.J. 136, available at <https://www.icj-cij.org/case/131/>
 5. *Ibid.*, p. 136.

undefined and uncertain. What territory is supposed to be Palestinian? For some it would include all of Israel; for others, it would include all of Jerusalem, but not necessarily all of Israel. No matter how the Court decides to determine Palestinian territory, there are entities that will disagree and say that the Court's determination regarding the territory is wrong. The question is not asked with sufficient precision to be answerable.

Let us assume that the Resolution refers to the West Bank, Gaza and East Jerusalem, and that East Jerusalem does not refer to something east of the current Jerusalem, but rather the eastern component of the current Jerusalem. On its face, this territory does not look occupied. There were no Israeli forces in Gaza before the Israeli response to the Hamas attack of October 7, 2023. There were Egyptian and Israeli forces at the border of Gaza. Border control does not render a state an occupier of the neighboring territory. 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.⁶

The West Bank, according to the Oslo accords, is divided into three components – Area A under civil and security control of the Palestinian Authority; Area B under Israeli security control and Palestinian civil control; and Area C under Israeli civil and security control.⁷ The phrase “Occupied Palestinian territory” on its face refers to areas that the Palestinian Authority claims as its territory but does not control. That could be Area C, yet even Area C is controlled by Israel because of the mutually agreed-upon Oslo Accords. It is not occupied against the will of the Palestinian Authority. If “Occupied Palestinian Territory” is meant to refer to the West Bank and Gaza, in practice, it would appear to refer to a null category.

The Government of Israel recognizes East Jerusalem as part of Israel. Proponents of the resolution would say that Jerusalem's place within Israel's borders is the result of wrongful annexation. Whether wrongful annexation took place is a different issue from whether there is a current occupation.

The claim of occupation is even more puzzling when one considers the history of the West Bank and Gaza. Except for basic human rights standards, which require certain minimum treatment and rights for everyone, the Geneva Conventions on the Laws of War only apply to international armed conflict. The existence of an occupying power requires the existence of a sovereign state. This is why the Fourth Geneva Convention uses the phrases “Occupying Power” and “Occupied State,” not “Occupied Territory,” or “Occupied Future State.”

A protocol to the Geneva Conventions relating to the protection of victims of international armed conflict recognizes the possibility of the occupation of a people.⁸ Israel, however, is not a party to the Protocol, and since treaties bind only signatory states, Israel cannot be bound by its terms.

Before the Six Day War in 1967, the West Bank and Gaza were under the control of Jordan and Egypt. Today, neither Jordan nor Egypt lay claim to the West Bank and Gaza. In fact, they have signed peace treaties with Israel that assert no continuing claim to the West Bank and Gaza. Therefore, the notion that the territory transformed to “Occupied Palestinian Territory” the moment it shifted from one controlling state to a different controlling state is untenable. If the West Bank, Gaza and East Jerusalem were not occupied Palestinian territory before 1967, they should not be considered occupied Palestinian territory after 1967 merely because the state controlling the territories has changed.

When the ICJ rendered its advisory opinion on the Israeli security barrier, it identified Jordan as the original occupied power of the West Bank.⁹ The judgment moved on from this legal reasoning to labelling the West Bank as Palestinian occupied territory rather than Jordanian occupied territory. This labelling was based on the ethnic composition of the West Bank and not on its legal status.

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. If it were, then it would apply to a wide range of peoples and regions such as Tibet, Xinjiang and Mongolia in China; Tigray in Ethiopia; Tamil Eelam in Sri Lanka; Chin, Kayin and Rakhine states in Myanmar; and Kurdistan in Iraq, Syria and Turkey.

ICJ Judge Pieter Kooijmans, in his separate reasoning which forms 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; he never called the West Bank “Occupied Palestinian

6. Investigation report no. BI 613, Australian Communications and Media Authority, p. 16, available at <https://www.acma.gov.au/publications/2022-07/report/bi-613-investigation-report-abc-radio-national>
7. The Israeli Palestinian Interim Agreement on the West Bank and Gaza Strip: Annex I (Sept. 28, 1995), available at <https://www.jewishvirtuallibrary.org/oslo-ii-annex-i>
8. Protocol I Additional to the Geneva Conventions of 1949, Jun. 8, 1977 (Protocol I), art. 1(4).
9. *Supra* note 4, at para. 101.

Territory” during that period. He wrote: “the West Bank between 1949 and 1967...was under Jordanian control...the West Bank had been placed under Jordanian authority.”¹⁰

Similarly, one can call the West Bank today, by virtue of the Oslo Accords, at least partially Israeli controlled territory or partial territory under the authority of Israel. Yet, the judge referred to the West Bank after 1967 as “Occupied Palestinian Territory” twice in his reasoning and did not at any point refer to the West Bank after 1967 as “Israeli controlled territory.”¹¹

Judge Kooijmans accordingly shifted terminology, referring to the West Bank between 1949 and 1967 when Jordan controlled the West Bank as “under Jordanian control” and not as “Occupied Palestinian Territory,” and called the West Bank “Occupied Palestinian Territory” and not “under Israeli control” when Israel controlled or partially controlled the West Bank.

Judge Kooijmans wrote that he 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.¹² Judge Kooijmans' own reasoning, however, can 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 under the Oslo Accords Israel has sole control, the state in control has changed. That is all.

If Israel is going to be considered the occupier of the Palestinian people after the 1967 war, then Jordan must be treated as 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 cannot be considered 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 avoided discussing the subject.

If the Court did not want to discuss the subject at that time, it would also presumably not want to discuss it now. If the Court assumed jurisdiction and proceeded to plough through this case, addressing this question would be inevitable.

As for Gaza, the lack of basis for the charge of occupation is even more obvious, because Israeli forces withdrew from Gaza in 2005. One Hamas leader after another has claimed that Israeli occupation ended in 2005.¹³

It is unclear whether the Court would address the events since October 7, 2023, in its advisory opinion. Those events might be relevant to the question of occupation of Gaza to

the extent that the Court finds that there was no occupation prior to October 7. If there was no occupation of Gaza prior to that date, have subsequent events changed that conclusion? The position of the Government of Israel is that it does not intend to occupy Gaza in response to the attack of October 7.¹⁴ As long as Israel maintains that position and acts on it, the conclusion of no occupation would stand.

The second question asked in the request for an advisory opinion is “How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?” Not every occupation is illegal under international law. The question needs rephrasing in light of this reality. Furthermore, the question is leading. It conveys its own answer. There is no question whether the policies and practices of Israel affect the legal status of the occupation. It is just assumed that there is an effect.

There is little doubt that those who posed the question want the answer to be that the policies and practices of Israel render the occupation illegal. The question in substance is a request to affirm the views of the authors of the resolution, namely that what they characterize as the violations by Israel have made the occupation illegal, if it ever was legal.

The Court can avoid the question of whether the occupation is illegal by finding that there is no occupation. It would be much simpler, however, to decline to address the request for an advisory opinion in its entirety. It would be next to impossible to stop halfway in answering the questions asked.

In any court of justice, justice itself is on trial. In the ICJ, one can hope that justice will prevail. If not, there is always a further appeal to the court of public opinion. The appeal to the court of public opinion has no time or geographic limits. The submission in which I participated had both courts in mind. ■

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10. *Id.*, at para. 10.

11. *Id.*, at paras. 29, 34.

12. *Id.*, at para. 9.

13. *Supra* note 6.

14. “Israel does not seek to occupy Gaza, but 'credible force' needed – Netanyahu,” REUTERS, Nov. 10, 2023, available at [https://www.reuters.com/world/middle-east/israel-does-not-occupy-gaza-credible-force-needed-netanyahu-2023-11-10/#:~:text=Nov%20%20\(Reuters\)%20%2D%20Israeli,the%20emergence%20of%20militant%20threats](https://www.reuters.com/world/middle-east/israel-does-not-occupy-gaza-credible-force-needed-netanyahu-2023-11-10/#:~:text=Nov%20%20(Reuters)%20%2D%20Israeli,the%20emergence%20of%20militant%20threats)

How October 7 Should Inform Israel's Clash at the International Court of Justice

Richard D. Heideman and Joseph H. Tipograph

On October 7, 2023, Hamas, an Iranian-backed terrorist organization, breached the Gaza-Israel border security fence and entered Israel. The Hamas terrorists went on to murder more than 1,200 civilians, commit heinous acts of rape and savage torture, desecrate bodies, wound thousands of people, and take at least 240 hostages reportedly from 42 countries, including Israel and the United States. The evidence documenting these atrocities is perhaps unparalleled by any other act of genocidal violence in contemporary human history. Corroborating hours of gruesome video evidence collected from the cell phones of victims and first responders, as well as security and traffic cameras, are the videos recorded by the Hamas terrorists themselves, some of which they broadcast directly through social media and some of which were subsequently recovered by the Israel Defense Forces from the terrorists' bodies and vehicles.

Despite this abundance of evidence, sympathy and empathy for Israel and for the devastated Israeli families from the international community ranged from non-existent to short-lived. Moreover, Israel's efforts to eliminate Hamas's military capabilities in Gaza as a response to Hamas's attacks has given rise to a groundswell of threatened diplomatic and legal actions against Israel, as well as huge anti-Israel and antisemitic gatherings in communities and on campuses throughout the globe. Based on what has occurred in the past, we can predict that these actions will lead to biased and inflammatory charges in international courts, including the International Criminal Court (ICC) and the International Court of Justice (ICJ), both of which are based in The Hague.

The ICJ was already considering a request for an Advisory Opinion referred to it by the United Nations General Assembly (UNGA) in a resolution entitled "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem."¹ The resolution calls on the ICJ to prescribe "legal consequences" against Israel for certain unsubstantiated claims about Israel that were adopted by the General Assembly on December 30, 2022 by less

than a majority of UN member states.² Many of the claims are premised on specious characterizations, determinations and proclamations made about Israel's security practices that can be found in other UN resolutions and reports, as well as the ICJ's 2004 Advisory Opinion concerning Israel's security barrier between Israel and the West Bank.³ In many of these sources, including most notably the 2004 Advisory Opinion, the security measures Israel has taken have been treated as excessive, indefensible or without legal basis under international law.

The necessity and sufficiency of Israel's security should have become an issue of global concern on October 7, but it remains unclear whether the ICJ's analysis of the questions referred to it will be properly informed by the evidence of the events of that day or Israel's ensuing response. It is also unclear how the ICJ can be seen as administering meaningful productive justice if it were to proceed with issuing an Advisory Opinion that ignores or minimizes the evidence documenting the savagery of the Hamas-led massacre. Indeed, in the context of the October 7 barbaric conduct of Hamas, a fact-based analysis of Hamas's actions is not only essential but fundamentally fair.

ICJ Fact-Finding Protocol and Prior Advisory Opinion

The ICJ indicates that its decision-making on the referred questions will be informed at least in part by the submissions it receives from interested parties. On or before the ICJ's submission deadline of July 25, 2023, more

1. UN GA Resolution A/RES/77/247 ("Referring Resolution") Dec. 30, 2022.
2. Of the 193 voting UN Member States, 87 voted in favor, 26 against, 53 abstained and 27 did not vote.
3. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004). Available at <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> ("2004 Advisory Opinion").

than two months prior to the Hamas massacre, several countries and organizations had either submitted or filed comments regarding the referred question to the Peace Palace. On behalf of B'nai Brith International, B'nai Brith Canada, the B'nai Brith World Center-Jerusalem, and the B'nai Brith Office of United Nations Affairs (collectively "B'nai Brith"), the authors of this article along with David Matas, Esq., Senior Legal Counsel to B'nai Brith Canada, submitted a brief to the ICJ, wherein it is argued why the ICJ should reject the UN's request for an Advisory Opinion.

B'nai Brith is recognized as the global voice of the Jewish community and has served in that role as an ECOSOC-accredited non-governmental organization (NGO) since 1947. As a non-state filer, B'nai Brith's submission can be found in the Peace Palace library pursuant to The International Court of Justice Practice Direction XII.⁴

In its submission, B'nai Brith argued that the ICJ should not issue an Advisory Opinion addressing the questions posed to it because of the unproven premises upon which the questions were constructed, the potential negative impact an Advisory Opinion could have on the Arab-Israeli "peace process," and the demonstrable problems that have already resulted from the ICJ's 2004 Advisory Opinion.

In 2004, the ICJ issued an Advisory Opinion condemning Israel for building a security barrier like the one that Hamas destroyed along the Israel-Gaza border. Among the opinion's flaws, some of which B'nai Brith highlighted in our recent submission, "the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall."⁵

Simply put, it was the ICJ's view in 2004 that Israel had no right to build a structure to prevent the documented horrific scenes that would later unfold in and upon Israel. It would shock the conscience of any peace-loving person for the ICJ to double down on this view, which would be the effective result of issuing a wrong-headed similar or supplemental Advisory Opinion⁶ in the wake of the irrefutable Hamas massacre.

States (but not NGOs) were allowed to submit additional rebuttal reports by October 25, 2023. As they have not been published on the ICJ website, it is unknown at the time of this writing (December 2023) whether any of the fourteen rebuttal reports discussed the Hamas massacre or argued that the ICJ should feel compelled in the context of the events of October 7 to fully reject the UNGA's earlier and pending request for an Advisory Opinion.

The Hamas-Led Massacre

Early in the morning of October 7, the Hamas terrorist organization initiated a multipronged attack against Israel. Most notably, Hamas, which manipulatively presents itself to the world as the "political party" that leads the population of Gaza, having ousted in 2007 both Fatah and the Palestinian Authority from their quasi-governmental role over Gaza, from which Israeli Prime Minister Ariel Sharon and the Israeli government unilaterally withdrew in 2005:

- (1) Launched thousands of missiles towards indiscriminate targets throughout central and southern Israel, sparking terror and destruction in cities throughout the country;
- (2) Broke through the Gaza-Israel border fence, using motorized hang gliders, explosives and bulldozers, allowing armed terrorists on motorbikes and four-wheel drive vehicles to enter Israel's territory from Gaza;
- (3) Fired on a nearby festival attended by 3,500 young Israelis who came together for a joyous night of music;
- (4) Murdered at least 260 of those festival attendees, injured others, and kidnapped hostages to Gaza;
- (5) Ran rampant through Israel, brutally killing, beheading, raping, burning, injuring, and capturing thousands of innocent women, men, and children of all ages; and
- (6) Used social and other media to broadcast video of their horrendous acts for the world to see.

It is reported that Hamas was able to lure Israelis into a false sense of security by convincing Israel that the terrorist organization cared more about internal economic stability for its population than engaging in further

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4. Written Statement Submission by B'nai Brith International et al., *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Case No. 2023/7 (Int'l Ct. of Justice, July 21, 2023), available at <https://www.bnaibrith.org/wp-content/uploads/2023/07/BBI-ICJ-Brief-7.21.2023.pdf> ("B'nai Brith Brief").
 5. 2004 Advisory Opinion at ¶142.
 6. Press Release No. 2023/65, "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem" (Int'l Ct. of Justice, Nov. 14, 2023), available at <https://www.icj-cij.org/sites/default/files/case-related/186/186-20231114-pre-01-00-en.pdf>

warfare, despite rockets, incendiary terror balloons, and kite attacks from Gaza over the past two decades. Eager for peace and reconciliation, the government of Israel worked extensively with Hamas to create economic opportunities for the Palestinian people, all while Hamas planned the logistics of the massacre, seeming to use the previous and renewed Great Return Marches as cover for their acts of terror.

Israel, consistent with its obligation to protect itself and its citizens, responded by taking measures to eliminate and deter the threats against its citizens, both now and in the future. Meanwhile, Hamas responded to the measures that Israel took by threatening to kill the hostages in their custody. Some hostages have been released, but at great cost to Israel, which in a hostage-prisoner exchange released three times as many Palestinian prisoners and paused its operations for several days.

Arguments in the B'nai B'rith Brief Relevant to October 7

As set forth in the B'nai B'rith brief submitted on July 21, 2023, well before the October 7 massacre, the coupling of terrorism and lawfare is a strategy employed by Palestinian extremists, such as Hamas and other anti-Zionists who actively seek to physically eradicate the State of Israel. The dual strategy of terrorism and lawfare is also detrimental to the aspirations and realities of the challenges facing the Palestinian population. The Referring Resolution frames Israel's security measures as an illegal "occupation" and ignores the heinous acts of terrorism that necessitate Israel's need to maintain constant vigilance in seeking to protect its people.

In addition, B'nai B'rith argues that at least since Israel's unilateral withdrawal from Gaza in 2005, and notwithstanding public pronouncements by Hamas, other designated foreign terror organizations, Fatah, the PA and the PLO, Gaza has not been under occupation by Israel. For this reason alone, it was argued, the ICJ should decline to exercise jurisdiction and should refrain from issuing an Advisory Opinion.

Perhaps the most important takeaway following October 7 was one of the more seemingly obvious arguments advanced by B'nai B'rith: that "[t]errorism and terrorists should not be glorified."⁷ In the brief, B'nai B'rith pointed to the streets, schools, and other buildings across the West Bank and Gaza that are named in honor of terrorists. This point has now taken on new meaning. In rallies in cities and on college campuses around the world, the events of October 7 are being celebrated as a significant victory in Hamas's resistance movement. This perspective has

been facilitated by educators who have vilified Israel's security measures by citing materials that they claim are instruments of "international law," namely the 2004 Advisory Opinion and the bevy of biased UN resolutions and reports upon which it is predicated.

The current perception of Hamas's massacre as an act of resistance stems from the fact that these instruments either refuse or struggle with describing Hamas's prior acts as acts of terrorism, particularly the wave of suicide bombings during the Second Intifada and its sponsorship and support of subsequent supposed "lone wolf" attacks. It should not be such a controversial undertaking to do so. Intentional violence carried out by Palestinian terrorist organizations against innocent civilians and even people visiting or working in Israel, and actions carried out by Palestinian terrorist organizations for the purpose of coercing the Israeli government to change its policies, fall squarely within the classic terrorist "triangle" that the UN itself has recognized for the purpose of defining acts of terrorism.⁸

The ICJ Advisory Opinion on the security barrier mentions the word "occupied" or its variations 184 times. It mentions "terrorism" or a variation three times. The purpose of the security barrier was to counter terrorism, but the opinion does not mention "counterterrorism" at all. The Court did not consider the security barrier to be a necessary or lawful measure to prevent terrorism. In fact, it found that Israel did not have the right to defend itself against terrorism, even though the right to self-defense is a well-established principle in international law, recognized in the UN Charter and customary international law.⁹

Israel's countermeasures, including its declaration of war against Hamas in response to the attack on October 7, can only be properly analyzed once Hamas's murderous acts are defined and understood as acts of terrorism. The sequence of events on and after October 7 followed the precise pattern that was previously highlighted in the B'nai B'rith Brief: "Terrorists attack innocent Israeli citizens. Israel responds."¹⁰ It is indeed terrifying, but by no means surprising, to see that even in the context of the sheer

7. B'nai B'rith Brief at 70, ¶8(f).

8. See Introduction to International Terrorism, University Module Series, United Nations Office on Drugs and Crime (2018), available at https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINAL.pdf

9. UN Charter, Art. 51.

10. B'nai B'rith Brief at 53, ¶7.

brutality of the attack, so many voices purporting to advocate for human rights were quick to “take [Israel’s] responses out of context and describe them as gratuitous acts of violence against Palestinians.”¹¹

Indeed, as the brief explained, “Palestinians are victims, but their victimizer is not Israel.”¹² Hamas steals humanitarian aid directed to the Palestinians and uses it instead to establish its terrorism infrastructure. With that in place, Hamas targeted innocent Israelis to be raped, murdered, beheaded, and desecrated, while Israel undertook countless measures to save innocent Palestinians by providing advance warning of strikes on nearby Hamas militants and weaponry. “Terrorism victimizes Israelis initially. However, the Israeli response and induced precautions in turn harm Palestinians.”¹³

It is currently impossible to accurately summarize how Gaza’s civilians have been impacted by the entry of the IDF into Gaza to end Hamas’s rule over Gaza and Hamas’s capabilities to mount any attack upon Israel or its citizens. It is essential to note that Hamas continues the “use of Palestinians as human shields in defense against Israeli responses to terrorist attacks...launch[ings of] terrorist attacks from Palestinian civilian sites [in particular in this instance from hospitals] and attempts to blend into the Palestinian civilian population, putting that population at risk when Israel responds to terrorist attacks.”¹⁴ A related theme highlighted by B’nai B’rith that has become relevant in the aftermath of October 7, is the ambiguity with which death counts in Gaza are reported, as Hamas is the sole source of the reported numbers; it is commonly inferred by most readers that these numbers reflect the number of innocent civilians who were killed by the IDF. The reality may well track the circumstances during the Second Intifada, when “[b]etween September 27, 2000, and January 29, 2004, 78% of Israeli fatalities were non-combatants killed by Palestinians while only 36% of Palestinian fatalities were non-combatants killed by Israeli forces. Meanwhile, almost 50% of Palestinian fatalities were combatants or non-combatants killed by Palestinians.”¹⁵

Additionally, the international community must recognize how Arab governments were quick to hold Israel responsible to prevent a humanitarian crisis among the displaced Gazans, yet simultaneously refuse to welcome displaced Gazans for “resettlement or local integration of Palestinian refugees.”¹⁶

Israel’s “response is described as disproportionate, in violation of international law.”¹⁷ This is an absurd assertion that has used instruments such as the 2004 Advisory Opinion to bolster its merit. While it is implied that

“proportionality” somehow relates to “similarity,” it is unfathomable that Israel should be expected to depart from its humane protocols and instead shape its response based on Hamas’s horrific actions of raping, beheading, and publicizing its acts of brutality. Perhaps that is why, as pointed out in the brief, “neither the word disproportionate nor its variations [are] found in any of the international instruments relating to response to armed attack[s] or counterterrorism.”¹⁸

A particularly instructive aspect of the October 7 massacre was how it began with a breach of Israel’s security fence in Gaza. This is an ironic fact when viewed in the context of the 2004 Advisory Opinion, which criticized Israel’s security apparatus as unnecessary and inherently offensive, even though the border barrier built in the early 2000s in the areas of the West Bank of the Jordan River and around Jerusalem was set up for the precise purpose of preventing such atrocities. For starters, as was argued in the B’nai B’rith Brief, “[c]alling a barrier a wall which is more than 96% a fence built solely for the purpose of fencing out the terrorists in keeping with Israel’s right and obligation to defend her people, is one small part of this pattern of obfuscation”¹⁹ and that “[t]he reason for the use of concrete in portions of the ‘wall,’ rather than a chain link fence, in minimal parts of the length of the barrier was that those are populated areas where snipers could engage in terrorist activity by shooting or launching stones through the fence.”²⁰ Moreover, it is essential to recognize that the barrier has been largely effective. Since its construction, which began in 2003, suicide attacks decreased by 100 percent and terror attacks decreased by over 90 percent. Israeli civilian deaths decreased by over 70 percent, and the number of Israeli civilians wounded decreased by more than 85 percent.²¹

The aftermath to the October 7 massacre has been outrageous on college campuses in the United States and elsewhere, where students are regarding the massacre as

11. *Ibid.*

12. *Id.* at 67, P1.

13. *Id.* at 68, PP2.

14. *Id.* at 78, PP11.

15. *Id.* at 18, P33.

16. *Id.* at 78, PP11.

17. *Ibid.* at 53, P7.

18. *Ibid.*

19. *Id.* at 10, P21.

20. *Ibid.* at 18, P33.

21. *Ibid.*

being “justified” by Israel’s “illegal occupation of Palestine.” This thinking reflects, and is indeed perpetuated by, the terminology employed by the international diplomatic community. The ICJ’s 2004 Advisory Opinion and the international community’s practice of “[c]onstantly referring to Israel as an occupier is not legally correct and not useful. It is a form of incitement and provocation.”²²

This is true of both Israel’s presence (or lack thereof) in the West Bank and Gaza. Israel’s presence in the West Bank – whether it is an occupation or not – is not illegal, but rather “by agreement with the Palestinians under the Oslo Accord II.”²³ Israel’s presence in Gaza, prior to October 7, was non-existent. After Israel evacuated Gaza in 2005, Hamas leaders issued many statements to the effect that Gaza had been liberated and the occupation ended. In fact, it remains the case that Israel does not “occupy” Gaza. On the contrary, Hamas conquered and occupies Gaza since at least 2007, ousting the Palestinian Authority and preventing it from rendering its quasi-governmental functions.²⁴

The October 7 massacre underscores the point that, “[b]efore the Israeli military presence from the West Bank can be removed, the threat of terrorism . . . directed against Israel itself has to be removed.”²⁵ As argued by B’nai B’rith,

Occupation/security measures are a symptom of the problems Palestinians face, not the cause, not the disease. The proximate causes are terrorism and hatred. The ultimate causes, the disease, are antisemitism, anti-Israelism and anti-Zionism. Remove the hatred, the acts of anti-Zionism, end the terrorism and the stringent Israeli security measures will disappear.²⁶

The international community continues to make the same mistake of “[a]ttacking a symptom as if it were a cause,” and this

does nothing to remove the cause, or indeed even the symptom. Attacking a symptom as if it were a cause makes the disease worse through neglect and misdirection. That is what we would see if the International Court of Justice were to answer the pending request for an advisory opinion and give the answer the supporters of the resolution would like.²⁷

The October 7 massacre also highlights the highly unbalanced and now clearly offensive nature of the Referring Resolution. This is not by accident, “[t]he request for an advisory opinion is a component of a comprehensive anti-Israel and anti-Zionist strategy. The goal of the Israel-haters is, through a second advisory opinion adverse to Israel, to continue their deadly demonization and delegitimization campaign.”²⁸

For the international community to play a role in facilitating regional peace, it must be able to identify and cease the advancement of narratives promulgated by anti-Zionists, such as those espoused in the Referring Resolution and the hatred taught in Palestinian and Gaza schools, largely through instruction in UNRWA schools. As the acts of Hamas, and the global response from anti-Israel activists have very clearly shown,

[t]he strategy of anti-Zionists is neither a strategy for peace nor a strategy of indifference to peace; it is rather a strategy of active hostility to peace. Anti-Zionists do what they can, through a series of terrorist attacks, to discourage Israeli interest in peace. Through these attacks they hope to create the impression amongst Israelis that peace is impossible. The message they try to give to Israelis is that any autonomous Palestinian state adjoining Israel would be nothing more than a terrorist free zone, a site for unending unimpeded terrorist attacks against Israel.²⁹

When it issued the 2004 Advisory Opinion, the ICJ failed to grasp the destructiveness of terrorism perpetrated by Hamas and supported by anti-Zionists, and this miscalculation has proven to be a significant impediment to peace and resolution. This happened because the ICJ relied primarily on UN resolutions and reports rather than on authentic evidence. The footage from October 7, particularly the footage recorded by Hamas terrorists that

22. *Ibid.* at 69, ¶8(a).

23. *Ibid.*

24. *Id.* at 62, ¶7.

25. *Id.* 72, ¶10.

26. *Id.* at 71, ¶9.

27. *Id.* at 72, ¶12.

28. *Ibid.* at 68, ¶4.

29. *Id.* at 79, ¶13.

Israel initially withheld from broadly disseminating out of respect for the families, but which has now been viewed by opinion-makers, influencers, government officials and legislators, has been shockingly eye opening to those who have attended private screenings. It may be the case that exposing the ICJ decision-makers to that irrefutable evidence could help guide the court to reach the appropriate conclusion, which is that the ICJ should decline to issue an Advisory Opinion sought by the Referring Resolution. ■

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European Law and the Protection of Rights of the Jewish People

Aleksandra Gliszczyńska-Grabias

Shockingly, immediately after October 7, 2023, many places around the world, including parts of Europe, were flooded by a wave of ferocious antisemitism, replete with calls for the “slaughter of Jews” in the streets of Paris, Berlin, and London. One of the countless examples of this virulent antisemitism was when a lecturer accosted Jewish students who were handing out posters with pictures of those kidnapped by the murderous Hamas. He shouted, “go back to Poland, *sharmuta*” (“wh*re” in Arabic). This serves as just one illustration of an emerging phenomenon: antisemitic attacks are no longer disguised as criticism of the State of Israel and its military actions, but rather outright, public support of anti-Jewish pogroms and the most brutal crimes committed by Hamas.¹ The emotions caused by this unprecedented outburst of hatred are often those of fear and helplessness. To overcome them, it is necessary to take action and not to remain passive. For lawyers and legal scholars, the response should be the initiation of concrete legal actions and production of legal analyses that address how the law, including international human rights law, can be used to combat the “oldest hatred,” as antisemitism was famously coined by Robert S. Wistrich.²

Human Rights Narratives and Distortions Post-October 7

In the three months since the Hamas pogrom against the Jewish People, we have witnessed the so-called “Palestinian side” effectively overtake the narrative surrounding the preservation of human rights, including in its strictly legal dimension. According to this narrative, Palestinians are the only victims of human rights violations, specifically those caused by Israel’s response to the unnamed, unidentified actions of Hamas. Also, the United Nations (UN) and its affiliated bodies and organizations have remained passive in the face of appalling evidence of crimes, including rape and murder against Jews.³ The infamous example of UN Women, discredited today by its total of seven weeks of silence in the face of sexual crimes committed against Jewish women, is just one of the instances of the practice of denying Jewish

people protection within a system that rose from the ashes of Holocaust victims. The antisemitism of the “Palestinian side” represents a form of hatred that the UN and its member states are obligated to combat, yet it goes unnoticed. Instead, some of the UN affiliated special procedures and their experts’ actions are focused on signing letters which suggest that Israel is committing genocide, while using language and reasoning that falls outside the accepted meaning of “genocide” in international law.⁴ In this reality, the European system for the protection of human rights, which is generally much more efficient and fulfilling, becomes a viable and effective alternative to the UN system, which, vis-à-vis Israel, has long ceased to be a shield against hatred and discrimination.

Fighting Antisemitism in Europe with the Law

One distinctive feature of the Council of Europe’s (CoE) effort to combat antisemitism, racism, and xenophobia, is that this goal is deeply embedded in the European approach to human rights protection. In this way, fighting against various forms of racism becomes an integral part of guaranteeing the rights and freedoms of individuals

1. Danielle Greyman-Kennard, “‘Go back to Poland, sharmuta,’ Montreal professor tells Jewish students,” JERUSALEM POST, Nov. 10, 2023, accessed Dec. 7, 2023, available at <https://www.jpost.com/diaspora/antisemitism/article-772592>
2. Robert S. Wistrich, *ANTISEMITISM: THE LONGEST HATRED* (NY: First Ed., 1991).
3. Amy Spiro, Jakob Magid, Carrie Keller-Lynn, “After 7 weeks of silence, UN chief calls to investigate Hamas sex crimes on Oct 7,” TIMES OF ISRAEL, Nov. 30, 2023, accessed Dec. 7, 2023, available at <https://www.timesofisrael.com/after-7-weeks-of-silence-un-chief-calls-to-investigate-hamas-sex-crimes-on-oct-7/>
4. UN press release, Nov. 16, 2023, available at <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>

and groups in Europe. From the CoE's beginning, it has openly included antisemitism in the catalogue of negative phenomena that the Council opposes.⁵

Similarly, the European Union (EU) emerged as a second component of the European system of human rights protection, and it has exhibited various developments such as the implementation of antidiscrimination directives and the Charter of Fundamental Rights.⁶ After some decades of its existence, the EU started intervening on matters in the realm of hate speech and hate crimes, which encompass acts of antisemitism. Today, it offers concrete legal tools to counteract antisemitism.

For example, EU Council Directive 2000/43/EC,⁷ the EU Council Framework Decision 2008/913/JHA of 28 November 2008,⁸ and the antidiscrimination provisions of the EU Charter of Fundamental Rights provide basis for banning speech and actions of antisemitic character. In turn, the CoE's system offers the European Convention of Human Rights,⁹ the Convention on Cybercrime,¹⁰ and the Framework Convention for the Protection of National Minorities.¹¹ The European system of human rights protection also includes two major European judicial bodies: the Court of Justice of the EU and the European Court of Human Rights that adjudicate also on cases related to antisemitism, including Holocaust denial and distortion. The creation of numerous legal instruments for counteracting racism and xenophobia, accompanied by consistent political actions against these phenomena, has shown the European system of human rights protection to be a persistent defender of the Jewish people's human rights along with those of other groups.

Additionally, on November 27, 2023, a report was published with a motion calling for a European Parliament Resolution on extending the list of EU crimes to include hate speech and hate crimes.¹² Specifically, it argues that hate speech and hate crimes should be included among the criminal offenses listed under Article 83(1) of the Treaty on the Functioning of the European Union. It also highlights that EU Member States have diverse approaches to the prosecution of hate speech and hate crimes. As a result, it is difficult for the EU to establish a uniform base line for crimes committed against a group or individual based on their race, skin color, religion, descent or national or ethnic origin. This lack of uniformity (or even a threshold standard adopted by the Member States) ultimately hinders the EU's collective ability to implement a successful common strategy to effectively combat hatred. At the same time, as it has been stressed, the EU Parliament strongly regrets that the CoE has not made any progress on the issue, even though it was able to swiftly expand

the list of EU crimes for other purposes.

Two more elements of the European system's approach to combating antisemitism should be mentioned. The first is of a strictly legal nature, with potentially groundbreaking implications: the adoption of the Digital Services Act (DSA), which enters into force in 2024.¹³ Online dissemination of illegal and hateful content is arguably one of the biggest challenges in combating antisemitism. The DSA's main goal is to prevent illegal and harmful activities online and the spread of disinformation. It ensures user safety, protects fundamental rights, and creates a fair and open online environment. The DSA applies to very large online platforms, search engines, hosting services such as cloud and web hosting, and intermediary services offering network infrastructure.

The second is the EU Strategy on combating antisemitism and fostering Jewish life.¹⁴ The first initiative of its kind, this EU Strategy of 2021 includes three main components coordinated by the EU Commission:

5. J. Roubache, "The Council of Europe was the First to Recognize the Relationship between Racism and Antisemitism," *JUSTICE* No. 23 (Spring 2000), p. 8.
6. Charter of Fundamental Rights of the European Union, 2012, O.J. (C 326) 391–407.
7. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) July 19, 2000, pp. 22–26.
8. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008 O.J. (L 328) Dec. 6, 2008, pp. 55–58.
9. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Council of Europe Treaty Series 005.
10. Convention on Cybercrime, Nov. 23, 2001, ETS No. 185.
11. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, ETS No. 157.
12. Report of the European Parliament on extending the list of EU crimes to hate speech and hate crime, 2023, A9-0377/2023.
13. Information of the EU Commission on the Digital Services Act, available at <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>
14. Information of the EU Commission on the EU Strategy on combating antisemitism and fostering Jewish life, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4990

preventing all forms of antisemitism; protecting and fostering Jewish life in Europe; and promoting research, education and Holocaust remembrance. Especially now, the realization of these goals constitutes a great challenge, and it seems essential for European lawyers to become engaged in the expert work on the Strategy.

Post-October 7 Legal Mobilization

The effectiveness of European legal instruments against antisemitism depends, as it always does, on proper implementation. An example of effective implementation is the legal intervention undertaken by the International Association of Jewish Lawyers and Jurists (IJL) in Poland with regard to Marie Andersen.¹⁵

Marie Andersen, a Norwegian student at the Warsaw Medical University, participated in a pro-Palestinian, anti-Israeli military demonstration in Warsaw, Poland. During the demonstration, she carried a disgraceful antisemitic poster displaying a trash bin with an Israeli flag inside it, and bearing the words, “keep the world clean.” Other demonstrators carried numerous banners with slogans including, “From the river to the sea, Palestine will be free.” However, it was Andersen’s banner that caused particular outrage and was described as a manifestation of antisemitism by multiple public figures, including Andrzej Duda, the president of Poland, and Rafał Trzaskowski, the mayor of Warsaw. During the demonstration she also gave an interview where she failed to condemn Hamas terrorists, whereas she expressed her denial of the Jewish people’s right to live in Israel and of the right of Israel to exist within its borders.

It was later revealed that she also posted on her Instagram a poster directly equating the State of Israel with the Nazi regime, which is classified as a form of antisemitism according to the International Holocaust Remembrance Alliance’s (IHRA) Working Definition of Antisemitism.¹⁶ The Working Definition states that antisemitism can be manifested in part by:

- (1) depriving Jews of their right to self-determination, such as by expressing the view that the existence of the State of Israel is a racist endeavor;
- (2) applying double standards by requiring Israel to behave in a way that is not expected or required of any other democratic state; and
- (3) comparing contemporary Israeli policy with that of the Nazis.

Andersen’s actions also provoked a legal response. The IJL (as well as various Polish NGOs) submitted formal

notifications to the Public Prosecutor’s Office in Warsaw, requesting the opening of an investigation into the possible commission of a crime by Andersen. The claim concerns the violation of Article 126a of the Polish Criminal Code, which penalizes public incitement to commit a crime (genocide, participation in mass murder, discrimination), as well as the praising of a crime. The claim also cited Article 256 para. 1 of the Polish Criminal Code, which penalizes public incitement of hatred based on nationality and ethnicity. The Prosecutor’s Office accepted the IJL arguments and officially launched the investigation on December 28, 2023. Additionally, the IJL called upon the Rector of the Medical University of Warsaw to expel Andersen from the University on disciplinary grounds, as her antisemitic behavior breached numerous provisions of the medical school’s rules of procedure. As raised by the IJL, expelling her is imperative to protecting the rights and freedoms of other medical students, including, above all, Jewish and Israeli students. Both proceedings are pending and IJL monitors them closely.

The legal systems of individual European countries and European institutions are no substitute for several other elements within a larger, more comprehensive approach to combating antisemitism. Legal measures have also usually been considered a “last resort” and a tool to be used when other methods have failed, or the law has been drastically violated. However, the events that occurred on October 7, 2023, and the subsequent wave of antisemitism flooding the world forces us to redefine the role of law and litigation as instruments for preventing antisemitic attacks. Importantly, these measures are reflected in the national laws of European countries, which is why the recent, shocking antisemitic act of a Polish MP who has a long history of promoting antisemitic conspiracy

15. Unpublished letter from IJL to Prof. Zbigniew Gaciong, Rector of the Medical University of Warsaw, dated Oct. 23, 2023 (English). Unpublished IJL submission to the Prosecutor, sent Oct. 26, 2023 (Polish); see IJL, X (Twitter), Oct. 27, 2023, available at https://twitter.com/ijl_jewish/status/1717836673009021111; see also IJL, X (Twitter), Nov. 19, 2023, available at https://twitter.com/ijl_jewish/status/1726302226916761769; <https://cst.tau.ac.il/perspectives/head-held-high/>

16. IHRA Working Definition of Antisemitism, available at <https://holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>

theories, will not go unpunished.¹⁷ Far-right MP Grzegorz Braun used a fire extinguisher to put out Hanukkah candles that had been lit in the Polish Parliament, and to physically attack a member of the Jewish religious community, during a ceremony with both Polish-Jewish leaders and Israel's ambassador to Poland in attendance. It is noteworthy that the immediate legal response by the Public Prosecutor's office was accompanied by condemnation across the entire Polish political spectrum.

I believe the law should have a superior role among other tools used to combat and prevent genocidal forms of hatred. Particularly relevant in this regard is the issue of reporting and underreporting of antisemitic acts by victims. For a long time, the problem of underreporting has been one of the major obstacles in making the law an effective mechanism for action. Failing to report antisemitism to the authorities (police, prosecutors, etc.), as well as avoiding civil lawsuits against antisemitic individuals, prevents lawyers from effectively fulfilling their role. At the same time, the unequivocal and publicly proclaimed willingness of the legal community to take up such cases is crucial. Indeed, scholarly reflection and analysis of available legal measures must be accompanied

by concrete steps taken on the basis of criminal, civil, and international law. ■

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17. Anna Koper, "Far-right Polish lawmaker uses fire extinguisher on Hanukkah candles in parliament," REUTERS, Dec. 13, 2023, accessed Dec. 16, 2023, available at <https://www.reuters.com/world/europe/far-right-polish-lawmaker-uses-fire-extinguisher-hanukkah-candles-parliament-2023-12-12/>

The Resurgence of Antisemitism and Anti-Israel Sentiment in the Arab and Islamic World

Eyal Zisser

The murderous terrorist attack by the Hamas organization in southern Israel on October 7, 2023, was one of the most difficult events that Israel has experienced since its founding. About 1,200 Israelis were murdered by Hamas on that day, most of them civilians – the elderly, men, women, children, and even babies in their cradles. This was a mass murder of Jews, due to their being Jews, on a scale and scope which the Jewish people has not known since the Holocaust. Following Hamas's murderous attack, Israel launched the "Iron Swords" war with the aim of "destroying Hamas's military capabilities and its ability to control the Gaza Strip."¹

The Hamas attack sparked a wave of sympathy around the world towards Israel and led to widespread support among most Western governments for the war it launched against Hamas. Western governments saw the conflict that erupted at the Gaza border as not only an Israeli-Palestinian struggle, but a struggle against radicalism and Islamic terrorism that threatens the values of the West and may eventually reach the streets of cities in Europe and the United States, as happened a few years earlier with ISIS.²

The war in Gaza, however, also led to an unprecedented wave of antisemitism throughout the Western, Arab, and Muslim worlds that no longer operated under the guise of anti-Israelism. This phenomenon is not new, but it has grown stronger over the last few years and seems to have broken records with the outbreak of this war in Gaza.

The waves of hatred for Israel and the Jews in the Arab and Muslim world manifested itself in the statements of many leaders of Arab and Muslim countries, such as the presidents of Iran and Turkey. They also emerged among the heated discourse in the Arab media, on social media platforms, and in the slogans voiced in demonstrations taking place throughout the Middle East and the Western world.³

The antisemitic and anti-Israeli underpinnings of these statements are so fundamental to their meaning and historic use that they cannot be repurposed for any alternative meaning. The enmity and hatred of these slogans does not differentiate between Jews and Israel

and is anchored in a religious antisemitism that has always characterized the attitude of Muslims and Arabs toward Israel and the Jews. Alongside this, the new antisemitism identifies Israel as the imperialist and colonialist state of the Jews, rendering Jews themselves, regardless of their location or nationality, as imperialists and colonialists by association. This classification comes with the ills and crimes of the European colonialists and white supremacists of the modern age.

In this article we examine the historic roots of these waves of hatred throughout the Arab and Muslim world, their characteristics, and the ways in which they are expressed. Finally, we present the inherent dangers in these revelations of antisemitism and anti-Israeli sentiments.

Antisemitism in the Arab and Islamic World:

Historical Roots

Antisemitism in the Arab and Muslim world is historically anchored in Islam. Islam does show tolerance toward Jews and Christians as "the people of the book" (*Ahl al-Kitab*) who believe in the Bible and the New Testament. Additionally, Islam considers them proteges (*Ahl al-Dhima*) who are accorded protection for their lives,

1. See Israel Ministry of Foreign Affairs, "Swords of Iron: War in the South – Hamas' Attack on Israel" (Oct. 7, 2023), available at <https://www.gov.il/en/departments/news/swords-of-iron-war-in-the-south-7-oct-2023>
2. See Josef Federman and Amy Teibel, "The US has strongly backed Israel's war against Hamas. The allies don't seem to know what comes next," AP PRESS (Nov. 2, 2023), available at <https://apnews.com/article/israel-hamas-11-1-2023-blinken-netanyahu-d57766fd8e55500ff6f16b78b3560d51>
3. See George Washington University, *Program on Extremism*, "Antisemitism in the Middle East: Unpacking the Root Causes and Implications for Regional Stability" (Nov. 21, 2023), available at <https://extremism.gwu.edu/antisemitism-middle-east>

bodies and property and are allowed to observe the customs of their religion, so long as they accept Muslim political authority and the resulting social and political limitations. At the same time, the Qur'an and other Islamic sources contain harsh assertions regarding Jews that serve as the basis for negative religious, economic, and social attitude toward Jews. Consequently, Jews have been persecuted by Muslim rulers and dynasties based on their religious background – both in the Sunni world and in the Shi'ite world.⁴

In the nineteenth century, translations of antisemitic European writings into Arabic, often undertaken by Arab-Christians, operated as the primary vehicle of disseminating the “classical” Christian-European antisemitism throughout the Arab and Muslim worlds. A striking example of such antisemitism was found in the blood libel of Damascus in 1840, which accused Jews of murdering a Christian monk and his Muslim servant in order to use their blood for baking matzah. The intervention of Jewish dignitaries such as Moshe Montefiore and members of the Rothschild family, led to the acquittals of the accused, but similar affairs occurred in the following years and were accompanied by attacks against Jews throughout the Middle East.⁵

The twentieth century witnessed revelations of antisemitism on a racial basis in the Middle East. This was aggravated on the eve of, and during, World War II by Nazi propaganda spread by Arabic-language radio broadcasts, as well as by German diplomatic representatives in the Middle East. Preaching for the fight against the common Jewish enemy played a central role in this propaganda and led to the 1941 *Farhud* riots in Baghdad. In the following years, murderous riots against Jews took place in Egypt in 1945, Syria and Libya, and Aleppo and Aden in 1947.⁶

Haj Amin al-Husseini, the Mufti of Jerusalem and the leader of the Supreme Palestinian Arab Committee who lived in the Axis countries during World War II, served as a purveyor of the Nazis' antisemitism. In this context, it is worth mentioning his promise that after ensuring that Jews would not live in Palestine, he would work with Germany to lead a holy Islamic war against world Jewry that would finally end the “Jewish problem.”⁷

Antisemitism in the Arab world underwent a revival upon the establishment of the State of Israel in 1948. Manifestations of antisemitism were based on the racial and religious elements in “classic” European antisemitism, but also included uniquely Islamic motifs. The version of antisemitism fostered by the Arab regimes became widespread in the Arab world and even served as a

weapon for Arab nations in the propaganda war waged by the Arabs against Israel.

The Internet and Social Networks: The New Purveyors of Antisemitism

The information revolution, the emergence of TV satellite channels, the internet, and social media networks, have all given impetus to increased manifestations of antisemitism. Social networks generally lack oversight and control, and allow for the expanded circulation of books, articles, films, and radio broadcasts. They thus provide an uncensored and unmonitored arena for the unchecked spread of hatred. It is no wonder that antisemitic and anti-Israeli motifs find diverse forms of expression through the content uploaded by Arab internet surfers. The most direct and obvious are open expressions of animosity towards Jews and explicit calls for their extermination. Alongside this, there is an indirect form of antisemitism that concerns the casual classification of Jews as obscene, scheming, malicious, or destructive.⁸

An additional element in the modern ecosystem of Arab antisemitism is the lack of initiative among Arab regimes to address antisemitism within their own society. Their absolute abstention from condemning antisemitism gives their respective societies a green light, even if only implicitly, to continue engaging in their hatred. It seems that the regimes see these revelations as a way to release or regulate internal pressures that might otherwise be directed against them.

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4. Mark R. Cohen, “Muslim Anti-Semitism: Old or New?” in *A HISTORY OF JEWISH-MUSLIM RELATIONS: FROM THE ORIGINS TO THE PRESENT DAY*, Abdelwahab Meddeb and Benjamin Stora, eds. (Princeton: Princeton University Press, 2014), 546-558, available at <https://doi.org/10.1515/9781400849130-045>
 5. Ronald Florence, *BLOOD LIBEL: THE DAMASCUS AFFAIR OF 1840* (New York: Other Press, 2006).
 6. Edwin Black, *THE FARHUD: ROOTS OF THE ARAB-NAZI ALLIANCE IN THE HOLOCAUST* (Washington D.C.: Dialog Press, 2010).
 7. Jeffrey Herf, “Haj Amin al-Husseini, the Nazis and the Holocaust: The Origins, Nature and Aftereffects of Collaboration,” 26(3/4) *JEWISH POLITICAL STUDIES REV.* 13-37 (2014).
 8. Emily Schrader, “Arabic social media campaign compares Jews to coronavirus,” *JERUSALEM POST* (Apr. 29, 2020), available at <https://www.jpost.com/opinion/arabic-social-media-campaign-compares-jews-to-coronavirus-626332>

There are countries, of course, that actively encourage manifestations of anti-Israelism and even antisemitism. Both Iran and Turkey, despite their differences, seek to advance their status in the Muslim and Arab worlds and use hatred of Jews and Israel as a political tool to achieve their goals. They position themselves as combatants against a larger evil represented by global Jewry and Israel, which is then spun as a reason to support their political campaigns.

The Revival of Religious Antisemitism Anchored in Islam

Manifestations of Islamic religious antisemitism also continue and gain momentum with the increasing religious radicalization sweeping the Arab and Islamic worlds in recent decades. Qur'anic verses and Islamic traditions undergo a political reinterpretation in the spirit of extreme Islam, with the goal of delegitimizing Zionism and the State of Israel and dehumanizing the Jewish people. For example, it is particularly common to use a quote from the Muslim tradition (*hadith*) which states that Muslims will fight the Jews when the Day of Judgment comes. If the latter seek to hide, they will be betrayed by the stones and trees behind which they hide.⁹

The strains of antisemitism on social media also utilize conspiracy theories that claim Israel, or the Jews, are behind every conceivable problem ranging from the Twin Towers "9/11" attack (2001) to the Arab Spring revolutions (early 2010s). The goal of these antisemitic conspiracy theories is to link the West to Israel and sow division between the Arab and Western worlds. The story of the blood plot is also being revived with both internet surfers and media people using the centuries-old antisemitic trope to claim that Jews use blood for ritual purposes.¹⁰

Even television series were utilized to disseminate antisemitic content. For example, "Ride Without a Horse," a 30-episode series that aired on Egypt's state television in 2002, is based on "The Protocols of the Elders of Zion."¹¹ In 2003, Hezbollah's satellite channel, *al-Manar*, broadcast a series produced in Syria called "*al-Shatat*" (The Diaspora), which purported to present the life of Jews in the diaspora and the birth of Zionism. It included scenes of ritual slaughter of a Christian child and the Jewish community's execution of a Jew who had married a non-Jew. It also described how Amschel Rothschild, the alleged founder of the secret Jewish government, made a deathbed command that his sons instigate wars and corrupt societies around the world to advance the financial and political interests of the Jews.¹²

A combination of antisemitism – old and new – finds expression in the Hamas Charter published on August

18, 1988. Section 22 of the Charter presents Jews as both a group seeking to rule the world and responsible for every negative historical event, war or plot in the world:

With their money they took over the media ...they ignited revolutions...they stood behind the French revolution, the communist revolution...they stood behind the First World War, in which they managed to eliminate the Islamic Caliphate (Ottoman Empire)...they established the League of Nations through which they could rule the world...they who were behind the Second World War...they ordered the establishment of the League of Nations and the United Nations and the Security Council...Not a single war is waged anywhere in the world without their hand being involved in it.¹³

9. Islam Question and Answer, "In the battle between the Jews and the Muslims at the end of time, the aggressors will be the Jews," available at <https://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>; see also Ben Cohen, "There is a Jew hiding behind me — come and kill him," PITTSBURGH JEWISH CHRONICLE (Sept. 24, 2021), available at <https://jewishchronicle.timesofisrael.com/there-is-a-jew-hiding-behind-me-come-and-kill-him/>
10. See Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), "Contemporary Arab-Muslim anti-Semitism, its Significance and Implications" (Apr. 17, 2008), available at https://www.terrorism-info.org.il/Data/pdf/PDF_08_AS_2.pdf
11. "Faris Bila Jawad reveals the 'truth' about the Jews through 'Protocols of the Elders of Zion'," AL BAWABA (Nov. 19, 2002), available at <https://www.albawaba.net/entertainment/faris-bila-jawad-reveals-truth-about-jews-through-protocols-elders-zion>
12. Dr. Fathallah Omar and Dr. Suheil Zakar, "Al-Shatat: The Syrian-Produced Ramadan 2003 TV Special," MEMRI (Dec.12, 2003), available at <https://www.memri.org/reports/al-shatat-syrian-produced-ramadan-2003-tv-special>
13. Intelligence and Terrorism Information Center at the Center for Special Studies (C.S.S.), "The Hamas Charter (1988)" (Mar. 21, 2006), available at https://www.terrorism-info.org.il/Data/pdf/PDF_06_032_2.pdf; see also Bruce Hoffman, "Understanding Hamas's Genocidal Ideology," THE ATLANTIC (Oct.10, 2023), available at <https://www.theatlantic.com/international/archive/2023/10/hamas-covenant-israel-attack-war-genocide/675602/>

Section 28 of the Charter states that, “The Zionist invasion is a malicious invasion that does not hesitate to use all vile and despicable means to achieve its goal.”

Denial of the Holocaust and Praise for Nazi Germany

A central motif of antisemitism in the Arab and Muslim world is the two-faced denial of the Holocaust and simultaneous praising of its perpetrators. The Arab and Muslim world minimizes the scope of the Holocaust. At the same time, there are many expressions of praise and glory for Hitler and the Nazis for exterminating Jews. Regardless of the path taken, both expressions of antisemitism include likening Israel and Zionism to Nazi Germany and accusing Israel of committing war crimes and genocide against the Palestinians.

Data from the Anti-Defamation League (ADL) reveal a very bleak picture of the prevailing perceptions regarding the Holocaust in the Middle East. Most respondents reported that they are not aware of the Holocaust at all. The majority of those who acknowledged that the Holocaust took place said that its horrors and the number of Jewish victims are greatly exaggerated. Such perceptions are not limited to the countries of the Middle East but are also common in Arab and Muslim communities in the West.¹⁴

It is worth remembering that Mahmoud Abbas, the head of the Palestinian Authority who is also known as “Abu Mazen,” wrote his 1982 Ph.D. thesis at the University of Moscow about the Zionist-Nazi collaboration in the elimination of European Jewry. At the 2023 Fatah Revolutionary Council conference, he stated that “in many Jewish books when they say that Hitler killed the Jews because of their Jewishness, then no – He fought them because of their social role and not because of their religion. That is, Hitler fought the Jews because they dealt in loans with interest and money.”¹⁵

Left-Wing Antisemitism

A new dimension of antisemitism that Arab and Muslim countries have adopted in recent decades comes from left-wing circles in the West. In the West, antisemitism and anti-Israel hatred usually leads to short outbursts among immigrant communities from the Arab and Muslim world. These outbursts usually include demonstrations against Israel as a basic common denominator that unifies diverse communities, and even blends a shared hostility towards Israel and the Jews into an element of identity that replaces any national and religious identity that may have gotten lost through their migration to the West. The demonstrations are also a way for them to protest their social and economic

situation in their adopted countries. Eventually, these immigrant groups join the radical left and progressive circles in Europe and in the United States, where hatred of Israel operates under the guise of progressivism, and a battle against the current world order and includes their negative perceptions of Western dominance (especially the United States). Essentially, just as right-wing forms of antisemitism portray Jews and Israel as the purveyors of every hardship to afflict mankind and the absolute evil of our time, so too does the progressive left.¹⁶

In this context it is worth noting that Bernard Lewis, a leading scholar of Islam, wrote that the scope of the antisemitic books and articles published, as well as the size and number of editions and appearances, the high status and authority of the writers, publishers and sponsorship data, their place in schools and the college curriculum, their role in the mass media, all indicate that classical antisemitism is an essential part of the intellectual life of the Arab and Islamic world at the present time. This mimics the role antisemitism played in Nazi Germany, where many esteemed members of academia willingly supported the Nazi party and its ideologies.¹⁷

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14. See Rebecca Shimoni Stoil, “Poll: 93% of Palestinians hold anti-Jewish beliefs,” *TIMES OF ISRAEL* (May. 13, 2014), available at <https://www.timesofisrael.com/poll-93-of-palestinians-hold-anti-jewish-beliefs/>; see also, “2023 Online Holocaust Denial Report Card,” ADL (Oct. 4, 2023), available at <https://www.adl.org/resources/report/2023-online-holocaust-denial-report-card>
 15. “EU condemns ‘unacceptable’ Abbas comments on Holocaust,” *FRANCE 24* (May 2, 2018), available at <https://www.france24.com/en/20180502-eu-us-netanyahu-condemns-unacceptable-abbas-comments-holocaust-jews>; see also Dr. Gustavo Perednik, “Abbas’ ‘Jews are to Blame’ Speech: Replete with Lies, Antisemitism and Holocaust Denial,” *MIDA* (May 6, 2018), available at <https://en.mida.org.il/2018/05/06/abbas-jews-blame-speech-replete-lies-antisemitism-holocaust-denial/>
 16. Jonathan A. Greenblatt, “Antisemitism on the left is subtler than on the right. But it’s getting worse,” *WASHINGTON POST* (Oct. 12, 2021), available at <https://www.washingtonpost.com/outlook/2021/10/27/antisemitism-left-rising/>; see also Stephen H. Norwood, “Left-Wing Antisemitism in the United States: Past and Present,” *INSTITUTE FOR NATIONAL SECURITY STUDIES (INSS)* (Oct. 13, 2021), available at <https://www.inss.org.il/publication/antisemitism-left/>
 17. See Bernard Lewis, *SEMITES AND ANTISEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE* (New York: W. W. Norton & Company, 1999).

Admittedly, many Arab regimes have worked in recent years to promote a peace process and normalization of relations with Israel, recognizing the importance and potential benefits of such peace, and hoping that it would ensure stability and prosperity within their own countries. In many Arab countries, the peace process with Israel is accompanied by a nostalgic look at the Jewish past, that is, at the days when there were prosperous Jewish communities that lived a meaningful Jewish life in the respective Arab countries. But these days came to an end in the mid-20th century following the outbreak of the Israeli-Arab conflict and the establishment of the State of Israel.

It must therefore be admitted that despite the advancement of the peace process with Israel, enmity and hatred for Israel and the Jews still flourishes and thrives in the streets, public opinion, and among the intellectual elites in the Arab world who continue to see Israel and the Jews as an enemy. All this virulent animosity continues to percolate while Arab leaders refrain from acting against these manifestations of hatred and antisemitism. It therefore seems that the peace and normalization processes, despite their importance, not only fail to curb these negative trends but actually perpetuate their use as a counter-argument to peace and reconciliation efforts.

Hatred of Israel and Antisemitism Following October 7, 2023

The various strains of antisemitism that have been discussed in this article emerged with full force in the wake of the terrorist attack by Hamas on October 7, 2023, and the subsequent war that Israel launched against Hamas in Gaza.

Following the terrorist attack by Hamas, political leaders, intellectuals, media talking heads, and social media users across the Arab world praised Hamas's murderous attack and harshly attacked Israel, accusing it of committing genocide against the Palestinians. For example, in their response to October 7, *al-Azhar*, the leading religious institution in the Sunni world, said that it "salutes with absolute pride the resistance efforts of the Palestinian people and strengthens the hands of the proud Palestinian people who instilled in us spirit and confidence and gave us life back."¹⁸ An opinion piece published in the Bahraini newspaper *Akhbar al-Khalij*, said that

What the Palestinian people have endured for the past 75 years is a Holocaust of their

own...surpassing the Zionist narratives and legends about the Jewish Holocaust. The Zionist entity has perpetrated severe crimes beyond anything seen worldwide, which makes the Palestinian Holocaust an atrocity a thousand times greater.¹⁹

Across the West, prestigious institutions and universities grappled with an extensive torrent of unabashed antisemitism. For example, the organization "Students for Justice in Palestine" (SJP), a network of pro-Palestinian student associations operating in academic institutions throughout the U.S. and Canada, called the Hamas attack on October 7, a historic victory for the Palestinian resistance and said that "this should be the meaning of a free Palestine: not just slogans and rallies, but an armed confrontation with the oppressors."²⁰

Conclusion

Arab and Muslim antisemitism is not a marginal phenomenon, but rather a wide-ranging phenomenon among the general public in the Arab and Muslim world. It does not grow exclusively from the popular stratum, and it is not only the property of intellectuals, opposition elements or radical Islamic movements. Nor is the phenomenon limited to the countries of the Middle East;

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18. Morr Link, "The 'Gaza Holocaust': The Outrageous Framing of the War by the Arab Media," INSS (Oct. 25, 2023), available at https://www.inss.org.il/social_media/the-gaza-holocaust-the-outrageous-framing-of-the-war-by-the-arab-media
 19. Fawziyya Rashid, "The Holocaust and the Palestinian Holocaust" (Arabic), AL-KHALIJ AL-ARABI (Oct. 22, 2023), available at <https://akhbar-alkhaleej.com/news/article/1345747>
 20. Dr. Hayim Iserovich, "In the streets and social networks: the organizations that support Hamas and lead the anti-Israel demonstrations in the United States," MEIR AMIT INTELLIGENCE AND TERRORISM INFORMATION CENTER AT THE ISRAELI INTELLIGENCE HERITAGE AND COMMEMORATION CENTER (Dec. 1, 2023), available at <https://www.terrorism-info.org.il/en/in-the-streets-and-social-networks-the-organizations-that-support-hamas-and-lead-the-anti-israel-demonstrations-in-the-united-states>; see also Randy Kessler, "Language around 'Day of Resistance and Protest' leaves Jews fearful," SEATTLE TIMES (Oct. 18, 2023), available at <https://www.seattletimes.com/opinion/language-around-day-of-resistance-and-protest-leaves-jews-fearful/>

hostility towards Jews and Israel is widely prevalent in Muslim communities around the world (mainly in Western countries) and reincarnated as an expression of progressivism and liberal values.

In recent decades, as noted earlier, some Arab countries have established peaceful relations with Israel in a process that seemed to re-calibrate the culture of the Middle East. Despite the progress of the peace processes, the Arab and Muslim worlds continue to witness an increase in antisemitism. The communication and information revolution, and the emergence of satellite communication channels and social networks, have facilitated the distribution of antisemitic trope. At the same time, a trend towards the Islamization of antisemitism expanded to include antisemitism influenced by left-wing circles in the West. The hallmark of this antisemitism is its refusal to distinguish between Israel and the Jews and the use of anti-Israelism as a cover for attacking the Jews.

There is no doubt that antisemitism and hatred of Israel is frequently used to legitimize violence, and even terrorist

acts, against Israelis and Jews. This is particularly true of the Palestinian terrorist organizations of an extreme Islamic nature that regard Israel in particular, and the Jewish people in general, as an eternal enemy against whom a war of attrition must be waged until Israel and the Jews are destroyed. The spread of antisemitism and anti-Israelism is even more widespread, though, and characterizes large audiences in the Arab and Muslim world, and even among communities of Arab and Muslim immigrants in the West. The result is that Israelis and Jews become a legitimate target for hate crimes, harassment and even acts of violence and terrorist attacks. ■

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8 January 2024

**Statement by the International Association of Jewish Lawyers and Jurists (IJL)
in response to South Africa's ICJ Application Accusing Israel of Genocide
If Everything is Genocide, Nothing is Genocide**

On 29 December 2023, South Africa applied to the International Court of Justice requesting the Court to institute proceedings, including an urgent provisional measures procedure, alleging that Israel violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") in its conduct towards Palestinians in Gaza.

This baseless accusation of "Genocide" levelled at Israel by South Africa is a blatant attempt to subvert international law.

The driving force behind the Genocide Convention was a Polish Jew, Raphael Lemkin, whose work to codify the crime of genocide was motivated by his personal experience of an actual genocide - the efforts of the Nazis and their collaborators to exterminate the Jewish people. The term he then coined – "Genocide", was intended to portray the most heinous of atrocities against humanity, the intentional attempt to annihilate a people.

The attempt to harness the Genocide Convention to target the very people whose murder led to the Convention reflects a growing phenomenon of undermining the right of the Jewish people to a state of their own through accusations comparing Israel with the Nazi regime. In practice, it is intended to deny Israel the right to defend itself against those seeking its destruction.

One would expect that the complete and utter falsity of the genocide accusation and the abuse of international law which it entails, would be obvious to all. It is therefore with a sense of deep disappointment that we feel obliged, as the International Association of Jewish Lawyers and Jurists, founded some 55 years ago by, among others, French Nobel Prize laureate *René Cassin*, an initiator and co-drafter of the Universal Declaration of Human Rights, to publicly respond to a libel so patently untrue that a response should be unnecessary.

We will do so by stating the obvious: There is no genocide or attempted genocide in Gaza.

Israel is engaged in a military campaign against Hamas, an internationally designated terrorist organization, which launched a widespread attack inside Israel on October 7th, 2023, taking control of over twenty towns and villages while murdering and wounding thousands. Hamas has, for decades, pursued a relentless campaign of terrorism against Israeli civilians aimed at achieving its declared aim of the destruction of the State of Israel.

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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר) THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A)
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However, what took place on October 7th, was of unprecedented magnitude and cruelty, a rampage of murder, torture, rape, mutilation and other atrocities, intentionally targeting civilians - babies, children, older persons, women and men - just for being Jewish.

In parallel, over 3,800 rockets were launched that day alone at Israeli civilian population centers. 253 people were taken hostage ranging in age from 9 months to over 80 years. To date, 132 hostages kidnapped from Israel over 90 days ago, in addition to 4 held prior to October 7, are still being held in Gaza, whereabouts and fate unknown. There are well-grounded fears for their health and wellbeing with no access being granted to the International Red Cross. The indiscriminate rocket attacks against Israel continue - over 13,400 since October 7th.

The Hamas attacks are linked to a wider campaign orchestrated by an Iran-led axis which includes terror organizations such as Hezbollah and the Houthis, attacking Israel on all fronts, with the openly-stated common purpose of annihilating the Jewish State.

Another component of this campaign is the instigation of widespread protests around the world calling for Israel's demise, coupled with a wave of rampant antisemitism, including violence and threats of violence against Jews. These have clearly exposed the link between the denial of Israel's right to exist and the denial of the Jewish people's right to exist. This is the rhetoric of Genocide.

The deeds of Hamas, accompanied by its clear statements of intent to bring about the destruction of Israel while calling for the murder of Jews, fulfill the definition of Genocide.

It is sad and deeply troubling that South Africa has decided to ignore the perpetrators of genocide and chooses instead to blame the victim.

The vicious attacks by Hamas and its allies have compelled Israel to defend itself by removing the threat of Hamas in the Gaza Strip, where it has exploited its control over the area, transforming it into a giant fortified military compound, configured with one primary goal - to attack Israel and bring about its destruction.

The tragic high Palestinian civilian casualty toll and level of destruction are an unfortunate, but inevitable, consequence of Hamas' *modus operandi* of enmeshing its military-terror apparatus within the civilian environment. This includes their launching and conduct of military-terror activities from within, around and under residential buildings, schools, mosques and even hospitals and UN facilities. Hamas and its leaders have clearly proven that the destruction of Israel is their only motivation and that they view their and the Palestinian civilians' lives as a price worth paying to achieve this goal.

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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר) THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)
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Contrary to the picture portrayed by South Africa in its application, the IJL notes that the Israeli Government and the official spokespersons of the Israel Defense Forces (IDF) have declared, time and time again, that the military effort is directed against Hamas and not against the people of Gaza.

This is clearly reflected in the actual conduct of the IDF on the ground by *inter alia*: giving advance warnings to civilians of impending airstrikes and other military operations; urging the evacuation of civilians from pending combat zones; designation of a humanitarian zone within Gaza; and working with the international community to facilitate the entry of large quantities of humanitarian aid to the Gaza Strip.

It requires an extraordinary contortion of fact and logic to read into these actions proof of “genocidal intent” on Israel’s part.

South Africa further purports to prove “genocidal intent” by presenting heated quotes from various Israeli politicians and other figures (made soon after the massacre of October 7th), none of which constitute official Israeli government statements or policy nor reflect the policies and practices of the IDF. This displays at best, a willful ignorance, or at worst, an intentionally selective misrepresentation of Israeli policy.

Notwithstanding the bitter and protracted dispute between Israel and the Palestinians, Israel has never displayed any hint of intention to harm the Palestinian people *per se*. To impute such an intention to Israel today can only be understood as an attempt to focus the international discourse on Israel and away from Hamas’ egregious and heinous crimes.

More broadly, by labelling Israel’s defensive war against Hamas an act of genocide, South Africa is effectively stripping the term of its meaning. If this is genocide, then many instances of the use of force in response to an armed attack could easily meet that definition.

In light of the above, the IJL calls on governments, international institutions and the international legal community, to denounce and reject the cynical and dangerous misuse of the Genocide Convention.

The International Association of Jewish Lawyers and Jurists (IJL), founded in 1969, comprises lawyers, judges, judicial officers, and academic jurists from around the world.

The IJL strives to advance human rights for all, including by combatting antisemitism, racism, xenophobia, Holocaust denial, and the delegitimization of the State of Israel.

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צדק

ENGLISH: 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory. [ARAMAIC: צדק (he was righteous), SYRIAC: זדק (it is right), UGARITIC: *sdq* (= reliability, virtue), ARABIC: *sadaqa* (= he spoke the truth), ETHIOPIC: *sadaqa* (= he was just, righteous)] Derivatives: צדקה POST-BIBLICAL HEBREW: alms, charity. Cp. ARAMAIC צדקתה (= justice). PALMYRENE צדקתה (= it is right). צדק 1. just, righteous. 2. pious.

Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa

Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, antisemitism, Holocaust denial and negation of the State of Israel.

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