

Hamas' October 7th Genocide: Legal Analysis and the Weaponization of Reverse

Accusations:

A Study in Modern Genocide Recognition and Denial

Avraham Russell Shalev

Abstract:

This paper analyzes the 7 October 2023 Hamas attack on Israel through the lens of the Genocide Convention, arguing that these actions constitute genocide under international law. Drawing on international case law, the analysis demonstrates how Hamas' actions meet both the physical element and specific intent requirements for genocide, evidenced by its ideology, systematic policies, and leadership statements. The paper also examines how reverse accusations of genocide against Israel have functioned as a rhetorical shield to deflect recognition of Hamas' own genocidal actions. It analyzes the legal implications for state parties and the international community.

Acknowledgments

I thank Professor Abraham Bell for providing the original idea for this paper and his guidance throughout its development. His expertise in international law greatly informed the analysis.

1. INTRODUCTION

The 7 October 2023 attack by Hamas on Israeli civilians marked one of the deadliest assaults in modern history, resulting in over 1,200 deaths and raising critical questions about the legal classification of these acts under international law. While much attention has been

focused on Israel's military response in Gaza, there has been limited scholarly analysis of whether Hamas' actions themselves constituted genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. This paper examines the 7 October attacks through the lens of international law, analyzing both the physical acts committed and the evidence of specific intent required to establish genocide. It argues that Hamas' systematic targeting of Israeli Jews, combined with its documented ideology and statements, meets the legal threshold for genocide under international law. The analysis also explores how accusations of genocide against Israel, mainly through South Africa's application to the International Court of Justice (ICJ), have served as a rhetorical shield to deflect attention from Hamas' own genocidal actions. The implications of this determination extend beyond legal classification, affecting issues of accountability, deterrence, and the international community's obligations to prevent and punish such acts.

This paper examines why correctly classifying the 7 October events as genocide matters, particularly for deterrence and collective memory. It then establishes the theoretical framework by analyzing the responsibility of armed groups under international law and reviewing recent ICJ case law on genocide. The paper proceeds to examine the elements of genocide under international law before presenting a detailed analysis of Hamas' 7 October attack, demonstrating how the acts committed constitute the physical element (*actus reus*) of genocide. It then marshals extensive evidence of Hamas' genocidal intent, including its foundational ideology, systematic policies, documented preparations, and statements by its leaders before and during the attack. The analysis then turns to examine how accusations of genocide against Israel, particularly South Africa's ICJ application, have been deployed as a rhetorical shield to deflect recognition of Hamas' own genocide. Finally, the paper considers the legal consequences of Hamas' violation of the Genocide Convention, including

obligations for state parties and the international community to prevent and punish these acts.

2. THE SIGNIFICANCE OF GENOCIDE RECOGNITION: DETERRENCE, MEMORY, AND JUSTICE

In addition to the legal duties that the Genocide Convention imposes on State parties, the proper labeling of the events of 7 October 2023 as 'genocide' is crucial for reasons of deterrence, combating denial, recovery, and the shaping of social memory.

On 22 August 1939, following the German invasion of Poland, Adolph Hitler informed his generals of his plans to settle Poland *en masse* with Germans. His plans for German 'living space' would require the mass murder of Poles and Jews. Hitler dismissed any international opposition or harm that the mass killings might do to Germany, reportedly telling his generals: "Who after all is today speaking about the destruction of the Armenians [during the First World War]?"¹ This anecdote emphasizes that failure to recognize and punish the perpetrators of genocide emboldens future genocidaires.

The historian of antisemitism, Robert Wistrich, has identified "eliminationist" or genocidal antisemitism as the shared core of the totalitarian ideologies of Nazism, Communism and Islamism. As he describes the ideology that motivates Hamas and other Islamic groups:

Much of this anti-Semitic worldview has infected the body politic of Islam during the past forty years. Its focus has become the "collective Jews"

¹ E.L. Woodward and Rohan Butler (eds), *Documents on British Foreign Policy, 1919-1939*, 3rd series ('Contents of the Speech by the Fuhrer to the Chief Commanders and Commanding Generals on the Obersalzberg, August 22 1939, Foreign Office, London 1995) vol. 7 at 258.

embodied in the State of Israel. Its geographic center of gravity has moved to the Middle East, but the tone and content of the rhetoric, along with the manifest will to exterminate the Jews, are virtually identical to German Nazism. The leadership of Iran does not even disguise its desire for a *judenfrei* (Jew-free) Middle East- a “world without Zionism,” to adopt a more politically correct language. Radical Islamists of every stripe openly proclaim at every opportunity that the eradication of Israel is a divine commandment, the will of God, and a necessary prologue to the liberation of mankind. In a manner reminiscent of the Nazis, they see themselves as engaged in a war of civilizations against terminal Western decadence (analogous to *jahiliyah*, or pre-Islamic barbarism), equated with social chaos, sexual permissiveness, idolatry and apostasy. All these evils are symbolized by perfidious ‘Jewish influence.’ As in Nazi anti-Semitism... Islamofascism today builds on the same mythological figure of the satanic, ubiquitous, immoral, and all-powerful Jew that once haunted the European anti-Semitic imagination from Richard Wagner to Adolf Hitler.²

This eliminationist antisemitism is the defining feature of Hamas’ ideology. It is shared by a wide range of Islamist groups, such as the Muslim Brotherhood, al-Qaeda, the Islamic State (ISIS), and Khomeinist Iran.³ The aftermath of the 7 October genocide has seen the worst wave of antisemitic violence against Diaspora Jewish communities since the end of the

² Robert S Wistrich, *A lethal obsession: Anti-semitism from antiquity to the global Jihad* (Random House, 2010) 6.

³ Markos Zografos, *Genocidal Antisemitism: A Core Ideology of the Muslim Brotherhood* (ISGAP Occasional Paper Series no. 4, June 2021).

Second World War.⁴ Islamic groups such as al-Qaeda and ISIS have called on their followers worldwide to follow Hamas' example and attack Jews.⁵

The use of the label 'genocide' may prompt a systematic examination of Islamist ideology and the threat that it poses to Jews, amongst others. It would also undermine certain defensive arguments made in favor of Hamas, namely that it is acting in self-defense against Israeli aggression and is a legitimate response to occupation. Hamas, although a Palestinian nationalist movement, has its origins in the virulently anti-Zionist and antisemitic Muslim Brotherhood movement founded in Egypt in the 1920s. The Muslim Brotherhood was violently opposed to any form of Jewish statehood in Israel far before 1948 or the post-1967 Israeli administration of Gaza, Judea, and Samaria.⁶ Furthermore, Hamas was emboldened by Israeli withdrawal from Gaza in 2005 and stepped up its violent attacks on Israel.⁷ That is because Hamas' goal is not a Palestinian state within the 1967 lines alongside Israel but an Islamic state in place of Israel.

The State of Israel and its Jewish population remain under genocidal threat, mainly from Iran and its proxies, including Hamas, Hezbollah, and the Houthis. Less than one month after 7 October, Hamas official Ghazi Hamad told a Lebanese news outlet that 'Israel is a country that has no place on our land... We must remove that country... The Al-Aqsa Flood [the 7 October massacre] is just the first time, and there will be a second, a third, a fourth.'⁸ Iranian

⁴ 'Global Antisemitism in the Wake of October 7', *Yad Vashem*, 2024 <https://www.yadvashem.org/education/7-oct.html>.

⁵ Anti-Defamation League, 'Islamic State, Al-Qaeda Call for Violence Against Jewish Communities Following October 7 Attack', 2023 <https://www.adl.org/resources/article/islamic-state-al-qaeda-call-violence-against-jewish-communities-following-october>.

⁶ Zografos (n 3).

⁷ Michael Herzog, 'A Wind in Hamas's Sails: Palestinian Militants Gather Post-Disengagement Momentum', *The Washington Institute for Near East Policy* 13 Sept. 2005 www.washingtoninstitute.org/policy-analysis/wind-hamass-sails-palestinian-militants-gather-post-disengagement-momentum.

⁸ "'We Will Repeat October 7 Again and Again' - Hamas Official", *Jerusalem Post*, 1 Nov. 2023, www.jpost.com/arab-israeli-conflict/article-771199.

Supreme Leader Ali Khamenei reaffirmed Iran's commitment to Israel's destruction in a 23 May 2024 meeting with Hamas leader Ismail Haniyeh in Tehran. In the meeting, Khamenei said, 'The divine promise to eliminate the Zionist entity will be fulfilled, and we will see the day when Palestine will rise from the river to the sea,' to which Haniyeh responded, 'God willing, we will see that day together.'⁹

The 7 October genocide has been met with persistent denial, especially among Muslim communities and the far-right. According to one poll, only 25% of UK Muslims believe that Hamas terrorists committed rape and murder on 7 October. Additionally, 46% of British Muslims expressed support for Hamas, and 39% denied that atrocities were committed on 7 October.¹⁰ Conspiracy theorists have spread claims that Israel was responsible for the killing of its own citizens. Especially pernicious is the denial of mass rape and sexual violence committed by Palestinian armed groups against Israeli women. For example, during the UN Human Rights Council's 56th session, the Palestinian representative insisted that the UN Commission of Inquiry found no evidence of rape.¹¹

Recognition of 7 October as genocide may have a deterrent effect, both in signaling Israel's resolve to prevent its repetition and by prompting the international community to act against Iran and its genocidal proxies. In 1998, Rwandan officials argued that the

⁹ 'Iran's Khamenei Tells Visiting Hamas Chief That Israel "will One Day Be Eliminated"', *The Times of Israel*, www.timesofisrael.com/irans-khamenei-tells-visiting-hamas-chief-that-israel-will-one-day-be-eliminated/ accessed 16 July 2024.

¹⁰ 'Only One in Four British Muslims Believe Hamas Committed Murder and Rape in Israel on October 7th', *Henry Jackson Society*, 8 April 2024, <https://henryjacksonsociety.org/2024/04/08/only-one-in-four-british-muslims-believe-hamas-committed-murder-and-rape-in-israel-on-october-7th/>.

¹¹ 'Echoes of Denial – Oct. 7th Atrocities & Rising Antisemitism', *Jerusalem Institute of Justice*, 22 July 2024, 6 <https://ijj.org/advocacy-materials/echoes-denial-october-7th-atrocities-rising-antisemitism-report/>; See also, Elizabeth Dwoskin, 'Denial of the Oct. 7 Hamas Attack on Israel Is Spreading', *The Washington Post*, 21 January 2024, <https://www.washingtonpost.com/technology/2024/01/21/hamas-attack-october-7-conspiracy-israel/>; 'Denial and Distortion of the Hamas-led October 7 Attack: An Overview of False Narratives' *Anti-Defamation League*, <https://www.adl.org/resources/article/denial-and-distortion-hamas-led-october-7-attack-overview-false-narratives>, accessed 5 January 2025.

prosecution of Hutu genocidaires in the Rwandan courts would serve as a deterrent against Hutu guerillas who were still targeting Tutsis at the time. Similarly, Pol Pot and Ieng Sary were tried *in absentia* while they still controlled Cambodian territory. The Cambodian government sought to deter future crimes.¹² Therefore, legal recognition of the 7 October atrocities as genocide by both international and Israeli authorities will allow the exposure of the extent of Hamas' crimes and the network of perpetrators and their supporters.

The recognition of the genocidal nature of Hamas' attacks alongside a public trial, may also serve as a catharsis for Israeli society. As Caroline Fournet explains:

The impact of legal recognition, and thus of the legal memory, of the crime of genocide on shaping collective memory and remembrance of the crimes lies precisely in the recognition of the victims. And indeed, by legally qualifying the crime of genocide as genocide, trials would simultaneously acknowledge the status of victims as victims... Because genocide is precisely nothing by the denial of the victims' identity, dignity and humanity, victims of genocide want justice not only to see the perpetrators punished but also to be recognized as victims through the official public recognition of the perpetration of the crime. In the course of such trials, and therefore of the recognition of victims as victims, it is also argued here that it is essential for those victims who wish to do so to be able to testify; whether for individual purposes – testifying might somehow help them to exorcize their pain and to heal their wounds –

¹² John Quigley, *The Genocide Convention: An International Law Analysis* (Routledge, 2016) 282.

or for collective reasons – they might feel that their testimonies will ultimately reinforce, if not ensure, the collective memory of the crime.¹³

Historical precedents, such as Hitler’s dismissal of the Armenian genocide’s repercussions, underscore the importance of recognizing and punishing genocide to prevent future atrocities. Israel faces ongoing genocidal threats from Iran and its proxies, including Hamas. Recognizing 7 October as genocide may deter further violence, prompt international action, and provide societal catharsis by acknowledging victims’ suffering. Legal recognition can also expose the extent of Hamas’ crimes and support a robust collective memory.

While the destruction of Israel is an integral part of Hamas’ ideology, recently captured documents demonstrate that on October 7, Hamas believed that Israel’s destruction was a goal that they could achieve. According to documents seized by the IDF in the Gaza Strip, following the 2021 Guardian of the Walls Operation, Hamas’ leadership began to consider Israel’s elimination as one highly feasible in the near future. On October 7, Hamas intended to provoke a multi-front war against Israel, including Israeli Arabs and other Iranian “axis of resistance” groups that would result in Israel’s collapse.¹⁴ Therefore, in distinction to other acts of terrorism carried out by Hamas, October 7 was perpetrated with the real and immediate intention of Israel’s destruction and the genocide of its Jewish population.

3. LEGAL FRAMEWORK: NON-STATE ACTORS AND INTERNATIONAL CRIMINAL RESPONSIBILITY

¹³ Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Routledge, 2016) 132-133.

¹⁴ Dr. Uri Rosset, ‘Hamas’ Strategy to Destroy Israel: From Theory into Practice, as Seen in Captured Documents’, Meir Amit Intelligence and Terrorism Information Center, Published: 13/03/2025, <https://www.terrorism-info.org.il/en/hamas-strategy-to-destroy-israel-from-theory-into-practice-as-seen-in-captured-documents/>

A preliminary issue that must be examined is whether Hamas, as a non-state entity and an armed group (the two terms are used interchangeably), can be held collectively responsible for the crime of genocide. Scholars have pointed out that armed groups now play an outsized role in armed conflicts worldwide. According to Dr. Bellal's 'The War Report 2018', 31 of the 50 active armed conflicts involved armed groups.¹⁵ The UN Secretary-General has noted the preponderance of human rights abuses committed by armed groups:

The consequences for civilians have been devastating, as armed groups have often sought to overcome their military inferiority by employing strategies that flagrantly violate international law. These range from deliberate attacks against civilians, including sexual violence, to attacks on civilian objects such as schools, to abduction, forced recruitment and using civilians to shield military objectives.¹⁶

While it is widely accepted that armed groups have international obligations,¹⁷ it is unclear whether they bear responsibility under international law. The International Committee of the Red Cross (ICRC) study on customary International Humanitarian Law (IHL) has admitted that armed groups 'incur responsibility for acts committed by persons forming part of such groups.' However, the content of such responsibility is unclear. In its 2016 Commentary to Common Article 3, the ICRC stated that it is still undetermined whether international law

¹⁵ Bellal, Annyssa, *The War Report 2018* (Geneva Academy of International Humanitarian Law and Human Rights, 2018) 33, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>.

¹⁶ UN Secretary General, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, (10 November 2010), UN Doc S/2010/579, para 8.

¹⁷ Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55(2) *International & Comparative Law Quarterly* 369–394; Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 (882) *International Review of the Red Cross* 443–461; Ryngaert, Cedric, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 284–294.

can attribute collective responsibility to non-state actors for the acts committed by their members.¹⁸ Alternately, the Articles on State Responsibility offer the possibility 'that the insurrectional movement may itself be held responsible for its conduct under international law, for example, for a breach of international humanitarian law committed by its forces.'¹⁹

The current international legal system has several responses to violations of international humanitarian law by non-state actors: international criminal law, truth-seeking mechanisms, naming and shaming, and sanctions.²⁰ Although international criminal law focuses on the responsibility of individual perpetrators, it recognizes that certain international crimes require group action. These existing mechanisms may form the basis for a more expansive notion of armed group responsibility.

According to the International Criminal Tribunal for the Former Yugoslavia (ICTY) case law:

Most of the time [international] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.²¹

¹⁸ International Committee of the Red Cross, *Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016) para. 892.

¹⁹ Draft Articles on Responsibility of States for Internationally Wrongful Act (Aug. 2001), UN Doc No A/56/83, Art 10 Commentary para 16.

²⁰ Laura Íñigo Álvarez, *Towards a regime of responsibility of armed groups in international law*. (Diss. Universidad de Sevilla, 2019) s 2.3.1

²¹ ICTY, *Prosecutor v. Tadić*, Appeal Chamber Jurisdiction Decision, IT-94-I-T, 15 July 1999, para 191.

According to Article 7(2)(a) of the Rome Statute, a key element of crimes against humanity is the existence 'of a State or an organizational policy to commit such as an attack'. In *Prosecutor v Tadić*, the ICTY recognized that armed groups exercising de facto control over territory may perpetrate crimes against humanity.²² In the *Tadić* Appeal Chamber judgment, the court established the doctrine of joint criminal enterprise (JCE), which holds that each member of an organized group can be individually responsible for crimes committed as part of a common plan or purpose, even if they did not physically participate in the crime(s).²³ The JCE doctrine has been incorporated in Article 25(3)(d) of the Rome Statute.

The United Nations has set up many investigative mechanisms monitoring international humanitarian law violations of armed groups.²⁴ A small number have explicitly examined the collective responsibility of armed groups, including their obligation to provide reparations to victims. Referring to violations committed by the Sudan Liberation Movement and the Justice and Equality Movement, the Commission of Inquiry in Darfur stated:

Serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the ICTY in *Tadić* (Interlocutory Appeal) and largely codified in the ICC Statute. In other words, these violations may entail the individual criminal liability of their author or authors. These violations may also involve the international responsibility of the State or of the international non-state entity to which those authors belong as officials (or for which they acted as de facto organs), with the

²² ICTY, *Prosecutor v. Tadić*, Trial Judgment, IT-94-I-T, 7 May 1997, para 654.

²³ Giulia Bigi, 'Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnik Case' in A. von Bogdandy and R. Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (Vol 14, Koninklijke Brill, 2010) 51–83.

²⁴ Álvarez, (n 20) s 2.3.1.2.

consequence that the State or the non-state entity may have to pay compensation to the victims of those violations.²⁵

Similarly, the Panel of Experts on Accountability in Sri Lanka recognized that the Liberation Tigers of Tamil Eelam (LTTE) could be held responsible for international humanitarian law violations:

The Panel considers three forms of responsibility. State responsibility concerns whether the State of Sri Lanka would be responsible for violations were the alleged facts found to be true. Under international law, state responsibility applies only to the acts of the State of Sri Lanka. Actions by non-state actors, such as paramilitary groups or private citizens who act under the instructions of, or are directed or controlled by, the State, are imputable to the State. Organizational responsibility is a concept that recognizes that international humanitarian law also places duties on non-state armed groups, including, in this case, the LTTE. Individual responsibility generally concerns whether particular individuals, regardless of their affiliation in an armed conflict, would be criminally responsible for violations. Criminal responsibility attaches to certain acts, regardless of whether the individual was acting on behalf of the Government, the LTTE, or neither.²⁶

The UN Secretary-General has appointed a Special Representative to examine the abuse of children and sexual violence in armed conflicts. The Special Representative submits annual reports to the General Assembly and the Human Rights Council. In the 2023 report to the

²⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), para 175.

²⁶ Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (31 March 2011) para 191.

General Assembly, the Secretary-General notes that armed groups perpetrated close to 50% of grave violations.²⁷ Such “naming and shaming” is another mechanism used to address human rights violations by armed groups.

Finally, Chapter VII of the UN Charter allows the Security Council to impose sanctions against armed groups and states. The Security Council has imposed sanctions on Bosnian Serb militias in the former Yugoslavia, armed groups in Sierra Leone, the Taliban in Afghanistan, and other groups in the Democratic Republic of Congo, among others.²⁸

Sanctions, among other mechanisms, demonstrate that the international system recognizes the need for action against armed groups, in addition to the individual criminal responsibility of its members.

Dr. Álvarez suggests comparing the common principles of attribution rules for states codified in the Articles of State Responsibility (ASR) and the rules of attribution for international organizations codified in the Articles of Responsibility of International Organizations (ARIO) and applying these to armed groups.²⁹ These common principles are: (a) attribution based on the conduct of organs and agents belonging to the organization, including *ultra vires* acts; (b) attribution based on the conduct of other individuals or entities under the direction and control of the organization; (c) attribution based on the acknowledgment of the conduct of the organization as its own.³⁰ These principles are particularly appropriate to apply to groups like Hamas, which since 2007 has served as the

²⁷ Promotion and Protection of the Rights of Children: Children and Armed Conflict, Report of the Secretary-General (3 June 2024) UN Doc A/78/842-S/2024/384, 3.

²⁸ UNSC Res 942 (1994); UNSC Res 1132 (1997); UNSC Res 1171 (1998); UNSC Res 1267 (1999); UNSC Res 1493 (2003); UNSC Res 1807 (2008); See also J. K. Kleffner, 'The Collective Accountability of Organised Armed Groups' (2011) 93(882) *International Review of the Red Cross* 253.

²⁹ Álvarez (n 20) Ch 4.

³⁰ Álvarez (n 20) 96.

de facto governing authority in Gaza. Hamas' governing apparatus was highly centralized, including a parliament, numerous ministries, and a large bureaucracy.³¹

It should be noted that while this article focuses specifically on Hamas, a similar analysis could be made regarding crimes committed by members of the Palestinian Islamic Jihad. Gazan civilians who participated in the October 7th atrocities could potentially be charged with complicity in genocide or aiding and abetting genocide.³²

As non-state actors increasingly play a central role in armed conflicts and often display the characteristics of states, the current non-attribution of group responsibility is inadequate. In recent years, German courts have set a precedent in convicting members of the Islamic State in Iraq and Syria (ISIS) of genocide and related crimes against the Yazidi minority.³³ Multiple international entities, such as the UN and the US State Department, have recognized ISIS' campaign against the Yazidis as genocide.³⁴ However, the restrictive attribution of responsibility limits victims' access to justice. An organizational conviction could implicate the entire chain of command and support structure without targeting each person individually. It might allow for reparations or asset seizure to be redirected to

³¹ See Devorah Margolin, 'Retreating From Legitimacy: Hamas' Engagement in and Disengagement from Governance' *The Washington Institute for Near East Policy* (Jihadist Governance and Statecraft series, 2023).

³² See ICTY *Prosecutor v. Blagojević*, Judgement, IT-02-60-A, 9 May 2007, para 122 and ICTR *Prosecutor v. Ntakirutimana*, Judgement, ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para 364.

³³ See Higher Regional Court of Frankfurt, Case No. 5-3 StE 3/20 (November 30, 2021); German Federal Court of Justice confirmation (January 17, 2023); Higher Regional Court of Düsseldorf, Case No. (not publicly specified in available sources) (May/July 2022); Higher Regional Court of Koblenz, Case No. (not publicly specified in available sources) (June 21, 2023).

³⁴ United Nations Security Council, Document S/2021/419, "Fourth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD)," May 10, 2021.; United Nations Human Rights Council, Document A/HRC/32/CRP.2, "They Came to Destroy: ISIS Crimes Against the Yazidis," June 15, 2016.; U.S. Department of State, "2023 Country Reports on Human Rights Practices: Iraq," April 22, 2024; supplemented by statements from the Office of International Religious Freedom and the Bureau of Near Eastern Affairs (e.g., March 2024 commemorations of the Yazidi genocide).

victims. Therefore, attribution of group responsibility to Hamas may lead the way in redefining how armed groups are treated under international law as well as promote broader recognition and justice for victims.

4. EVOLUTION OF GENOCIDE JURISPRUDENCE: KEY ICJ PRECEDENTS

The International Court of Justice's evolving jurisprudence on genocide provides essential interpretive guidance for analyzing Hamas' actions. Three aspects are particularly relevant: First, the Court's decisions in *Bosnia and Herzegovina v Serbia* and *Croatia v Serbia* establish the framework for proving genocidal intent through patterns of conduct and circumstantial evidence. Second, the *Ukraine v Russia* case demonstrates how genocide accusations can be weaponized for political purposes, a dynamic relevant to understanding the broader context of the 7 October events. Third, the *Gambia v Myanmar* decision expands our understanding of state obligations to prevent and punish genocide, which has direct implications for states currently providing safe haven to Hamas leaders. This jurisprudential framework helps us evaluate both the substantive elements of Hamas' actions and the international community's legal obligations in response.

The ICJ's decision, issued on 27 February 2007, on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* was the first to adjudicate a case brought by one State against another for allegations of genocide. The Court held that the Genocide Convention imposes a duty on State Parties not to commit genocide and other related acts, such as conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit genocide, and

complicity in genocide.³⁵ The Court also held that the targeted group's legal definition was positive. Therefore, the ICJ examined whether genocide was committed against Bosnian Muslims, as opposed to "non-Serbs." The Court also concluded that genocide against "part" of the group must target a part substantial enough to impact the entire group.³⁶ In terms of proof, the ICJ held that "charges of exceptional gravity must be provided by evidence that is fully conclusive".³⁷ In this regard, the ICJ relied on the fact-finding procedures of the ICTY and other UN reports and resolutions. In keeping with the ICTY findings, the ICJ held that genocide only occurred in Srebrenica in July 1995.

As regards state responsibility, the Court found that the Applicant could not prove that orders to commit genocide were issued by the Former Republic of Yugoslavia (FRY) or that the army of the *Republika Srpska*, the entity that committed the genocide, was under FRY effective control.³⁸ However, the Court found that Serbia failed to prevent the genocide at Srebrenica by not taking all measures within its power to stop the massacre, despite being aware of the grave risk of genocide. Serbia influenced the Bosnian Serb forces responsible for the massacre and failed to act to prevent the killings, which constituted a breach of its obligation under the Genocide Convention to prevent genocide. Following the genocide, Serbia did not fully cooperate with the ICTY, specifically failing to arrest and extradite suspects or to provide evidence requested by the Tribunal.³⁹

³⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ GL No 91, 27 February 2007, paras 142-179.

³⁶ *ibid* para 198-201.

³⁷ *ibid* 209.

³⁸ *Ibid* paras 396-412.

³⁹ See Antoine Ollivier, 'The Judgment of the International Court of Justice in the "Genocide" Case Between Bosnia and Herzegovina v. Serbia and Montenegro' (2007) 46(2) *International Legal Materials* 185-310.

In 2015, the ICJ issued its judgment in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, which was broadly consistent with its findings in the Bosnia and Herzegovina case and the ICTY findings. The Court found that Croatia demonstrated the commitment of the *actus reus* of genocide (denial of medical care, food and water, deportation, killings) against Croats without proving the necessary intent to commit genocide. The Court reaffirmed the ICTY's finding that for a pattern of conduct to be accepted as evidence of genocidal intent, it would have to be 'the only reasonable [one] available on the evidence'.⁴⁰ As such, patterns of *actus reus* of genocide were committed not to destroy Croats but rather to induce them to leave or to punish the Croat population. Similarly, the Court rejected Serbia's counter-claims of Croatian genocide against Serbs, ruling once again that Serbia failed to prove the *dolus specialis* (special intent) required of genocide.⁴¹

On 27 February 2022, Ukraine introduced proceedings against Russia before the ICJ, asking the Court to issue provisional measures, inter alia, ordering Russia to end its military operations in Ukraine. Prior to and during its invasion, Russia accused Ukraine of committing genocide against Russian co-ethnics in the Donbas region of Ukraine.⁴² Ukraine requested the Court to rule that, contrary to Russian claims, no genocide had occurred in Ukraine and that the Genocide Convention did not authorize Russia to take military action to prevent such a genocide.⁴³ The uniqueness of the proceedings lies in it being a reverse genocide

⁴⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Merits, Judgment, ICJ Reports 2015, X ('Croatian Genocide'), para 148; reaffirming ICTY *Tolimir* Judgment, Trial Chamber, IT-05-88/2-T, 12 December 2007, 745.

⁴¹ Hemi Mistry, 'The International Court of Justice's Judgment in the Final Balkans Genocide Convention Case' (2016) 16(2) *Human Rights Law Review* 357-369.

⁴² Andreas Kulick, 'Provisional Measures after Ukraine v Russia (2022)' (2022) 13 (2) *Journal of International Dispute Settlement* 329.

⁴³ ICJ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Provisional Measures, Order of 16 March 2022, para 2(a)-(b).

accusation, in which Ukraine sought the ICJ's jurisdiction based on the Charter to counter Russian claims of Ukrainian genocide. The Court, having established its *prima facie* jurisdiction over the dispute, held that it had not been presented with evidence substantiating Russian allegations of genocide in Ukraine and that it was "doubtful" whether the Convention authorized the unilateral use of force on the territory of another state to prevent or punish alleged genocide.⁴⁴ The Court ordered an immediate halt to Russian military actions due to the urgency of the matter and the risk of irreparable harm to the civilian population in Ukraine before the Court's final decision.⁴⁵

In July 2022, the ICJ delivered its judgment on preliminary objections in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. This decision has important ramifications, expanding the notion of state standing before the ICJ in cases involving the Genocide Convention. In November 2019, the Republic of Gambia (The Gambia) filed proceedings against Myanmar alleging violations of the Genocide Convention with regards to the Rohingya minority. The ICJ rejected Myanmar's claim that The Gambia had brought the proceedings on behalf of the Organization of Islamic States, a non-state actor, without standing before the Court. According to the Court, The Gambia seized the Court in its name, and there was no legal reason to look beyond that.⁴⁶ The Court also rejected Myanmar's argument that there was no dispute between the Parties, thereby denying the ICJ's jurisdiction. According to the Court, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. Four statements made by Gambian representations before the

⁴⁴ *ibid* para 60.

⁴⁵ *ibid* paras 74, 75 and 77.

⁴⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary objections, paras 34-50.

United Nations General Assembly decrying Myanmar's actions and a *note verbale* sent to the Permanent Mission of Myanmar to the United Nations were sufficient to establish the existence of a dispute.⁴⁷ Most importantly, the Court rejected Myanmar's claim that The Gambia was not an "injured State" and had suffered no wrong by Myanmar's supposed violations of the Convention. By committing to the obligations within the Convention, all States parties to the Genocide Convention share a common interest in preventing, suppressing, and punishing genocide. This shared interest means that each party has obligations toward all other parties, known as *erga omnes partes* obligations, implying that each State party has a vested interest in ensuring compliance with these obligations in every instance. Therefore, every State party is entitled to invoke the responsibility of another party for alleged breaches by seizing the Court.⁴⁸

Canada, Denmark, France, Germany, the Netherlands, and the UK submitted a joint declaration of intervention in The Gambia v. Myanmar case, arguing for a broad interpretation of the Genocide Convention.⁴⁹ The declaration represents *opinion juris*, without accompanying evidence of state practice. Therefore, the declaration has important, although not binding, interpretative value. Among the significant points made in the declaration, the states argue that genocide is not limited to mass killing and that there is no hierarchy among the acts of genocide. Mass killing and other acts of genocide can be perpetrated in a coordinated manner to destroy a protected group.⁵⁰ As for specific intent, this can be established based on circumstantial evidence, namely widespread patterns of

⁴⁷ *ibid* paras 51-77.

⁴⁸ *ibid* paras 93-114.

⁴⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Intervention, Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, [2023], ICJ GL No 178.

⁵⁰ *ibid* 6.

conduct.⁵¹ The Court's finding of genocidal intent as 'the only reasonable inference' only refers to alternative explanations reasonably supported by the evidence.⁵² The number of victims killed is not determinative of genocidal intent. However, sexual and gender-based violence may play an important role since it has no military value besides harm to the group.⁵³ The positions expressed in this declaration have yet to crystalize into state practice, although they may point to future developments.

With this jurisprudential framework established, we can now examine the specific elements of genocide that must be proven and apply them to Hamas' actions on 7 October.

5. DEFINING GENOCIDE: LEGAL ELEMENTS AND EVIDENTIARY REQUIREMENTS

The crime of genocide is one of the most fundamental and severe in international law. Since at least the end of the Second World War, genocide has been considered 'the crime of crimes'. The Genocide Convention codified the crime of genocide for the first time. It was the first human rights treaty adopted in the United Nations General Assembly and represents the international community's determination to prevent the recurrence of the atrocities committed during the Second World War. One hundred and fifty states have ratified the Convention.

The crime of genocide consists of two parts: an act of genocide accompanied by genocidal intent. The Genocide Conventions defines genocide as the following (Article II):

⁵¹ *ibid* 11.

⁵² *ibid* 12.

⁵³ *ibid* 14-15.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Genocide is unique among war crimes and crimes against humanity as it requires a *dolus specialis* (a specific or a special intent), which requires that the crime be committed with the intent to destroy, in whole, or in part, a national, ethnic, racial,, or religious group as such.⁵⁴ This *dolus specialis* is met by demonstrating that genocide was 'the only reasonable inference which can be drawn from the said pattern of conduct'.⁵⁵ The specific intent to destroy the group is the distinguishing feature of the crime of genocide. According to the ICTY in the *Jelusic* case, 'it is in fact the *mens rea* which gives genocide its specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law'.⁵⁶ Similarly, the ICTR in the *Akayesu* case defined the *dolus specialis* as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.⁵⁷

⁵⁴ ICTR, *Prosecutor v Kambanda*, Judgment and Sentence, ICTR 97-23-S, 4 December 1998, para 16.

⁵⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Cr. Summary of the Judgment of 3 February 2015 [2015] ICGJ 470, 11.

⁵⁶ ICTY, *Prosecutor v Goran Jelusic*, Trial Judgement, IT-95-10, para 66.

⁵⁷ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, 1998, para 498.

The ICTR and ICTY jurisprudence agree that the perpetrator of genocide must act with the goal or purpose of destroying the group, as opposed to merely knowing that the campaign is aimed at group destruction.⁵⁸ Where the accused do not reveal their mental state, the desire to destroy may be inferred from facts on the ground. As the Court says in *Prosecutor v Akayesu*:

The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups, can enable the Chamber to infer intent of a particular act.⁵⁹

The destruction of the group refers to physical destruction, as opposed to the group's dissolution as a social concept. After considering recent developments in domestic law, the ICTY Trial Chamber in *Prosecutor v Krstic*, held that:

⁵⁸ ICTR, *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96.4-T, 2 September 1998, para 498; ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3-A, 26 May 2003, para 524; ICTY, *Prosecutor v Radislav Krstic*, Appeals, para 134.

⁵⁹ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96.4-T, 2 September 1998, para 523; see also *Sylvestre Gacumbitsi v Prosecutor*, Judgment, ICTR-2001-64-A, 7 July 2006, para 40.

it recognizes that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.⁶⁰

The *Krstic* Appeal Chambers judgment clarifies the meaning of 'part of the group' as referring to a substantial part of that group. The determination of 'substantiality' begins but is not limited to the size of the targeted group. It must also consider the targeted group's overall size and the part's prominence within the group – whether the specific part is emblematic of the overall group or essential to its survival.⁶¹ However, the Court noted that:

The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.⁶²

The ICTY in the *Tadic* Appeals Chamber Judgment developed the joint criminal venture (JCE) doctrine to deal with the individual criminal responsibility of perpetrators of a common

⁶⁰ *Prosecutor v Radislav Krstic*, Judgment, IT-98-33-T, 2 August 2001, para 580.

⁶¹ *Prosecutor v Radislav Krstic*, Appeals Judgment, IT-98-33-A, 19 August 2004, paras 6-23.

⁶² *ibid* para 13.

plan. The Appeals Chamber defined the *actus reus* as follows: (a) a plurality of persons; (b) a common plan or purpose to commit a crime; and (c) the participation of the accused in the common design involving the perpetration of a crime. As to the *mens rea*, the Court distinguished between three categories of JCE. According to the first category, all co-perpetrators share a common intent to perpetrate a certain crime (JCE I). The second category requires a personal knowledge of the system of ill-treatment, as well as the intent to further this system (JCE II). The third category consists of the intent to participate in and advance the criminal purpose, along with the foreseeability that a crime might be perpetrated by one or other group members and that the accused willingly took that risk ((JCE III)).⁶³

In the *Tadic* case, the Appeals Chamber applied JCE to hold a perpetrator at the bottom of the command hierarchy responsible for the killing of five men. Dusko Tadic took part in the violent attack on a non-Serbian village, although his direct role in the killing of the men was unclear. According to the Appeals Chamber, Tadic had the intention of advancing the criminal purpose of ethnically cleansing the region of its non-Serbian population by committing inhumane acts against them. Tadic willingly took the risk that co-perpetrators might foreseeably kill non-Serbs in pursuit of this common plan.⁶⁴ The ICTY has applied JCE to other low-ranking perpetrators,⁶⁵ commanders or wardens of prison camps,⁶⁶ mid-level perpetrators⁶⁷ and the highest echelon of power.⁶⁸

⁶³ ICTY, *Prosecutor v. Dusko Tadic*, Appeals Judgment, IT-94-1-A, paras 227,228.

⁶⁴ ICTY, *Prosecutor v. Dusko Tadic*, Appeal Judgment, IT-94-1-A, para 232 ff.

⁶⁵ ICTY, *Prosecutor v. Mitar Vasiljevic*, Trial Judgment, IT-98-32-T, 29 November 2002.

⁶⁶ ICTY, *Prosecutor v. Miroslav Kvocka et al.*, Appeals Judgment, IT-98-30/1-A, 28 February 2005; ICTY *Prosecutor v. Milorad Krnojelac*, Appeals Judgment, IT-97-25-A, 17 September 2003.

⁶⁷ ICTY, *Prosecutor v. Milomir Stakic*, Trial Judgment, IT-97-24-T, 31 July 2003; ICTY, *Prosecutor v. Blagoje Simic et al*, Trial Judgment, IT-95-9-T, 17 October 2003.

⁶⁸ ICTY, *Prosecutor v. Radoslav Brđanin*, Decision on Motion for Acquittal Under Rule 98bis, IT-99-36-T, 28 November 2003; ICTY, *Prosecutor v. Radoslav Brđanin*, Decision on Appeal Against Rule 98bis Decision, IT-99-

To refine the application of the JCE doctrine to Hamas' actions on 7 October 2023, it is critical to identify the specific *mens rea* category that aligns with the group's collective criminality. The most applicable framework is JCE I, where all co-perpetrators share a common intent to commit genocide against Israeli Jews. Hamas' leadership—including Yahya Sinwar, Mohammed Deif, and Ismail Haniyeh—demonstrated this intent through explicit statements, such as Deif's 7 October call to "kill them wherever you may find them," and through operational planning, evidenced by captured documents instructing fighters to murder women and children. The organization's foundational ideology, rooted in the 1988 Charter's call to "obliterate" Israel, and its decades-long indoctrination of fighters via militarized education ensured that lower-ranking perpetrators acted in concert with this shared purpose. The coordinated massacre of 1,200 Israelis across 22 towns and the Nova Festival, marked by systematic targeting of Jews, aligns the *actus reus* of killing and causing serious harm with a collective *mens rea* to destroy the group "as such," satisfying JCE I's requirements as established in *Prosecutor v. Tadić*.⁶⁹

Attributing genocidal intent from Hamas leaders to lower-ranking perpetrators is further justified by the group's centralized command and pervasive ideological conditioning, bridging any gap in individual comprehension of the broader goal. Operating as Gaza's de facto authority since 2007 with a "highly centralized" structure, Hamas disseminated its intent through detailed attack plans—like those for Kibbutz Sa'ad and Be'eri—executed by the Izz al-Din al-Qassam Brigades. Even if some fighters lacked a nuanced understanding of genocide, their enthusiastic participation, evidenced by audio recordings bragging of killing

36-A, 19 March 2004; ICTY, *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004.

⁶⁹ ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1-A, 15 July 1999, para. 227

Jews “with my own hands,” reflects alignment with the leadership’s directives. The ICTY in *Krstić* held that intent can be inferred from participation in a coordinated plan⁷⁰. At the same time, *Akayesu* emphasized the role of context⁷¹—here, Hamas’ systematic dehumanization of Jews as “sons of pigs and monkeys.” For peripheral actors, JCE III supplements this analysis: their willing execution of orders in a foreseeably genocidal campaign, marked by torture and rape, imputes liability even absent personal intent, ensuring the concurrence of *actus reus* and *mens rea* across the organization.

6. THE PHYSICAL ELEMENT: ANALYZING HAMAS' ACTIONS ON 7 OCTOBER

While the events of 7 October are well-known in Israel and much of the Western world, it remains necessary to describe them briefly. On 7 October 2023, thousands of armed Hamas terrorists tore down large parts of the Gaza security perimeter and invaded southern Israel. The invasion was accompanied by a barrage of thousands of rockets fired at Israel. Hamas' highly trained terrorist fighters breached over 30 points in the 40-mile-long security fence, using an array of technologies and tactics. Hamas terrorists also crossed the barrier into Israeli territory using paragliders.

The terrorists split up, conquering and taking control of over twenty Israeli towns. Terrorists also attacked the Nova Music Festival near the town of Re'im. Their goal was to murder as many Jews as possible. During that day, over 1,200 Israelis were tortured, mutilated, and massacred, including women, children, and the elderly, and over 200 were abducted back to

⁷⁰ ICTY, IT-98-33-A, 19 April 2004, para. 135

⁷¹ ICTR, ICTR-96-4-T, 2 September 1998, para. 523

Gaza.⁷² Comparatively, the 7 October attack was the most deadly in Israel's history and the third most lethal attack in modern history.⁷³

Hamas' murderous attack was also accompanied by sexual violence and rape. According to a report issued by the Association of Rape Crisis Centers in Israel, systematic sexual assaults took place at the site of the Nova Festival, kibbutzim and villages, IDF army bases, and against hostages held in captivity. Many of these assaults were carried out by multiple perpetrators and in front of family members. Women at the Festival who tried to escape were hunted down and then assaulted. The report also notes evidence of tying and binding, as well as the mutilation of the sexual organs of girls, women, and men.⁷⁴

A report by the UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict summarized its findings after a two-and-a-half-week mission to Israel:

Based on the information gathered by the mission team from multiple and independent sources, there are reasonable grounds to believe that conflict-related sexual violence occurred during the 7 October attacks in multiple locations across Gaza periphery, including rape and gang rape, in at least three locations. Across the various locations of the 7 October attacks, the mission team found that several fully naked or partially naked bodies from the waist down were recovered – mostly women – with hands tied and shot

⁷² For a description of the events, see ' Hamas-Israel Conflict 2023: Key Legal Aspects', *Israeli Ministry of Foreign Affairs*, www.gov.il/en/departments/general/hamas-israel-conflict-2023-key-legal-aspects, accessed 16 July 2024; 'What Happened in the October 7th Massacre?' *Israel Defense Forces*, www.idf.il/en/minisites/hamas-israel-war-24/all-articles/what-happened-in-the-october-7th-massacre/ accessed 16 July 2024.

⁷³ Daniel Byman and others, ' Hamas's October 7 Attack: Visualizing the Data', *Center for Strategic and International Studies (CSIS)*, www.csis.org/analysis/hamass-october-7-attack-visualizing-data accessed 16 July 2024.

⁷⁴ 'Silent Cry - Sexual Violence Crimes on October 7', *Association of Rape Crisis Centers in Israel*, www.1202.org.il/centers-union/publications/reports/712-silent_cry accessed 16 July 2024.

multiple times, often in the head. Although circumstantial, such a pattern of undressing and restraining of victims may be indicative of some forms of sexual violence.⁷⁵

The above-mentioned acts clearly fall under Article II (a) and (b) of the Genocide Convention: killing members of the group (Israeli Jews) and causing serious bodily and mental harm to members of the group.

7. ESTABLISHING SPECIFIC INTENT: HAMAS' IDEOLOGY, PLANNING, AND ACTIONS

While the scale and brutality of the 7 October attacks establish the physical element of genocide through killings and serious bodily harm to Israeli Jews, the more complex question is whether these acts were committed with the specific intent to destroy this group 'as such.' As the ICJ and international tribunals have consistently held, genocidal intent can be inferred from both direct evidence and patterns of conduct. In Hamas' case, the systematic nature of the attacks - their careful planning, coordinated execution across multiple locations, and deliberate targeting of civilians - provides the first indication of such intent. However, to fully establish the *dolus specialis* required by the Genocide Convention, we must examine these actions within the broader context of Hamas' ideology, preparations, and stated objectives. This analysis reveals that the 7 October attacks were not merely acts of terror or military strategy, but rather the culmination of a systematic policy aimed at the destruction of Israeli Jews as a distinct national, ethnic, and racial group.

⁷⁵ Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC), Mission report: Official visit of the Office of the SRSG-SVC to Israel and the occupied West Bank 29 January – 14 February 2024, (4 March 2024), UN Doc, para 12.

Hamas' 7 October killings were motivated by an intent to destroy Israeli Jews as a distinct ethnic, racial, and national group. The specific genocidal intent can be inferred from a careful examination of Hamas' antisemitic worldview enshrined in its foundational Charter, the systematic anti-Jewish policies that it has advanced over decades, statements of top officials both before and during 7 October, and the existence of a specific plan to destroy Israel and its Jewish population.

As Professor Schabas explains:

The specific intent necessary for a conviction of genocide is even more demanding than that required for murder. The crime must be committed with intent to destroy, in whole or in part, a protected group, as such. If the accused accompanied or preceded the act with some sort of genocidal declaration or speech, its content may assist in establishing the special intent. In practice, because of the large scale of genocide, its association with a State plan or policy, and the requirement of a racist climate in public opinion, as a minimum, there is actually no shortage of examples in the case law of perpetrators betraying their intent through public speeches or in meetings with others. Otherwise, the prosecution will rely on the context of the crime, its massive scale, and elements of its perpetration that suggest hatred of the group and a desire for its destruction.⁷⁶

⁷⁶ William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd ed. Cambridge: Cambridge University Press, 2009. Print) 265.

This article adopts the narrowest definition of intent, as opposed to more expansive knowledge-based definitions,⁷⁷ as finding that the acts committed satisfy this definition inherently satisfy the broader ones.

The death toll on 7 October was limited only by Hamas' capabilities to murder Israeli Jews, not by any redline or moral inhibition. While Hamas may not have been able to destroy all Israeli Jews realistically, their weakness should not work to their benefit. As international tribunals have already stated, the perpetration of genocide is always limited by the capacity and reach of the genocidaires themselves.⁷⁸

7.1 HAMAS' GENOCIDAL WORLDVIEW AND ITS SYSTEMATIC PROPAGATION

Hamas is both a Sunni Islamist and a Palestinian nationalist movement. Emerging out of the Palestinian Muslim Brotherhood into an independent organization in the 1980s, it is ideologically committed to the destruction of Israel and the establishment of an Islamic state in all of historical Palestine. Hamas emphasizes *jihad* and violent struggle as the sole means of achieving its goal.⁷⁹ The war against Israel is a religious and existential one:

In the view of Hamas, the Palestinian–Israeli conflict is not merely a territorial dispute between Palestinians and Israelis: it is first and foremost a “war of religion and faith” between Islam and Judaism and between Muslims and Jews. As such, it is portrayed as an unbridgeable dichotomy between two opposing absolutes—as a historical, religious, and cultural conflict between

⁷⁷ See for example Katherine Goldsmith, 'The issue of intent in the genocide convention and its effect on the prevention and punishment of the crime of genocide: toward a knowledge-based approach' (2010) 5(3) *Genocide Studies and Prevention* 238-257.

⁷⁸ ICTY, *Prosecutor v. Krstic*, Appeals Judgment, IT-98-33-A, para 13.

⁷⁹ 'Hamas Covenant 1988', *Yale Law School*, The Avalon Project, Article 13 https://avalon.law.yale.edu/21st_century/hamas.asp accessed 16 July 2024.

faith and unbelief, between the true religion that supersedes all previous religions, that is, Islam, and the abrogated superseded religion, Judaism. It is a war between good, personified by the Muslims representing the party of God (Hizballah), and “the party of Satan” (*hizb al-shaytan*) represented by the Jews. Consequently, the conflict is considered an ‘existential battle, rather than a dispute over borders’ (*ma‘rakat wujud wa-la hudud*).⁸⁰

While Sunni movements generally de-emphasize the millennialist end goal of *jihad*, Hamas has invested the war against the Jews with messianic and eschatological meaning. The destruction of the Jews is required for the establishment of the divine kingdom on earth.⁸¹ Its foundational Charter, adopted in August 1988, references an Islamic tradition according to which 'the time [the End Time] will not come until Muslims fight the Jews; until the Jews hide behind rocks and trees, which will cry: O Muslim! There is a Jew hiding behind me, come on and kill him...'⁸²

In 2007, Hamas took control of the Gaza Strip following a brief civil war with the Palestinian Authority and its ruling Fatah party. According to a 2014 survey carried out by the Anti-Defamation League, 93% of Palestinians in Gaza and the West Bank hold hard-core antisemitic views.⁸³

In November 2013, Hamas introduced a new curriculum to Gazan schools, deviating from the approved Palestinian Authority textbooks. The Hamas curriculum serves as a critical

⁸⁰ Meir Litvak, “‘Martyrdom is Life’: Jihad and martyrdom in the ideology of Hamas’ (2010) 33(8) *Studies in Conflict & Terrorism* 717-718; See also Shaul Bartal, ‘Ḥamās: The Islamic Resistance Movement’, *Handbook of Islamic Sects and Movements* (2021) 381.

⁸¹ Litvak (n 75) 727.

⁸² ‘Hamas Covenant 1988’, Article 7 (n 74).

⁸³ ‘Global 100: Index of Antisemitism - West Bank and Gaza’, *Anti-Defamation League*, 2014, global100.adl.org/country/west-bank-and-gaza/2014

means to impart the movement's antisemitic ideology to younger generations. As described by the New York Times:

What Gaza teenagers are reading in their 50-page hardcover texts this fall includes references to the Jewish Torah and Talmud as “fabricated,” and a description of Zionism as a racist movement whose goals include driving Arabs out of all of the area between the Nile in Africa and the Euphrates in Iraq, Syria and Turkey.

“Palestine,” in turn, is defined as a state for Muslims stretching from the Jordan River to the Mediterranean Sea. A list of Palestinian cities includes Haifa, Beersheba and Acre — all within Israel’s 1948 borders. And the books rebut Jewish historical claims to the territory by saying, “The Jews and the Zionist movement are not related to Israel, because the sons of Israel are a nation which had been annihilated.”⁸⁴

Since September 2012, Hamas has run a program for high school students in Gaza, providing them with theoretical and practical military training. In the course of its youth program, students learn to handle assault rifles, hand grenades, and other deadly arms. The program is directed by the Hamas-run Ministries of Education and the Interior, with the cooperation of the Hamas security services and the Izz al-Din al-Qassam military wing. Hamas has

⁸⁴ Fares Akram and Jodi Rudoren, 'To Shape Young Palestinians, Hamas Creates Its Own Textbooks' *The New York Times*, 4 Nov. 2013, www.nytimes.com/2013/11/04/world/middleeast/to-shape-young-palestinians-hamas-creates-its-own-textbooks.html.

explicitly stated that the goal of its youth military training is to prepare Gazans for 'the expulsion of the Zionist occupation from the land of Palestine'.⁸⁵

In March 2023, UN Watch and the Institute for Monitoring Peace and Cultural Tolerance in School Education (IMPACT-se) released a report detailing the incitement to hatred, antisemitism, and terrorism rampant in the United Nations Relief and Works Agency in the Near East (UNRWA) school system in Gaza. Examples given in the report are conspiracy theories about Jewish world domination; praising Hitler; glorifying terrorists such as Diaa Hamarsheh, who murdered five people in a March 2022 attack in the Israeli city of Bnei Brak; praising Lion's Den terrorists who carried out recent terrorist attacks in the West Bank; and glorifying other terrorists affiliated with Hamas, Palestinian Islamic Jihad, and the Al-Aqsa Martyrs Brigades.⁸⁶ It must be stressed that Hamas is the de facto ruling authority in Gaza and its fighters in Gaza have gone through either the UNRWA or Hamas education system.

Hamas' senior officials and official broadcasts share the organization's genocidal worldview. Its leaders dehumanize Jews as enemies of God and Islam, frequently referring to them as 'sons of pigs and monkeys', an epithet originating in Islamic tradition. The war against them is portrayed as religious and existential in character. Jews are depicted as corrupt, conniving, and hostile to Muslims by nature. Hamas officials make explicit calls to kill Jews and describe this as a religious duty. These statements have been made over decades and in varying contexts. They cannot then be dismissed as mere bellicose rhetoric. Rather, they

⁸⁵ 'Hamas Has Introduced a Program in Gaza Strip Schools Called Al-Futuwwa, Which Provides Military Training for Tens of Thousands of Adolescent Boys', *The Meir Amit Intelligence and Terrorism Information Center*, 7 March 2017, www.terrorism-info.org.il/en/20511/.

⁸⁶ 'UNRWA Education: Reform or Regression', *IMPACT-Se*, 1 www.impact-se.org/wp-content/uploads/UNRWA_Report_2023_IMPACT-se_And_UN-Watch.pdf accessed 16 July 2024.

reflect Hamas' systematic incitement to the murder of Jews and the destruction of the State of Israel.

Below is a brief list of examples. MEMRI, Palestinian Media Watch, and the Meir Amit Intelligence and Terrorism Information Center provided all examples and translations.

- Islamic scholar Hussein Qasem spoke on al-Aqsa TV, Hamas' official television state, on June 23, 2023, in which he repeated traditional Islamist canards of Jews as religious enemies of Islam and monotheism. He said: 'The Jews are not the enemies of the Palestinians alone – they are the enemies of humanity as a whole and the enemies of every monotheist in the world... Why shouldn't we be furious? Why shouldn't we burn the ground under the Jews' feet?'⁸⁷
- Hamas official Sheikh Hamad al-Regeb, in a Friday sermon in Gaza on 7 April 2023, called for Allah to destroy the Jews. This destruction was not limited to divine action but called for divine aid in Hamas' murderous actions. Al-Regeb used the traditional Islamist description of Jews as pigs and moneys. He said: '[Allah] transformed them [the Jews] into filthy, ugly animals like apes and pigs because of the injustice and evil they had brought about... "Oh Allah, bring annihilation upon the Jews. Oh Allah, bring annihilation upon the Jews. Paralyze them, destroy their entity, tear them apart, and bring upon them a terrible punishment. Oh Allah, enable us to get to the necks of the Jews. Oh Allah, enable us to get to the necks of the Jews. Oh Allah, enable us to get to the necks of the Jews'.'⁸⁸

⁸⁷ 'Palestine Islamic Scholars Association Member Hussein Qasem: Jews Are Enemies of Humanity; We Are Thirsty for Their Blood', *MEMRI: Middle East Media Research Institute*, 27 June 2023, www.memri.org/tv/palestine-islamic-scholars-association-member-qasem-hamas-jews-enemies-humanity-thirsty-blood.

⁸⁸ 'Hamas Official Sheikh Hamad Al-Regeb Refers to Jews as 'brothers of Apes and Pigs' during a Rafah Friday Sermon, Prays for Annihilation of Polytheists and Atheists, Adds: 'Oh Allah, Enable Us to Get to the Necks of

- Islamic scholar Wael al-Zard "mused" on what Hamas would do to the Jews following their destruction of Israel. He spoke on al-Aqsa TV on March 8, 2023: 'What are we going to do with them [the Jews]? Will we throw them into the sea and make them into food for the fish?'⁸⁹
- Hamas TV Commentator Jamil Ziyada repeated the idea of Jews as irreconcilable enemies of Islam. The conflict is framed in religious terms, as the Jews killed the prophets as described in Islamic scriptures. On June 23, 2022, he said: 'We cannot possibly coexist and have neighborly relations with [the Jews, who are] slayers of prophets and messengers, and the slayers of the Palestinian people'.⁹⁰
- Rajaa al-Halabi, head of Hamas Women's Movement, similarly promoted the idea of Jews as irresolute enemies of Islam at a Gaza rally, on 9 July 2020. The Palestinians have the good fate of being the divine tool of the Jews' destruction: 'Indeed, these are the Israelites. These are the Jews. They are the ones who slayed the prophets, the ones who acted treacherously and violated [sanctities]...Indeed, my dear sisters, our conflict with the Zionist enemy is a matter of faith, not of borders. Needless to say, we will not make do with what we have here. We will not make do with partitioning the land and taking only a part of it. This land will be ours in its entirety, Allah willing because our conflict with the Zionist enemy is an existential conflict, not a conflict about borders. This enemy, who came from all corners of the world, has no

the Jews"', *MEMRI: Middle East Media Research Institute*, 10 Apr. 2023 www.memri.org/tv/rafah-gaza-friday-sermon-hamas-official-regeb-allah-necks-jews-annihilate-them .

⁸⁹ 'Gaza Islamic Scholar Wael Al-Zard on Hamas TV: "We Have Teams Planning What to Do with Israel's Nuclear Missiles Once We Liberate Palestine and Whether to Throw the Jews into the Sea"', *MEMRI: Middle East Media Research Institute*, 13 Mar. 2023 www.memri.org/tv/gaza-islamic-scholar-zard-making-plans-what-to-do-with-nukes-throw-jews-into-sea.

⁹⁰ 'Hamas TV Commentator Jamil Ziyada: "We Cannot Coexist with the Jews; Life Is All about Fighting, Not Negotiations"', *MEMRI: Middle East Media Research Institute*, 30 June 2022, www.memri.org/tv/gaza-resident-cannot-coexist-with-the-jews-must-fight-them .

place here, but this is what Allah wanted for them... This is our fate, my beloved sisters – to be Allah's hand on Earth, the hand that will finish off the Israelites, this Zionist enemy, Allah willing. Allah brought them here in droves, so that Palestine becomes their graveyard, Allah willing'.⁹¹

- Hamas member of the Palestinian Parliament Ismail al-Ashqar gave a statement in the Palestinian parliament on 23 August 2020, in which he called 'death to Israel' and 'burn the attacking sons of Zion'.⁹²
- Hamas Member of Parliament Yunis al-Astal in a 4 July 2020 sermon framed the conflict as a religious one, according to which Hamas and Muslims must destroy Israel: 'There is no doubt that by occupying this land, the Jews have filled this land with corruption, because Allah described them by saying: 'Whenever they kindle fire for war, Allah extinguishes it. They strive to spread corruption in the land.' Allah said that they are 'the worst of living creatures in the sight of Allah,' and that they are 'the strongest in enmity towards the believers.' There is no time to mention the many other evil attributes that Allah used to describe this kind of creature. Therefore, we must invest every effort in finishing off this phenomenon [i.e. Israel], which is considered a stain on humanity and its history'.⁹³
- Islamic Scholar Sheikh Nasser Maarouf promoted classical antisemitic theories, according to which Jews are responsible for the misfortunes of the world. He quotes

⁹¹ 'Rajaa Al-Halabi, Head of Hamas Women's Movement: "We Are Destined to Do Allah's Will, Finish off the Treacherous Jews; Palestine Will Be Their Graveyard"', MEMRI: Middle East Media Research Institute, 20 July 2020 www.memri.org/tv/raja-halabi-head-hamas-womens-movement-finish-off-jews-palestine-graveyard .

⁹² Jacques Zilberdik, 'One Day of Hamas TV Hate and Terror Messages: PMW Analysis' *Palestinian Media Watch*, 7 Sept. 2020 <https://palwatch.org/page/18206> .

⁹³ 'Hamas MP Yunis Al-Astal: "The Jews Are Evil, Spread Corruption; Israel Must Be Finished Off."' *MEMRI: Middle East Media Research Institute*, 12 July 2020 www.memri.org/tv/hamas-mp-yunis-astal-jews-vile-creatures-spread-corruption-must-finish-off-israel .

Quranic texts, portraying the battle against the Jews as eternal and divinely commanded. In an interview on Hamas TV on 3 July 2020, he said: 'Millions of people were killed, all because of these Jews, who ran wild, tyrannized the world and spread corruption in it. Their corruption affects all walks of life. Look at the poverty all over the world. Look at the blood that is being spilled all over the world. Look at the honor of women being violated all over the world. If you check, you find that it is the Jews who are behind all that. They are the ones feeding all corruption on earth, and they are the ones financing it. These are glad tidings for us, Allah willing. [The Quran says:] "Those who disbelieve spend their wealth to avert [people] from the way of Allah. So they will spend it, then it will be for them a [source] of regret, and then they will be vanquished. And those who have disbelieved - unto Hell they will be gathered"''.⁹⁴

- Hamas uses its media channels to incite genocide and murder of Jews. Song lyrics glorify terrorists and call upon Palestinians to emulate them. One such example is the song, 'Expel the Thieving Occupier', broadcast on the official Hamas TV channel, on 25 March 2019, 4 May 2019, and 12 November 2019. Its lyrics are:

Expel the thieving occupier from the enraged land of Jerusalem,
Rid your house of that one, that Zionist in his humiliation,
Write 'death, death, death to Israel' with flowing blood,

⁹⁴ 'Palestinian Sheikh Nasser Maarouf: "The Jews Are behind All the Bloodshed, Corruption, Poverty in the World; They Will Ultimately Be Vanquished"', *MEMRI: Middle East Media Research Institute*, 13 July 2020, www.memri.org/tv/palestinian-sheikh-nasser-maarouf-jews-tyrannize-world-kill-millions-gathered-onto-hell.

And with the bleeding body cause death, death, death to Israel.

Khaibar, Khaibar⁹⁵, O Jews,

The soldiers of Muhammad have started to return.

Be red death.

Have no mercy on the army of aggression that wears the clothes of the soldier and the settler.⁹⁶

- Hamas Political Bureau member Fathi Hammad has made it clear in many statements that Hamas' terrorism is not directed solely at the establishment of a Palestinian state in Gaza, Judea, and Samaria but at the destruction of Israel and the annihilation of Jews worldwide. In July 2019, he said: 'There are seven million Palestinians abroad, enough of your warming up. You have Jews everywhere. **We must attack every Jew on the planet – slaughter and kill, Allah willing.** Enough of the warming up, enough... we have exploded... You will be killed, by Allah, you will be killed by our [explosive] belts, Allah willing... Everyone who wants, stand in line – belt, belt, belt – off you go. Say "in Allah's name" and put your trust in Allah. However, to die when we are in this situation is impossible... let the Zionist enemy hear, this is a message... I will die as I blow up and cut – what? The necks of the Jews and their legs. We will tear them to shreds, Allah willing'.⁹⁷

On 15 May 2019, he said: 'We have come to tell the Zionist enemy - including its people, its army, its government, and the Israeli Parliament - leave us, *for the day of*

⁹⁵ 'Khaibar' refers to a 7th century battle in which the Prophet Muhammad slaughtered an Arabian Jewish tribe. It is a common chant by modern Islamist groups.

⁹⁶ 'Death to Israel' - Song on Hamas TV: PMW Translations', *Palestinian Media Watch*, 12 Nov. 2019, <https://palwatch.org/page/15465>.

⁹⁷ 'Top Hamas Official Calls to "Slaughter" - "Every Jew on the Planet": PMW Translations', *Palestinian Media Watch*, 12 July 2019, <https://palwatch.org/page/16693> (emphasis added).

your slaughter, extermination, and annihilation is near. Each one of you should search for a place for yourself in Europe, or in any kind of stronghold, or in hell, or in the sea, or in the ocean, or in the Bermuda Triangle. You have no place in Palestine. You have no place on the land of Jerusalem. You have no place in the Al-Aqsa Mosque plazas, or in Jaffa, or in Haifa, or in Acre, or anywhere... leave us, for the day of your annihilation is near'.⁹⁸

- Islamic Scholar Dr. Muhammad Suleiman al-Farra provided a religious ruling that the Quranic imperative of jihad applies to the Jews. He said in an interview on 3 February 2019: 'Kill the polytheists wherever you may find them.' Today, you can rest assured that, according to the religious ruling, Palestine in its entirety constitutes a battlefield between us and the Jews. Therefore, we must strive to fight them using any means that might enable us to get to them anywhere in our pure land, using any means that might enable us to get to them anywhere in our pure land, in the hope of driving them out, Allah willing... It is our duty today to fight this criminal enemy. First of all, we should try to kill them – "Kill the polytheists wherever you may find them..." [The verse continues:] "...and seize them." There is a second option of capturing them so we can swap them for our prisoners'.⁹⁹
- Hamas senior official Ismail Radwan held a speech on 5 November 2018, in which he said: 'The land will spew them [those who do not support Hamas] out, Allah will be fed up with them, and they will be burned in the fire (hellfire) along with the apes

⁹⁸ 'Fatah Seeks Reconciliation with Hamas; Hamas Promises "Extermination" of Israel' *Palestinian Media Watch*, PMW Analysis, 23 May 2019, <https://palwatch.org/page/15660> accessed 16 July 2024.

⁹⁹ 'Gazan Scholar Dr. Muhammad Suleiman al-Farra: "It Is Our Religious Duty to Fight the Jews and 'Kill Them Wherever You May Find Them'"', *MEMRI: Middle East Media Research Institute*, 13 Feb. 2019, www.memri.org/tv/gazan-scholar-suleiman-farra-religious-duty-fight-jews-capture-prisoner-swaps.

and pigs'. 'Apes and pigs' is a term for Jews in Islamist discourse, originating in Islamic exegetical tradition.¹⁰⁰

- Yahya Sinwar, the mastermind of the 7 October massacre, forewarned in a speech on 6 April 2018 by the Gaza fence: 'We will take down the border [with Israel] and we will tear out their hearts from their bodies'.¹⁰¹

This pervasive genocidal worldview, cultivated over decades, directly informed Hamas' actions on 7 October 2023, transforming ideological rhetoric into concrete violence. The systematic propagation of antisemitic hatred—through education, media, and leadership pronouncements—ensured that the attack was not an isolated outburst but the culmination of a deliberate policy to destroy Israeli Jews as a group. By embedding this intent within its organizational ethos and operational directives, Hamas bridged the gap between its doctrinal foundations and the mass killings, torture, and sexual violence inflicted on that day. This continuity underscores that the 7 October atrocities were neither spontaneous nor merely tactical but rather the execution of a long-standing genocidal ambition, distinguishing Hamas' actions from conventional terrorism and aligning them with the legal threshold for genocide under international law.

7.2 PATTERNS OF CONDUCT DEMONSTRATE DEHUMANIZATION OF JEWS

¹⁰⁰ 'A Senior Hamas Figure Delivers a Speech Replete with Anti-Semitic Motifs – yet Another Expression of Hamas's Long-Standing Tradition of Anti-Semitism', *The Meir Amit Intelligence and Terrorism Information Center*, 27 Dec. 2018 www.terrorism-info.org.il/en/senior-hamas-figure-delivers-speech-replete-anti-semitic-motifs-yet-another-expression-hamass-long-standing-tradition-anti-semitism/.

¹⁰¹ 'Hamas Leader Yahya Sinwar – "We Will Tear out Their Hearts" - April 6, 2018', *'Legal Insurrection'*, YouTube, 8 April 2018, www.youtube.com/watch?v=klFbf6VG7uA.

According to ICTY case law, genocidal intent can also be inferred from 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.'¹⁰² In terms of their scale, indiscriminate nature, sheer brutality, depravity, and nexus with other war crimes and crimes against humanity, the events of 7 October speak for themselves of Hamas' intent to murder Jews. Hamas murdered 1,200 Israelis and committed acts of torture, mutilation, and sexual violence in 30 communities and locations. At least 37 minors were killed, six of whom were under 5, as well as at least 25 elderly people.¹⁰³ The nature of the attacks demonstrates Hamas' successful dehumanization of Jews in the eyes of its militants.

According to Dr. Chen Kugel, head of Israel's forensics center, scans revealed signs of torture and execution: people burned alive and bodies found with their hands bound before being executed.¹⁰⁴ At the Re'im music festival, at least 347 civilians were massacred, and others forcibly abducted to Gaza. At Kibbutz Be'eri, terrorists entered and slaughtered entire families in their homes; 80% of the recovered bodies showed signs of torture. In the small town of Sderot, terrorists on motorcycles and trucks killed civilians on the street, on buses, and in cars.¹⁰⁵

Other war crimes and crimes against humanities systematically committed alongside acts of genocide include intentionally directing attacks against the civilian population, intentionally

¹⁰² ICTY, *Prosecutor v. Goran Jelusic*, Appeals Judgement, IT-95-10-A, 5 July 2001, para 47.

¹⁰³ 'October 7 - Hamas Tactics', *Israel Defense Forces*, www.docsend.com/ accessed 16 July 2024.

¹⁰⁴ Anat Peled and Rory Jones, 'Israel's 'Black Sabbath': Murder, Sexual Violence and Torture on Oct. 7', *The Wall Street Journal*, 31 December 2023 <https://www.wsj.com/world/middle-east/israel-hamas-oct-7-murder-sexual-violence-torture-45aab439> accessed 16 July 2024.

¹⁰⁵ See 'Mapping the Massacres', *The October 7th Geo-visualization Project* <https://oct7map.com/> accessed 16 July 2024; 'Special Announcement – the Hamas Atrocities Documentation Center (HADC)', *MEMRI: Middle East Media Research Institute*, 17 November 2023, www.memri.org/reports/special-announcement-%E2%80%93-hamas-atrocities-documentation-center-hadc.

directing attacks against vehicles involved in humanitarian assistance (ambulances), murder and willful killing, forcible transfer and deportation, unlawful confinement and imprisonment, torture, rape, ethnic persecution, enforced disappearance, inhumane acts and other willful acts causing great suffering, the taking of hostages, mutilation, outrages upon personal dignity and degrading treatment, and the use of civilian shields.

The International Criminal Tribunal for Rwanda, in the *Akayesu* judgement recognized that rape and sexual assault may constitute a form of genocide. During the Rwandan genocide, rape was used as a tool of destruction:

...solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or other public places, and often by more than one assailant. These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹⁰⁶

Rape was also an essential part of the genocide of the Yazidi minority in Iraq by ISIS terrorists in 2014-2015.¹⁰⁷

¹⁰⁶ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998, para 731.

¹⁰⁷ Zeyad Jaffal, 'Rape as Genocide Crime in International Criminal Law-The Case of Yazidi Women in Iraq' (2020) 15(2), *International Journal of Criminal Justice Sciences* 230-247; Paula Castellano San José, 'The rapes committed against the Yazidi women: a genocide? A study of the crime of rape as a form of genocide in International Criminal Law', (2019) 18 *Comillas Journal of International Relations*; Kimberly Lowe Frank, 'Rape as an Act of Genocide: History and Law', *Lesley University*, Violence Against Women conference, 11 September 2018.

Israeli police investigations, corroborated by independent inquiries from journalists such as the New York Times and the Wall Street Journal, demonstrate that Hamas used widespread and systematic sexual violence and rape on 7 October. Women's corpses were found naked with signs of genital abuse. An eyewitness at the Nova music festival saw one hundred men in military fatigues passing Israeli women around 'like an assembly point', stabbing them while raping them, slicing off breasts, and beheading victims.¹⁰⁸ The mass rape was not a spur-of-the-moment exploitation by Palestinian terrorists but rather a premeditated assault on Jewish women. Documents captured on Hamas terrorists instructed them how to say in Hebrew 'Take your pants off' and 'Open your legs'.¹⁰⁹

7.3 THE HAMAS CHARTER

Hamas has made its intention to commit genocide against the Jewish people extremely clear in a long series of official documents and public statements.

Hamas' foundational Charter, adopted in August 1988, is replete with virulent antisemitic conspiracy theories, even referencing the notorious Protocols of the Learned Elders of Zion.

The Charter is explicit in its murderous intention to kill Jews. Some excerpts:

- 'Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it'.

¹⁰⁸ Jeffrey Gettleman, Anat Schwartz and Adam Sella, 'Screams without Words: How Hamas Weaponized Sexual Violence on Oct. 7', *The New York Times*, 28 Dec. 2023
www.nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html

¹⁰⁹ 'Disturbing 🚩. On Nov 2, an Arabic-Hebrew transliteration glossary belonging to Hamas was discovered in Israel with sexual terminology, including 'take your pants off'. This evidence suggests that Hamas terrorists planned to systematically rape Israeli women. This Is a war crime.', *official X account of the State of Israel*, 12 November 2023, <https://x.com/Israel/status/1723759157960953981>.

- 'The time will not come until Muslims will fight the Jews; until the Jews hide behind rocks and trees, which will cry: O Muslim! There is a Jew hiding behind me, come on and kill him...'
- 'The Nazism of the Jews does not skip women and children, it scares everyone. They make war against people's livelihood, plunder their moneys and threaten their honor ... They took advantage of key elements in unfolding events, and accumulated a huge and influential material wealth which they put to the service of implementing their dream'
- '[Jews] control of the world media [and use their] wealth to stir revolutions ... They stood behind the French and the Communist Revolutions'.
- 'There was no war that broke out anywhere without their [Jews'] fingerprints on it.¹¹⁰

Hamas' original charter makes it clear that the war against Israel and the Jews is an existential battle. Palestine is sacred Muslim land, making any compromise or recognition of the Jewish State impossible. The only possible solution to the Palestinian problem is uncompromising *jihad* and struggle until Israel's annihilation. The Charter traffics in crude antisemitic tropes, including Jewish responsibility for the French and Communist Revolutions, The First and Second World Wars, the collapse of the Islamic Caliphate, and in the nefarious creation of secret societies such as the Freemason and Rotary Clubs.

Hamas issued a "kinder" and "friendlier" document in 2017, outlining its principles and goals. Although it removes most of the explicitly anti-Jewish language of the 1988

¹¹⁰ 'Hamas Covenant 1988' (n 74).

document, it remains eliminationist in its approach to Israel, denying any legitimacy to the Jewish state and justifying violent 'resistance' to bring about its destruction.

- Article 19: 'There shall be no recognition of the legitimacy of the Zionist entity. Whatever has befallen the land of Palestine in terms of occupation, settlement building, Judaisation changes to its features or falsification of facts is illegitimate. Rights never lapse'.
- Article 25: 'Resisting the occupation with all means and methods is a legitimate right guaranteed by divine laws and by international norms and laws. At the heart of these lies armed resistance, which is regarded as the strategic choice for protecting the principles and the rights of the Palestinian people'.¹¹¹

At the time of its adoption, some commentators argued that the new Charter might herald ideological or pragmatic changes in Hamas' behavior.¹¹² However, the new Charter re-affirms that Israel's existence has no validity. Israel's Jewish population must either leave Palestine or face destruction at the hands of the Islamic Resistance Movement.

Furthermore, Hamas' actions since 2017 have demonstrated conclusively that its commitment to antisemitic violence has not abated. The antisemitic rhetoric discussed in previous sections came after the new Charter. Hamas has carried out hundreds of violent terrorist attacks since then against Israeli civilians.¹¹³ The 7 October attacks themselves, with their systematic atrocities, are conclusive proof that Hamas has not moderated or seriously changed its stance on Jewish statehood.

¹¹¹ 'Hamas in 2017: The Document in Full', *Middle East Eye*, www.middleeasteye.net/news/hamas-2017-document-full accessed 16 July 2024.

¹¹² Colin P. Clarke, 'Hamas's Strategic Rebranding', *RAND Corporation*, 17 May 2017, www.rand.org/pubs/commentary/2017/05/hamas-strategic-rebranding.html.

¹¹³ See 'Reports' *Israel Security Agency (Shabak)*, www.shabak.gov.il/en/reports/.

7.4 THE EXISTENCE OF A GENOCIDAL PLAN

While the existence of a plan or a policy to commit genocide is not a legal element of the crime, the international case law has treated such plans as decisive evidence of genocidal intent.¹¹⁴ On 30 September 2021, Yahya Sinwar, the leader of Hamas in Gaza, sponsored a conference in Gaza to prepare for the supposedly upcoming 'liberation of Palestine'. Entitled 'The Promise of the Hereafter,' referencing the eschatological significance of Israel's destruction, Sinwar emphasized that in the wake of the May 2021 Hamas-Israel War, 'the battle for the liberation and the return to Palestine have become closer now than ever before.' Following Israel's destruction, Jews who have served in the army would be killed, while those who fled may be left alone or prosecuted for their crimes. Educated Jews and other experts would be prevented from leaving until they repaid their debts to the Palestinians.¹¹⁵ It should be pointed out that according to Hamas' religious authorities, such as Sheikh Yousef Qaradawi, Israel is defined as a military society where every civilian is a potential soldier. As such, killing 'soldiers' refers to all Jewish civilians.¹¹⁶ In fact, according to a report in Ha'aretz newspaper, so confident was the Hamas leadership of its victory on 7

¹¹⁴ See ICTY *Prosecutor v. Jelisić*, paras 48, 98; ICTRI T-95-10-T; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Appeals Judgement, ICTR-95-1-T, 21 May 1999, para 138; ICTY *Prosecutor v. Stakić* para 546; ICTY *Prosecutor v. Vujadin Popović et al*, Judgement, IT-05-88-T, 10 June 2010, paras 856, 858, 882.

¹¹⁵ 'Hamas-Sponsored 'Promise of the Hereafter' Conference for the Phase Following the Liberation of Palestine and Israel's 'Disappearance': We Must Differentiate between Jews Who Should and Should Not Be Killed, and Prevent a Jewish 'brain Drain' from Palestine', MEMRI: Middle East Media Research Institute, 4 Oct. 2021, www.memri.org/reports/hamas-sponsored-promise-hereafter-conference-phase-following-liberation-palestine-and.

¹¹⁶ 'Sheikh Yusuf Al-Qaradawi and His Impact on the Dissemination of Radical Islam', *The Meir Amit Intelligence and Terrorism Information Center*, 23 Oct. 2022, www.terrorism-info.org.il/en/sheikh-yusuf-al-qaradawi-and-his-impact-on-the-dissemination-of-radical-islam/.

For Qaradawi as Hamas' spiritual authority, see Shaul Bartal and Nesya Rubinstein-Shemer, *Hamas and Ideology: Sheikh Yūsuf al-Qaradāwī on the Jews, Zionism and Israel*, (Routledge, 2017).

October, which would result in Israel's destruction, that they divided the country into governing cantons.

As described by a former high-ranking Fatah official:

So strongly did they believe in the idea that Allah was with them and that they were going to bring Israel down, that they started dividing Israel into cantons, for the day after the conquest... One day, a well-known Hamas figure calls and tells me with pride and joy that they are preparing a full list of committee heads for the cantons that will be created in Palestine. He offers me the chairmanship of the Zarnuqa committee, where my family lived before 1948.¹¹⁷

More specifically, secret documents captured following the 7 October attack demonstrate that the massacre was meticulously and systematically planned out in advance and had the goal of killing as many Jews as possible. Documents recovered on bodies of terrorists, for example, demonstrate detailed maps of the Israeli kibbutz of Sa'ad, with instructions to murder women and children. NBC News quoted an Israeli army official saying that 'the level of specificity would cause anyone in the intelligence field's jaw to drop'.¹¹⁸ In Kibbutz Beeri, Hamas terrorists were found with a notebook containing handwritten Quranic verses and

¹¹⁷ Shlomi Eldar, 'Hamas Actually Believed It Would Conquer Israel, and Divided It into Cantons', *Ha'aretz*, 5 April 2024, www.haaretz.com/israel-news/2024-04-05/ty-article-magazine/.highlight/hamas-actually-believed-it-would-conquer-israel-and-divided-it-into-cantons/0000018e-ab4a-dc42-a3de-abfad6fe0000.

¹¹⁸ "Top Secret' Hamas Documents Show That Terrorists Intentionally Targeted Elementary Schools and a Youth Center', *NBC Universal News Group*, 13 October 2023, www.nbcnews.com/news/investigations/top-secret-hamas-documents-show-terrorists-intentionally-targeted-elem-rcna120310 ; Patrick Kingsley and Ronen Bergman, 'The Secrets Hamas Knew about Israel's Military', *The New York Times*, 13 October 2023, www.nytimes.com/2023/10/13/world/middleeast/hamas-israel-attack-gaza.html .

orders to 'Kill as many people and take as many hostages as possible'.¹¹⁹ Detailed maps were also found for Israeli communities such as Kfar Aza, Nahal Oz, and Alumim, demonstrating Hamas' extensive intelligence gathering.¹²⁰ The coordinated massacres took place in 22 Israeli towns and villages, although Hamas intended to move further to major Israeli cities.¹²¹

7.5 STATEMENTS BY HAMAS LEADERS AND MILITANTS ON 7 OCTOBER

Genocidal intent can also be inferred from statements demonstrating that the perpetrators selected the victims because of their membership in the group that they seek to destroy.¹²² Hamas' intent to perpetrate genocide against Israeli Jews is clearly expressed in statements issued by its leaders in the immediate aftermath of the 7 October attack. On 7 October, Hamas military commander Mohammed Deif issued a call:

"This is the day that you make this criminal enemy understand that its time is up. [The Quran says:] "Kill them wherever you may find them"... I say to our people in occupied [pre-1967 Israel] – in the Negev, the Galilee, the Triangle, Haifa, Jaffa, Acre, Lod, and Ramla: Torch the earth under the feet of the plundering occupiers – kill, burn, destroy, and shut down roads. Make the

¹¹⁹ 'Hamas Envisioned Deeper Attacks, Aiming to Provoke an Israeli War', *The Washington Post*, www.washingtonpost.com/national-security/2023/11/12/hamas-planning-terror-gaza-israel/ accessed 16 July 2024.

¹²⁰ 'In Coded Doc, Hamas Instructed Terrorists to Kill Civilians, Take Captives', *The Times of Israel*, www.timesofisrael.com/in-coded-doc-hamas-instructed-terrorists-to-kill-civilians-take-captives-report/ accessed 16 July 2024.

¹²¹ Ronen Bergman and Adam Goldman, 'Israel Knew Hamas's Attack Plan More than a Year Ago', *The New York Times*, 1 December 2023, www.nytimes.com/2023/11/30/world/middleeast/israel-hamas-attack-intelligence.html.

¹²² ICTY, *Prosecutor v. Goran Jelusic*, Trial Judgement, IT-95-10-T, 14 December 1999, para 73; ICTY, *Prosecutor v Karadžić (Radovan)*, Decision on appeal of Trial Chamber's decision on preliminary motion to dismiss count 11 of the indictment, IT-95-5/18-AR72.5, ICL 762, 2009, para 97- 99.

cowardly occupiers understand that the Al-Aqsa Deluge is bigger than they think.¹²³

Hamas political leader Ismail Haniyeh said on the day of the attack that the goal was the destruction of Israel and the murder and ethnic cleansing of its people.¹²⁴

This intent was not limited to the Hamas leadership alone. For example, audio recordings sent by terrorists that perpetrated the massacres themselves have them bragging: 'Look how many I killed with my own hands, your son killed Jews... ten with my own bare hands. Their blood is on my hands'.¹²⁵

8. WEAPONIZING GENOCIDE CLAIMS: SOUTH AFRICA'S ICJ CASE AS RHETORICAL SHIELD

8.1 GENOCIDE INVERSION – A DEFINING FEATURE OF THE HAMAS ATTACK

The recognition of Hamas' genocide cannot be fully understood without examining how accusations of genocide have themselves become weaponized in this conflict. A distinctive feature of Hamas' 7 October genocide is how its perpetrators and allies have simultaneously accused its victims of the same crime. This pattern of genocide inversion not only

¹²³ 'Hamas Military Commander Mohammed Deif Announces Launch of Operation Al-Aqsa Deluge, Calls on Palestinians in West Bank, Jerusalem, and Israel Proper to Attacks with Guns, Knives, Vehicles', *MEMRI: Middle East Media Research Institute*, 8 October 2023, www.memri.org/tv/hamas-military-commander-deif-operation-aqsa-deluge-calls-palestinian-carry-out-attacks.

¹²⁴ 'Al-Jazeera Airs Hamas Leader Ismail Haniyeh's Statement on Hamas's Invasion of Southern Israel: I Call on Palestinians in the West Bank, Israeli Arabs, and the Entire Nation Abroad to Join the Battle; to the Enemy I Say: Get out of Our Land!', *MEMRI: Middle East Media Research Institute*, 8 October 2023, www.memri.org/tv/hamas-leader-ismail-haniyeh-statement-jazeera-operation-aqsa-deluge-palestinians-west-bank-israel-abroad-join-battle.

¹²⁵ 'Listen: "your Son Killed 10 Jews", Hamas Terrorist Tells Gazan Parents' *The Jerusalem Post*, October 24, 2023 www.jpost.com/middle-east/article-769989 accessed 16 July 2024.

complicates efforts to establish legal accountability but also serves as a strategic tool to shield Hamas from the consequences of its actions.

Hamas' genocide of Israeli Jews is uniquely characterized by the immediate deployment of reverse accusations against its victims. Within weeks of the 7 October attacks, South Africa filed an application at the ICJ alleging Israeli genocide in Gaza. This was not merely coincidental timing. The close ties between South Africa's ruling party and Hamas, including meetings with Hamas leadership in December 2023, suggest a coordinated strategy to use genocide accusations as both shield and sword.¹²⁶ This pattern of genocide inversion serves three distinct purposes: (i) first, it deflects attention from Hamas' own genocidal actions; (ii) second, it appropriates the moral weight of genocide accusations to delegitimize Israel's military response; and (iii) third, it exploits and inverts Jewish historical trauma by comparing Israeli actions to the Nazi genocide.

While legally speaking, accusations of Israeli genocide are irrelevant to an analysis of Hamas' actions, they are indeed linked in the public consciousness. Hamas has succeeded in tying 'Israel' and 'genocide' together. While a full-scale rebuttal of South Africa's claims against Israel requires a separate article, it is necessary to examine the charges of genocide against Israel, as through their contrast, the case against Hamas becomes clearer. The reverse genocide accusation against Israel is a defining feature of the 7 October Hamas genocide and any analysis that ignored it would therefore be incomplete.

¹²⁶ Charles Asher Small, 'South Africa, Hamas, Iran, and Qatar: The Hijacking of the ANC and the International Court of Justice', *The Institute for the Study of Global Antisemitism and Policy (ISGAP)*, 2024, at 42. https://isgap.org/wp-content/uploads/2024/11/SA_Report_Final_121124-2.pdf

This section will briefly examine South Africa's claims in its application and then proceed to demonstrate how claims of Israeli genocide are used, intentionally or incidentally, as a rhetorical shield to blunt recognition of Hamas' genocide.

8.2 ANALYSIS OF SOUTH AFRICA'S APPLICATION

South Africa's claims, detailed at length in an 84-page application, have two principal sections: it reviews various Israeli military actions in Gaza, describing them as genocidal acts, then couples these acts with belligerent statements made by Israeli politicians throughout the war as proof of genocidal intention. As will be demonstrated, South Africa relies on ascribing genocidal motivation to military actions without the necessary evidence of such motivation. South Africa's legal team, in its oral presentation before the ICJ in January 2024, acknowledged Israel's lack of a genocidal plan, stating that 'genocides are never declared in advance'.¹²⁷ Such a statement is historically false, as the Final Solution, the Rwandan Genocide and the Yugoslav atrocities were all methodically and systematically planned out in advance.¹²⁸ The drafters of the Genocide Convention went to pains to distinguish between the systematic destruction of a protected group and large-scale casualties on the battlefield. As legal scholars Abtahi and Webb describe:

The infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of

¹²⁷ 'Israel Shows 'chilling' Intent to Commit Genocide in Gaza, South Africa Tells UN Court', *The Guardian*, 11 January 2024, www.theguardian.com/law/2024/jan/11/south-africa-accuses-israel-of-genocide-gaza-the-hague-international-court-of-justice.

¹²⁸ See Hans Mommsen, 'The Realization of the Unthinkable: the 'Final Solution of the Jewish Question' in the Third Reich', in Gerhard Hirschfeld (ed) *The Policies of Genocide (RLE Nazi Germany & Holocaust)* (Routledge, 2014) 97-144; Jean Mukimbiri, 'The seven stages of the Rwandan genocide' (2005) 3(4) *Journal of International Criminal Justice* 823-836.

communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide.¹²⁹

Paragraphs 45 to 49 of South Africa's application detail the 'killing of Palestinians in Gaza'. South Africa's central claim, based on the Hamas-run Health Ministry data, is that over 21,000 Palestinians had been reported killed and an additional 7,780 people missing (at that time).¹³⁰ Of course, assuming the reliability of Hamas' figures, this number does not distinguish between combatants and civilians. It assumes that civilians killed were intentionally targeted by Israel, as opposed to having been killed incidentally as part of a legitimate proportionality calculation according to the Laws of Armed Conflict (LOAC). Finally, even if a disproportionate number of civilians were killed in a strike on a lawful target, this would be a violation of Israel's obligations under the LOAC, not the Genocide Convention. It should be noted that there are at least six statistical analyses questioning the reliability of the Hamas-run Health Ministry's casualty figures.¹³¹

¹²⁹ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires (2 vols)* (Martinus Nijhoff Publishers, 2008) 208.

¹³⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, [2023], para 45.

¹³¹ See 'Gaza Fatality Data Has Become Completely Unreliable', *The Washington Institute*, www.washingtoninstitute.org/policy-analysis/gaza-fatality-data-has-become-completely-unreliable accessed 16 July 2024; Mark Zloch, 'The Numbers of Dead in Gaza Don't Add up – and There Is No Easy Explanation', *The Telegraph*, 28 March 2024, www.telegraph.co.uk/global-health/terror-and-security/unrwa-staff-death-toll-gaza-israel-hamas-war-data/; Tom Simpson, Lewi Stone and Gregory Rose, 'Statistically Impossible: A Critical Analysis of Hamas's Women and Children Casualty Figures' *Fathom Journal*, March 2024, <https://fathomjournal.org/statistically-impossible-a-critical-analysis-of-hamass-women-and-children-casualty-figures/>; 'How Hamas Manipulates Gaza Fatality Numbers: Examining the Male Undercount and Other Problems', *The Washington Institute*, www.washingtoninstitute.org/policy-analysis/how-hamas-manipulates-gaza-fatality-numbers-examining-male-undercount-and-other accessed 16 July 2024;

Similarly, paragraphs 51 to 54 detail bodily injuries incurred by Palestinians as a result of Israeli operations, while paragraphs 88 to 94 describe the destruction of homes and property in the Gaza Strip. South Africa's application does not consider urban warfare's unique challenges and destructiveness.¹³² Neither does the application take into account Hamas' well-documented practice of using human shields and hiding in densely populated civilian areas.¹³³ Based on South Africa's application, there is no way to know whether the harm to persons or property was intentional, incidental to a valid proportionality analysis, or disproportionate under the LOAC.

Israeli advance warnings, a humanitarian measure to distance civilians from the battlefield, are deliberately misconstrued as 'mass expulsion from homes and displacement of Palestinians in Gaza'. The duty to provide 'effective advance warning' is enshrined in Article 57(2)(c) of the Additional Protocol I of 1977 and is recognized in many military manuals. It is also the practice of the US, the UK, and other Coalition forces in Afghanistan and Iraq.¹³⁴

The supposed Israeli siege of Gaza is described in paragraphs 61 to 70 as proof of Israel's intention to starve Palestinian civilians. Siege, meaning the encircling and isolation of enemy forces to induce their surrender, is a lawful tactic of war, regulated most notably in Article 27 of the Hague Convention of 1907 and Articles 17 and 23 of the Fourth Geneva

'How the Gaza Ministry of Health Fakes Casualty Numbers', *Tablet Magazine*, 7 March 2024, www.tabletmag.com/sections/news/articles/how-gaza-health-ministry-fakes-casualty-numbers ; Andrew Fox, 'Questionable Counting: Analyzing the Death Toll from the Hamas-Run Ministry of Health in Gaza', *The Henry Jackson Society*, December 2024, www.henryjacksonsociety.org/wp-content/uploads/2024/12/HJS-Questionable-Counting-%E2%80%93-Hamas-Report-web.pdf.

¹³² See Margarita Konaev, 'The future of urban warfare in the age of megacities', *Institut français des relations internationales*, 2019.

¹³³ Michael N. Schmitt, 'Human shields in international humanitarian law' (2008) 38 *Israel Yearbook on Human Rights*, 17-59.

¹³⁴ See Pnina Sharvit Baruch and Noam Neuman, 'Warning Civilians Prior to Attack under International Law-Theory and Practice' (2011) 41 *Israel Yearbook on Human Rights*, 137-196.

Conventions, among others.¹³⁵ Despite a brief 'complete siege' from 9 October until 21 October 2023, Israel imposes no limitations other than security arrangements on the entry of food and supplies into Gaza.¹³⁶ Compared with other urban conflicts, such as those of Fallujah (2004), Mosul (2016-2017), and Marawi (2017), food insecurity is a significant feature of urban warfare.¹³⁷

In its Order from 26 January 2024, the ICJ relied on statistics from the United Nations and other international organizations detailing the largescale destruction in Gaza to conclude that some of the rights' violations claimed by South Africa were plausible.¹³⁸ However, the ICJ does not demonstrate that the destruction stems from intentional Israeli targeting, as opposed to valid (or even invalid) collateral damage. According to long-standing military doctrine, battlefield decisions can only be judged based on the information available to the military commander at the time of the action.¹³⁹ Without examining the information available to the Israeli army commanders at the moment of every attack, the resulting

¹³⁵ See *The US Department of Defense Law of War Manual* (Updated July 2023), s 5.19.1; Henckaerts and Doswald-Beck (n 17) 188; See Avraham Shalev, 'The Death of Siege? The Future of Siege Warfare in the Wake of Gaza', (2025) *San Diego Journal of International Law* (forthcoming).

¹³⁶ HCJ 2280/24 *Gisha v. Government of Israel*, 2 April 2023, Response of the Government of Israel, para 15 (in [Hebrew]).

¹³⁷ See Cedric Turlan and Kasra Mofarah, 'Military action in an urban area: the humanitarian consequences of Operation Phantom Fury in Fallujah, Iraq', *Humanitarian Practice Network*, November 2006, 19 <https://odihpn.org/wp-content/uploads/2006/11/humanitarianexchange035.pdf> ; 'Mosul Battle: Iraqi Forces Seize Key Bridge', *BBC News*, 27 Feb. 2017, www.bbc.com/news/world-middle-east-39103701 ; Dennis Jay Santos, 'Starvation Threatens Hundreds Trapped by Fighting in Philippine City', *The New Humanitarian*, 19 June 2017, www.thenewhumanitarian.org/news/2017/06/19/starvation-threatens-hundreds-trapped-fighting-philippine-city.

¹³⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order: Provisional Measures in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) [2024], paras 46-49 www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

¹³⁹ United States Military Tribunal, Nuremberg, *The Hostages Trial: Trial of Wilhelm List and Others*, Case No. 47, 1948, see the Rendulic Rule.

damage is meaningless to an analysis of genocide. Indeed, military necessity would be a reasonable inference of intent.

South Africa presents martial statements by Israeli leaders as proof of genocidal intent. However, a careful analysis shows that these statements were not made by those who decide military policy, contradict actual Israeli conduct on the ground, or are ambiguous or taken out of context. South Africa relies on statements by Prime Minister Benjamin Netanyahu that Israel would 'operate forcefully everywhere,' that Israel was 'striking [its] enemies with unprecedented might,' and that Israel was ready to 'defeat the bloodthirsty monsters who have risen against [Israel] to destroy us.'¹⁴⁰ Nowhere in these statements does Netanyahu indicate that Israel will not conduct its campaign according to international humanitarian law. A reasonable inference from this statement would be Israel's resolve to combat Hamas.

Another intentionally truncated statement is that of President Herzog, who said: 'It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware, not involved. It's absolutely not true...' The South African application cut off the next sentence in which he makes evident that there are Palestinians who oppose Hamas terror.¹⁴¹ Herzog did not call for the targeting of Palestinian civilians but acknowledged the widespread popular support that Hamas enjoys among the Palestinian public. Herzog also reaffirmed that Israel conducts its operations according to international law.¹⁴²

¹⁴⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order [2023] para 101

¹⁴¹ 'One-On-One With Israeli President Isaac Herzog; Israel Warns Of 'Next Stages' Of The War; Israel Expected To Conduct 'Significant Ground Operations' Soon In Gaza', *CNN*, transcripts.cnn.com/show/cnr/date/2023-10-15/segment/01 accessed 16 July 2024.

¹⁴² Isaac Herzog, 'The Case against Israel Rests on Lies', *The Wall Street Journal*, 11 February 2024 www.wsj.com/articles/the-case-against-israel-rests-on-lies-the-hague-south-africa-genocide-gaza-bc7c264c, accessed 16 July 2024.

In its Order from 26 January 2023, the ICJ relied on the above quote from President Herzog, as well as from Yoav Gallant, the Israeli Minister of Defense, and Israel Katz, then Minister of Energy and Infrastructure, to indicate the plausibility of violation of Convention rights.

Galant's full statement reads as follows:

You saw what we are fighting against. We are fighting against human animals. This is the ISIS of Gaza. This is what we are fighting against. Gaza won't return to what it was before. We will eliminate everything. It doesn't take one day, it will take a week, it will take weeks, or even months, we will reach all places. There is no way that our brothers, our children, our parents will be killed and we won't react because we are a state. So we understand that Hamas wanted to change the situation. It'll change back 180 degrees and they'll regret this moment. They will regret it.¹⁴³

While this statement may be ambiguous to whether it refers to Hamas or all Palestinians, the reference to 'the ISIS of Gaza' should be sufficient to clarify that it is aimed at Hamas. Once again, an inference of 'genocidal intent' would not be the only reasonable interpretation of this statement.

8.3 GENOCIDE ACCUSATIONS AS A RHETORICAL SHIELD

Accusations of genocide by Israel serve as a rhetorical device to blunt recognition of Hamas' genocide against Israeli Jews. South Africa and the network of NGOs responsible for the

¹⁴³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order: Provisional Measures in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) [2024] para 52.

charges against Israel have successfully linked Israel with genocide in the public sphere, making it more difficult to recognize claims of genocide by Hamas. As stated by Judge Bennouna in his Declaration in the Provisional Measures proceedings between Russia and Ukraine:

I am aware that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions. This is neither in the interest of the human groups under serious threat of destruction, nor in the interest of the credibility and efficiency of the 1948 Convention, which has enjoyed massive support from States and their consent to the jurisdiction of the International Court of Justice for the settlement of disputes relating to the Convention.¹⁴⁴

Legal scholar Kenneth Marcus demonstrates that the reversal of genocide charges against the victim is a prevalent practice and was used by Nazi, Serbian, and Hutu propagandists.¹⁴⁵ The Nazis, prior to and during their systematic murder of European Jewry, claimed that the Jews in fact planned to annihilate Germans. In *Mein Kampf*, Hitler wrote: '[I]f, with the help of his Marxist creed, the Jew is victorious over the other peoples of the world, his crown will be the funeral wreath of humanity and this planet will, as it did millions of years ago, move through the ether devoid of men'.¹⁴⁶ Josef Goebbels, in a 1941 pamphlet, claimed that Germany was acting in self-defense: 'Who should die, the Germans or the Jews? . . . You

¹⁴⁴ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order: Provisional Measures in the Case Concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), [2022] Declaration of Judge Bennouna, para 4, www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-02-en.pdf.

¹⁴⁵ Kenneth L. Marcus, 'Accusation in a Mirror' (2012) 43(2) *Loyola University Chicago Law Journal* 357 - 393, <https://ssrn.com/abstract=2020327>.

¹⁴⁶ Adolf Hitler, *Mein Kampf* (Ralph Manheim (tr), Houghton Mifflin 1971) 65.

know what your eternal enemy and opponent intends for you. There is only one instrument against his plans for annihilation'.¹⁴⁷

Rwandan politician Leon Mugesera, who was charged in Canada with incitement to murder Tutsis, publicly told Tutsis that Tutsis were conspiring to murder them: 'I am telling you, and I am not lying,... they only want to exterminate us. They only want to exterminate us: they have no other aim. We must tell them the truth'.¹⁴⁸ The ICTY observed that 'In articles, announcements, television programs and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat . . . that the Croats and Muslims were preparing a plan of genocide against them'.¹⁴⁹

Furthermore, the charge of genocide against Israel has been a decades-long staple of contemporary antisemitism.¹⁵⁰ As researcher Izabella Tabarovsky determines, already in the 1950s and 1960s, the Soviet Union promoted the canard of Israeli (Jewish) genocide against Palestinians.¹⁵¹ Genocide accusations serve to appropriate terms and symbols associated with the genocide of Jews at the hands of the Germans and their collaborators and impose them on contemporary Jews. Turkey's President Tayyip Erdogan has said that 'Netanyahu has reached a level that would make Hitler jealous with his genocidal methods'.¹⁵² Tunisian

¹⁴⁷ Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide', (2008) 48(3) *Virginia Journal of International Law* 485, 511.

¹⁴⁸ SCC (Supreme Court of Canada) 40, *Mugesera v. Canada, (Minister of Citizenship and Immigration)*, 2005, para 13.

¹⁴⁹ ICTY, *Prosecutor v Tadic*, Opinion and Judgment, IT-94-1-T, 91.

¹⁵⁰ Lesley Klaff, 'Holocaust inversion'(2019) 24(2) *Israel studies* 73-90; Robert Solomon Wistrich, 'Antisemitism and Holocaust Inversion' in Jeffrey Herf and Anthony McElligott (eds) *Antisemitism Before and Since the Holocaust: Altered Contexts and Recent Perspectives* (2017) 37-49; Dovid Katz, 'Primary Holocaust Inversion and Eastern European Antisemitism', *The ISGAP Papers: Antisemitism in Comparative Perspective* (2018) 207-18.

¹⁵¹ Izabella Tabarovsky, 'Demonization Blueprints: Soviet Conspiracist Antizionism in Contemporary Left-Wing Discourse' (2022) 5(1) *Journal of Contemporary Antisemitism* 1-20.

¹⁵² 'Erdogan Says Netanyahu's 'genocidal Methods Would Make Hitler Jealous', *Times of Israel*, www.timesofisrael.com/erdogan-says-netanyahus-genocidal-methods-would-make-hitler-jealous/ accessed 16 July 2024.

President Kais Saied rejected claims of antisemitism in Tunisia and accused Jews of repaying Tunisian help from the Nazis with genocide against Palestinians.¹⁵³ Brazilian President Luiz Inacio Lula da Silva said that 'what is happening in the Gaza Strip with the Palestinian people hasn't happened at any other moment in history' except one, 'When Hitler decided to kill the Jews'.¹⁵⁴

Finally, genocide charges appropriate symbols associated with Palestinian terror against Israelis and re-package them against Israel. For example, at the March 2024 Oscars awards ceremony, pro-Palestinian artists wore pins purportedly calling for a ceasefire in the form of red and bloody hands. While not necessarily intentional, for Israelis, raised and blood-soaked hands immediately recall the 2000 Ramallah lynching of Israeli reservists Vadim Norzhich and Yosef Avrahami. The two were detained by Palestinian police, beaten and then had their bodies mutilated by a Palestinian mob. One of the terrorists famously waved his bloody hands from the police station window, in what later became an iconic picture.¹⁵⁵

Understanding this strategy of genocide inversion is crucial for two reasons: it helps explain why Hamas' genocide has not been widely recognized as such, and it underscores the urgency of establishing clear legal accountability. These considerations directly inform our analysis of the international community's obligations under the Genocide Convention.

¹⁵³ Gabe Friedman and others, 'Days after Synagogue Attack, Tunisian President Criticizes Israel and Says His Country Saved Jews in WWII', *Jewish Telegraphic Agency*, 16 May 2023, www.jta.org/2023/05/16/global/days-after-synagogue-attack-tunisian-president-criticizes-israel-and-says-his-country-saved-jews-in-wwii.

¹⁵⁴ 'Israel Livid as Brazil's Lula Says Israel like "Hitler," Committing Genocide in Gaza', *The Times of Israel*, www.timesofisrael.com/israel-livid-as-brazils-lula-says-israel-like-hitler-committing-genocide-in-gaza/ accessed 16 July 2024.

¹⁵⁵ 'Red 'Ceasefire' Pin at Oscars Reminiscent of Ramallah Lynching of Jews', *Jewish News Syndicate*, www.jns.org/oscars-attendees-wear-red-ceasefire-pin-linked-to-lynching-of-jews/ accessed 16 July 2024.

9 INTERNATIONAL LEGAL OBLIGATIONS: PREVENTION, PUNISHMENT, AND STATE RESPONSIBILITY

Due to its customary legal status, the Genocide Convention imposes several significant legal duties on State parties and, it can be argued, on all States.

The Genocide Convention, at its minimum, is a 'suppression convention', meaning that it obligates State parties to criminalize and prosecute cases of genocide.¹⁵⁶ Article V contains the basic suppression obligation, according to which:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

As the state on whose territory genocide was committed, the primary responsibility for prosecuting Hamas war criminals lies on Israel.¹⁵⁷ Since the beginning of Israel's defensive war against Hamas, it has arrested and detained thousands of Hamas militants, including those who actively participated in the 7 October killings. In 1950, Israel's parliament, the Knesset, passed the Law on the Prevention and Punishment of the Crime of Genocide (the Genocide Law). The Genocide Law is closely modeled on the Genocide Convention. Therefore, Israel must prosecute Hamas war criminals according to the Genocide Law.

¹⁵⁶ Roger S. Clark, 'State Obligations under the Genocide Convention in Light of the ICJ's Decision in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (2008) 61 *Rutgers L. Rev* 77-78.

¹⁵⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Entry into force: 12 January 1951, Article VI.

While the Genocide Convention does not require the prosecution of genocide under universal jurisdiction, neither does it bar it.¹⁵⁸ The trial of Hamas war criminals by states whose nationals were murdered on 7 October or by states that host Hamas perpetrators would be a welcome development towards the advancement of universal justice and human rights.

Qatar, a non-state party to the Genocide Convention, hosts several top Hamas officials: Khalil al-Hayya, head of Hamas' communications department, and Khaled Mashal, former politburo head and chief of Hamas' diaspora office.¹⁵⁹ On 20 May 2024, the Prosecutor of the International Criminal Court applied for an arrest warrant against Ismail Haniyeh.¹⁶⁰ Israel has since killed Haniyeh and the ICC has not issued an arrest warrant against him.¹⁶¹

Iran, also a non-state party to the Convention, is another major patron of Hamas. Reports in the Wall Street Journal indicate that in the weeks before the 7 October attacks, close to five hundred Hamas and Palestinian Islamic Jihad militants underwent specialized combat training in Iran. These sessions were led by the Quds Force, an IRGC division responsible for training paramilitary groups. They included senior Palestinian officials and Brigadier General Esmail Qaani, head of the Quds Force. The tactics and technology used by Hamas, such as aerial drones and motorcycle attacks, show clear Iranian influence.¹⁶² Another report

¹⁵⁸ See Adanan, Amina. "Reflecting on the genocide convention in its eighth decade: how universal jurisdiction developed over Genocide." *Journal of International Criminal Justice* 19.5 (2021): 1039-1065.

¹⁵⁹ Daniel Ackerman, '10 Things to Know about Hamas and Qatar' *FDD*, 19 Dec. 2023, www.fdd.org/analysis/2023/12/19/10-things-to-know-about-hamas-and-qatar/.

¹⁶⁰ Karim A.A. Khan, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine (2024) www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state accessed 16 July 2024.

¹⁶¹ Ronen Bergman and others, 'Bomb Smuggled Into Tehran Guesthouse Months Ago Killed Hamas Leader' *The New York Times*, 1 August 2024, www.nytimes.com/2024/08/01/world/middleeast/how-hamas-leader-haniyeh-killed-iran-bomb.html.

¹⁶² Summer Said, Benoit Faucon and Stephen Kalin, 'Iran Helped Plot Attack on Israel over Several Weeks', *The Wall Street Journal*, 8 October 2023 www.wsj.com/world/middle-east/iran-israel-hamas-strike-planning-bbe07b25 accessed 16 July 2024.

reveals that the attack was carefully coordinated over months by the IRGC, Hamas, and Hezbollah, with Iranian officials giving the final approval during a meeting in Beirut the Monday before the attack.¹⁶³

Given the Genocide Convention's status as customary law, it can be argued that Qatar and Iran are required to prosecute Hamas leaders or to extradite them to states willing to prosecute them.¹⁶⁴ In the *Bosnian Genocide Case*, the ICJ found Serbia responsible for failing its international obligations by failing to bring perpetrators to its domestic courts and to cooperate with the ICTY.¹⁶⁵ Additionally, Qatar and Iran must refrain from providing Hamas leaders safe haven, or from funding and training Hamas fighters.

The ICJ, most notably in its *Gambia v. Myanmar* case, has held that all states have a compelling interest in preventing genocide. In *Nicaragua v. Germany*, Nicaragua demanded that the Court order Germany to suspend its military aid to Israel and renew funding to UNRWA in light of Israel's supposed violation of the Genocide Convention.¹⁶⁶ While the Court did not order any provisional measures, it ruled that it had jurisdiction over Nicaragua's request. Accordingly, every State party may seize the Court over a State party's failure of secondary obligations under the Convention. As such, states that provide safe haven to Hamas officials, allow fundraising or recruiting, fail to criminalize Hamas, or fail to prosecute Hamas criminals may be seized for failure to fulfill their Convention duties. This

¹⁶³ WSJ News Exclusive | Iran Helped Plot Attack on Israel over Several Weeks, www.wsj.com/world/middle-east/iran-israel-hamas-strike-planning-bbe07b25. Accessed 16 July 2024.

¹⁶⁴ Patricia M. Wald, 'Genocide and crimes against humanity' (2007) 6 *Wash. U. Global Stud. L. Rev.* 622.

¹⁶⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para 442.

¹⁶⁶ ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*.

also applies to States that carry out diplomatic relations with Qatar and Iran without ensuring that they fulfill their duties to prevent genocide.

States that have not recognized Hamas as a terrorist organization must do so immediately and act to prevent Hamas recruitment, operations, mobilization or fundraising on their territory. Hamas' network of terror incitement can be found on social media, television and radio, in its education system, mosques, and public rallies. This means seizing and closing channels or platforms guilty of incitement and prosecuting criminal inciters. While these obligations stem primarily from the various Terrorism Conventions, Hamas' genocide imposes new legal impetus to act.¹⁶⁷

10. CONCLUSION

The evidence examined in this paper demonstrates that Hamas' 7 October attack constitutes genocide under international law. This conclusion rests on three interconnected pillars. First, the physical acts committed - the systematic killing of over 1,200 Israelis, accompanied by torture, sexual violence, and mutilation - satisfy the *actus reus* requirement of the Genocide Convention. Second, Hamas' specific intent to destroy Israeli Jews as a group is evidenced through multiple channels: its foundational ideology of eliminationist antisemitism, its decades-long systematic policy of incitement, its detailed operational

¹⁶⁷ See Andrea Gioia, 'The UN conventions on the prevention and suppression of international terrorism' in Giuseppe Nesi (ed) *International Cooperation in Counter-Terrorism* (Routledge, 2016) 19-40; Ilias Bantekas, 'The international law on terrorist financing' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing, 2020) 97-108; Antonio Cassese, 'The multifaceted criminal notion of terrorism in international law' (2006) 4(5) *Journal of International Criminal Justice* 933-958.

planning for mass killing, and explicit statements by its leadership before and during the attack.

What distinguishes this case, however, is the third element: the immediate deployment of reverse genocide accusations against the victims. This strategy of genocide inversion, exemplified by South Africa's ICJ application, represents a sophisticated evolution in how perpetrators shield themselves from accountability. By appropriating and weaponizing genocide accusations, Hamas and its allies have created a rhetorical shield that both deflects attention from their own genocidal actions and exploits Jewish historical trauma - a pattern observed in previous genocides but never executed with such rapid precision.

These findings have significant implications for international law and policy. States that provide safe haven to Hamas leaders or fail to prevent Hamas operations on their territory may violate their obligations under the Genocide Convention. The international community must act to close the accountability gap for non-state actors who commit genocide, particularly when they control territory and civilian populations. Most urgently, the recognition of Hamas' actions as genocide creates immediate legal obligations for all state parties to prevent and punish these acts.

Beyond the immediate legal consequences, this analysis reveals the urgent need to protect the integrity of genocide as a legal concept. The weaponization of genocide accusations threatens to undermine the Convention's effectiveness as a tool for preventing and punishing the 'crime of crimes.' As this paper demonstrates, only by maintaining rigorous legal standards for proving genocide - while remaining alert to how these standards can be manipulated - can international law effectively address mass atrocities in an era of hybrid warfare and sophisticated information operations.