



I. INTRODUCTION

This legal memorandum is prepared by the European Centre for Law and Justice (ECLJ) in response to the Republic of South Africa's application to the International Court of Justice (ICJ), accusing Israel of violating the Genocide Convention. The ECLJ is a non-governmental organisation located in Strasbourg, France, dedicated to the promotion and protection of human rights around the world. The ECLJ has held Special Consultative status with the United Nations Economic and Social Council since 2007.¹

The ECLJ has a special interest in the peaceful resolution of the Hamas-Israeli conflict and has been engaged in the issues related to the conflict for over a decade. ECLJ attorneys have participated through both oral and written submissions before the International Criminal Court (ICC) and multiple organs of the United Nations on issues related to armed conflicts.²

On 29 December 2023, the Republic of South Africa submitted an application to the ICJ instituting proceedings against the State of Israel, alleging violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in relation to its military operations in the Gaza Strip and requested the ICJ to indicate provisional measures. This memorandum discusses South Africa's glaring legal and factual errors and its antisemitic bias in submitting a frivolous application to the ICJ. Contrary to South Africa's claims, its application does not provide any basis to conclude that the acts complained of are capable of falling within the provisions of the Genocide Convention. Absent the applicability of the Genocide Convention, the ICJ *has no jurisdiction* to order the provisional measures sought by South Africa, i.e., ordering Israel to suspend its military operations in Gaza.

II. PRELIMINARY OBSERVATIONS

South Africa's application turns the law on the crime of genocide on its head and relies on politically charged statements by world leaders and biased United Nations' officials as evidence of genocide. By making accusations of genocide, South Africa not only places the entire

¹ NGO Branch, U.N. DEP'T ECON. & SOC. AFFAIRS, Consultative Status for the European Centre for Law and Justice (2007), <http://esango.un.org/civilsociety/> (accessed by searching "European Centre for Law and Justice" in the iCSO Database).

² In March 2020, the ECLJ submitted written observations as an *amicus curiae* in the Situation in Palestine before Pre-Trial Chamber I of the ICC. In December 2019, ECLJ Chief Counsel, Mr Jay Sekulow, presented oral submissions as *amicus curiae* before the ICC Appeals Chamber with respect to the Situation in Afghanistan. In August 2015, the ECLJ submitted *amicus curiae* observations on the Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and The Kingdom of Cambodia (the Mavi Marmara case) to the Appeals Chamber of the ICC.

responsibility of all the casualties in the Gaza Strip on Israel but goes far beyond the usual attempts of moral equivalency between Hamas' terrorist attacks and Israel's legitimate acts of self-defence.

South Africa's application fails to even create an appearance of equivalency. It wholly ignores Hamas' terrorist acts of deliberately targeting and murdering civilians, as well as Israel's right of self-defence, from the equation. Furthermore, it not only holds Israel responsible for every single casualty in Gaza, but it predetermines all casualties as unlawful, acts of genocide, thereby simply disregarding the Law of Armed Conflict (LOAC) (a.k.a. International Humanitarian Law (IHL)). In other words, South Africa is falsely accusing Israel of deliberately targeting civilians in the Gaza Strip with the specific intent to destroy Gazans in whole or in part. Failing to acknowledge the application of IHL in the current conflict and calling Israel's actions genocidal are legally erroneous, factually untrue, morally reprehensible, and blatantly antisemitic.

South Africa's use of legally incorrect and politically charged terminology shows not only its bias against Israel but turns the entire application into dangerous and inaccurate political rhetoric designed to malign Israel in the international community. For example, the application erroneously calls the armistice lines of 1949 "internationally recognized borders . . . existing on 4 June 1967", concludes that the disputed territories, i.e., Judea and Samaria (the so-called "West Bank") and the Gaza Strip, constitute a "State of Palestine", and recognises the UN General Assembly's accreditation of the Palestinian Authority (PA) as a non-member observer State at the United Nations in November 2012 as evidence of the creation of a "State of Palestine".

Considering these purposeful glaring legal errors and politically biased jargon, one cannot take South Africa's application seriously or grant any credibility to it. However, reading the application further confirms the application's sinister character.

Just a few observations are notable in that regard. The application dedicates a total of approximately two paragraphs out of eighty-four pages to Hamas' actions. Yet, even when mentioned in the two paragraphs, the reference is simply in passing without calling Hamas' heinous acts of genocide as war crimes necessitating Israel's legitimate response. Instead of itself calling Hamas' actions war crimes, South Africa states that the "ICC Prosecutor has warned that hostage-taking 'represents a grave breach to the Geneva Conventions' . . .".³ While it accuses Israel of committing genocide, South Africa only "condemns" Hamas for its attacks on Israeli civilians in one sentence without even calling Hamas' actions war crimes, let alone genocide.⁴ South Africa's choice of words and tone, while mentioning Hamas' actions, are also noteworthy. It states:

The groups launched a large barrage of rockets towards Israel, breached the Israeli fence besieging Gaza, and attacked Israeli military bases and civilian towns, as well

³ Application Instituting Proceedings, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel) ¶41, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> (29 Dec. 2023) [hereinafter *The Application*].

⁴ *Id.* at ¶40.

as a music festival attended by thousands of young people, *in circumstances being investigated by the Prosecutor of the ICC.*⁵

South Africa is reluctant to label Hamas' and Palestinian Islamic Jihad's (PIJ) acts targeting civilians, desecrating dead bodies, committing rapes, and taking hostages as crimes, instead simply noting that the ICC Prosecutor is investigating the circumstances in which those attacks were carried out. South Africa shows no reluctance to label all Israeli actions as genocide without paying the least attention to IHL, the law that governs armed conflict.

In a weak effort to support its application, South Africa chooses to quote the number of casualties in Gaza provided by Hamas authorities—numbers that are often exaggerated and unreliable and do not distinguish between civilians and combatants.⁶ It further blames Israel for the destruction of protected facilities (such as hospitals and schools) without any mention of credible third-party evidence that most of the places that were destroyed resulted from Hamas' or PIJ's failed rockets fired towards Israel or because Hamas had turned such protected facilities into legitimate military objectives by using them as weapons storage units, military operations bases, or rocket launching sites.

South Africa also accuses Israel of “forced evacuation” of Palestinians from their homes⁷ when in fact Israel has been complying with the IHL rules regarding precautions for protecting civilian lives. If Israel had bombed military targets without giving warnings to civilians, South Africa would then be quick to accuse Israel of committing war crimes. Since Israel did give warnings to civilians to evacuate military targets in compliance with IHL, South Africa accuses Israel of violating the Genocide Convention.

III. APPLICATION OF THE INTERNATIONAL HUMANITARIAN LAW AND THE LAW ON GENOCIDE

South Africa's application states:

South Africa is highly cognisant of the fact that acts of genocide are distinct from other violations of international law sanctioned or perpetrated by the Israeli government and military in Gaza — including intentionally directing attacks against the civilian population, civilian objects and buildings dedicated to religion, education, art, science, historic monuments, hospitals, and places where the sick and wounded are collected; torture; the starvation of civilians as a method of warfare; and other war crimes and crimes against humanity — though there is often a close connection between all such acts.⁸

⁵ *Id.* (emphasis added).

⁶ See Michael N. Schmitt, *Israel – Hamas 2023 Symposium – The Legal Protection of Hospitals During Armed Conflict*, LIEBER INSTITUTE (29 Dec. 2023), <https://lieber.westpoint.edu/legal-protection-hospitals-during-armed-conflict/>. Isabel Debre, *What is Gaza's Ministry of Health and how does it calculate the war's death toll?*, ASSOCIATED PRESS, (6 Nov. 2023), <https://apnews.com/article/israel-hamas-war-gaza-health-ministry-health-death-toll-59470820308b31f1faf73c703400b033>.

⁷ The Application at ¶60, *supra* note 3.

⁸ *Id.* at ¶2.

While South Africa peripherally acknowledges the distinction between acts of genocide and other violations of IHL (i.e., war crimes),⁹ the entire application then disregards the IHL altogether. South Africa further disregards the application of IHL to determine whether Israeli strikes complied with IHL principles of military necessity, distinction, and proportionality. By accusing Israel of committing genocide, South Africa has labeled the lawful targeting of military objectives as acts of genocide by falsely claiming that Israeli actions are deliberately directed at civilians to destroy them in whole or in part because of their national, ethnic, or religious identity, which, as we explain below, is ludicrous.

The distinction between acts of genocide and violations of IHL, as admitted by South Africa only in passing, requires an assessment of facts under different laws. While a breach of the Genocide Convention would also constitute a breach of IHL, violations of IHL do not *ipso facto* constitute genocide.¹⁰

A. Applicable Law of Armed Conflict

While there is some dispute whether the conflict between Hamas and Israel qualifies as an international armed conflict (IAC) or non-international armed conflict (NIAC), “the practical effect of the two bodies of law is nearly identical”¹¹ and military actions in both instances must comply with *jus ad bellum* as well as *jus in bello*. *Jus ad bellum* governs the initiation of hostilities and must comply with Articles 2(4) and 51 of the UN Charter, and *jus in bello* governs the hostile parties’ actions during the entire duration of the armed conflict and must comply with several Geneva and Hague Conventions on the law of war, much of which is considered customary international law.

Belligerents are bound by both bodies of law. That is, the initial attack or response must comply with Articles 2(4) and 51 of the UN Charter, respectively, and the hostile parties’ conduct during the entire period of hostilities must also comply with principles of rules of engagement codified in the Geneva and the Hague Conventions.

While, in our opinion, the conflict between Israel and Hamas is not of an international character and, thus, Article 2(4), which prohibits States from the threat or use of force against the territorial integrity or political independence of any state, does not apply, the prohibition against acts of aggression—the gravamen of Article 2(4)—still governs. An unprovoked act of aggression (threat or use of force) by a state or a non-state actor is unlawful, whereas acting in self-defence in response to an act of aggression is lawful. While Article 51 of the UN Charter codifies the right to self-defence, it does not create the right itself. The right to self-defence is an inherent right. Further,

⁹ *Id.*

¹⁰ See *Prosecutor v. Krstic*, IT-98-33-T International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, ¶681 (2 Aug. 2001) [hereinafter *Krstic*], (*available at* <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>) (“The relationship between genocide and murder as a war crime can be characterized as follows. The offence of genocide requires a special intent to destroy a national, ethnical, racial or religious group (or part thereof). Murder as a war crime requires a close nexus between the acts of the accused and an armed conflict, which is not required by genocide”).

¹¹ Schmitt, *supra* note 6.

contrary to the ICJ's opinion often quoted by many anti-Israel individuals and organisations, which states that Israel could not invoke the right to self-defence under Article 51 of the UN Charter against Hamas attacks since those attacks are not from a state,¹² Article 51 neither expressly nor implicitly creates such an understanding. A state has an inherent right to defend itself from state as well as non-state actors.

In addition to the legality of the initiation of hostilities under Articles 2(4) (i.e., prohibition against acts of aggression) and 51 (self-defence) of the UN Charter, one must determine whether the parties' conduct during the hostilities complies with IHL, which is designed to lessen human suffering in times of war. IHL provides, *inter alia*, for rules of engagement, treatment of prisoners of war, protection of civilians, etc. Considering the very nature of an armed conflict, IHL does not criminalise incidental loss of civilian lives. It is only the intentional targeting of civilians or failure to intentionally take precautions to spare civilian lives that constitute war crimes. (Additionally, as discussed in sub-section B below, the law regarding genocide requires a few more elements to be fulfilled.)

Here, while many other individuals and UN bodies (which South Africa cites to in its application as legal authorities) provide a faulty analysis of IHL principles, South Africa fails to provide even a faulty analysis of IHL principles. South Africa simply jumps to a conclusion of genocide.

There is no question that Hamas' attacks of 7 October 2023 constitute war crimes or that Israel's response to Hamas' barbaric acts of aggression was lawful. As such, Hamas violated the prohibition against acts of aggression and Israel legitimately acted in self-defence. Even pro-Palestinian individuals and organisations have not denied the illegality of Hamas' attacks and the legality of Israel's use of force immediately after the unprovoked attacks by Hamas.¹³ South Africa simply fails to discuss these facts, evading not only its legal obligation but also a moral one.

South Africa also fails to provide any analysis of Israeli actions under IHL principles of military necessity, distinction, and proportionality. Like many others, South Africa looks at the number of casualties—albeit likely exaggerated and unreliable numbers by Hamas—in a vacuum without any regard to whether some of the casualties were caused by Hamas' faulty rockets fired toward Israeli civilian population centres, as well as Hamas' actions of deliberately putting its own civilians in harm's way, or were a sad but lawful collateral and incidental consequence of Israel's targeting legitimate military objectives. So far, anti-Israel individuals and organisations have claimed, albeit wrongly, that Israeli actions are disproportionate under IHL—something that simply cannot be determined without more information regarding what the specific military target was and how important it was considered. South Africa goes far beyond a faulty legal analysis of IHL. It simply bypasses the applicable law altogether and assumes that each Israeli strike deliberately targets

¹² See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. (13 Jul. 2004), <https://www.un.org/unispal/document/auto-insert-178825/>.

¹³ See e.g., *Palestinian armed groups must be held accountable for deliberate civilian killings, abductions and indiscriminate attacks*, AMNESTY INT'L, 12 Oct. 2023, <https://www.amnestyusa.org/press-releases/palestinian-armed-groups-must-be-held-accountable-for-deliberate-civilian-attacks/>; *Commission of Inquiry collecting evidence of war crimes committed by all sides in Israel and Occupied Palestinian Territories since 7 October 2023*, COI, OHCHR, 10 Oct. 2023, <https://www.ohchr.org/en/press-releases/2023/10/commission-inquiry-collecting-evidence-war-crimes-committed-all-sides-israel>.

civilians in Gaza to destroy Gazans in whole or in part just because they are Arab (“Palestinians”). Such a claim cannot be taken seriously, as it is completely unsupported by the facts.

It is common knowledge that Israel takes the law of armed conflict very seriously and makes every effort to comply with it. This is especially so because the international community has set its eyes on Israel’s every move in order to find fault and condemn it. Since the Hamas-Israeli conflict began decades ago, Israel has proven again and again that its actions comply with IHL. Absent contrary evidence, there is no reason to believe otherwise during the current conflict. And, South Africa has not produced even an iota of evidence to that effect. While questions of violations of IHL are not before the Court, and only the false allegations of genocide are, analysis of actions under the law of armed conflict is necessary because military actions lawful under IHL cannot at the same time be unlawful under the Genocide Convention. In other words, one cannot violate the law on genocide if one is mostly compliant with IHL.

B. Application of the Genocide Convention

[G]enocide 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.¹⁴

To be considered acts of genocide, the Genocide Convention requires several elements to be met, in addition to what is required under the IHL. Because general criminal law (whether domestic or international) distinguishes justified killing (i.e., killing in self-defence) from deliberate premeditated killing (i.e., murder), the law of armed conflict as well as the Genocide Convention also recognise this basic principle. As mentioned above, the law of armed conflict (whether international or non-international) recognises collateral damage as a sad but a natural and incidental consequence of war. Likewise, under the Genocide Convention, “killing”, “bodily harm”, and “physical destruction” must be *unjustified, unlawful* killing, bodily harm, and physical destruction for it to qualify as genocide. Additionally, under the Genocide Convention, for such unjustified killing and destruction to amount to acts of genocide, they must also be done with *specific intent to destroy* a national, ethnical, racial, or religious *group in whole or in part*. Moreover, the deliberate killing and destruction of the group in whole or in part must be *on account of* the group’s national, ethnical, or religious identity.

The **first** element under the Genocide Convention requires proof of deliberate targeting of civilians, not lawful incidental casualties as a result of targeting military objectives.¹⁵ In

¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan. 1951), 78 UNTS 277.

¹⁵ *Krstic* at ¶546, *supra* note 10 (“The Trial Chamber is ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age . . . [because] [a]ll of the executions systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers”).

Prosecutor v. Krstic, Radislav Krstic was found guilty for genocide against Muslim men of fighting age in Srebrenica.¹⁶ In that case, the tribunal held that a significant factor of establishing the necessary *mens rea* for genocide was that there was a deliberate killing of civilians in the targeted people group.¹⁷ The tribunal acknowledged that initially combatants were targeted, but at some point a decision was made “to capture and kill all the Bosnian Muslim men indiscriminately. No effort thereafter was made to distinguish the soldiers from the civilians”.¹⁸ By deliberately targeting civilians and not just military men, the element of deliberate killing of civilians was met.

To say that Israel is deliberately targeting civilians is absurd. Nowhere in the entire application has South Africa established this or provided any evidence indicating such intent or evidence of actual deliberate targeting of civilians. In fact, there is ample of evidence that Israel does *not* target civilians. Its target is the terrorist organisation Hamas, not Palestinians in Gaza in general.

The Israeli military is the only military in the world that requires approval by a group of military lawyers, not accountable to the military chain of command, before each military strike is carried out. Every bombing and every strike go through a rigorous process of evaluation under IHL rules of distinction (i.e., distinguishing between civilians and military objectives) and proportionality. Israel does not target civilians. In fact, it takes every possible precaution to protect civilian lives. War is a violent activity and collateral damage is a sad reality of war. Mistakes can be made on the battlefield. But neither lawful collateral damage nor mistakes constitute war crimes, much less acts of genocide. Assuming *arguendo* that some of the Israeli strikes are later determined to be in breach of the IHL rules, such a determination cannot be made without considerable evidence not available to South Africa or the Court and would still not constitute acts of genocide unless the additional requirements under the law of genocide (described below) are met. South Africa has intentionally blurred the distinction between acts of genocide and incidental casualties during an armed conflict, a distinction clearly noted by the *Krstic* tribunal¹⁹ as well as by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*.²⁰

The **second** element under the Genocide Convention requires that the deliberate killing of civilians must include *specific intent (dolus specialis) to destroy, in whole or in part, a national, ethnical, racial, or religious group*.²¹ In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ concluded that

civilian members of the protected group were *deliberately* targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of [the Genocide Convention], the

¹⁶ See *id.* at ¶727.

¹⁷ See *id.* at ¶546.

¹⁸ *Id.* at ¶547.

¹⁹ See *Krstic*, *supra* note 10.

²⁰ See *Bosnia and Herzegovina v. Serbia and Montenegro*, *infra* note 22, at ¶277 (“killings . . . may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention”).

²¹ See *Krstic*, *supra* note 10, at ¶544 (“The critical determination still to be made is whether the offences were committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”).

Court [did] not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part.²²

The Court held that it must be established that “the massive killings of members of the protected group were committed *with the specific intent (dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such.”²³

Looking at forced deportations, the Court considered that

there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. . . . However, even assuming that deportations and expulsions may be categorized as falling within . . . the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part.²⁴

Here, to support its claim that Israeli officials have specific intent to destroy “Palestinian” civilians as a group, in whole or in part, South Africa quotes Israeli officials’ speeches and the number of total casualties in Gaza provided by Hamas.

As to the Israeli officials’ statements, South Africa imputes genocidal intent to statements that the Israeli officials made after Hamas attacked and butchered Israeli civilians, including men, women, children, infants, and the elderly; after Hamas raped women in front of their families; after Hamas killed over 1200 innocent Israelis; and after Hamas took about 250 hostages and threatened to murder them. Some of the statements South Africa quotes are: destroy the “sons of evil”, “operate forcefully everywhere”, “striking our enemies with unprecedented might”, “to defeat bloodthirsty monsters”, “[t]o be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy – they’re all terrorists, and they should also be destroyed”, etc. South Africa imputes genocidal intent to these statements by assuming that Israel is now out to intentionally murder Palestinian civilians as a group. Deriving such an inference from such statements is not only absurd and factually incorrect,²⁵ but also morally reprehensible, especially when totally disregarding Hamas’ statements and barbaric actions.

A state that intends to destroy a civilian population group in whole or in part does not comply with applicable laws of armed conflict. It does not invest significant resources to help the civilian population evacuate areas of hostilities. It does not secure humanitarian corridors to facilitate the evacuation of civilians from combat zones. It does not provide medical supplies to the targeted

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, ¶328, <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf> (emphasis added).

²³ *Id.* at ¶277 (emphasis added).

²⁴ *Id.* at ¶334.

²⁵ Olivia Flasch, *Rebutting Allegations of Genocide Against Israel*, EJIL TALK, 10 Jan. 2024, <https://www.ejiltalk.org/rebutting-allegations-of-genocide-against-israel/>.

group. Israel not only is doing all of these things but is doing much more.²⁶ South Africa simply ignores these facts.

While South Africa imputes genocidal intent to Israeli officials' statements, it disregards Hamas' statements of truly genocidal intent to destroy the State of Israel and kill the Jewish people everywhere. South Africa also disregards Hamas' deliberate attacks on Israeli civilians, which are consistent with its stated intent. Hamas' actions of 7 October 2023 were just one expression of its stated intent to annihilate the State of Israel and the Jewish people. The Hamas Charter proclaims: "Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it".²⁷ The entire Hamas Charter, from its preamble to the last article, pursues only one purpose: the violent elimination of Israel and the Jewish people. Hamas and its allies have made statements expressing their genocidal intent since 1987 when Hamas was established. Hamas' actions of 7 October and its thousands of indiscriminate attacks against Israeli civilian population centres are all consistent with its stated genocidal intent. However, not once in its 84-page application does South Africa acknowledge these facts. It simply provides one-sided so-called "facts" and makes outlandish claims against Israel.

Hamas deliberately butchered innocent Israeli civilians on 7 October. Those deaths were not incidental to Hamas' targeting military objectives. The entire operation was intended to murder, rape, and take hostage as many Israeli civilians as possible. Yet, in South Africa's view, that does not convey an expression of genocidal intent, nor do those acts constitute acts of genocide. Instead, South Africa uses the word "condemn" only one time with respect to Hamas' actions in 84 pages of legally flawed and factually false accusations of genocide against Israel. But when Israel responds to such savagery as a matter of not just a right but a duty and takes every precaution to spare civilian lives consistent with IHL, South Africa accuses Israel of committing genocide. Hamas unequivocally expresses its genocidal intent to kill all Jews and intentionally targets and murders Israeli civilians—all constituting acts of genocide. In stark contrast, Israel offers land for peace, only responds when its civilians are deliberately attacked, and tries to protect civilians who are put in harm's way by Hamas—none of which violates the law of war, let alone constitute acts of genocide.

As for the number of casualties and the destruction of protected facilities, South Africa states:

Israel has now killed in excess of 21,110 named Palestinians, including over 7,729 children — with over 7,780 others missing, presumed dead under the rubble — and has injured over 55,243 other Palestinians, causing them severe bodily and mental harm. Israel has also laid waste to vast areas of Gaza, including entire neighbourhoods, and has damaged or destroyed in excess of 355,000 Palestinian homes, alongside extensive tracts of agricultural land, bakeries, schools, universities, businesses, places of worship, cemeteries, cultural and archaeological sites, municipal and court buildings, and critical infrastructure, including water and

²⁶ ISRAEL-HAMAS CONFLICT 2023: HUMANITARIAN EFFORTS, MINISTRY OF FOREIGN AFFAIRS, (14 Dec. 2023), available at <https://www.gov.il/en/Departments/General/israel-hamas-conflict-2023-humanitarian-efforts>.

²⁷ THE COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT pmb. (18 Aug. 1988), https://avalon.law.yale.edu/20th_century/hamas.asp.

sanitation facilities and electricity networks, while pursuing a relentless assault on the Palestinian medical and healthcare system. Israel has reduced and is continuing to reduce Gaza to rubble, killing, harming and destroying its people, and creating conditions of life calculated to bring about their physical destruction as a group.

Under South Africa's logic, none of the Israeli military strikes was lawful. That is an absurd and outlandish claim. No legal body would think that all of the above-mentioned deaths were a result of Israel's violation of the IHL, let alone amounting to genocide. South Africa's quoted numbers (which come from Hamas sources and are highly questionable) do not account for how many of those who died were Hamas operatives and how many were civilians. The numbers do not account for how many protected facilities were destroyed as a result of Hamas' or PIJ's faulty rockets. The numbers do not account for how many of the protected sites were being used by Hamas for military purposes—a fact commonly known and adequately proven. The numbers do not account for incidental civilian casualties while Israel targeted legitimate military objectives after taking every precaution to spare civilian lives. The numbers do not account for how many civilians died as a result of Hamas' using them as human shields. A blatant disregard of such facts and analysis, on top of the unreliable number of casualties, patently shows South Africa's antisemitic bias.

The way in which South Africa described what happened at two Gaza hospitals is yet another example of South Africa's clear antisemitic bias and lack of concern for actual facts. Describing the situation at Al Shifa Hospital and Al Ahli Hospital, South Africa claims that "Israel's military assault on Gaza has been an attack on Gaza's medical healthcare system, indispensable to the life and survival of the Palestinians in Gaza".²⁸ These allegations are made despite the fact that there is credible evidence available with videos of Hamas weapons found in Al Shifa Hospital's MRI centre²⁹ and evidence that Al Ahli Hospital was hit by PIJ's failed rocket fired toward Israel.³⁰ The United States intelligence services corroborated the Israeli claims that Hamas was using Al Shifa Hospital as a command-and-control node.³¹ Other evidence is available showing the network of Hamas tunnels under Gaza hospitals³² and rocket launching sites in UNRWA warehouse facilities and near UNRWA-run schools.³³ South Africa simply ignores this evidence.

²⁸ The Application at ¶76, *supra* note 3.

²⁹ @manniefabian, TWITTER (15 Nov. 2023, 1:20 PM),

https://twitter.com/manniefabian/status/1724854923030892548?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1724854923030892548%7Ctwgr%5E6b9ddf8f8f36513c7ee23e8563d01715977fdab5%7Ctwcon%5Ee1_&ref_url=https%3A%2F%2Fwww.timesofisrael.com%2Fliveblog_entry%2Fidf-publishes-evidence-of-weapons-found-inside-shifa-hospitals-mri-center%2F See also, Zeke Miller, *US Intel Confident Militant Groups Used Largest Gaza Hospital In Campaign Against Israel: AP Source*, ASSOCIATED PRESS (3 Jan. 2024), <https://apnews.com/article/hamas-intelligence-shifa-biden-hostages-israel-d0f782682a7a06ed5a3749ed92c4f821>.

³⁰ @manniefabian, TWITTER (18 Oct. 2023, 3:10 AM),

<https://twitter.com/manniefabian/status/1714539311914266931>.

³¹ Schmitt, *supra* note 6.

³² Alexander Smith et. al., *Israel Says New Videos Show Hamas Hostages and a Tunnel at Al-Shifa Hospital*, NBC NEWS (Nov. 20, 2023), <https://www.nbcnews.com/news/world/israel-video-hamas-hostages-al-shifa-hospital-tunnel-gaza-rcna125948>; @manniefabian, TWITTER (Nov. 5, 2023, 9:06 AM), <https://twitter.com/manniefabian/status/1721167071076085894>.

³³ Pamela Falk, *Israel Says These Photos Show How Hamas Places Weapons In And Near U.N. Facilities In Gaza, Including Schools*, CBS NEWS (8 Nov. 2023), <https://www.cbsnews.com/news/israel-photos-hamas-gaza-weapons-un-facilities-including-schools/>.

Hamas' use of protected facilities and turning them into legitimate military targets is not limited to the current conflict. There is plenty of evidence available showing that Hamas had used healthcare facilities in previous conflicts.³⁴ Even the pro-Palestinian Amnesty International found that—during the 2014 conflict—Hamas “used the abandoned areas of al-Shifa Hospital, including the outpatients’ clinic area to detain, interrogate, torture, and otherwise ill-treat suspects even as other parts of the hospital continued to function as a medical centre”.³⁵ According to the ICRC’s commentary on the Geneva Conventions, such protected facilities lose their protected status if they are used to commit acts harmful to the enemy. They become legitimate military objectives.³⁶ “[A] hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function”.³⁷ However, Israel still carefully follows the applicable distinction and proportionality rules and takes every precaution to protect civilian lives when deciding to attack a military objective.

Additionally, South Africa relies on the number of casualties provided by Hamas. Gaza’s Ministry of Health reported about 500 civilian deaths at Al Ahli Hospital. Even if this number were correct, Israel could not be blamed for it since it was PIJ’s failed rocket that struck the hospital. However, Human Rights Watch noted that “the count, which is significantly higher than other estimates, displays an unusually high killed-to-injured ratio, and appears out of proportion with the damage visible on site”.³⁸ Human Rights Watch concluded that the explosion “resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds . . .”.³⁹ South Africa shamelessly omits all of this evidence and wrongfully blames Israel for every death and bodily injury in Gaza.

The **third** element under the Genocide Convention requires that the deliberate killing with specific intent to destroy the group in whole or in part must be *on account of* the group’s national, ethnical, racial, or religious identity.⁴⁰ The International Criminal Tribunal for Rwanda noted the prosecution’s argument that “the Tutsi were targeted *because they were Tutsi* and not because they were fighters for the Rwandan Patriotic Front (RPF)”⁴¹ and found that the “Tutsi refugees were targeting solely on the basis of their ethnic group”.⁴²

³⁴ Schmitt, *supra* note 6.

³⁵ ‘Strangling Necks’ Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During The 2014 Gaza/Israel Conflict, AMNESTY INTERNATIONAL 6 (May 2015), <https://www.amnesty.org/en/documents/mde21/1643/2015/en/>.

³⁶ ICRC DATABASE, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 01.01.1958, Article 19 - Wounded and sick IV. Discontinuance of protection of hospitals, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-19/commentary/1958?activeTab=undefined> (last accessed on 5 Jan. 2024).

³⁷ Schmitt, *supra* note 6.

³⁸ *Gaza: Findings on October 17 al-Ahli Hospital Explosion*, HUMAN RIGHTS WATCH (26 Nov. 2023), <https://www.hrw.org/news/2023/11/26/gaza-findings-october-17-al-ahli-hospital-explosion>.

³⁹ *Id.*

⁴⁰ *Krstic* at ¶561, *supra* note 10 (“the victims of genocide must be targeted *by reason of* their membership in a group”) (citations omitted).

⁴¹ *Prosecutor v. Ntakirutimana et al*, Case No. ICTR-96-17, Appeals Judgement (13 Dec. 2004) ¶312, <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-17/MS41245R0000540233.PDF> (emphasis added).

⁴² *Id.* ¶340.

This is one of the most crucial inquiries under the Genocide Convention. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ noted:

When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed.⁴³

. . .

It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group “as such”. That means that the crime requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. . . ”.⁴⁴

More clearly in the *Krstic* case, the tribunal held that

victims of genocide must be targeted *by reason of* their membership in a group. This is the only interpretation coinciding with the intent which characterises the crime of genocide. The intent to destroy a group as such, in whole or in part, presupposes that the victims *were chosen by reason of* their membership in the group whose destruction was sought.⁴⁵

Here, Hamas intentionally murdered and raped Israeli civilians *because* they were Jewish not because they were members of the Israeli military. Israel, on the other hand, has not attacked civilians in Gaza *because* they are “Palestinians”. Israeli soldiers are not raping women. Israeli soldiers are not torturing and murdering civilians or taking them hostage. South Africa has presented no evidence that Israel is deliberately targeting Palestinian civilians *because of their Palestinian identity*. Israel is only targeting Hamas in self-defence after horrific, criminal attacks were perpetrated by Hamas. Incidental casualties resulting from an attack on a legitimate military objective does not amount to a war crime much less an act of genocide. In light of the disparity between Hamas’ crimes and Israel’s lawful actions, to say South Africa’s application accusing Israel of committing genocide is frivolous is to put it mildly. It is antisemitic nonsense.

IV. CONCLUSION

The ICJ’s jurisdiction is limited to the question of applicability of the Genocide Convention, and South Africa has provided absolutely no evidence whatsoever to show that the alleged acts complained of are capable of falling within the provisions of the Genocide Convention. As for the issues related to the ongoing armed conflict between Hamas and Israel, consistent with its holding in *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ does not have jurisdiction to determine whether war crimes may have occurred.⁴⁶ Because South Africa has provided no evidence that the alleged acts complained of are capable of falling within the provisions of the Genocide Convention, the Court does not have jurisdiction to indicate provisional measures

⁴³ *Bosnia and Herzegovina v. Serbia and Montenegro* at ¶191, *supra* note 22.

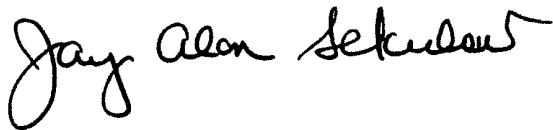
⁴⁴ *Id.* at ¶193.

⁴⁵ *Krstic* at ¶561, *supra* note 10 (emphasis added).

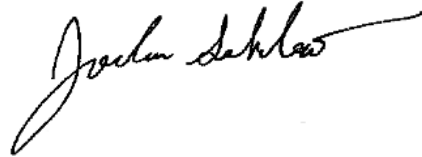
⁴⁶ *Bosnia and Herzegovina v. Serbia and Montenegro* at ¶277, *supra* note 22.

requested by South Africa. In fact, the ICJ's indicating provisional measures according to South Africa's application (i.e., that Israel suspend its military operations in Gaza) would amount to denying Israel the ability to lawfully defend itself against acts of aggression by Hamas.⁴⁷ The ICJ has no power to restrict a country's inherent right to self-defence recognised in Article 51 of the UN Charter.⁴⁸

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⁴⁷ Jesse Lempel, *Why the ICJ Cannot Order Israel to Stop the War in Gaza as a Provisional Measure*, EJIL TALK, (8 Jan. 2024), <https://www.ejiltalk.org/why-the-icj-cannot-order-israel-to-stop-the-war-in-gaza-as-a-provisional-measure/>.

⁴⁸ *Id.*