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

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

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

The ICJ was already considering a request for an Advisory Opinion referred to it by the United Nations General Assembly (UNGA) in a resolution entitled "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem."[1] The resolution calls on the ICJ to prescribe "legal consequences" against Israel for certain unsubstantiated claims about Israel that were adopted by the General Assembly on December 30, 2022 by less than a majority of UN member states.[2] Many of the claims are premised on specious characterizations, determinations and proclamations made about Israel's security practices that can be found in other UN resolutions and reports, as well as the ICJ's 2004 Advisory Opinion concerning Israel's security barrier between Israel and the West Bank.[3] In many of these sources, including most notably the 2004 Advisory Opinion, the security measures Israel has taken have been treated as excessive, indefensible or without legal basis under international law.

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

ICJ Fact-Finding Protocol and Prior Advisory Opinion

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

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

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

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

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

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

Simply put, it was the ICJ's view in 2004 that Israel had no right to build a structure to prevent the documented horrific scenes that would later unfold in and upon Israel. It would shock the conscience of any peace-loving person for the ICJ to double down on this view, which would be the effective result of issuing a wrong-headed similar or supplemental Advisory Opinion[6] in the wake of the irrefutable Hamas massacre.

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

The Hamas-Led Massacre

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

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

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

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

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

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

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

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

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

Perhaps the most important takeaway following October 7 was one of the more seemingly obvious arguments advanced by B'nai B'rith: that "[t]errorism and terrorists should not be glorified."[7] In the brief, B'nai B'rith pointed to the streets, schools, and other buildings across the West Bank and Gaza that are named in honor of terrorists. This point has now taken on new meaning. In rallies in cities and on college campuses around the world, the events of October 7 are being celebrated as a significant victory in Hamas's resistance movement. This perspective has been facilitated by educators who have vilified Israel's security measures by citing materials that they claim are instruments of "international law," namely the 2004 Advisory Opinion and the bevy of biased UN resolutions and reports upon which it is predicated.

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

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

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

7. B'nai B'rith Brief at 70, ℙ8(f).
8. *See* Introduction to International Terrorism, University Module Series, United Nations Office on Drugs and Crime (2018), available *at* https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINALpdf.pdf
9. UN Charter, Art. 51.
10. B'nai B'rith Brief at 53, ℙ7.

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

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

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

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

Israel's "response is described as disproportionate, in violation of international law."[17] This is an absurd assertion that has used instruments such as the 2004 Advisory Opinion to bolster its merit. While it is implied that "proportionality" somehow relates to "similarity," it is unfathomable that Israel should be expected to depart from its humane protocols and instead shape its response based on Hamas's horrific actions of raping, beheading, and publicizing its acts of brutality. Perhaps that is why, as pointed out in the brief, "neither the word disproportionate nor its variations [are] found in any of the international instruments relating to response to armed attack[s] or counterterrorism."[18]

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

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

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11. *Ibid*.
12. *Id*. at 67, ℙ1.
13. *Id*. at 68, ℙℙ2.
14. *Id*. at 78, ℙℙ11.
15. *Id*. at 18, ℙ33.
16. *Id*. at 78, ℙℙ11.
17. *Ibid*. at 53, ℙ7.
18. *Ibid*.
19. *Id*. at 10, ℙ21.
20. *Ibid*. at 18, ℙ33.
21. *Ibid*.

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

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

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

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

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

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

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

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

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

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

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22. *Ibid*. at 69, ℙ8(a).
23. *Ibid*.
24. *Id*. at 62, ℙ7.
25. *Id*. 72, ℙ10.
26. *Id*. at 71, ℙ9.
27. *Id*. at 72, ℙ12.
28. *Ibid*. at 68, ℙ4.
29. *Id*. at 79, ℙ13.

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

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