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ISRAEL-HAMAS WAR 2023-2024: CONTENDING LEGAL ISSUES ON DEFENCES OPEN TO ISRAEL

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ABSTRACT

To put the genocide tendencies of men under the guise of war on check, the Convention on the Prevention and Punishment of Genocide (the Convention) and the Rome Statute among other humanitarian international legislations were enacted. Israel experienced the massacre of its citizens in the hands of Hamas on the 7/10/2023. About fourteen hundred people were killed and over a hundred persons abducted. Israel has launched war against Hamas and is pleading self-defence. This paper is motivated by the divisions in the United Nations (UN) and in other fora on whether Israel should stop its war against Hamas in Gaza unconditionally or not because of the Israelis held as hostages by Hamas. The paper found Hamas still holding hostages, seeking using them as a bargaining factor with Israel. It is the view and the recommendation that one in violation of international law should be precluded from the assistance of international law. Consulting web resource materials, textbooks, case and statutory laws, this work found self-defence possibly available to Israel and a doubtful presence of 'intent' required by Article II of the Conventions for the crime of genocide. The work seeks to achieve a united UN by recommending that a state that is in violation of a rule of international law should not be indulged by the UN until it purges itself of that violation. Deterrence to members of the UN who provoke fights and run to the UN pleading sentiments and their sponsors is one of the objectives of the work.

Key words: Hamas, Israel, Self-defence, Genocide, Humanitarian.

Background

Humanity has witnessed genocide and other humanitarian crises due to arm conflicts.[1] The World War II is one of the terrible international arms conflicts the world ever witnessed. Unfortunately, Jews were the worst victims of World War II. This might have prompted the enactment of the Geneva Conventions[2] and much later, the Rome Statute. [3] Israel lives with the scar of the horror of World War II holocaust. About six million Jews were killed by cruel, uncivilised, treacherous methods when the use of the bullet was thought to be wasteful and incapable of achieving desired results within the desired time.[4] It was a war that one is at a loss whether the initiator's agenda was to conquer the world or to annihilate the Jews. By his mode of the prosecution of the war, Hitler appeared to make the Jews his victims wherever he led his war crusade to. This was a sad reminder to the Jews of how they were scattered across the face of the earth during wars of the ancient times.[5]

The Balfour Declaration of the 2nd of November 1917 was a British support for a national

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[1]Janice Anderson, Anne Williams and Vivian Head, *War Crimes and Atrocities* (Futura, 2007) 44-50.

[2] Adopted and open for signature, ratification and accession by the United Nations General Assembly Resolution 260 A (III) of (9th December, 1948; which came into force on the 12 January 1951, in accordance with article VIII. <https://www.un.org> Doc.1 Accessed 16 January 2024.

[3] Adopted and open for signature, ratification and accession by the United Nations General Assembly Resolution 2391 (XXIII) of 26 November 1968; which came into force on the 11 November 1970 in accordance with article VIII.

[4] Janice, Anne and Vivian (n 1) 173-202.

[5] Williams Whiston, *The Works of Josephus Complete and Unabridged in one Volume* (Hendrickson Publishers Inc, 2001); The Holy Bible books of Judges, the Kings, Chronicles, Esther, Nehemiah, etcetera.

home for the Jewish people in Palestine. The declaration was contained in a letter from the then British Secretary of State, Arthur James Balfour, to Baron Rothschild, the leader of the Anglo Jewish Community.[6] This declaration was approved by the principal Allied Powers on 24/7/1922 and was included in the British mandate over Palestine, formally approved by the League of Nations on the 24/7/1922. After its horrific experience in World War II, the State of Israel became an issue again when the need for a territory where they could call their home became unavoidable. On May 14, 1948, David Ben Gurion read the declaration of independence of the State of Israel at the expiration of the British mandate over the Palestine by mid night of May 13, 1948.[7]

David Ben Gurion's declaration marked the beginning of hostilities between the infant State of Israel and its neighbours, the Muslim/Arab states. The resistance of the Arabs resulted from the United Nations General Assembly adoption of its Resolution 181 of 1947 (known as the Partition Resolution) that divided the British Mandate Territory of the Palestine into two states, one for the Jews and the other for the Arab people of Palestine. The David Ben Gurion's declaration, therefore, sparked off a war in 1948 between the Jewish State and Arab countries who were opposed to the new state.[8]

The Six Day War of 1967 was a war that the then President of Egypt, Gamal Abdel Nasser Hussein, declared that it was 'aimed at Israel's destruction.'[9] The Yom Kippur War of 1973 was another war that was meant to reclaim lands lost to Israel by Egypt and Syria in the 1967 war.[10] From the above, it is hardly difficult to see that the State of Israel is not at peace with its Arab neighbours especially the State of Palestine that had wanted the obliteration of the State of Israel since its infancy. Israel has lived its life as a state the lives not to fight but fights to live. This makes its war crusades against the Palestinians an existential or survival war.

1. INTRODUCTION

The background above provides reason for the sensitivity of the state of Israel to any threat or rumour of war from any of its neighbours, especially the Palestinians. Israel has found itself in a war with Hamas, a terror group, in the land of the Palestine of old.[11] While Israel prosecutes the war in the name of self-defence, others see its prosecution of the war as genocide. The world of opinion is divided on this. While the Republic of South Africa has headed for the International Court of Justice (ICJ) against the State of Israel on grounds of genocide, protests rock parts of the United States, Britain, among others in support of the Palestinians' cause in some in support of the Jews.

It is a situation that the some of the major world media houses are in the fore front of the war of propaganda against Israel. The United Nations, both in the General Assembly and in the Security, has been in the fore front of the calls for the cessation of hostilities by Israel but with a faint voice calling for the immediate and unconditional return of the hostages taken by Hamas which is one of the causes of the war.

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[6] The Editors, Encyclopaedia Britannica, Britannica.com visited on the 27/01/2024.

[7]David Ben Gurion, 'The Declaration of the Establishment of the State of Israel' Published in the Official Gazette, No. 1 of the 5th Iyar, 5708 (14/5/1948) <htpps://www.gov.il/ne/pages/declaration-of-establishment-state-of-Israel > Accessed 18 January 2024.

[8]Ken Stein 'The Arab-Israel War of 1948- A Short History' <https://israeled.org/the-arab-israeli-war-of-1948-a-short-hist.> Accessed 18 January 2024.

[9] ibid.

[10] Olivia B Waxman, 'How the Yom Kipur War Changed Israel' < https://time.com/6322802/yom-kippur-war-israel-history/ > Accessed 2 May 2024. See also history.com, 'Yom Kipur War' <https://www.history.com/topics/middle-east/yom-kipur-war > Accessed 3 May 2024.

[11] Historically, the area and not any group of people was known as Palestine according to the Holy Bible, Exodus 15:14; Isaiah 14:29; 14:31.

This work examines the cause of the war, the claims of genocide and the State of Israel's claims of the exercise of the right of private defence in prosecuting the war; the activities of Hamas in the war among other things. It relates the laws on the subject matter to find out whether Israel is on a genocide mission or is rightly exercising its right of self-defence in international law as it claims. The examination of the law on the subject of the exercise of the right of self-defence shall be a bit extensive because the existing statutory provision, Article 51 of the Charter of the UN is silent on one aspect of the right that is vital to this research.

2. THE OCTOBER 7, 2023 ATTACK ON ISRAEL

An attendee of the party that was disrupted by Hamas terrorists on the 7 October, 2023 described the attack as a 'horror movie.'[12] It was reported that about fourteen hundred persons were killed in the attack. This number included children, women, the aged and armed personnel.[13] The attack was characterised by rape of female victims, mutilation of their bodies and the bodies of other victims; indiscriminate shooting at just anybody sighted.[14] Hamas abducted over a hundred persons (including women, children, the aged and foreigners) in a haul as hostages.[15] About five months after the Hamas attack of Israeli citizens during peace time, Karen and Sammy reported that 'A team of United Nations experts tasked with gathering information on sexual violence linked to Hamas's October 7 attacks on Israel found':

Reasonable grounds to believe that some victims were sexually assaulted, including rape and gang rape, according to a U.N. report released Monday…In most these incidents, victims first subjected to rape were then killed, a press release announcing the report's findings said. The mission team also found a pattern of victims, mostly women, found fully or partly naked, bound, and shot across multiple location.[16]

The UN mission conducted its visit from the 29/1/2024 to the 14/2/2024:

...and found reasonable grounds to believe that rape and gang rape occurred at the Nova music festival and surrounding areas, Road 232, and Kibbutz Re'im. The mission also found a pattern of victims-primarily women- whose bodies were found partially or fully naked and bound. While that's circumstantial evidence, it could point to sexual violence. Based on its findings, the report establishes that there is 'reasonable grounds to believe' that sexual violence occurred on October 7 and that captives in Gaza have been subjected to sexual violence, too.[17]

The Gaza tunnels network is no longer news to people that are far and near the Middle East. The only news to those that are far is the discovery of the use of the tunnels by Hamas for war purposes. Most intriguing is Nidal's report[18] that lends weight to other accounts that the largest hospital in Gaza, Al Shifa Hospital, is the 'command centre' of Hamas militants and that weapons were found there. A British Army Colonel, analysing a Hamas video, narrates 'Compelling Evidence of Human Shields Tactics' employed by Hamas as it uses civilians in hospitals as shields to members of its arm wing and armouries.[19]

In the course of prosecuting its war against Hamas, Israel Defence Forces (IDF) calls

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[12] Francesca Gilet and Alice Cuddy, 'Israel music festival, 260 bodies recovered from site where people fled in hail of bullets' <bbc.com> Accessed 18 January 2024.
[13] ibid.
[14] ibid.
[15] ibid.
[16] Karen Deyoung and Sammy Westfall, 'UN Report: 'Convincing information Hamas raped, tortured hostages' <washingtonpost.com> Accessed 6 May 2024.
[17] Ellen Loanes, 'What the UN report on October 7 sexual violence does-and doesn't say' <htpps://www.vox.com/world-politics/24093631/un-israel-october-7-sexual-violence> visited 6/5/2024.
[18] Nidal Al-Mugharabi. 'Hamas command Centre, weapons found at Gaza hospital, Israeli military says' <reuters.com> visited 18 January 2024.
[19] Homish de Bretton-Gordon, 'Compelling Evidence of Human Shields Tactics' <m.youtu.be.com> Accessed 19 January 2024.

on civilians living in areas within Hamas military facilities to leave the areas[20] but Hamas would threaten them to remain.[21] This is to retain them as shield to their military installations that are lawful war objectives. A recipient of a call to leave the military zones of Hamas within a civilian population area complained that 'Hamas is blocking roads on the route south and just sending people back home.'[22] A member of Hamas elite *Nukhba, Amer Abu Awash* on interrogation said that military equipment are hidden in hospitals and particularly Shifa Hospital which is very big and 'can be used to hide things' so that IDF 'won't strike them.'[23] Marsi confirmed 'evacuation orders' by IDF to all civilians living in Hamas Military installation areas of northern Gaza to move to the southern part of Gaza because they are living in war target areas. There are three humans shield situations in warfare: where civilians volunteer to remain in attack prone areas as shield; civilians that are coerced to remain as shield to military installations that are prospective war targets and civilian areas that are shield by virtue of their proximity to military positions.[24]

'Human shield' in warfare achieves the goal of 'utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations.'[25] It was reported that:

> The IDF estimates that Hamas has 10,000 rockets on hand. This infrastructure is concealed in private homes, tunnels, and public buildings such as mosques among 1.85 million Gazans, who reside in the relatively small area of 362 square kilometres, thus making Gaza most densely populated polity in the world.'[26]

Ecanow,[27] a research analyst, asked 'a senior member of Hamas' the vital question: 'since you [Hamas] have built 500 kilometres of tunnels, why haven't you built bomb shelters where civilians can hide during bombardments?' Abu Marzouk's answer was simple and straight to the point; and that is, that the tunnels are 'meant to protect us [Hamas] from Israeli aircraft and facilitate attacks on Israeli targets.' It is obvious from this answer that Hamas would never provide the civilian populace with any protection in Gaza during war thus making civilians its shield especially that it mingles with the civilians to prosecute its war against the IDF.

On the 21/11/2023, the son of a Hamas Co-founder, Mosab Hassan Yousef, denounced Hamas before the United Nations. It was his narration before the world body that Hamas' primary goal is the annihilation of Israel. He manifested knowledge of the goal of Hamas in his capacity as one in whose presence Hamas was formed and that he was groomed by Hamas to take part in the annihilation of Israel. He told of a teenage girl that was grabbed by a Hamas member and thrown to a place she could not make it out alive. He had, about six years before this,[28] warned the United Nations Human Right Council of the Palestinian leadership in the following terms:

> I take the floor on behalf of the UN Watch. My name is Mosab Hassan Yousef.

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[20] Natalie Ecanow, 'Hamas officials admit its strategy is to use Palestinian civilians as human shields' <www.fdd.org> Accessed 19 January 2024.

[21] ibid.

[22] This receives confirmation from Eyad al-Bozom, spokesman for Hamas interior ministry who 'encouraged Gaza's residents to stay put in your homes and places.' See Natalie (n 20).

[23] Peter Beumont , 'What is a human shield and how has Hamas been accused of using them?' <www.theguardian.com > Accessed 19 January 2024. On the same subject see also Federica Marsi, 'What is 'human shield' and why is Israel using the term in Gaza?' <www.aljazeera.com > Accessed 19 January 2024.

[24] ibid.

[25] Douglas Fischer, 'Human Shields, Homicides, and House Fires: How a Domestic Law Analogy can Guide International Law regarding Shield Tactics in Arm Conflict' American University Law Review (2007) (57) (2)488. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1029&context=aulr Accessed 18 January 2024.

[26] Natalie (n 20).

[27] ibid.

[28] 25 September 2017.

> I grew up in Ramallah as a member of Hamas. I address my words to the Palestinian Authority which claims to be the sole representative of the Palestinian people. I ask: Where does your legitimacy come from? The Palestinian people did not elect you and they did not appoint you to represent them. You are self-appointed. Your accountability is not to your own people. This is evidenced by your own total violation of their human rights. In fact, the Palestinian individual and their human development is the least of your concerns. You kidnap Palestinian students from campus and torture them in your jails. You torture your political rivals. The suffering of the Palestinian people is the outcome of your selfish political interest. You are the greatest enemy of the Palestinian people. If Israel did not exist, you would have no one to blame. Take responsibility for the outcome of your own actions. You fan the flames of conflict to maintain your abusive power. Finally, you use this platform to mislead the international community, to mislead the Palestinian society to believe that Israel is responsible for the problems you create. Thank you.[29]

Mosab, in this forum, opposed the voices of those that attributed genocide, apartheid, occupation, rights violations, stealing lands, ethnic cleansing, colonisation, etcetera[30] to Israel against the Palestinians. He maintained before the UN Rights Council that Hamas has only been trying to make Israel a scape goat for its atrocities.[31]

It has never been a hidden agenda of Hamas and other terrorist groups such as Hezbollah and, in fact, Islamic countries such as Iran and Iraq to name just two, that Israel be deleted from the global map. This was the motive for the Arab-Israeli wars of 1948, 1967 and 1973[32] among others. To underscore the assertion of the Muslim countries' hostile posture towards Israel, their membership of the Allied Forces that fought Iraq out of Kuwait in the Gulf War code-named 'Operation Desert Storm' was not guaranteed if Israel was admitted into the Allied Forces led by the United States of America (US) as they could not fight alongside Israel against Iraq. This is meant to reveal the problem this work sets out to address or its aim, i.e., whether Israel is entitled to plead the contributions of Hamas to civilians' death in Gaza in the allegations of the violations of humanitarian laws on genocide. Whether Israel can plead the right of self-defence in the prosecution of the war against Hamas in Gaza as a follow up to the events of October 7, 2023 attack but where Gaza civilians have lost their lives and, there is yet to be in sight, an end to the war and in the face of the bold official assertion of the Israeli leadership that it must cripple Hamas before it ends the war and Hamas vow to 'do it again, and again'.[33] Whether the war objectives of Israel, to bring the hostages back home, decimate Hamas and restore security in Gaza.[34] This work sets out to achieve, among others, the objective of either justifying punishment of regimes that use human as shield during warfare or the punishment of regimes that defy rules of war that protect civilians; to vindicate or villainy the use of 'Judi-warfare' to advantage when there is a warfare in exercise of the right of self-defence as the Palestinians appear to be doing through the Republic of South Africa (RSA)

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[29] UNHRC, 'Son of Hamas Shocks U.N. Delegates as PLO Abuses Exposed' < https://youtu.be/c2NaiX-hvVQ?si=AoRwySK-ahUIMiUs> Accessed 20 January 2024.

[30] ibid The words of representatives of PLO, Qatar, Pakistan, Venezuela and Iran in the same forum but presented in no particular order.

[31] 'Son of Hamas Co-Founder Denounces Group at UN, Exposes 'Savage' Indoctrination of Palestinian kids' <m.youtube.com> Accessed 20 January 2024.

[32] Ken (n 8).

[33] Ghazi Hamad, 'Hamas Terrorist's Shocking interview Threatens To Repeat October 7 Attack' in interview with LBC TV, Lebanon after the October 7 attack. <https://youtu.be/BJNccvNJtGk?si=CklYn17eh4ahawn0 > Accessed 16 June 2024.

[34] CNN "NETANYAHU OUTLINES WAR OBJECTIVES" 12 November 2023 <https://youtube.com/shorts/b4ITDly0tws?si=orkATVkqJcdvoJmc> Accessed 20 January 2024.

before the ICJ.

Just before the crime Israel is accused of and the possible defences are considered, it is important that the position of the law on the protection of non-military objectives be understood. The Geneva Conventions and their two protocols of 1977 have seven consequential rules.[35] This work shall dwell only on the rule that is most relevant to its aim; i.e., the object of military action during arm conflict must be the military of the enemy and its facilities and should not include civilians. This is where the Israeli-Hamas war has generated controversy making this work necessary.

The right of nations to defend themselves when attacked in international law is rooted in rules of customary international law. At the slightest apprehension of a threat, a man's members of the body that could be employed to ward off the attack swing into action by reflex or voluntarily thus making the right of self-defence a matter of the instincts of men. The statutes merely codify that which has been appointed by nature as the right of every man to defend himself when attacked. A state, for the purpose of the exercise of the right of self-defence, stands on the same footing with the human organism as illustrated above.

The rights of nations to defend themselves against any act of aggression or the threat of aggression has been statutorily provided for in article 51 of the United Nations (UN) Charter. The article provides that:

Article 51

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. (Emphasis supplied)

The description of the right as 'inherent' in article 51 underscores the argument that the right is natural or customary as it is inherent in every sovereign state as it is with every natural person. The inherent character of the right was held in the *Nicaragua v United States*[36] to exist in both customary international law as well as article 51 of the UN Charter. The ICJ in this case held the right to exist in the streams of customary international law and the UN Charter and that the latter has not subsumed and supervened the earlier. In the words of the ICJ:

> As regard the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions 'inherent right' … of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an arm attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present contents has been confirmed and influenced by the Charter.

[35]Hagler Okorie, *Law of Armed Conflict* (Princeton and Associates Publishing Co Ltd, 2021) 277.
[36] ICJ Reports (1986) 14, 94; (1986) 76 ILR449, 428.

(Emphasis supplied).

The common understanding of the law of self-defence suggests, especially as it is contained in article 51 of the UN Charter, that the right is not available when there is no actual violence or, at least, a threat of violence against the person seeking the benefit of the right. This, by implication, means that as soon as actual violence or the threat of it vanishes, the right of self-defence abates. Applying this principle in the Israeli-Hamas situation, Israel would appear to have lost the right of self-defence soon after the abatement of the Hamas attack of October 10, 2023. In a community reading of the right in article 51 and article 2(4) of the UN Charter, the actual use of force *ipso facto* does not constitute the only condition for the invocation of the right of self-defence against an aggressor. Article 2(4) of the UN Charter provides against the actual use of force or the threat of the use of force by state members in their international relations with one another in conflict situations.

The provisions of article 2(4) is a resounding announcement of the illegality of the threat of the use of force in resolving any difference between or among states. This inevitably leads us to the vital issue raised by Shaw in the following words: '…whether a right to anticipatory or pre-emptive self-defence exists.'[37] Unfortunately, the case of *Nicaragua v United States*[38] did not decide on 'anticipatory' or 'pre-emptive' attacks while considering the right of self-defence under article 51 of the UN Charter. Shaw proceeded from the vital issue raised by him to submit that in the world we are living today, warfare entails speed in arm strikes, pre-emptive defence should not be ruled out otherwise a response to an attack would only amount to a smack of closing the stable door when the horse is already out.[39]

Brownlie[40] holds the view that advocates of the right of pre-emptive self-defence argue that the right of self-defence provided in article 51 of the UN Charter is a codification of a customary international law right. He, however, maintains that this reasoning has its limit in the fact that by its clear terms, article 51 is inadmissible of pre-emptive right of self-defence. In further reaction to the assertion that pre-emptive right of self-defence is an ancient principle of customary international law that dates back to the nineteenth century, he argues that as of 1945, the date of the UN Charter, the practice of states generally was opposed to anticipatory self-defence.[41] He cited the *Iran Nuclear site case* where Israel was condemned by the UN Security Council for activating the right of self-defence anticipatorily.

A glean from this view suggests that states' practices in 1945 relegated the right of anticipatory self-defence to customary international law status as it was out of tune with the provisions of article 51 of the UN Charter. This argument appears to have fortification in *Caroline case* referred to by Shaw.[42] British subjects in 1837 had seized and destroyed a US Vessel, Caroline, at a port because the Caroline had been supporting American nationals that had been raiding Canadian territories to help their rebellion against British authorities though without the approval of the United States. In an exchange involving the US and Britain, the conditions for self-defence consequent to the incident were laid down to be that there must be an extant '…necessity for self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.'[43] The choice of words in this piece of exchange appears to cover anticipatory situations. The words certainly covered the Russian-Ukrainian situation when Russia started a military build-up at its boundary with Ukraine leaving no one in doubt, albeit amidst denials by Russia that it was going to invade Ukraine. In any case, it actually happened on the 24/2/2022

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[37] Malcolm N Shaw, *International Law*, (4th edn, Cambridge University Press, 1997) 789.
[38] ICJ Reports (1986) 14; (1986) 76 ILR 349.
[39] Malcolm (n 37)
[40] IAN Brownlie, *Principles of Public International Law*, (6th edn, Oxford University Press, 200) 701-702.
[41] ibid.
[42] Malcolm (n 37) 787.
[43] See DJ Harris, Cases and Materials on International Law, (6th edn, Sweet and Maxwell, 2004) 923.

when Russia invaded Ukraine.[44]

States have been active in anticipatory self-defence. After suffering terror attacks, states have hit military bases of terrorists even in foreign countries. Such actions are pre-emptive although were hitherto rejected. Many states have, however, come to accept such actions by the United States.[45] The death of Osama Bn Laden caused by American seals at Pakistan over a decade after the September 11, 2001 attack of the Twin Tower was certainly anticipatory self-defence because for as long as the deceased was alive, he was a threat to America, and, in fact, world security. Harris is of the view that if a state harbours terrorist, the latter could be attacked by their potential victims in what appears to be anticipatory self-defence.[46]

Harris relates another's opinion[47] that Article 51 of the UN Charter has no content other than the one determined by the provisions of article 51 itself. To justify the right of anticipatory self-defence and as a counter to the view referred to by Harris, Bowett[48] argues that article 51 was not meant to place a limit on the customary international law provision for the right which enclosed the anticipatory rights of nations to defend themselves. Kelsen's approach is from the positivists' perspective of law to wit, it is either it is written, and it is legal or it is illegal because it is not explicitly provided for in a statute. Article 51 that provides for this right does not say you must be a victim of the attack before the right could be activated. The right is available by this provision when a nation is left in no doubt that it would be attacked. The very essence of the right is to attack to prevent being attacked. This way the right of self-defence even as provided in article 51 is to all intents and purposes available in an anticipated attack situation.

It is not in dispute that Hamas is a terrorist organisation that has launched numerous rockets into Israel for a long time thereby causing the death of innocent civilians. It has equally been on the mission of suicide bombings of Israeli civilians in Israeli territory. It has an agenda of obliterating the Jewish nation as it has the Jews and Christians as eternal divinely ordained enemies.[49] The Hamas brutality of October 7, 2023 and other pre- October 7, 2023 deadly attacks on Israel have not only become a fecund ground for Israel to take offensive measures to recover its citizens that have been taken hostage but to prevent future attacks.

While the world stands on the post-World War II slogan 'never ever again,'[50] Hamas leadership announced that 7th October, 2023 would be repeated 'again and again and again.' Senator Josh Hawley of the US quoted pro-Palestine protesters as saying to the Jewish students that '…not a hundred, not one thousand, but ten thousand times the 7th of October is going to be every day for you…'[51] In a shocking manner, a leader of Palestine, with every audacity, said to the press that October 7 would be repeated again and again until Israel is annihilated.[52] How many times and for how long would Israel be expected to be attacked 'again and again' before it takes defensive measures in anticipation of any further 'again'? Until it is annihilated? This vindicates Israel avowed war aim in the Israel-Hamas war, to incapacitate the war machine of Hamas.

A situation arose in the case of *Guyana v Suriname*.[53] The evidence before the tribunal in

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[44] Madeline Fitzgerald and Elliott Davis Jr, "Russia Invades Ukraine: A Timeline of the Crisis" 18 November 2024 <usnews.com> Accessed 30 December 2024.
[45] ibid 941-942.
[46] ibid.
[47] ibid 922.
[48] ibid.
[49] Quran, Chapter 29:9
[50] Oleksandr Vodiannikov, "The Universal Declaration of Human Rights (UDHR) and Post-War Constitutional Democracy: Common Origins" < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804880> Accessed 30 December 2024.
[51] Josh Hawley on CNN < https://www.youtube.com/live/dZ5Y616ox10?si=DZtqATGL43PhxIqf > Accessed 17 May 2024.
[52] Ghazi (n 33).
[53] Amos Enabulele and Bright Bazuaye, *Basic Topics in Public International Law* (Malhouse Ltd, 2014)460.

this case was that a rig belonging to Guyana was ordered by one Major Jones of Suriname to vacate the disputed area and that if the demand were not complied with, unstated consequences would follow. There was no cogent evidence as to what these consequences might be. The Tribunal found the order given by Major Jones to the rig owner to constitute an explicit threat of the use of force if the order was not complied with. It was the decision of the Tribunal that the threat by Major Jones contravened article 2(4) of the UN Charter and general international law. The situation in this case called for the invocation of the right of self-defence by the state faced with the threat.

Denying Israel, the right of anticipatory self-defence in international law is rather illusory. It is the general principle of criminal law in all criminal jurisdictions that the right of self-defence accrues as soon as there is an actual attack or an eminent attack. The very essence of the right is pre-emptive. A man defending himself inflicts injuries or annihilates an aggressor to avoid annihilation or being injured. Why measures to prevent being injured within the precincts of the law of self-defence on the international plane should be restricted to only actual attacks situations is the point of concern. The historical antecedents of Arab countries above, and particularly the State of Palestine, are situations of a strong desire to annihilate the State of Israel. These annihilation efforts are no 'Mene Mene TEKEL Upharsin'[54] situations that beckons on a Daniel for interpretation. It is inhuman to expect Israel not to take anticipatory steps whenever there is an eminent threat of attack.

3. THE 'GENOCIDE' CLAIM AGAINST ISRAEL IN THE ISRAEL-HAMAS WAR

The RSA instituted proceedings before the ICJ in a case that is known as the 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, *South Africa v Israel*.[55] Hamas has alleged genocide through the RSA before the ICJ. The RSA, as the petitioner before the Court, is alleging that Israel has killed over twenty-three thousand persons, mostly civilians (children, women and the aged) thus Israel is guilty of the violation of the Convention. Genocide is defined by Article II of the Convention thus:

> Article II
>
> 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. (Emphasis supplied)

Genocide is a crime that is punishable under Articles III (a) and IV of the Convention. Article 6 of the Rome Statute of the International Criminal Court also defines 'genocide' as a crime similar to article II of the Convention cited above.[56] In the light of the provisions of the above international statutes, the above facts of the October 7, 2023 Massacre of the Jews, the ensuing war between Israel and Hamas, the defence tactics of Hamas i.e., the use of humans as shield in the ensuing war give rise to the important questions in international humanitarian law that Israel must address in its case of genocide.

In defence of the allegation of genocide under the Convention, Israel could rest its case on the strategy of the warfare it has employed since the inception of the war. The mental element

[54] Holy Bible, Daniel 5:25 KJV.
[55] Case No 2023/77 Filed 29/12/2023
[56] Note that article 8 of the Rome Statute defines war crimes to include grave breaches of the Geneva Conventions of 12 August, 1949.

of genocide provided by Article II of the Convention is *intent*. This mental element could be shaken when the war strategy employed by Israel is brought to the fore. For instance, in response to questions from Juddie Cohen of Wion Pulse electronic media outfit, Richard Hecht stated that the goal of the war Israel is fighting is to decimate the terrorists, Hamas. He maintained that Israel is not fighting the civilian populace; thus, the IDF calls on the civilians to leave military targets and avoid being used as shield.[57] This could be a serious problem to the allegation that Israel is prosecuting the war with *intent* to eliminate a people within the context of articles II, III and IV of the Geneva Conventions.

This position is reinforced by the facts of Hamas preventing civilians from leaving war objectives, militarising purely civilian areas such as schools, hospitals and worship places by building tunnels used for military activities under them. The leader of Hamas has been reported as saying that the death of Palestinian civilians is a 'necessary sacrifice' to help Hamas' cause.[58] This practice was reported of the leader in 2016 when he declared in '…2016 at the Gaza boarder, Hamas leader Yahya Sinwar admitted the group "decided to turn that which is most dear to us, the bodies of our women and children into a dam blocking the collapse of Arab reality.'[59]

Article 51 paragraph 7 of Protocol I of the Geneva Conventions further made provisions in this regard in the following terms:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack or to shield military operations.

In the plenitude of its provisions, this law serves the double barrel purpose of placing an obligation on both sides to a conflict. The victim of aggression should not use human beings as shield when it is attacked neither should an aggressor use human beings as shield to deter its victim from any return fire. It is a provision that covers the use of the civilian population as well as prisoners of war as shield during arm conflicts.

Article 58 of Protocol I to the Geneva Conventions places an obligation on a state under attack to 'endeavour to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives;' to 'avoid locating military objectives within or near densely populated areas;' and to take other necessary precaution to protect the civilian population, individual civilian and civilian objects under their control against the dangers resulting from military operations.' Unfortunately, while Israel would announce that the death of a civilian during the war is a tragedy, Hamas looks at the death of its civilians as a war tactic or strategy.[60] With this strategy, Hamas sends its men into civilian areas from where they launch their rockets and fight the IDF; it keeps its war materials among civilians. In a nutshell, it surrounds military objectives with civilians, especially women and children.[61]

Hamas provoked the war and has given Israel cause to continue the war by its October 7, 2023 attack and abduction of citizens of Israel and its refusal to return them. Israel warned that

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[57] Richard Hecht and Juddie Cohen, 'Israel-Hamas War: How IDF plans to decimate Hamas Militants' Wion Pulse broadcast of 23 October 2023.
[58]Natalie (n 20).
[59] ibid

[60] Sam Munson of New York Post, 'Israel Calls Rafah's civilian deaths tragic – but for Hamas they're a tactic' <https://youtu.be/AVHD9IBMHGY?si=x2Npl8ZBYdzZxx1N > Accessed 28 December 2024.
[61] ibid.

it was not fighting Palestinians but Hamas. Hamas fights the war from among civilians. In view of the danger Hamas exposes its civilians to as a war strategy,[62] Israel has, nevertheless, always given civilians notice and time to leave war objectives before its military assaults.[63] With the active exposure of civilians to danger as seen above and the active warnings to civilians to get away from harm way i.e., military objectives before attacks, there is intention on the part of Hamas to kill its own while Israel cares for their preservation thereby nullifying the *intent* element required by Article II of the Conventions. Furthermore, from these, it appears that Hamas and not Israel is in breach of Articles 51 and 58 of Protocol I to the Geneva Conventions.

The figures of the dead in the war have been subjects of media and political propaganda. There is no certainty on these figures especially that Hamas would want high figures to attract global sympathy. However, let us take the figures for what they are for the purpose of arguments. There is no indication of how many from these figures announced from time to time were armed men on the ground fighting; how many are civilians (women, children and the aged) whose death were caused by the strategy of making them 'necessary sacrifice' for the cause of the Palestinians by Hamas.[64] These considerations cast the reasonable doubts on the crime of genocide alleged against Israel. Article 8 paragraph 2 (b) (xxiii) of the Rome Statute has criminalised the use of protected persons to render military points immune from being military targets. It is doubtful if Hamas, by its 'necessary sacrifice' tactics, is not guilty of the violation of these prohibitions in the international humanitarian statutes referred to above.

In all these, one would hardly lack voluntary human shield. For instance, many Serbians went on the bridges of Belgrade to shield them off the enemy in the war campaigns of North Atlantic Treaty Organisation (NATO) against Kosovo in 1999; Palestinians surrounded Yasser Arafat Head Quarters in Ramallah in 2003 to 'insulate' it from Israeli attacks.[65] These countries were in violation of rules of international law forbidding and penalising the use of humans shield during arm conflict like Hamas is doing today. Such a violator should not be allowed to take the benefit of his crimes by transferring punishment to an 'aggressor' whose target is located by his enemy in the heart of a civilian population.[66]

4. THE POSSIBILITY OF THE SUCCESS OF THE PLEA OF SELF-DEFENCE BY ISRAEL

A successful plea of self-defence by Israel or anyone or more of its officials presents a unique situation. It is for this reason that the plea would be considered for Israel from two fronts. First, the right shall be considered as a defence under customary international law and/or Article 51 of the UN Charter; second, on the possibility of charges under the Rome Statute. This plea on article 51 of the UN Charter or under customary international law. Article 51 must, however, be read along with article 2 paragraph 4 of the Charter. It is the principle of statutory construction that provisions of a statute should not be read in isolation but in community with others to make out the best of the intent of the statute.[67] It is the explicit provision of article 2(4) of the UN Charter that all Member States shall refrain from the use or the threat of the use of force against the territorial integrity or political independence of one another. It is for this reason that the provisions of article 2(4) of the Charter cannot be treated as a statutory orphan when considering the defence under article 51.

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[62] Natalie, (n 20).

[63] Efrem Graham of CBN Newswatch 'Israel Orders Evacuation of Civilians in Gaza City' < https://youtu.be/mFsHy1kiJGA?si=0E-WNd9exJAlmuE> Accessed 28 December 2024.

[64] Becky Anderson of CNN, "Hamas leader said civilian death toll could benefit militant group in Gaza war" <https://youtu.be/fzNZNCQ6oc8?si=h01-B2HTe1JUJRQq> 28 December 2024.

[65] ibid p885.

[66] Gordon of the Queen Mary University of London on the question 'What are the implications of labelling civilians as human shields?' <www.aljezeera.com > Accessed 24 January 2024.

[67] *Nuclear Weapons Case* cited by DJ Harris (n 33) 951-971.

While the actual use of force is understood to be a breach of article 2 paragraph 4 of the UN Charter, the provision of article 51 of the UN Charter may appear to be of little assistance to the state of Israel in view of the cessation of the attack of October 7, 2023 by Hamas. If one would consider a war by Israel to rescue its citizens taken hostage by Hamas on that day among other things, the right would appear to beckon for reconsideration. Israel would not justifiably be out of the precincts of the right pursuant to the combined effect of article 51 and article 2 paragraph 4 of the UN Charter or even under customary international law. About one thousand four hundred of its citizens were killed by Hamas and over a hundred taken hostage in circumstances that their lives are in danger. Israel will be failing as a state to keep abreast with its primary obligation of protecting its citizens if it does not fight to rescue them. That is a primary obligation each state of the world owes its citizens. In the face of the continuing threat that Hamas is to the hostages and without guarantee that it would not launch more attacks,[68] it is only justifiable that Israel responds in self-defence.

5. THE THREAT OF THE USE OF FORCE

What could qualify for a threat of the use of force under article 2 paragraph 4 of the UN Charter is a point of concern. In the first place, what amounts to a threat of the use of force may not be agreed upon by the parties involved in a conflict. The party that is alleging the threat of the use of force would stand his ground that the 'aggressor's conduct amounted to a threat of the use of force and the latter would always insist on 'no' to such an allegation. On the face of article 2 paragraph 4 of the UN Charter, a threat of the use of force by any state against another is illegal in international law. There cannot be any iron cast rule on when such a threat could be said to have accrued to give rise to a ground of military action in self-defence under article 51 of the UN Charter or under customary international law.

In the *Nuclear weapons case*,[69] the question arose whether the ultimatum given Israel and Egypt by France and the United Kingdom to cease fire within twenty-four hours in 1956 amounted to a threat of the use of force; and, in the advisory jurisdiction of the Court, whether a 'signalled intention to use' nuclear weapons or other kind of force or the possession of nuclear weapons is a threat of the use of force contrary to article 2 paragraph 4 of the UN Charter. The Court held that article 2 paragraph 4 of the UN Charter definitely prohibits the use of force or the threat of the use of force; but that the article must be read in conjunction with other articles of the UN Charter. It was the view of the Court that:

i. the use of force or the threat of the use of force must be considered in the light of article 51 of the Charter that allows for the exercise of the right of self-defence; and article 42 that empowers the Security Council to take military enforcement measures in instances covered by Chapter 7 of the UN Charter;
ii. Article 42 that allows the Security Council to use Military force does not limit the force that could be employed for the purposes of meeting its requirement;
iii. that the use of force in self-defence under customary international law is governed by the nature of the force used by the assailant; that the state acting in self-defence can use force that is proportional to the one used against it i.e., nuclear force to ward off nuclear force used by the assailant; this impliedly applies to the threat of the use of force since article 51 of the UN

[68] Hamas has for years launched ceaseless rocket attacks on Israel and embarked on many suicide bomb attacks on Israeli civilians.
[69] Harris (n 35) 891 and 951-971.

Charter does not limit the force to be used in self-defence…

6. CONCLUSION AND RECOMMENDATIONS

A glean from the above would lead to the inevitable finding that:

a. Hamas has the annihilation of the State of Israel as its aim; and it was in the prosecution of that goal that it launched the unprovoked attack on Israel on the 7 October, 2023 where women were raped, their bodies mutilated; many civilians were killed and some taken as hostages till date with a promise to do what it did on the 7 October, 2023 'again and again.'
b. Hamas was seen as doing what it did and has been on admission of doing what it is accused of and is even negotiating with the State of Israel on the terms of the release of hostages taken from the State of Israel on 7 October, 2023.
c. Israel is fighting a battle of survival.
d. The UN is fast losing its credibility when its agency, UNRWA has compromises it is accused of making to help Hamas before and in the course of the October 7 2023, attack and even in the course of the prosecution of the current war.
e. The UN is divided on the unconditional stop to the war, one camp is for unconditional stop to the war and the other camp maintains that Israel has the right to prosecute the war in self-defence.

It is the recommended that:

a. The word 'inherent' in article 51 of the UN Charter be construed to convey the customary international law right of self-defence which encompasses anticipatory self-defence. This is not only in tandem with reality but also accords with the notion that men are born with the right of self-preservation.
b. Hamas having made its intention to wipe away Israel and Jews clear, any future government of the 'Palestinian State' should not include Hamas in the interest of the peace of the 'two states' in particular and the Middle-East in general.
c. The UN should create a platform of negotiations between Israel and the Palestinian Authority on the possibility of the states of Israel and Palestine living side by side but strictly on the basis of a consensus reached through the negotiations between the two parties.
d. The UN Charter and Rules of the United Nations General Assembly and the UN Security Council be altered to exclude a state that is in any alleged violation of a rule of international law not to be a competent complainant over the issue such a violation is alleged against it.