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PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public

Observations filed pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: Canadian Union of Jewish Students (CUJS)
World Union of Jewish Students (WUJS)

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Palestinian Human Rights; Israel Bar Association; Czech Republic; International Centre of Justice for Palestinians and the Centre for Human Rights Law (SOAS University of London); Jerusalem Institute of Justice; Chile and Mexico; Centre for European Legal Studies on Macro-Crime (MACROCRIMES); Dr Robert Heinsch and Dr Giulia Pinzauti; The Hague Initiative for International Cooperation; ICJ Norway and Defend International Law; UN Special Rapporteurs and Working Groups; the United States of America; Professor Neve Gordon; Al-Quds Human Rights Clinic and Al-Quds University; the League of Arab States; L'association des Juristes pour le respect du droit international and la Fédération internationale pour les droits humains; University Network for Human Rights, the International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and Professor Michael Lynk; Professor Adil Ahmad Haque; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The

Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA – Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shahd Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), Al- Mezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); République Démocratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.

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I. INTRODUCTION

1. These observations are filed by the Canadian Union of Jewish Students ("CUJS") and the World Union of Jewish Students ("WUJS") pursuant to the Chamber's Decision of 22 July 2024¹ in which it granted leave. They are intended to assist the Court in ruling on the Prosecution's 20 May 2024 Article 58 Application for the issuance of arrest warrants for Benjamin Netanyahu and Yoav² ("**Prosecution Article 58 Application**").
2. The CUJS and the WUJS seek to make observations on the following matters:
 - a. The global rise in antisemitism and the advisability of the ICC taking a prudent approach in this case in order to minimise the risk of further harm to the Jewish community;
 - b. The need for circumspection when assessing evidence supplied by Hamas, an inherently antisemitic organisation, and from other organisations with a demonstrated antisemitic bias; and
 - c. The independence, impartiality and competence of the Israeli prosecutorial and judicial systems and the fact that impunity would not result if the Pre-Trial Chamber were to reject the Prosecution Article 58 Application.

II. THE GLOBAL RISE OF ANTI-SEMITISM AND THE ADVISABILITY OF A PRUDENT APPROACH BY THE ICC

3. Antisemitism is a profoundly distressing, persistent form of hatred against Jews. Since October 7, there has been a spike in antisemitic expressions and attacks globally. In many nations, including Canada, hate crimes against Jews have reached their highest levels since the Holocaust.³ These have included arson

¹ ICC-01/18-249.

² ICC OTP, "Statement of the ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine", 20 May 2024, available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

³ B'nai Brith Canada. (2024). Annual Audit of Antisemitic Incidents 2023. <https://www.bnaibrith.ca/antisemitic-incidents/>

attacks against synagogues, vandalism, and physical and verbal harassment of Jews.

4. CUJS has noted troubling incidents on university campuses, some of which were presented to a committee of the Canadian House of Commons: At Queen's *mezuzot* owned by Jewish students were ripped down in university residences. At McMaster, the campus *Chabad* was egged. Jewish students feel unsafe from coast-to-coast when hearing calls to "globalize the Intifada" - a call for global terror attacks against Jews.⁴
5. CUJS and WUJS submit that Hamas' actions have had a far-reaching effect beyond Israel and Gaza and cause significant harm to global Jewry. Antisemites have been emboldened by Hamas' 7 October 2023 attack on Israel and both its historical and ongoing incidents of incitement to violence against members of the Jewish community. Indeed, Hamas' founding charter references a violent *hadith*, calling for Jews to be killed.⁵ Hamas deliberately chose to attack Israel on a Jewish holiday: *Simchat Torah*. *Simchat Torah* marks the beginning of the annual cycle of the reading of the Torah. October 7 also fell on a Saturday, the Jewish day of rest known as *Shabbat*. The attacks, which resulted in the murder of approximately 1,200 people and the kidnapping of 251 hostages, marked the largest massacre of Jewish people since the Holocaust.
6. Hamas has made an array of antisemitic statements over the years, chief among them declaring October 13 a "Global Day of Jihad," which has caused profound distress to Jews in the diaspora.⁶ Hamas and its affiliated TV network

⁴ Canadian Union of Jewish Students. (2024). Submission to the Standing Committee on Justice and Human Rights. <https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR13153995/br-external/CanadianUnionOfJewishStudents-e.pdf>

⁵ Article 7 of the Hamas charter includes the quote: "The hour of judgment shall not come until the Muslims fight the Jews and kill them, so that the Jews hide behind trees and stones, and each tree and stone will say: 'Oh Muslim, oh servant of Allah, there is a Jew behind me, come and kill him,' except for the Gharqad tree, for it is the tree of the Jews." See: The Avalon project: Hamas covenant 1988. (1988). Avalon Project - Documents in Law, History and Diplomacy. https://avalon.law.yale.edu/20th_century/hamas.asp

⁶ Holt, F. (2023, October 13). Remain vigilant as calls for global 'Day of jihad' circulate online: FBI. National Post. <https://nationalpost.com/news/israel-hamas-day-of-jihad>

consistently adopt numerous antisemitic tropes,⁷ engage in Holocaust denial,⁸ and frequently incite violence against Jews, including in children's television shows.⁹ Unsurprisingly, Hamas is listed as a terrorist organization by numerous nations including Canada¹⁰, Australia¹¹, Japan and the EU¹² who all proscribe the political wing of Hamas as part of the broader Hamas terror group. These countries have also imposed terrorist sanctions on individual members of Hamas' leadership and on the various funding mechanisms which aid its work.

7. It is respectfully submitted that the severity of the current antisemitism crisis, and the leading role played by Hamas within that crisis, means that the Court should take a prudent approach to the assessment of evidence that is cognizant of the risks associated with evidence sourced from bodies associated with antisemitism or potentially motivated by antisemitism. Such an approach, which necessitates the Court taking a circumspect view of evidence provided to the Prosecution by Hamas, will minimize the risk of further harm to the Jewish community by avoiding granting misinformation evidential legitimacy.
8. To be clear; it is not our submission that the Prosecutor is motivated by antisemitism in bringing this case. Although CUJS and WUJS disagree with the Prosecutor's approach to the investigation of the Situation in the State of

⁷ Dehumanization, Jews as Bacteria: *Hamas deputy minister of religious endowments: Jews are bacteria, not human beings*. (2010, March 15). MEMRI. <https://www.memri.org/tv/hamas-deputy-minister-religious-endowments-jews-are-bacteria-not-human-beings>; Blood libel trope: *Blood libel on Hamas TV - President of the American center for Islamic research Dr. Sallah Sultan: Jews murder Non-Jews and use their blood to knead Passover matzos*. (2010, April 11). MEMRI. <https://www.memri.org/tv/blood-libel-hamas-tv-president-american-center-islamic-research-dr-sallah-sultan-jews-murder-non>

⁸ *Hamas TV: The Holocaust was part of a Zionist plan to get rid of the Jewish elderly and handicapped*. (2008, May 3). MEMRI. <https://www.memri.org/tv/hamas-tv-holocaust-was-part-zionist-plan-get-rid-jewish-elderly-and-handicapped>

⁹ *Children on Hamas TV: We want to wage jihad and blow up the Jews*. (2015, September 15). MEMRI. <https://www.memri.org/tv/children-hamas-tv-we-want-wage-jihad-and-blow-jews>

¹⁰ Currently listed entities. (2024, July 2). Public Safety Canada / Sécurité publique Canada. <https://www.publicsafety.gc.ca/cnt/ntnl-scrnt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#25>

¹¹ Minister for Home Affairs. (2022, April 3). *Hamas listed as a terrorist organization*.

¹² European Council. (n.d.). Sanctions Against terrorism. <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/sanctions-against-terrorism/#hamas>

Palestine, but we do not allege that the Prosecutor has acted in bad faith in his reliance upon the evidence that has been submitted to him.

9. In this same vein, we applaud the Court's recent decision to reject the motion for leave to file *amicus curiae* observations by Mr. Devers on behalf of Hamas.¹³

III. THE NEED FOR CIRCUMSPECTION WHEN ASSESSING EVIDENCE SOURCED FROM HAMAS OR OTHER DEMONSTRABLY ANTI-SEMITIC SOURCES

10. Hamas' antisemitic motives call its credibility and impartiality into question. It is therefore submitted that reliance by the Court upon evidence provided by antisemitic groups, such as Hamas, or other bodies which have demonstrated antisemitic conduct in the past, risks harming the integrity of and public confidence in the administration of justice.

i. Concerns as to evidence provided to the Prosecution by Hamas

11. We understand that the Prosecution has relied on evidence which is ultimately sourced from Hamas in its Article 58 Application for arrest warrants in respect of Benjamin Netanyahu and Yoav Gallant. This evidence relates both to the warnings of a famine in Gaza and the number of people killed and injured in the armed conflict since 7 October 2023.
12. In his statement announcing the application for arrest warrants, the ICC Prosecutor referenced a tweet made on 18 March 2024 by UN Secretary-General António Guterres warning of a coming famine in Gaza.¹⁴ He stated:

"1.1 million people in Gaza are facing catastrophic hunger – the highest number of people ever recorded – anywhere, anytime" as a result of an 'entirely manmade

¹³ Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence ICC-01/18-249 22 July 2024, Pre-Trial Chamber.

¹⁴ Khan, K. (2024, May 20). *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine.*

disaster'. Today, my Office seeks to charge two of those most responsible, NETANYAHU and GALLANT... pursuant to Articles 25 and 28 of the Rome Statute."

13. The Secretary-General's written statement¹⁵ associated with that tweet also cites a Food Security Report from the Integrated Food Security Phase Classification Global Initiative ("IPC Report").¹⁶ Page four of the IPC Report features the following excerpt:

"As of 14 March 2024, the ongoing hostilities have reportedly caused nearly 105,000 casualties within the Gaza Strip... This includes over 73,000 people injured, about half of them women and children,¹⁷ and over 31,000 deaths."

14. However, this claim references the World Health Organization's "Health Cluster Dashboard." The Dashboard sources information from UN's Office for the Coordination of Humanitarian Affairs ("OCHA"), which, in turn, relies upon information sources from the Hamas run, Gaza Ministry of Health.¹⁸
15. The Prosecution erred in relying on premature, Hamas-sourced, predictions of famine "projected to occur anytime between mid-March and May 2024" as an evidential basis for the 20 May 2024 Article 58 Application.¹⁹ In June 2024 the IPC released further findings contrary to Guterres' expectation, noting that "available evidence does not indicate that famine is currently occurring."²⁰ Thankfully, the disaster never materialized, no doubt thanks in part to Israeli efforts to expand the facilitation and provision of humanitarian aid into Gaza.²¹

¹⁵ Secretary-general's press encounter on Gaza food insecurity report - Statement - Question of Palestine. (2024, March 18). UNISPAL. <https://www.un.org/unispal/document/secretary-generals-press-encounter-on-gaza-18mar24/>

¹⁶ Note the March 18 publication date: IPC. (2024, March 18). *IPC Global Initiative - Special Brief: The Gaza Strip*.

¹⁷ The number of women and children's casualties would later be reduced, see Para. 50.

¹⁸ See also: Ibid, Figure one.

¹⁹ IPC. (2024, March 18). *IPC Global Initiative - Special Brief: The Gaza Strip*, page 1.

²⁰ Page 2, IPC Famine Review Committee. (2024, June 25). *June 2024 Conclusions and Recommendations*, web.

²¹ *Humanitarian Efforts Israel*. (2024). <https://gaza-aid-data.gov.il/main/#RecentUpdate>; See also *Transparency and methodology issues in the IPC Special Brief of 18 March 2024*. (2024). Israel Ministry of Foreign Affairs, web, annex one noting steps taken even before the March IPC report to increase aid into Gaza.

Such efforts are especially notable given that Hamas' presence complicates the aid distribution process due to their theft of aid packages and corruption in allocating aid.²²

16. The Prosecution also erred in relying upon Hamas-sourced estimates of deaths said to have occurred in the Gaza Strip since 7 October 2023. Unlike in previous conflicts, Hamas death tolls since 7 October 2023 have not been independently verified by the UN.²³ Thus, the fact that estimates of death tolls provided by Hamas are cited by the UN or others does not speak to an increased reliability of those estimates. Indeed, mere days after the Prosecution requested the issuance of arrest warrants, the number of women and children estimated to have been killed was nearly halved.²⁴ The difficulties for the Hamas-run Gazan Ministry of Health in providing accurate estimates of those killed no doubt stems in part from the fact that over the course of the war, Hamas has lost substantial control over Gaza and no longer has any real capability to provide accurate evidence on this issue.
17. The majority of the other evidence relied upon by the Prosecution is not publicly known due to the *ex parte* nature of the Article 58 Application procedure. However, the unreliable nature of evidence sourced from Hamas, can be readily demonstrated by reviewing allegations related to the alleged 17 October 2023 attack on Al Ahli Hospital. The Hamas-run Gaza Ministry of Health claimed that Israel targeted and bombed the Al Ahli Hospital and that this resulted in the killing of 500 people, including civilians. However, Human Rights Watch's analysis of photo and video evidence using "Photogrammetry techniques" measuring the crater of the explosion, concluded that the size was inconsistent

²² *Gaza Strip: Freedom in the world 2024 country report*. (2024, February 28). Freedom House. <https://freedomhouse.org/country/gaza-strip/freedom-world/2024>

²³ See disclaimer at the bottom of the document: "The UN has so far not been able to produce independent, comprehensive, and verified casualty figures." OCHA. (2023, October 28). *Hostilities in the Gaza Strip and Israel*. <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-22>

²⁴ Epstein, G. (2024, May 24). *Here's the real problem with the U.N.'s revised Gaza death toll*. The Washington Post.

with the "point detonation of a large air-dropped bomb with a high explosive payload" usually used by Israel.²⁵ The Associated Press, New York Times, and others retracted their conclusion that Israel caused the strike.²⁶ The New York Times claimed it would be impossible for Israel to cause the strike, given the size of Israeli bombs.²⁷ When asked for proof of Israeli missile parts near the site, Hamas claimed that such proof had "evaporated."²⁸

18. US officials and intelligence from Canada's armed forces subsequently concluded that the strike was, in fact, a rocket misfired from Palestinian Islamic Jihad or Hamas.²⁹ Despite the overwhelming evidence to the contrary, the figure of 500 persons alleged to have been killed at the Al Ahli hospital is still included in the Hamas-run Gazan Ministry of Health's death toll. For these reasons and others, the US administration noted shortly after the incident that they have "no confidence" in the Gaza Ministry of Health count.³⁰ Hamas' mismanagement of evidence surrounding the Al-Ahli hospital should be viewed within the context of remarks by Hamas leaders suggesting that a high civilian death toll in Gaza would be beneficial, and a "necessary sacrifice."³¹

19. For all these reasons, CUJS and WUJS respectfully submits that extreme caution should be adopted by the Court when assessing evidence contained in the Article 58 Application which is ultimately sourced from Hamas.

²⁵ *Gaza: Findings on October 17 al-ahli hospital explosion*. (2023, November 28). Human Rights Watch. <https://www.hrw.org/news/2023/11/26/gaza-findings-october-17-al-ahli-hospital-explosion>

²⁶ Leonhardt, D. (2023, November 3). *Revisiting the Gaza hospital explosion*. The New York Times. <https://www.nytimes.com/2023/11/03/briefing/gaza-hospital-explosion.html>

²⁷ Ibid.

²⁸ Supra 13.

²⁹ See: National Defence. (2023, October 21). *Statement from the Department of national defence and the Canadian Armed Forces on the recent strike at al-ahli hospital in Gaza*.

³⁰ Reuters. (2023, October 25). *Biden says he has 'no confidence' in Palestinian death count*. reuters.com. <https://www.reuters.com/world/middle-east/biden-says-he-has-no-confidence-palestinian-death-count-2023-10-26/>

³¹ *Hamas leader said civilian death toll could benefit militant group in Gaza war, WSJ reports*. (2024, June 11). CNN. https://www.cnn.com/2024/06/11/middleeast/sinwar-hamas-israel-ceasefire-hostage-talks-intl/index.html?utm_source=ground.news&utm_medium=referral

ii. Concerns as to evidence provided to the Prosecution by other sources with a history of antisemitic statements or conduct

20. It is also submitted that circumspection should be applied to evidence sourced from other individuals and organisations with a history of antisemitic statements or conduct. In this regard, we have been troubled recently by antisemitic statements made by prominent UN officials whose roles relate to this conflict. We are particularly concerned about the use of evidence from these sources given that Article 15(2) of the ICC Statute gives a special prominence to the Prosecutor's empowerment to seek information from "organs of the United Nations."

21. It should be noted that UN Special Rapporteur Francesca Albanese was repudiated by the US for invoking the antisemitic trope of Holocaust inversion by comparing Netanyahu to Hitler.³² She was also recently condemned by Germany³³ and France³⁴ and is under investigation for accepting illegal payments.³⁵ Ms. Albanese previously submitted evidence to the Prosecution, and was thanked by the Prosecutor,³⁶ who noted separately that he "look[ed] forward to strengthening [his] collaboration" with her and other special rapporteurs.³⁷ Given her history of antisemitism, the Court should exercise caution in relying upon evidence submitted by Ms. Albanese and groups involving her³⁸.

³² Halpern, S. (2024, July 27). *Albanese 'unfit' to serve at UN, US Amb. Greenfield states after Netanyahu-Hitler comparison*. The Jerusalem Post. <https://www.jpost.com/diaspora/antisemitism/article-812088>

³³ German Foreign Office. (2024, February 11). *A disgrace and goes against everything the UN stands for*. X (formerly Twitter). <https://twitter.com/GermanyDiplo/status/1756674368606736529>

³⁴ France Diplomatie. (2024, February 10). *Le contaster est une faute*. X (formerly Twitter). <https://x.com/francediplo/status/1756438502231724104>

³⁵ UN Watch. (2024, June 3). *Violations of Code of Conduct Complaint & Access to Information Request*. <https://unwatch.org/wp-content/uploads/2024/06/Complaint-Against-Francesca-Albanese-3-june-2024.pdf>

³⁶ Dillon, M. (2024, April 26). *OTP-CR-113/23 (Letter to Francesca Albanese)*.

³⁷ Ms. Albanese seemingly takes a leading position among the Special Rapporteurs on this issue as it more closely aligns with her mandate, see: Khan, K. (2023, May 12). *CPI Answer State of Palestine, OTP 2023/008835*.

³⁸ We note that the UN Special Rapporteurs and Working Groups have been granted leave to file observations in this case.

22. We are also mindful that members on the UN Commission of Inquiry (“COI”) appear to harbour antisemitic biases. In particular, Miloon Kothari has used the antisemitic term “Jewish lobby” invoking tropes about Jews and power.³⁹ Further, Navi Pillay has been condemned by Jewish groups for “demonstrating a bias that fundamentally undermines the fight against antisemitism, Israeli-Palestinian peace prospects, and the integrity of international law”.⁴⁰ Pillay has acknowledged that the COI has a Memorandum of Understanding with the Prosecutor and has submitted 7,000 pieces of evidence to his office.⁴¹
23. CUJS and WUST therefore submits that the Court should exercise prudence and careful scrutiny when examining all evidence relied upon as part of the Prosecution’s Article 58 Application in order to ensure that such evidence is not sourced from an antisemitic organisation, such as Hamas, or is not otherwise motivated by antisemitism.

IV. THE INDEPENDENCE, IMPARTIALITY AND COMPETENCE OF ISRAEL'S PROSECUTORIAL AND JUDICIAL SYSTEMS

24. Israel’s prosecutorial and judicial systems, and the Supreme Court in particular, have consistently demonstrated independence and impartiality from the Government.⁴² These systems are competent at prosecuting violations of international law, including crimes against humanity and war crimes.⁴³ Sovereign and presidential immunity are not recognized in Israel, consistently with Article 27 of the Rome Statute. Moreover, Israel’s justice system has shown itself capable of prosecuting its former leaders for any wrongdoing committed

³⁹ AFP and TOI Staff. (2022, August 4). *Member of UN Gaza probe says sorry for ‘Jewish lobby’ remark; Israel rejects apology*. Times of Israel.

⁴⁰ A letter signed by prominent Jewish human rights groups notes that “Pillay has used her platform at the United Nations to further a demonstrably discriminatory agenda against the Jewish people and the State of Israel,” See: Tress, L. (2023, September 27). *Leading US Jewish groups decry top legal award for anti-Israel UN official*. Times of Israel.

⁴¹ Bays, J. (2024, June 19). *UN Israel-Gaza inquiry sends ‘7000 pieces of evidence’ to ICC* [Video]. Al Jazeera.

⁴² See for example, Supreme Court of Israel. *Movement for Quality Government in Israel vs The Knesset* (2024) 5658/23.

⁴³ See for example, *Attorney-General v Adolf Eichmann, District Court of Jerusalem*, Criminal Case No. 40/61, 11 December 1961.

by them. Former Prime Minister Ehud Olmert was found guilty of bribery and obstruction of justice and Former President Moshe Katzav was found guilty of rape and obstruction of justice. Indeed, Prime Minister Netanyahu is currently standing trial for corruption in Jerusalem and the Supreme Court is presently actively considering the Israeli Government's decision making process in relation to the sufficiency of humanitarian aid to Gaza. In this context, there is no real risk of impunity if the Pre-Trial Chamber were to reject the Prosecution's application for arrest warrants for Mr Netanyahu and Mr Gallant as the Israeli investigation, prosecutorial and judicial authorities are willing and able to investigate any wrongdoing on behalf of Government officials with respect to the conduct of operations in Gaza since 7 October 2023.

V. CONCLUSION

25. The Pre-Trial Chamber should therefore take account of:

- a. The global rise in antisemitism and the advisability of the ICC taking a prudent approach in this case in order to minimise the risk of further harm to the Jewish community;
- b. The need for circumspection when assessing evidence supplied by Hamas, an inherently antisemitic organisation, and from other organisations with a demonstrated antisemitic bias; and
- c. The independence, impartiality and competence of the Israeli prosecutorial and judicial systems and the fact that impunity would not result if the Pre-Trial Chamber were to reject the Prosecution Article 58 Application.

Respectfully submitted:



*Nati Pressmann, President, Canadian Union
of Jewish Students*

Dated this 6th day of August 2024 at 8:59 AM EST



*Yana Naftalieva, President, World Union of
Jewish Students*