



حكمة – مركز من أجل القانون الدولي وحقوق الانسان

Hikmah – Center for International Law and Human Rights

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Mr. Karim Khan KC

Prosecutor, International Criminal Court

P.O. Box 19519

2500 CM The Hague

The Netherlands

Ms. Gali Baharav - Miara

Israel's Attorney General

29 Salah Al-Din Street

Occupied East Jerusalem

Re: **Israel's War on Gaza Since October 2023**

“What was I to say about these cases?”

Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017), p.xviii.

“In public, the White House expressed bafflement. Press Secretary Karine Jean-Pierre noted that only one weapons shipment had been paused since the war began, while billions of dollars of weapons had flowed unimpeded. ‘We genuinely do not know what he is talking about’, she said.

In private, Biden’s team was angry and shocked by Netanyahu’s ingratitude, according to one U.S official.”

Barak Ravid, “Scoop: White House cancels meeting, scolds Netanyahu in protest over video”, 19 June 2024.¹

“U.S. President Joe Biden said on Wednesday he has ‘no confidence in the number that the Palestinians are using’ for the death toll in the Hamas-run Gaza Strip, where the health ministry says over 6,500 have been killed in Israeli attacks. Biden

¹ See also John Hudson, “Biden advances \$1 billion in arms for Israel amid Rafah tensions”, *Washington Post*, 14 May 2024; Seema Mehta, “Hollywood mega-donor Haim Saban slams Biden’s decision to halt weapons shipment to Israel”, *Los Angeles Times*, 9 May 2024; Andrew Ross Sorkin, “Schlepping to Moguldom”, *New York Times*, 5 September 2004; Connie Bruck, “The Influencer”, *New Yorker*, 3 May 2010; Philip Rucker et al, “Billionaires Adelson and Saban, at odds in campaigns, unite on Israel and hit Obama”, *Washington Post*, 9 November 2014. According to Open Secret’s website in 2020 Biden was the top US politician recipient of pro-Israel funding: \$3,753,304.

was asked at a White House press conference whether the death count, which the ministry says includes some 2,700 children, meant Israel was ignoring U.S. appeals to reduce civilian deaths in its bombardment of the coastal enclave.”

“Biden says he has ‘no confidence’ in Palestinian death count”, *Reuters*, 26 October 2023.²

“ليس الزمن في غزة استرخاء ولكنه اقتحام الظهيرة المشتعلة

لأن القيم في غزة تختلف.. تختلف.. تختلف

القيمة الوحيدة للإنسان المحتل هي مدى مقاومته للاحتلال... هذه هي المنافسة الوحيدة هناك.

...

من هنا يكرهها العدو حتى القتل.. ويخافها حتى الجريمة.. ويسعى إلى إغراقها في البحر أو في الصحراء أو في الدم.

من هنا يحبها أقاربها وأصدقائها على استحياء يصل إلى الغيرة والخوف أحياناً. لأن غزة هي الدرس الوحشي والنموذج المشرق للاعداء والاصدقاء على السواء.”

محمود درويش، صمت من أجل غزة.

ICC Under Pressure

1. On 7 October 2023 Israel launched an unjustified and illegal war against Gaza committing genocide, crimes against humanity, and war crimes. Israel’s actions are captured by the International Criminal Court’s (ICC) jurisdiction.³ The purpose of this letter is to address three issues: (a) the pressure that has been leveled against the ICC by Israel or on its behalf; (b) the request for arrest warrants against two Israeli officials the Prime Minister and the Minister of Defense; and (c) the missing charges regarding Israel’s conduct during the current conflict and more broadly. Israel’s attorney general Ms. Gali Baharav Miara is a formal addressee to this correspondence given the direct legal consequences to her and other senior Israeli officials. Israel does not recognize the validity of ICC’s jurisdiction to its actions in the 1967 occupied territories (East Jerusalem, West Bank, and Gaza) or anywhere else.⁴

² See also Trevor Hunnicutt et al, “White House sees no Genocide in Gaza, condemns aid convoys attacks”, *Reuters*, 14 May 2024 (“U.S. national security adviser Jake Sullivan said on Monday that President Joe Biden’s administration does not view the killings of Palestinians in Gaza by Israel in its war with Hamas as genocide... Biden has sought to influence Prime Minister Benjamin Netanyahu’s approach to the war, Sullivan said, but Israel is a sovereign, democratic nation that ultimately makes its own decisions, Sullivan said. ‘The prime minister doesn’t have to answer to us. He’s got to answer to the Israeli people,’ Sullivan said.”)

³ ICC-01/18 Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, 5 February 2021.

⁴ See Statement by Attorney General Avichai Mandelblit regarding the ICC’s jurisdiction decision in the Palestine situation, 6 February 2021, available at: <https://www.gov.il/en/pages/statement-by-ag-mandelblit-regarding-the-icc-decision-6-february-2021>. (“As previously published, the Attorney General’s position is that the ICC lacks any jurisdiction on this matter given, among other reasons, that no sovereign Palestinian state

2. The Palestine situation at the ICC has generated significant and probably unprecedented diplomatic, political, and covert pressure against its organs, particularly the Office of the Prosecutor. Already at the beginning of your tenure British Prime Minister Boris Johnson yielded to Israel's supporters in Britain by affirming his belief that ICC's jurisdiction does not extend to Israel's action in the 1967 occupied Palestinian Territories.⁵ We wrote you a letter in this regard dated 24 July 2021 asserting Johnson's violations of the ICC's Statute and applicable Rules of Procedure and Evidence requesting that you recuse yourself from contemplating the Palestine situation.⁶ Despite former ICC Prosecutor Ms. Fatou Bensouda's announcement on 3 March 2021 about opening an investigation into the Palestine situation,⁷ no known follow up has been made by you since assuming the Office of the Prosecutor's duties and responsibilities.

3. Israel's current assault against Gaza and your Office's attempts to be involved given the ICC's jurisdiction, have attracted yet more political pressure by G7 diplomats⁸ and American politicians.⁹ In our letter of 11 May 2024 we underscored the illegality of these steps and your obligations pursuant to the ICC's Statute and Rules of Procedure and Evidence.¹⁰ On 17 May 2024 ICC's Presidency of the Assembly of State Parties issued a statement in support of the independence and impartiality of the International Criminal Court affirming:

The Presidency of the Assembly of States Parties to the Rome Statute expresses concern over the recent public statements related to an ongoing International Criminal Court investigation in the situation in the State of Palestine. The Presidency regrets any attempts to undermine the Court's independence, integrity and impartiality. Some statements may constitute threats of retaliation against the Court and its officials, in the event the Court exercises its judicial functions as mandated in the Rome Statute.

Prosecutorial and judicial independence is one of the key components of the rule of law. We call on all States to respect the independence and impartiality of the International Criminal Court.¹¹

exists nor does any territory belonging to such an entity; and moreover, that the Palestinian Authority has no jurisdiction over Israeli citizens (for more information, see the Memorandum of the Attorney General dated 20.12.2019).") Israel's attorney general claims that his country has a capable and willing judicial system to address legal issues under the ICC's jurisdiction and that he and his team "will continue to assist the Israeli Government and Israel's citizens in addressing any situation arising out of the ICC." See also Avinoam Sharon, "Why is Israel's Presence in the Territories is still called 'Occupation'?" 23(3/4) *Jewish Political Studies Review*, pp.40-64 (2011); What is the Mishnah?: The State of the Question (Harvard University Press, 2022). It should be noted that former Israeli Chief Justice Aharon Barak resigned from his post as an ad hoc judge at the proceedings before the International Court of Justice filed by South Africa against Israel under the Convention on the Prevention and Punishment of the Crime of Genocide: TOI Staff & Reuters, "Aharon Barak resigns as Israeli ad hoc judge at ICJ for 'personal reasons'", *Times of Israel*, 6 June 2024.

⁵ Oliver Holmes, "Palestine condemns Boris Johnson for opposing ICC Israel investigation", *The Guardian*, 15 April 2021.

⁶ This letter of 24 July 2021 is available here: <https://www.hikmahs.org/boris-johnson-in-the-hague>.

⁷ Former ICC Prosecutor Ms. Fatou Bensouda's announcement of 3 March 2021 is available here: <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>

⁸ Patrick Wintour et al, "ICC urged to delay possible war crimes charges against Israel and Hamas", *The Guardian*, 29 April 2024.

⁹ Jacob Magid, "Republican senators warn ICC: Target Israel, and we will target you", *Times of Israel*, 6 May 2024; Andrew Solender, "House GOP Drafts ICC Sanctions as 'precaution'", *Axios*, 7 May 2024. See also Editorial, "The International Criminal Court and Israel", *Wall Street Journal*, 26 April 2024; Barak Ravid, "Israel Tells U.S. it will Punish Palestinian Authority if ICC Issues Warrants", *Axios*, 1 May 2024; "Israel, US said working to prevent ICC arrest warrant against Netanyahu", *Times of Israel*, 28 April 2024.

¹⁰ This letter dated 11 May 2024 is available here: <https://www.hikmahs.org/copy-of-israeli-military-campaigns-20>

¹¹ ICC's Presidency of the Assembly States Parties' statement of 17 May 2024 is available here: https://asp.icc-cpi.int/press-releases/PR-20240517?fbclid=IwZXh0bgNhZW0CMATAAR27xGmjBpla3gtT0ezI80OPSWysN4NnrfjaQPMdIC3NDQwpSI0guXLZs8g_aem_AdTEYA_WbbSsEKHADwe_A8zgdeABMO9Pu8wDG2O7buuDjFLOKw411JTMXApJrgxJ9LJNeKCSNxx_c9v9rwWYY_uu

4. Further, *The Guardian* revealed recently that Israeli intelligence services have been engaging in hostile covert activity against the ICC for almost a decade striving to sabotage its activity. This revelation exposed that you have been under exceptionally tremendous pressure by the United States, not a state member of the ICC, while examining whether to apply for arrest warrants against Israeli officials:

Israel has run an almost decade-long secret “war” against the court. The country deployed its intelligence agencies to surveil, hack, pressure, smear and allegedly threaten senior ICC staff in an effort to derail the court’s inquiries. Israeli intelligence captured the communications of numerous ICC officials, including Khan and his predecessor as prosecutor, Fatou Bensouda, intercepting phone calls, messages, emails and documents.

The surveillance was ongoing in recent months, providing Israel’s prime minister, Benjamin Netanyahu, with advance knowledge of the prosecutor’s intentions. A recent intercepted communication suggested that Khan wanted to issue arrest warrants against Israelis but was under “tremendous pressure from the United States”, according to a source familiar with its contents.¹²

5. In your 20 May 2024 CNN interview with Christiane Amanpour, you acknowledged some of the intimidations that the ICC has received given its investigation of Israel, but not those described in *The Guardian’s* reporting. You also elected to say that “The good news is, I think, for the last two and a half years, we’ve had very positive engagement with the Biden administration in the United States.”¹³ President Biden and his administration vehemently opposed your request for arrest warrants against Israeli officials.¹⁴
6. Articles 70(1)(d) and (c) trigger the ICC’s jurisdiction regarding offences executed intentionally against its administration of justice.¹⁵ There is no sign that Israel’s and the United States’ grave behavior against the ICC’s administration of justice was accidental and not intentional. Overlooking the two countries’ blunt attempt to undermine the ICC will strike a fundamental blow to basic principles of international law particularly its efforts to apply the rule of law impartially and independently.

¹² Harry Davies et al, “Spying, hacking and intimidating: Israel’s nine year ‘war’ on the ICC exposed”, *The Guardian*, 28 May 2024. Israel’s preposterous undermining of international justice is not rare. See Zvi Bar’el, “He Had Plenty of Secrets and Enemies”, *Haaretz*, 25 January 2002 (“A short while later, Hobeika announced he was ready to testify in the Belgian courts dealing with the lawsuit against Prime Minister Ariel Sharon, filed by survivors of the Sabra and Chatila massacres in 1982. Hobeika said he was going to testify against Sharon, the Israeli defense minister - and Hobeika ally - at the time of the massacres, which were ordered by Hobeika.”); Brian Whitaker & Ian Black, “Sharon witness blown up in Beirut”, *The Guardian*, 25 January 2002. Bar’el’s almost celebratory reporting about many political assassinations in Lebanon from different parts of its political and sectarian spectrum, in addition to writing on other regional mysterious sabotage activity targeting civilians and faith locations, could be the starting point for resolving the enigma that captured some of the Special Tribunal for Lebanon’s mandate: Zvi Bar’el, “A Column Written in Blood”, *Haaretz*, 10 June 2005; Zvi Bar’el, “For the Third Time in Four Months: Anti-Syrian Politician was Assassinated in Lebanon”, *Haaretz*, 22 June 2005 (Hebrew) (“Hawi was murdered as a result of an explosion of a small device in his car in Beirut. The device was placed under the passenger’s seat in Hawi’s car, and activated by remote control.”); Zvi Bar’el, “The Spark that Will Ignite a Civil War?”, *Haaretz*, 24 October 2012; Zvi Bar’el, “Like Other Lebanese Journalists, Slain Hezbollah Critic Knew He Was Living on Borrowed Time”, *Haaretz*, 7 February 2021; Zvi Bar’el, When Cars Fell from the Sky: A Journey Among Occupations (Hakibbutz Hameuchad – Sifriat Poalim, 2011)(Hebrew).

¹³ ICC Prosecutor Karim Khan, Interview with Christiane Amanpour, *CNN*, 20 May 2024.

¹⁴ Michael Williams, “Biden denounces ICC for ‘outrageous’ implication of equivalence between Israel and Hamas”, *CNN*, 20 May 2024. Compare with Emily Jacobs, “Schumer accuses ICC of ‘long term, anti-Israel bias’ amid Israeli arrest warrants fears”, *Jewish Insider*, 30 April 2024.

¹⁵ Chapter 2 of the Code of Conduct for the Office of the Prosecutor covers applicable norms.

Israel's Accusations

7. Your list of charges¹⁶ against only two Israeli officials seem to suffer from glaring deficiencies: the short list of selected senior individuals and their reduced character. It is inconceivable in such perpetration of international criminality by Israel to leave out of the identified probable international criminals the military's (IDF) Chief of Staff Herzl Halevi, the Commander of IDF's Air Force Tomer Bar, IDF's commander of the Southern Region Yaron Finkelman, head of Israel Security Agency Ronen Bar, and Israel's Attorney General Ms. Gali Baharav Miron who is the supreme judicial authority in the executive branch surpassing that of IDF's Military Advocate General Ms. Yifat Tomer – Yerushalmi.¹⁷
8. On 12 October 2023 IDF's Chief of Staff said "the fighting spirit of the IDF is pounding Gaza with all its force and we will not stop here...Gaza shall not look the same."¹⁸ Commander of the Air force Tomer Bar said early in the war "it's a long war. We are already in the sixth day. we are after thousands of bombs, 6000 bombs dropped on Gaza...you know the air force, you know the IDF, no one limits us."¹⁹ On 16 November 2023 he (Tomer Bar) said "we are operating with intensity and forcefully. Gaza's face has changed."²⁰ IDF's commander of the Southern Region Yaron Finkelman, ordered and oversaw the massive killing and overwhelming destruction in Gaza. In addition to the genocidal human death toll and injuries, the IDF forcefully mass displaced Palestinians in Gaza²¹ and destroyed civilian buildings, including hospitals and religious sites on a calamitous scale.²² Head of the Israel

¹⁶ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications of arrest warrants in the situation of the State of Palestine, 20 May 2024. In reaching conclusions to file an application for arrest warrants in the Palestine situation the Prosecutor relied on several experts to *confirm* your work: Sir Adrian Fulford PC, former Lord Justice of Appeal and former International Criminal Court Judge; Baroness Helena Kennedy KC, President of the International Bar Association's Human Rights Institute; Elizabeth Wilmschurst CMG KC, former Deputy Legal Adviser at the UK Foreign and Commonwealth Office; Danny Friedman KC; attorney Amal Clooney; and His Excellency Judge Theodor Meron CMG. The Prosecutor also benefited from other two advisers Adama Dieng and Professor Kevin Jon Heller. At first glance, the disproportionate British representation in the committee may give the impression that it is informed by the hostile environment in Britain to the noble pro-Palestinian politics of Jeremy Corbyn by both major political parties Labor and The Conservatives. Moreover, one of the Prosecutor's advisers, Mr. Danny Friedman KC, had already formed an opinion on the supposed criminality of the Palestinian side already in November 2023 most probably following utterly inaccurate media coverage of the conflict especially in the United States and Britain. See Danny Friedman KC, "Case for a Cease Fire: an Issue of Law and Values", *Jewish News*, 18 November 2023. In their Financial Times essay the Prosecutor's advisers who approved his work wrote "We hope that the prosecutor will continue to conduct focused investigations including in relation to the extensive harm suffered by civilians as a result of the bombing campaign in Gaza...": ICC Panel of Experts on International Law, "Why we support ICC prosecutions for war crimes in Israel and Gaza", *Financial Times*, 20 May 2024.

¹⁷ The initial Israel war cabinet dissolved on 17 June 2024 without ending the war was composed of Prime Minister Netanyahu, Minister of Defense Yoav Gallant; and Benny Gantz with three observers Gadi Eizenkot, Aryeh Deri, and Ron Dermer. The current composition of the cabinet is: Netanyahu, Gallant, Deri, Dermer, and Tzachi Hanegbi.

¹⁸ Ilya Egorov, "IDF Chief of Staff in a Statement: 'Now it's Time for War – Gaza Shall Not Look the Same'", *Yisrael Ha-Yom*, 12 October 2023.

¹⁹ IDF Commander of the Air Force Tomer Bar, Statement before Air Force Command, 13 October 2024, available at: https://www.youtube.com/watch?v=-jEIF_TfGhI

²⁰ Yael Chekhnober, "'Commander of the Air Force: 'We Hit Thousands of Terrorists, Gaza's Face Has Changed'", *Ynet*, 16 November 2023 (Hebrew).

²¹ Yara Bayoumy et al, "Fearful, Humiliated, and Desperate: Gazans Heading South Face Horror", *New York Times*, 28 November 2023; Zach Levitt et al, "What the scale of Displacement in Gaza Looks Like?", *New York Times*, 2 December 2023; Raja Abdulrahim et al, "As Israel Steps Up Attacks, 300,000 Gazans Are Forced to Evacuate", *New York Times*, 11 May 2024; Julia Ledur et al, "How Israel pushed over a million Palestinians into a tiny corner of Gaza", *Washington Post*, 22 December 2023; Miriam Berger et al, "Israeli operations in north and south Gaza force displaced to flee again", *Washington Post*, 12 May 2024.

²² Lauren Leatherby, "Gaza Civilians, Under Israeli Barrage, Are Being Killed at Historic Pace", *New York Times*, 25 November 2023; Robin Stein et al, "Visual Evidence Shows Israel Dropped 2000-Pound Bombs Where it Ordered Gaza's Civilians to Move for Safety", 21 December 2023; Tamara Qiblawi et al, "'Not seen since Vietnam': Israel dropped hundreds of 2,000- pound bombs on Gaza, analysis show", *CNN*, 22 December 2023; Evan Hill et al, "Israel has waged one of this century's most destructive wars in Gaza", *Washington Post*, 23 December 2023; Jared Malsin

Security Agency Ronen Bar shares responsibility for the arbitrary mass arrests and is culpable for the aggressive interrogation methods that include torture.²³ Intentionally targeting civilians is a traditional and consistent warfare pursued by the IDF which reached genocidal proportions since 7 October 2023.²⁴ As one authoritative Israeli security commentator described IDF's tactic and strategy "time and again, including during operation 'Guardians of the Walls', the military establishment said that when the enemy would see the damage inflicted upon them, they would acknowledge their defeat and would be deterred from renewing fire."²⁵

9. Israel's Attorney General Ms. Gali Baharav – Miara should also be part of senior Israeli officials subject to potential arrest warrant and indictment. There is no indication that she attempted to uphold the rule of international law towards Israeli government and military officials. On the contrary, the Israeli legal and political culture generally express disdain to the notion of international law most notably when the rights of Palestinians as individuals or as a people are concerned.²⁶ Israel's opposition to international law is not mere technical legal reasoning, rather it is

et al, "The Ruined Landscape of Gaza After Nearly Three Months of Bombing", *Wall Street Journal*, 30 December 2023; Julia Frankel, "Israel's military campaign seen as among the most destructive in recent history, experts say", *Associated Press*, 11 January 2024; Danielle Palumbo et al, "At least half of Gaza's buildings damaged or destroyed, new analysis shows", *BBC*, 30 January 2024; UNOSAT Gaza Strip Comprehensive Damage Assessment – January 2024, available at: <https://unosat.org/products/3793>; Gaza: UN experts decry 'systematic obliteration' of education system", 18 April 2024; "Unlike anything we have studied": Gaza's destruction in numbers", *AFP*, 7 May 2024; Chandni Desai, "Israel has destroyed or damaged 80% of schools in Gaza. This is scholasticide", *The Guardian*, 8 June 2024; Vivian Nereim et al, "Israel's Military Campaign Has Left Gaza's Medical System Near Collapse", *New York Times*, 26 April 2024; Frances Vinall et al, "Mapping the damage to Gaza's hospitals: battered, abandoned and raided", *Washington Post*, 21 May 2024; Reha Kansara et al, "Israel – Gaza war: Counting the destruction of religious sites", *BBC*, 30 January 2024; Robin Stein et al, "Israel Used U.S.-Made Bombs in Strike that Killed Dozens in Rafah", *New York Times*, 29 May 2024; Lara Jakes, "A Small American Bomb Killing Palestinians by the Dozen in Gaza", *New York Times*, 8 June 2024.

²³ Miriam Berger et al, "Israel is detaining civilians in Gaza. Many have disappeared, families say", *Washington Post*, 9 December 2023; Isabel Debre et al, "Hungry, Thirsty, and Humiliated: Israel's mass arrest campaign sow fear in northern Gaza", *Associated Press*, 14 December 2023; Jack Khoury et al, "A Senior Gazan Doctor Died During Israeli Detention. Officials Refuse to Explain How", *Haaretz*, 12 May 2024; Kavitha Chekuru, "Gaza's Stolen Healers: Hundreds of Palestinian Doctors Disappeared into Israeli Detention", *The Intercept*, 24 May 2024; Kanav Kathuria, "How Israeli prison doctors assist in the torture of Palestinian detainees", *Mondoweiss*, 28 May 2024; "Strapped down, blindfolded, held in diapers: Israeli whistleblowers detail abuse of Palestinians in shadowy detention center", *CNN*, 11 May 2024.

²⁴ See Amos Harel, "Plans to Use Disproportionate Force Next War", *Haaretz*, 5 October 2008; Gabi Siboni, "Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War", 74 INSS (October 2008); Yagil Henkin, "'A High Price for our Blood' Israel's Security Paradigms, from Reprisal Operations until Operation Protective Edge", 15 *Dado Center Journal*, pp.17-41 (2018); Amir Oren, "This is How Barak Proposed to Sharon to Deceive the World", *Haaretz*, 3 October 2014 (Hebrew). See also Baruch Kimmerling, *Politicide: Ariel Sharon's War Against the Palestinians* (Verso, 2003); Avi Shlaim, "Israel's error, then and now", *New York Times*, 4 August 2006; Edward Said, "Permission to Narrate", 6(3) *London Review of Books* (February 1984).

²⁵ Ofer Shelah, "Escaping Maneuver Will Not Lead to Victory", INSS, 12 August 2021 (Hebrew). From late 2008 until the current military campaign, Israel launched several military operations that resulted each time with significant human death toll and destruction in Gaza. OCHA produced the following statistics: Operation Cast Lead (27 December 2008 – 18 January 2009, 1385 killed, 5300 injured); operation Pillar of Defense (14 – 21 November 2012, 168 killed, 1064 injured); operation Protective Edge (8 July - 26 August 2014, 2251 killed, 11231 injured); and operation Guardian of the Walls (10 – 21 May 2021, 261 killed, 2211 injured). Israeli forces have repressed Palestinian demonstrators in Gaza known as "Marches of Return" with severe lethal gunfire and absolute impunity. See Report of the Independent UN Commission of Inquiry on the 2018 Protests in the OPT, 28 February 2019. Israeli Supreme Court failed to amend the military's rules of engagement during these protests (HCJ 3003/18, Judgement, 24 May 2018). Similarly, the same court rejected a strategic petition requesting an investigation into grave violations of international law by the Israeli military in Gaza entailing the killing of civilians and destruction of civilian property filed by the undesigned (HCJ 3292/07, Judgement, 8 December 2011). Israel's most noted and sole commission of inquiry that related to Palestinian victims is the Kahan commission which enquired Israel's involvement in the massacres in the Palestinian refugee camps Sabra and Shatila in 1982 Lebanon perpetrated by its trained and financed Lebanese proxy. It found no knowledge or direct responsibility on the part of senior Israeli political and military officials, imposing only recommended administrative measures against few of them. Evidence to the contrary of the commission's findings is available. See, for example, Edward Walsh, "Key Israeli Officer Testifies in Probe", *Washington Post*, 7 November 1982; William Farrell, "Israeli Inquiry is Told Sharon Aide Knew of Massacre", *New York Times*, 12 November 1982.

²⁶ David Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territory* (SUNY Press, 2002); Nimer Sultany, "The Legacy of Justice Aharon Barak: A Critical Review", 48 *Harvard International Law Journal On-Line*, pp.83-92 (2007); Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press, 2019). During a hearing before former Chief Justice Aharon Barak on 26 October 2004 in a case filed by the undesigned regarding mass home demolitions in Rafah, south Gaza, justice Barak expressed his concern regarding international documentation of the argued grave violations of international law saying "these reports are read by the entire world. If we

derived from deep ideological affirmations. Israeli Attorney General's opposition to the ICC's jurisdiction is not premised only on the argument that there is no Palestinian state, but also that there is no territory at all belonging to the Palestinian Authority.²⁷ The Israeli Attorney General does not perceive that the Palestinian people have any right to self-determination on any portion of historic Palestine. The legal, political, and moral implications of this legal insistence cannot be underestimated.

10. Israel routinely does not cooperate with international investigations regarding its purported violations of international law, an approach that is supported by the country's Attorney General.²⁸ Its appearance before the International Court of Justice in the proceedings instituted by South Africa under the Convention on the Prevention and Punishment of the Crime of Genocide is considered rare and points to the level of diplomatic crisis that Israel found itself in.
11. Israeli Attorney General consciously spends every effort to protect senior government officials and military commanders as well as low level soldiers from incurring any responsibility under international law. This has been the case with Attorney General Baharav – Miara during the current Israeli executive and military performance despite their abhorrent criminality witnessed by the international community. Consequently, no genuine investigations and prosecutions are carried out by the Israeli authorities regarding serious violations of international law, notwithstanding their loud and unconvincing boasting about a capable judicial system.
12. Israeli Attorney General's individual criminal responsibility falls under article 28(2) of the ICC statute.
13. Given the dominance of the British legal epistemology in the current case, it is not implausible to draw historical lessons from the legal debates that engulfed the British government towards the illegal 2003 invasion of Iraq.²⁹ On

reject the petition history will be written according to these documents. Why not to examine internally (by the military – MD) whether thousands of homes were indeed needed to be demolished. We owe it to ourselves and to our history". See Tal Rosner, "Justice Barak Proposed: Examine Home Demolitions of Palestinians", *Ynet*, 26 October 2004 (Hebrew). Ultimately no such examination was pursued and the court rejected the petition: HCJ 4969/04, Judgment, 13 July 2005. For Israel's conduct in this regard see Amnesty International, *Under the Rubble: House Demolitions and Destruction of Land and Property*, 17 May 2004; Human Rights Watch, *Razing Rafah: Mass Home Demolitions in the Gaza Strip*, October 2004. For further analysis of Israel's legal legitimization of international law violations see George Bisharat, "Violence's Law: Israel's Campaign to Transform International Legal Norms", 42(3) *Journal of Palestine Studies*, pp.68-84 (2013); Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press, 2005); Sharon Weill, "The judicial arm of the occupation: the Israeli military courts in the occupied territories", 89(866) *International Review of the Red Cross*, pp.395-419 (2007).

²⁷ See Statement by Attorney General Avichai Mandelblit regarding the ICC's jurisdiction decision in the Palestine situation, 6 February 2021, available at: <https://www.gov.il/en/pages/statement-by-ag-mandelblit-regarding-the-icc-decision-6-february-2021>. ("As previously published, the Attorney General's position is that the ICC lacks any jurisdiction on this matter given, among other reasons, that no sovereign Palestinian state exists nor does any territory belonging to such an entity; and moreover, that the Palestinian Authority has no jurisdiction over Israeli citizens (for more information, see the Memorandum of the Attorney General dated 20.12.2019).").

²⁸ See Israel's Rejection of ICJ's Jurisdiction regarding Constructing a Wall, 29 January 2004, available here: <https://www.icj-cij.org/public/files/case-related/131/1579.pdf>; Richard Falk, "My expulsion from Israel", *The Guardian*, 19 December 2008; Statement by Richard Falk, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 20 October 2010; Government of the Netherlands, Joint statement on the Israeli designation of six Palestinian civil society organisations as terrorist organisations, 12 July 2022; OHCHR, Bachelet deplores Israel's failure to grant visas for UN Human Rights staff in the occupied Palestinian territory, 30 August 2022.

²⁹ See Stephen Moss, "Iraq War was Illegal, says former Lord Chief justice", *The Guardian*, 8 February 2010.

the one hand attorneys for the British Foreign Service insisted on the need for a specific UN Security Council resolution authorizing the use of force against Iraq,³⁰ and on the other the Prime Minister resorted to outside advice in the form of the learned Sir Christopher Greenwood, who exempted this basic requirement.³¹ The British context demonstrates that international law was taken seriously by both sides of the legal and political divide, whereas in Israel the judicial effort is tailored towards avoiding it.

14. The war in Gaza has engaged the British government and society as it did with much of the rest of the planet. Britain's Chief Rabbi unequivocally objected to the idea that Israel is committing genocide in Gaza.³² Britain has been arming Israel despite its violations of international law as Minister of Foreign Affairs David Cameron has stressed that refraining from doing so would strengthen Israel's opponents.³³ The British government has also been accused of double standards for not supporting South Africa's case before the International Court of Justice given its recent position on genocide regarding Myanmar before the same Court.³⁴ Prominent figures in British society signed a petition urging the British government not to arm Israel because the risk of its genocide against Palestinians in Gaza.³⁵

15. Israel's conduct in Gaza amounts to genocide in the meaning of articles 6(a) to 6(d) of the ICC Statute based on their elements.³⁶ The human death toll and injuries of children, women, and men is shattering. The physical, cultural, and medical destruction is daunting. Conditions of life imposed by Israel are unbearable. The medical system in Gaza has collapsed under Israel's persistent illegal attacks. The intent of the Israeli government, military, and prominent leaders in the country's society is hard to dispute. Israel's performance naturally qualifies also as crimes against humanity and war crimes. Political or other ultra vires dimensions, stemming mainly from Britain and the United States, should not be permitted to influence genuine investigation, accurate factual determinations, reasonable legal conclusions, and fair prosecution. This elementary proposition applies to the Office of the Prosecutor as well as to his advisers.³⁷

³⁰ See Wilmschurst Resignation Letter of 18 March 2003, *BBC*, 24 March 2005; Michael Holden, "Government lawyer said the Iraq war was illegal", *Reuters*, 26 January 2010; Mark Townsend et al, "Iraq war was illegal, top lawyer will tell Chilcot inquiry", *The Guardian*, 24 January 2010.

³¹ Memorandum by Professor Christopher Greenwood, *The Legality of the Use of Force Against Iraq*, 24 October 2002, available at <https://publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm>; Owen Bowcott, "War QC sticks to his guns", *The Guardian*, 1 March 2004.

³² Alexandra Topping, "Israel's actions in Gaza are not genocide, says UK's chief rabbi", *The Guardian*, 21 January 2024.

³³ Patrick Wintour, "UK has issued 108 arms export licenses to Israel since 7 October", *The Guardian*, 11 June 2024; Sam Francis, "UK ban on selling arms to Israel would strengthen Hamas, says Cameron", *BBC*, 12 May 2024.

³⁴ Patrick Wintour, "UK accused of hypocrisy in not backing claim of genocide in Gaza before ICJ", *The Guardian*, 7 January 2024.

³⁵ Haroon Siddique, "Fourth former UK supreme court judge signs letter over Israeli actions in Gaza", *The Guardian*, 4 April 2024.

³⁶ The Israeli genocidal intent and destruction in Gaza is not less severe and extreme than the one described in ICTY's genocide case of *Krstic*.

³⁷ See, for example, Peter Baker, "Biden Team Set to Raise Record \$28 Million at Hollywood Fund-Raiser", *New York Times*, 15 June 2024. One of the fundraisers in this event was the talented and inspiring actor Mr. George Clooney. He is the husband of Prosecutor's adviser and extraordinary human rights attorney Ms. Amal Clooney. The US Administration is Israel's primary accomplice in perpetrating its international crimes having constantly provided it with weapons and furnished diplomatic support and cover at the UN Security Council as well as other international forums. This administration has also engaged in undermining the Court towards the Prosecutor's request to issue arrest warrants against Israeli officials. The applicability of the Code of Conduct for the Office of the Prosecutor is incontestable.

16. When a country a-priori decides to commit genocide, crimes against humanity, or war crimes, before shooting the first bullet by its armed forces, it nullifies its purported legitimate reasoning for engaging in war, be it self-defense or other. That is the case of Israel's operation in Gaza starting from 7 October 2023. The same is true after the first bullet is shot. It is therefore perplexing that the Office of the Prosecutor whose obligation is to investigate and prosecute international crimes under the Court's jurisdiction found it appropriate to relate in his public statement about applying for arrest warrants to Israel's right to self-defense, which is a consistent argument advanced by the Israeli government.³⁸ This oddity may contribute to the accelerating impression that the Prosecutor's judgment is impacted by extraneous aspects or circumstances.³⁹ No mention was made of the illegal nature and duration of the Israeli occupation.⁴⁰
17. Reading the list of charges leveled against both sides it would appear that the Office of the Prosecutor is engaged in a disappointing exercise of optical illusion. As any practitioner of international criminal law is aware, there is a hierarchy of international crimes in the ICC statute grounded in intent, harm, and scope. Genocide is the first-class crime, crimes against humanity second, followed by war crimes. The Palestinian side is charged with more cruelty offences. Israel is not accused of committing genocide, forced displacement, mass arbitrary arrests, and torture.⁴¹
18. As noted in our letter of 11 May 2024, the main objective of the operation from Gaza on 7 October 2023 was IDF's Gaza division that enforces the occupation and enclavement of Gaza. We reiterate our affirmation that Israeli military censorship prevents Israeli media from reporting that the Israeli military is responsible for the death of at least most of the Israeli civilians that day.⁴² There are also different accounts regarding the purported rape and sexual violence than those enthusiastically advanced by Israel internationally to support its genocidal war effort.⁴³ Palestinian armed resistance operations the objective of which to capture Israeli soldiers in order to free Palestinian prisoners occurred in the past.

³⁸ See Sean Murphey, "Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", 99(1) *American Journal of International Law*, pp.62-76 (2005);

³⁹ See Henry Lucy, "The Power of the British Press", 163 *The North American Review*, pp.168-174 (1896); Andy McSmith, "Iraq and the Rupert Murdoch connection: The media mogul's network of pro-war campaigners", *The Independent*, 8 July 2016.

⁴⁰ See Jeff McMahan, "The Morality of Military Occupation", 31(101) *Loy. L.A. Int'l & Comp. L. Rev.*, pp.101-123 (2009).

⁴¹ Charging Ismail Haniyeh, a political leader in Hamas which is also a Palestinian political and social movement who currently resides in Qatar defies any sensible theory of individual criminal responsibility under international criminal law.

⁴² See, for example, Haggai Matar, "Israeli military censors bans highest number of articles in over a decade", +972 *Magazine*, 20 May 2024; Noa Limone, "If Israel Used a Controversial Procedure Against its Citizens, We Need to Talk About It Now", *Haaretz*, 13 December 2023; Rachel Fink, "'Unlawful, Unethical, Horrifying': IDF Ethics Code Author on Alleged Use of 'Hannibal Directive' During Hamas Attack", *Haaretz*, 17 January 2024.

⁴³ See Jeremy Scahill et al, "Between the Hammer and the Anvil: The Story Behind the New York Times October 7 Expose", *The Intercept*, 28 February 2024; Jeremy Scahill et al, "Kibbutz Be'eri Rejects Story in New York Times October 7 Expose: 'They Were Not Sexually Abused'", *The Intercept*, 4 March 2024; Cathrine Philp et al, "Israel says Hamas weaponized rape. Does the evidence add up?", *The Times*, 7 June 2024; Michelle Rosenberg, "'They twisted our words': Times newspaper faces bitter backlash over 7/10 sexual violence article", *Jewish News*, 10 June 2024. Jewish News is the same media outlet where Mr. Danny Friedman KC published his November 2023 article.

Palestine as a Burden to the ICC

19. Pressures that have been exerted on the International Criminal Court with respect to its application of its jurisdiction over Israel's international criminality leave no place for doubt that Palestine forms a burden to this Court. The ICC is confronted with exceptional challenges to its declared principles, statute, rules of procedure and evidence, and regulations. These pressures are sourced mainly with the government of the United States some of which have been described in this letter. Others took place before the current ICC's activity regarding Palestine and are being maintained.⁴⁴
20. The ICC is an international organization that is founded on state cooperation. The United States is not a member state of the Court, but collaborates with it by dedicating various resources when its diplomatic interests are well served. The most powerful country in the world has backed Israel during its genocide in Gaza militarily and diplomatically. It does not wish for Israel's international crimes to be investigated and prosecuted. That is a significant limitation introduced against the ICC exercising its jurisdiction over Israel's deplorable behavior. Additionally, in the circumstances of your tenure, there are the complications of domestic politics in Britain. A genocide was required, albeit not recognized by your office, to capture the Court's attention.
21. Not only did your office ignore the investigation pertaining to the Palestine situation announced by your predecessor Ms. Fatou Bensouda on 3 March 2021, serious crimes committed by Israel not related to the current application for arrest warrants have been outside your horizon's priorities. We will relate to two: apartheid and forming or expanding settlements in the 1967 occupied Palestinian territories that include East Jerusalem. Other international crimes perpetrated by Israel remain justiciable by the ICC that are outside of its current breadth of engagement, particularly torture, arbitrary arrests, and administrative detentions.

Apartheid

22. Contrary to Israel's image abroad, specifically in the United States and Britain, Israel is and has always been an apartheid state, irrespective of its performance in the 1967 occupied Palestinian territories.⁴⁵ ICC's jurisdiction encompasses the 1967 territories of historic Palestine where Israel has also been applying an apartheid regime in a prolonged and illegal occupation. Documentation on this mode of apartheid is not scarce.⁴⁶ Apartheid is a crime against humanity under ICC's statute.

⁴⁴ See, TOI, "Pompeo warns ICC of 'consequence' for potential war crimes probe of Israel", 16 May 2020; "International Criminal Court officials sanctioned by US", *BBC*, 2 September 2020; Rachel Looker, "US House passes legislation to sanction ICC over warrants bid", *BBC*, 2 June 2024.

⁴⁵ See, for instance, Law of Return – 1950; Basic Law: The Land of Israel - 1960; Basic Law: Israel – The Nation State of the Jewish People - 2018; John Quigly, "Apartheid Outside Africa: The Case of Israel", 1 *Ind. Int'l & Comp. L. Rev.*, pp.221 – 251 (1991).

⁴⁶ Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Persecution and Apartheid*, 27 April 2021; Amnesty International, *Israel's apartheid against Palestinians: Cruel system of domination and crime against humanity*, 1 February 2022; John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territories", 24(3) *European Journal of International Law*, pp.867-913 (2013); Richard Falk, "The Inside Story on Our UN Report Calling Israel an Apartheid State", *The Nation*, 22 March 2017.

Settlements

23. Israel was formed as a settler colonial country in Palestine ethnically cleansing and dispossessing the native Palestinian population. The Kibbutz and the Moshav were key instruments in its attempt to erase Palestine's presence, memory, and collectivity, realize military objectives, and strive for geographic and demographic dominance.⁴⁷
24. Settlements in the 1967 occupied Palestinian territories, including East Jerusalem, are innate extension of the ideology upon which Israel was founded and remain dedicated to. Their illegality under international law is well established. In its advisory opinion on the legality of Israel's construction of a wall in East Jerusalem and the West Bank the International Court of Justice surveyed U.N. Security Council and U.N. General assembly resolutions asserting the settlements' lawlessness and illegitimacy concluding unambiguously that:
- [T]he Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.⁴⁸
25. Israel's constant thrust to establish and expand settlements is important evidence of its will to bar meaningful Palestinian sovereignty on all the Palestinian areas it occupied in 1967.
26. Israeli settlements are a war crime according to article 8(2)(viii) of ICC's statute.

Respectfully,



Marwan Dalal
Executive Director

⁴⁷ See Absentee Property Law – 1950; Walid Khalidi, *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute of Palestine Studies, 1992); Walid Khalidi, “Plan Dalet: Master Plan for the Conquest of Palestine”, 18(1) *Journal of Palestine Studies*, pp.4-33 (1988); Ilan Pappé, *The Ethnic Cleansing of Palestine*, (One World, 2007); Elia Zureik, *The Palestinians in Israel: A Study in Internal Colonialism* (Routledge, 1979); Elia Zureik, *Israel's Colonial Project in Palestine: A Brutal Pursuit* (Routledge, 2015).

⁴⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p.136, para.120.