

-- URGENT --

Communication to the Prosecutor
of the International Criminal Court

Incitement to Genocide in Gaza

Situation in the State of Palestine

ICC-01/18

*

Dr. Omer Shatz, Adv.

ICC List of Counsel (Israel Bar 2009)

*

Rebecca Basso, Naïs Deprez, Léa Franchistéguy, Grace Kneafsey,

Justine Lager, Taceo Lenfant, Pia Siebert and Emilie Trannoy

Students of the Course 'International Law in Action' 2023/2024

Master Program in Human Rights and Humanitarian Action

Sciences Po (Paris)

*

The Hague, 6 December 2024

A. Introduction.....	1
I. The Situation in Gaza	1
II. Prosecuting Incitement, Preventing Genocide	2
III. The Interplay Between the ICJ and the ICC: From State to Individual Responsibility	4
B. Substantive Law & Factual Analysis.....	6
I. Not a Mode of Liability, an Inchoate Crime: Incitement to Genocide in the Rome Statute	6
II. Elements of the Crime of Incitement to Commit Genocide	14
III. Analysis of Inciting Statements	18
3.1 Yoav Gallant (fugitive)	18
3.2 Isaac Herzog.....	29
3.3. Israel Katz	33
3.4 Benjamin Netanyahu (fugitive).....	39
3.5 Bezalel Smotrich	47
3.6 Itamar Ben-Gvir	56
3.7 Zvi Yehezkeili	65
3.8 Giora Eiland	70
C. The Legal Implications and the Evidentiary Value of the ICJ Order and Findings	86
I. Legal implications of the ICJ Provisional Measures Order in South Africa v Israel	88
II. State and Individual Responsibility for Genocide: Inter-Court Dialogue.....	99
III. Equating the ICJ’s Plausibility Standard with the ICC’s ‘Reasonable Grounds’ Standard	105
D. Procedure	111
I. The Investigation into the Situation in the State of Palestine	113
II. Jurisdiction	114
III. Admissibility	121
3.1 Complementarity	122
3.1.1 Notice and Deferral.....	122
3.1.2 Grounds of inadmissibility	125
3.1.2.1 Activity in Relation to the Same Case(s)	126
3.1.2.2 Unwillingness or inability to genuinely investigate and prosecute	141
3.2 Gravity	152
IV. Interests of Justice.....	157
E. Conclusions: The Duty to Investigate and Prosecute Incitement to genocide	163
I. A Duty to Prevent: The Statute, the Crime of Incitement, and the identity of the Suspects ..	166
II. The Prosecutor’s Duty to Extend the Investigation and Seek Arrest Warrants	169
III. Case Selection	170
IV. Case Prioritisation.....	171

Executive Summary

From **October 2023**, Isaac Herzog, Benjamin Netanyahu (fugitive), Yoav Gallant (fugitive), Israel Katz, Giora Eiland, Bezalel Smotrich, Itamar Ben-Gvir, and Zvi Yehezkeli (the Suspects) have **publicly and directly incited others to commit genocide against Palestinians in Gaza**.

In **January 2024**, the International Court of Justice (ICJ) cited three of the Suspects' inciting statements. In its Order, the ICJ legally **ordered Israel to punish the inciters**. In **November 2024**, however, the Israeli Legal Adviser to the Government informed the Israeli Supreme Court of their decision not to open a single criminal investigation on the matter, **in defiance of the Order of the ICJ**. In accordance with the principle of complementarity, Israel's failure to investigate and prosecute an International Criminal Court (ICC) crime, **redirects the ICJ Order to the ICC, obligating its Prosecutor to prosecute this crime in Israel's stead**.

Incitement to genocide is a *sui generis* ICC crime. Unlike all other ICC crimes and modes of liability, this inchoate crime can and indeed must be independently investigated and prosecuted, **regardless of whether genocide has been committed or not**. The ICJ factually determined that it is plausible that genocidal acts including incitement have been committed against the targeted group. The ICJ's evidentiary standard of '**plausibility**' corresponds to the ICC's standard of '**reasonable grounds to believe**', the requisite standard for issuing arrest warrants against the Suspects.

In **November 2024**, the Pre-Trial Chamber (PTC) of the ICC issued arrest warrants against two of the Suspects, albeit for other ICC crimes. The PTC factually determined that there are "reasonable grounds to believe" the two suspects created "**conditions of life calculated to bring about the destruction of part of the civilian population in Gaza**," purportedly a genocidal act under the Rome Statute. The PTC noted that these conditions caused "the death of civilians, including children, due to malnutrition and dehydration." The PTC explained it has decided to publish its secret decision since "**conduct similar to that addressed in the warrant of arrest appears to be ongoing**."

Under the Rome Statute, the obligation to prevent further ICC crimes or terminate ongoing ones leaves the ICC Prosecutor no discretion but to extend the investigation into the Situation in the State of Palestine and **investigate incitement to genocide** within the meaning of Article 25(3)(e) of the Rome Statute. As long as the ICC Prosecutor fails to fulfil this obligation under the Statute, the victim on whose behalf this Communication is submitted, as well as more than two million members of the targeted group, remain at **imminent risk of becoming victim of further genocidal acts and crimes**. Crimes in Gaza are ongoing, and as the Prosecutor said, he should not "wait until everybody's dead".

A. INTRODUCTION

I. THE SITUATION IN GAZA

In response to the atrocities of 7/10/23, Israel waged on Gaza one of the most devastating and unrelenting military campaign in contemporary history.¹ Within four weeks, Israel had unleashed over 25,000 tons of bombs, equivalent to about two Hiroshima bombs.² About **7.5%** of the population has been killed or injured: More than 44,249 were killed, including 13,319 children and 7,216 women, and more than 104,746 were injured. **90%** of the population, 1.9 million people, have been internally displaced, some multiple times. Many others fled the Strip to Egypt. **68%**³ of the agricultural land and **66%**⁴ of housing units have been destroyed, along with most of the health, educational, welfare and heritage facilities and sites.⁵ Despite the Security Council's (SC) resolution on a ceasefire,⁶ the Israeli campaign continues uninterrupted for more than a year now.⁷ This campaign is exacerbated

¹ UN Security Council, 'Amid increasingly dire humanitarian situation in Gaza, Secretary-General tells Security Council Hamas attacks cannot justify collective punishment of Palestinian People' (SC/15462, 24 October 2023) <<https://press.un.org/en/2023/sc15462.doc.htm>> accessed 30 October 2023. Israel has occupied Gaza since 1967 and subjected this area to an unlawful blockade since 2007 - a war crime of collective punishment *per se*. See Hague Regulations, Article 50; Third Geneva Convention, Article 87, para 3; Fourth Geneva Convention, Article 33, para 1; APNews, 'Israel's military campaign in Gaza seen as among the most destructive in recent history, experts say' (11 January 2024) <<https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope-419488c511f83c85baea22458472a796>> accessed 27 June 2024

² Euro-Med Human Rights Monitor, 'Israel hits Gaza Strip with the equivalent of two nuclear bombs' (2 November 2023) <<https://euromedmonitor.org/en/article/5908/Israel-hits-Gaza-Strip-with-the-equivalent-of-two-nuclear-bombs>> accessed 27 June 2024

³ UNOSAT, 'UNOSAT FAO Gaza Strip Cropland Damage Analysis' (29 September 2024) <<https://unosat.org/products/3984>> accessed 1 December 2024

⁴ UNOSAT, 'UNOSAT Gaza Strip Comprehensive Damage Assessment' (29 September 2024) <<https://www.unosat.org/products/3985>> accessed 1 December 2024

⁵ UNOCHA, 'Reported impact snapshot | Gaza Strip (26 November 2024)' <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-26-november-2024>> accessed 1 December 2024

⁶ UN Security Council, 'Resolution 2728 (2024)' (25 March 2024) <<https://documents.un.org/doc/undoc/gen/n24/080/81/pdf/n2408081.pdf?token=iFU7U1zJXiSIjnoxMM&fe=true>> accessed 27 March 2024

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Gaza (South Africa v Israel)* (Request for the Indication of Provisional Measures: Order) General List No 192 [2024] <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> accessed 7 June 2024 (*South Africa v Israel: Order of Provisional Measures*); See also the UN Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967: UNHRC, 'Anatomy of a Genocide. Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese' (26 March 2024, A/HRC/55/73) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-auv.pdf>> accessed 27 March 2024 (UN HRC: Anatomy of a Genocide)

by Israeli nationals employing racist and dehumanizing rhetoric, inciting to commit genocidal acts and other ICC crimes against Palestinians in Gaza, and advocating for their collective destruction.⁸

II. PROSECUTING INCITEMENT, PREVENTING GENOCIDE

On 17 November 2023, the Chief Prosecutor of the International Criminal Court (ICC) urged individuals to provide information on breaches of the Rome Statute (RS) in Palestine,⁹ particularly during the ongoing conflict in Gaza.¹⁰ The Office of the Prosecutor (OTP) has received ample evidence indicating the potential commission of genocide within the meaning of Article 6 (RS).¹¹

The present Communication does not concern the crime of genocide under Article 6 RS but the crime of *incitement* to commit genocide within the meaning of Article 25(3)(e) RS. Incitement to genocide is *not* a mode of liability but a *sui generi* crime. Unlike the modes of liability of ordering, soliciting or inducing a crime, for example, incitement is an inchoate crime.¹²

This means that incitement to genocide is prosecutable irrespective of whether the primary crime – in this case genocide – has been committed, or even attempted.¹³ It also follows that contrary to the common view, ICC jurisdiction is not limited to the four crimes of aggression, war crimes, crimes against humanity and genocide. **Incitement to genocide is the 5th crime of the Rome Statute.**¹⁴

Even if the ICC Prosecutor does not believe that the Israeli campaign in Gaza amounts to genocide under the Rome Statute (or that he has enough evidence to prove one), and even if the International Court of Justice (ICJ) will ultimately reach a similar conclusion under the Genocide Convention - the ICC crime of incitement to genocide must nonetheless be independently investigated and prosecuted.

⁸ As well as for the destruction of the territory or parts of the territory of Gaza, its permanent and full occupation, and the reinstatement of Israeli settlements. UN, ‘9588TH Meeting’ (26 March 2024, SC/15643) <<https://press.un.org/en/2024/sc15643.doc.htm>> accessed 30 March 2024

⁹ Rome Statute of the International Criminal Court (adopted 17 July 1999, entered into force 1 July 2002) 2187 UNTS 3

¹⁰ Karim Khan, ‘Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties’. (ICC, 17 November 2023) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>> accessed 19 March 2024

¹¹ Law For Palestine, ‘Joint Communication to the Office of the Prosecutor of the International Criminal Court regarding the Perpetration of the Crime of Genocide by Members of the Israeli War Cabinet’ (March 2024) <<https://law4palestine.org/wp-content/uploads/2024/03/ICC-Submission-Executive-Summary-Law-for-Palestine-and-ICHR.pdf>> accessed 20 March 2024

¹² See Article 25(3)(b) RS.

¹³ Compare with Articles 25(3)(a), (b), (c) and (d) RS.

¹⁴ Compare with Article 5 RS.

Like the crimes for which arrest warrants were issued, investigating a speech crime such as incitement to genocide requires no 'boots on the ground'. There is no need to wait for the cessation of hostilities, no victims to interview, no witness statements to collect, no forensic evidence to analyse. The verbal nature of the *actus reus* of this crime, the dissemination of the inciting call in the public sphere, the unlimited accessibility to the digital record of the call, render the facts in this case indisputable. To assess the context in which these statements were made, simple desk-research in the Hague suffices. Because in the case of incitement the investigative actions are few and simple, the investigation is expected to be short in time and low in costs.

Similar to the crimes for which the arrest warrants were issued, already prior to the arrest, extradition and interrogation of the suspects, there are reasonable grounds to believe they have committed the alleged crime. This is so *inter alia* because in the case of incitement, the material element evidences the mental element: because the *actus reus* is a speech act, it establishes, at least *prima facie*, the suspects' *mens rea*. In the present case, the alleged culprits openly flaunt their statements. They know national authorities have no intention to comply with the ICJ Order and prosecute them.

Incitement plays a crucial role in the perpetration of other genocidal acts. Accordingly, prosecuting incitement plays a crucial role in the prevention and termination of these acts. Unlike incitement, these genocidal acts are often difficult to prove. Their prosecution requires to establish the requisite intent, to distinguish them from other atrocity crimes, to substantiate a relation between the intent and the act, to capture the liability of actors who orchestrate the genocidal enterprise without being physically present in the crime scene.

Prosecuting incitement to genocide without having to prove an attempted or actual commission of genocide, reflects the role prosecution of this crime has in preventing or repressing genocidal acts whose prosecution is so difficult and complex. Accordingly, a failure to comply with the obligation to prosecute incitement to genocide exposes millions of Gazans to other genocidal acts as well as to ICC crimes which according to three Justices of the ICC appear to be ongoing.

That the Rome Statute criminalizes *only* incitement to genocide, whereas incitement to commit other ICC crimes such as crimes against humanity go completely unpunished, emphasizes the importance the drafters saw in repressing this conduct, first and foremost in order to pre-empt the commission of the 'crime of crimes', that is, genocide.

The obligation to prosecute and punish every ICC crime including incitement to genocide, or the obligation to prevent the commission of ICC crimes including genocide, is not a hypothetical or abstract exercise. The extension of investigation in the case of Palestine and the inclusion of the crime of incitement to genocide in Gaza within the scope of this investigation rest on the *factual* determination of the ICJ that this crime has been plausibly committed, and the *legal* implication of Israel's failure to comply with the ICJ Order to prosecute and punish the inciters.

III. THE INTERPLAY BETWEEN THE ICJ & THE ICC: FROM STATE TO INDIVIDUAL RESPONSIBILITY

The legal obligation to prosecute a crime within the jurisdiction of the Court, therefore, hinges on a solid and undisputed evidentiary basis. To order provisional measures in *South-Africa v Israel*, the ICJ had to first determine as a matter of fact that it is plausible that Israeli nationals have been committing genocidal acts in Gaza, including direct and public incitement to commit genocide.¹⁵ This ICJ evidentiary standard ('plausibility') for ordering provisional measures is higher or at minimum equal to the ICC evidentiary threshold for investigating ('reasonable basis to believe') and arresting the Suspects ('reasonable grounds to believe').¹⁶

One of the six Provisional Measures the ICJ granted specifically orders Israel to prevent and punish incitement to genocide.¹⁷ In line with the principle of complementarity, the failure of the Israeli AG to comply with this Order¹⁸ renders the ICC Prosecutor its sole addressee. The main purpose of prosecuting incitement to genocide is to prevent the genocidal acts to which they publicly and directly call. A failure of the Prosecutor to do so not only undermine the credibility and legitimacy of both the ICJ and the ICC; it may unintentionally contribute to the commission of the crime of crimes.

The ICJ's Provisional Measures Order, therefore, obligates the ICC Prosecutor to investigate the crime of incitement to commit genocide in Gaza, twice: *substantively*, because the ICJ evidentiary threshold is higher or equal to the requisite ICC standard for extending the Palestine investigation and issuing arrest warrants against the Suspects; *procedurally*, because the Israeli government has openly and directly defied the ICJ Order to prosecute and punish the alleged inciters.

¹⁵ *South Africa v Israel*: Order of Provisional Measures, paras 50-53

¹⁶ See, respectively, Article 53(1) and Article 58(1) RS

¹⁷ *South Africa v Israel*: Order of Provisional Measures, para 86(3)

¹⁸ Article 54(1) RS

*

This Communication establishes that statements made by six senior Israeli politicians, one former IDF major-general, and one influential journalist, qualify as direct and public incitement to commit genocide as per Article 25(3)(e) of the Rome Statute (**Section B**). The ICJ cited three of these suspects, found that it is plausible that genocidal acts including incitement have been committed, and ordered Israel to punish the inciters. This Communication demonstrates that the ICJ's evidentiary standard of 'plausibility' corresponds to the ICC's standard of 'reasonable grounds to believe', the requisite threshold for investigating and issuing arrest warrants against the suspects (**Section C**). Because the case against the Suspects is within the Court's jurisdiction and admissible, it is in the interest of justice to arrest and prosecute the Suspects. Specifically, since Israel failed to criminally investigate the inciters, the ICJ Order is now redirected to the ICC Prosecutor (**Section D**), whose duty to prevent or terminate genocidal acts and other international crimes obligates him to extend the investigation into the situation in the State of Palestine and prosecute the inciters (**Section E**).

B. SUBSTANTIVE LAW & FACTUAL ANALYSIS

After careful legal analysis and factual assessment, this Communication found reasonable grounds to believe that statements by Yoav Gallant, Isaac Herzog, Israel Katz, Benjamin Netanyahu, Bezalel Smotrich, Itamar Ben-Gvir, Zvi Yehezkeli and Giora Eiland have directly and publicly incited others to commit genocide within the meaning of Article 25(3)(e) RS.

The Suspects' selection criterion was threefold: the seniority or popularity of the authors (position), the scope and gravity of their statements (content), and the capacity to mobilise the addressees of these statements (impact). Yet, proper investigation of the crime of incitement to genocide is likely to identify additional suspects, as countless statements inciting others to commit genocide in Gaza were made by influential Israeli nationals from 7/10/2023 to date.

Part I provides the normative framework based on which incitement to commit genocide is an inchoate crime under the Rome Statute; **Part II** outlines the elements of this inchoate crime; and **Part III** provides a factual analysis of Suspects' inciting statements in light of these legal elements.

I. An Inchoate Crime: Incitement to Commit Genocide in The Rome Statute

An inchoate crime is a step toward the commission of another crime, but a step that is “in itself being serious enough to merit punishment.”¹⁹ In other words, an inchoate crime is an incomplete offence that is “considered to have been committed despite the fact that the substantive offence (that is, the offence the commission of which they were aiming at) is not complete and the intended harm is not realised.”²⁰ Sometimes called *infractions formelles*, as opposed to *infractions matérielles*, inchoate crimes are defined as “acts constituting an offence *per se* irrespective of their results”.²¹ This concept exists in various national legal systems. English common law incorporates three inchoate offences: attempt, conspiracy, and incitement.²² In the civil law system inchoate crimes exist, for example, in Section 111 of the German Criminal Code,²³ or in Article 259 of the Swiss Criminal Code.²⁴ Inciting statements qualify as “particular social evils, which deserve to be stigmatised (and deterred) in their own right.”²⁵ This is in particular so nowadays, as the “omnipresence of the Internet and the opportunities it offers for spreading inciting messages have considerably aggravated this danger”.²⁶

Since Nuremberg, incitement to genocide has been codified as an inchoate crime in the statutes of the ICTY, ICTR and the ICC. The Statute of the International Military Tribunals (IMT) did not mention incitement, and the closest conduct to it, instigation, was framed as a mode of liability. Article 6 of the Statute of the IMT notes that “instigators... participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”²⁷ Yet, the IMT determined that “incitement to

¹⁹ Garner *Black's Law Dictionary* (Thomas Reuters 4th pocket edition, 2011) 533

²⁰ Wibke K. Timmermann, *Incitement in International Law* (Routledge 2015) 200 *et seq*

²¹ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 562

²² Wibke K. Timmermann, *Incitement in International Law* (Routledge 2015) 201

²³ German Federal Ministry of Justice, ‘German Criminal Code’ (German Federal Ministry of Justice, n.d.) <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed 21 June 2024

²⁴ Botschaft betreffend das Übereinkommen über die Verhütung und Bestrafung des Völkermordes sowie die entsprechende Revision des Strafrechts, No. 99.033, 31 March 1999, 5340 <https://www.fedlex.admin.ch/eli/fga/1999/1_5327_4911_4611/de> accessed 1 July 2024. For historical context, see Alan Watson (ed.), *The Digest of Justinian Vol. 4* (University of Pennsylvania Press 2009) 316 para 1, 321 para 13, 330 para 3; Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell, ebook 2014) 241 <https://www.gutenberg.org/cache/epub/46564/pg46564-images.html#Page_220> accessed 30 April 2024; referred to by: Tom Stenson, ‘Inchoate Crimes and Criminal Responsibility under International Law’ (n.d.) UPenn Journal of International Law 1, 6 <https://archive.law.upenn.edu/journals/jil/jilp/articles/1-1_Stenson_Thomas.pdf> accessed 21 June 2024

²⁵ John R.W.D. Jones, ‘The Inchoate Forms of Genocide: Attempts, Direct and Public Incitement and Conspiracy’, in Laurence Burgorgue-Larsen (ed.), *La Représion Internationale du Génocide Rwandais* (Bruylant 2003) 282

²⁶ Timmermann (2006) 852

²⁷ Article 6 of The Charter of the International Military Tribunal, Aug. 8, 1945

murder and extermination... clearly constitutes persecution on political and racial grounds in connection with War Crimes... and constitutes a Crime Against Humanity.”²⁸

By contrast, Article 4(3)(c) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) criminalizes “[d]irect and public incitement to commit genocide” as an inchoate crime.²⁹ Also the Statute of the International Criminal Tribunal for Rwanda (ICTR) reiterates the Genocide Convention in its definition of the crime as “[d]irect and public incitement to commit genocide”.³⁰

In its jurisprudence, the ICTR reaffirmed that incitement is committed even when a genocide does *not* occur.³¹ The ICTR noted “that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime *must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.*”³² The court relied on the *travaux préparatoires* of the Genocide Convention and the debate on the inclusion of the words “*whether or not it was successful*”.³³ The Court inferred that the drafters intended to make unsuccessful acts of incitement punishable.³⁴

The ICTR further developed the *telos* for the incrimination of incitement, stating “that such acts are *in themselves particularly dangerous because of the high risk they carry for society*, even if they fail to produce results, warrants that they be punished as an exceptional measure”.³⁵ Consequently, there is no need to establish a causal relationship between the incitement and a potential genocide.³⁶ For “[i]t is *the potential of the communication to cause genocide* that makes it incitement. [...] [W]hen

²⁸ International Military Tribunal: *Streicher case*: (1946) 22 Trial of German Major War Criminals, 502

²⁹ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, May 17, 1993, as amended on July 7, 2009, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

³⁰ UN Security Council, ‘Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994’ (8 November 1994) UN Doc. S/RES/955 (1994) <<https://digitallibrary.un.org/record/198038?v=pdf>> accessed 30 April 2024

³¹ *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 562; *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1013; *Prosecutor v Bikindi* (Judgement), ICTR-01-72-T (2 December 2008) para 419

³² *Prosecutor v. Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 562; see also *Prosecutor v Kajelijeli* (Judgement and Sentence) ICTR-98-44A-T (1 December 2003) para 855; *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 678

³³ *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 561

³⁴ *ibid*

³⁵ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 562; see also *Prosecutor v Kajelijeli* (Judgement and Sentence) ICTR-98-44A-T (1 December 2003) para 855; *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 678

³⁶ *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1015

this potential has realized, a crime of genocide as well as incitement to genocide has occurred.”³⁷ The jurisprudence of the ICTR was further picked up and developed by national courts. For instance, the Supreme Court of Canada relied on the ICTR jurisprudence affirming the inchoate nature of incitement.³⁸

In line with the Genocide Convention, the ICTY, and the ICTR, the Rome Statute too frames incitement to genocide as an inchoate crime.³⁹ Despite its location in Article 25, incitement to commit genocide is regarded not as a mode of liability but as a fifth ICC crime.⁴⁰ As an inchoate offence, incitement to commit genocide establishes responsibility for the mere act of provoking others to commit the substantive crime of genocide.⁴¹

Accordingly, and unlike *all* the other modes of liability listed in Article 25 RS such as ordering, soliciting or inducing, incitement does *not* require the commission or attempted commission of the primary crime, in this case genocide. Similarly, unlike *all* the crimes listed in Article 5 RS, only incitement to genocide is criminalized, whereas incitement to all other ICC crimes, such as crimes against humanity and war crimes, is not.

(1) Wording

The wording of Article 25(3)(e) RS (“directly and publicly incites others to commit genocide”) stems from Article III(c) of the 1948 Genocide Convention (“[d]irect and public incitement to commit genocide”). The drafting history shows that this crime was originally envisioned as an inchoate

³⁷ *ibid*

³⁸ Supreme Court of Canada, *Canada (Minister of Citizenship and Immigration) v Léon Mugesera*, Judgment of 28 June 2005, Case No 30025 [2005] 2 SCR 100, para 85; referencing *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) paras 1015, 1029; see further: *Prosecutor v Nahimana et al* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 678; Timmermann (2015) 206

³⁹ But compare with Article 2(3)(f) of the ‘Draft Code of Crimes against the Peace and Security of Mankind’ (1996) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf> accessed 2 May 2024. Under Article 2(3)(f) the crime of incitement is narrower in the sense that the crimes incited to needs to occur, but wider in the sense that the crimes one can incite to are not limited to genocide, but include crimes against humanity, crimes against UN and associated personnel and war crimes, see Arts 17-20. Some claim that the International Law Commission blurs the line between incitement and instigation, see Jérôme de Hemptinne, ‘Incitement’ in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt (eds) *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) para 28

⁴⁰ *ibid* 206 arguing in favor; against others: Thomas E. Davies, ‘How the Rome Statute Weakens the International Prohibition on Incitement to Genocide’ (2009) 22 *Harvard Human Rights Journal* 245

⁴¹ Jérôme de Hemptinne, ‘Incitement’ in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt (eds) *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) para 10

crime,⁴² and today there is “no debate that direct and public incitement to omit genocide is an inchoate offence”.⁴³

According to Article 25 Rome Statute:

“(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

...

(b) Orders, solicits or induces the commission of such a crime **which in fact occurs or is attempted**;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its **commission or its attempted commission**, including providing the means for its commission;

(d) In any other way contributes to the **commission or attempted commission** of such a crime by a group of persons acting with a common purpose.[...]

...

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;”.

The wording of sub-paragraphs of (b)-(d) explicitly requires an actual or at least attempted commission of a primary crime. By contrast, the wording of sub-paragraph (e) does not require the

⁴² On the debate on whether to insert the wording “whether such incitement be successful or not” and thereby, to explicitly state the inchoate nature of incitement: UN Economic and Social Council ‘Draft Convention on the Crime of Genocide’ (26 June 1947) UN Doc. E/447, 7; Ad Hoc Committee on Genocide ‘Draft Convention on Prevention and Punishment of the Crime of Genocide’ (19 May 1948) UN Doc E/AC.25/12, Art IV(c); Ad Hoc Committee on Genocide ‘Summary Record of the Sixteenth Meeting’ (22 April 1948) UN Doc E/AC.25/SR.16, 3, French, Lebanese, US and Venezuelan delegate; Addendum, ‘Commentary on Articles Adopted by the Committee’ (27 April 1948) UN Doc E/AC.25/W.1/Add.1, 1 *et seq*; Ad Hoc Committee on Genocide ‘Report of the Committee and Draft Convention Drawn up by the Committee (Dr. Karim Azkoul - Rapporteur)’ (24 May 1948) UN Doc E/794, 20 *et seq*; Eighty-fourth Meeting (26 October 1948) UN Doc. A/C.6/SR.84, 207; Eighty-fifth Meeting (27 October 1948) UN Doc A/C.6/SR.85, 226 *et seq*.; Wibke K. Timmermann, ‘Incitement in international criminal law’ (2006) 88(864) *International Review of the Red Cross, IRRC*, 823, 834 *et seq*; Wibke K. Timmermann, *Incitement in International Law* (Routledge 2015) 203, 205.

⁴³ Wibke K. Timmermann, *Incitement in International Law* (Routledge 2015) 206

actual or attempted commission of a primary crime, in this case genocide. This is because sub-paragraphs of (b)-(d) describes modes of perpetration of and liability for a crime, whereas sub-paragraph (e) describes a criminalized conduct, whose perpetration gives rise to prosecutable criminal liability, irrespective of whether the primary crime has been committed or not.

(2) Structure

It has been argued that due to the position of incitement in Article 25(3) RS, which regulates modes of liability, incitement was ‘reduced’ to a ‘mode of liability’⁴⁴ and should accordingly be treated like sub-paragraphs (a)-(d), namely not as an inchoate crime but as a mode of liability that requires a causal link to one of the crimes listed in Article 5 Rome Statute.⁴⁵

However, its position in letter (e), after the regulation of the lowest form of participation in a crime in letter (d),⁴⁶ suggests that the standards applicable to the first four sub-paragraphs need not apply to (e), just as it neither applies to (f). Indeed, if incitement was drafted as a mode of liability, it would have thus been inserted at minimum before the lowest, subsidiary mode of liability (d).

In this sense (e) is no different than (f), which regulates attempted commission which applies to all crimes. Neither (f) nor (e) is a ‘classic’ mode of liability, further supporting the view that the last two sub-paragraphs of Article 25(3) are not modes of liability. Rather, both attempt and incitement are inchoate crimes which are completed before the crime occurs. Both criminalise conduct on the preparatory stage independently of the result.

As William Schabas notes, Article 25(3)(e) RS makes sense *only* if incitement is considered an inchoate crime.⁴⁷ Otherwise, the conduct would have already been covered by sub-paragraph (b) which incriminate ‘ordering, **soliciting or inducing**’, or (c) which criminalizes ‘aiding, abetting or **otherwise assisting**’ (d).⁴⁸

Sub-paragraph (b) requires a commission or attempted commission of a crime. But at the same time it covers all ICC crimes including genocide, applies to both the private and public spheres, and does not impose the directness requirement. By contrast, sub-paragraph (e) is not dependent on a primary

⁴⁴ Davies (2009) 245

⁴⁵ *ibid* 260 *et seq*

⁴⁶ Gerhard Werle & Boris Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’ in Elies van Sliedregt/Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press 2014) 315

⁴⁷ Schabas (2010) 438

⁴⁸ *ibid*

crime, but its criminalization is limited to a single ICC crime (only genocide), and it applies only in so far as the conduct is direct and made in the public sphere.

If incitement to genocide was not an inchoate crime, therefore, it would have been redundant since it would have been already covered by sub-paragraph (b). The requirement that incitement to genocide would be public serves as a limiting condition to the inchoate nature of the crime.⁴⁹ Likewise, if incitement to genocide under Article 25(3)(e) was not an inchoate crime, it would have been incoherent to require a higher threshold (the elements of direct and public) than the one set, for example, for inducement to commit war crimes or crimes against humanity under Article 25(3)(b).⁵⁰

To sum, because genocide is considered the most serious international crime, incitement to commit this crime is independently criminalized. Because this criminalization is so exceptional, it has been narrowed by imposing the additional restrictive elements of ‘direct’ and ‘public’.⁵¹

(3) *Travaux Préparatoires*

No compelling reason to divert from the historically established interpretation of ‘direct and public incitement to commit genocide’ can be found in the drafting process of the Rome Statute. On the contrary. Not only the drafters considered incitement to genocide as an inchoate offence,⁵² the discussion was focused on its expansion⁵³ also to war crimes and crimes against humanity.⁵⁴

The ICC working group, while drafting Article 25(3)(e) (back then Article 23(7)(f)) Rome Statute, rejected these calls and limited the criminal liability under the Statute to incitement to commit genocide,⁵⁵ to avoid a potential threat to freedom of expression.⁵⁶ The drafting history, therefore, is

⁴⁹ *ibid*

⁵⁰ Schabas (2010) 438

⁵¹ ‘The crime of crimes’ as suggested by William Schabas, *Genocide in International Law. The Crime of Crimes* (2nd edition, Cambridge University Press 2009).

⁵² Timmermann (2015) 206.

⁵³ As previously suggested in International Law Commission in Article 2(3)(f) of the ‘Draft Code of Crimes against the Peace and Security of Mankind’ (1996) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf> accessed 2 May 2024

⁵⁴ Schabas (2009) 156

⁵⁵ Working Group on General Principles of Criminal Law, ‘Report of the Working Group on General Principles of Criminal Law’ (18 June 1998) A/CONF.183/C.1/WGGP/L.4, 3; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act’ (1998) UN Doc A/Conf.183/2/Add.1, 59; Jérôme de Hemptinne, ‘Incitement’ in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt (eds) *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) para 17

⁵⁶ *ibid*

also consistent with the view that incitement is an inchoate crime that covers both successful and unsuccessful incitements.⁵⁷

(4) Object and Purpose

Genocide is always a process and never a single act.⁵⁸ Genocidal acts criminalised in Article 6 RS are limited to its escalatory phase. These acts emerge from and prosper in an atmosphere of hate and fear.⁵⁹ The prosecution of inciting statements, early in a genocidal process, is an important step to suppress their destructive potential and counter the significant role they play in enabling genocide.

Because incitement is the driving force of this process of dehumanisation, De Hemptinne sees the use of incitement in sanctioning the initial preparatory phase of a genocide.⁶⁰ Cryer argued that “the main type of harm that justifies the criminalization of incitement is that it creates the *risk* of commission of the final crime of genocide by those incited”.⁶¹ Some even considered inciters as the ones “really responsible for the atrocities committed”.⁶²

Incitement to genocide is criminalised to prevent the outbreak of genocide. Chronologically and logically, it must be possible to prosecute incitement (also) *before* genocide materializes. The deterrence-based purpose of the crime dictates its inchoate nature. Waiting for a genocide to be committed in order to prosecute incitement to genocide would defeat the crime’s purpose.

(5) The Position of the Office of the Prosecutor

The Office of the Prosecutor (OTP) has also interpreted Article 25(3)(e) to be an inchoate crime:

“In fact, in order for a person be held accountable for incitement to commit genocide the Statute requires that he engage in a specific conduct – that is a direct and public act of incitement, which may

⁵⁷ Coming to the same conclusion: Robert Cryer, ‘General Principles of Liability in International Criminal Law’, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The International Criminal Court: Legal and Policy Issues* (Hart 2004) 252

⁵⁸ See for further references: Sheri P. Rosenberg, ‘Genocide Is a Process, Not an Event’ (2012) 7(1) *Genocide Studies and Prevention: An International Journal* 16

⁵⁹ Gregory H. Stanton, ‘8 Stages of Genocide’ (Genocide Watch, 1998) <<https://www.keene.edu/academics/cchgs/resources/educational-handouts/the-eight-stages-of-genocide/download/>> accessed 14 May 2024; Holocaust Memorial Day Trust ‘10 Stages of Genocide’ (HMD, n.d.) <<https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/what-is-genocide/the-ten-stages-of-genocide/>> accessed 14 May 2024

⁶⁰ Jérôme de Hemptinne, ‘Incitement’ in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt (eds) *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) para 13

⁶¹ Robert Cryer, ‘Incitement’ in Dinah L. Shelton (ed.), *The Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale 2005) 495

⁶² Timmermann (2006) 852 citing: Eighty-fourth Meeting (26 October 1948) UN Doc A/C.6/SR.84, 219 (Mr Morozov)

include statements. This is a consequence of **the inchoate nature of that particular form of liability: the Accused may be found liable on the strength of his words alone, even if genocide does not eventually occur.**⁶³

The OTP also reaffirmed that public and direct are the conditions which limit the scope of incitement to genocide as they “operate [...] as corrective factors, ensuring that only conduct that is *per se* dangerous enough leads to criminal responsibility.”⁶⁴

As explained above, the causal link that is required under Article 25(3)(b-c) fulfils the same limitation function:⁶⁵ Persons privately inducing or ordering others to commit genocide are criminally liable since the gravity of the act lies in the result, that is, the (attempted) commission of genocide.

II. ELEMENTS OF THE CRIME OF INCITEMENT TO COMMIT GENOCIDE

In respect of the crime of genocide within the meaning of Article 6 RS, the crime of incitement under Article 25(3)(e) RS is composed of three elements: the inciting statement must be direct (i), it must be public (ii), and its author(s) must have a specific *mens rea* (iii).

(i) Direct

General propaganda aimed at inciting hatred or violence is insufficient to meet the directness requirement.⁶⁶ Only a statement which “actually calls for genocide” is considered direct.⁶⁷ In its development of the element of directness, the ICTR has set lower and upper thresholds: the statement must be more than a vague suggestion,⁶⁸ but **does not need to explicitly call for extermination.**⁶⁹

Because directness depends on the context in which the criminal statements were made,⁷⁰ it is determined on a case-by-case basis.⁷¹ Among the relevant factors are the cultural and linguistic

⁶³ *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Prosecution’s consolidated response to the “Corrigendum of Ruto Defence Request for Judgment of Acquittal” and “Sang Defence ‘No Case to Answer’ Motion”) ICC-01/09-01/11-2000-Conf (20 November 2015) para 118

⁶⁴ *ibid*

⁶⁵ *ibid*, para 119

⁶⁶ Timmermann (2015) 212

⁶⁷ *Prosecutor v Bikindi* (Judgment), ICTR-01-72-T (2 December 2008) para 388

⁶⁸ *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 557; *Prosecutor v Muvunyi* (Judgment and Sentence) ICTR-2000-55A-T (12 September 2006) para 502; *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-00-56-T (17 May 2011) para 5986

⁶⁹ *Prosecutor v Bikindi* (Judgment), ICTR-01-72-T (2 December 2008) para 387

⁷⁰ *ibid*; *Prosecutor v Karemera et al* (Appeal Judgment) ICTR-98-44 (29 September 2014) para 483

⁷¹ Cf. *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 557

content,⁷² the political and community affiliation of the author,⁷³ its audience,⁷⁴ and how the message was immediately understood by its intended audience,⁷⁵ i.e., whether the members of the audience to whom the message was directed understood its implication.⁷⁶

As noted above, because incitement is an inchoate crime, no causal link to (attempted) genocide is required.⁷⁷ As per the ICTR, "...causal relationship is not requisite to a finding of incitement. **It is the potential of the communication to cause genocide** that makes it incitement [...]."⁷⁸

(ii) Public

The 'public' element of incitement to commit genocide is examined by looking at the circumstances of the incitement,⁷⁹ specifically the place, the audience, and the medium. Incitement is generally considered public when it is made in public places or at public gatherings,⁸⁰ or diffused to the public.

The Charter of Public Space endorsed by UN Habitat defines public spaces as "all places publicly owned or of public use, accessible and enjoyable by all for free and without a profit motive."⁸¹ This includes streets, open spaces and public facilities. Public spaces may also include natural spaces, such as national parks or lands owned or operated by the government. In *Akayesu*, the ICTR's Trial Chamber (TC) referred to Civil Law systems (mainly French jurisprudence) which are holding that words are public when "spoken aloud in a place that [...] [is] public by definition".⁸²

In terms of audience size, the number of people forming the audience may have a probative value but is not a decisive factor in an analysis of the public element. In *Kalimanzira*, the Appeal Chamber

⁷² *Prosecutor v Bikindi* (Judgment), ICTR-01-72-T (2 December 2008) para 387; *Prosecutor v Muvunyi* (Judgment and Sentence) ICTR-2000-55A-T (12 September 2006) para 502; *Prosecutor v Nahimana et al* (Appeal Judgement) ICTR-99-52-A (28 November 2007) para 700; *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-00-56-T (17 May 2011) para 5986

⁷³ *Prosecutor v Bikindi* (Judgment), ICTR-01-72-T (2 December 2008) para 387

⁷⁴ *ibid*

⁷⁵ *ibid*; *Prosecutor v Muvunyi* (Judgment and Sentence) ICTR-2000-55A-T (12 September 2006) para 502

⁷⁶ *ibid*; *Prosecutor v Nahimana et al* (Appeal Judgement) ICTR-99-52-A (28 November 2007) para 700; *Prosecutor v Bikindi* (Judgment), ICTR-01-72-T (2 December 2008) para 387; *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-00-56-T (17 May 2011) para 5986; *Prosecutor v Karemera et al* (Appeal Judgement) ICTR-98-44 (29 September 2014) para 483

⁷⁷ *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1015; *Prosecutor v Nahimana et al* (Appeal Judgement) ICTR-99-52-A (28 November 2007) para 678; Timmermann (2015) 206

⁷⁸ *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1015

⁷⁹ *Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-T (1 December 2003) para 851

⁸⁰ *Prosecutor v Nzabonimana* (Trial Judgement) ICTR-98-44D-T (31 May 2012) para 1755

⁸¹ UN-Habitat, 'SDG Indicator 11.7.1 Training Module: Public Space. United Nations Human Settlement Programme' (2018), 9

⁸² *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 556

(AC) noted that “convictions... for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, **messages disseminated by the media**, and communications made through a public address system over a broad public area”.⁸³

Inciting messages in public spaces can be made also to small audiences, in so far the inciting message is given to an unselected audience. The determinative factor to establish that the message was made to the general public is “**whether or not the assistance/audience was selective or limited**”.⁸⁴ In *Akayesu* TJ, for example, the ICTR found that a speech in a public place to “a crowd of over 100 people” **urging the population to eliminate the enemy** constituted direct and public incitement.⁸⁵

The medium through which the incitement was disseminated is crucial to determine if incitement is public when the speech was made in a non-public place. Based on the above, broadcasted messages are public because they have been sent to neither pre-selected nor limited individual citizens.⁸⁶

The ICTR recognised that incitement is public when it is disseminated to “members of the general public at large by such means as the mass media, for example, radio or television.”⁸⁷ It relied in part on the *travaux préparatoires* of the Genocide Convention that confirmed that “**‘public’ incitement to commit genocide pertained to mass communications.**”⁸⁸

iii. *Mens Rea*

Under Article 30(1) Rome Statute, the material elements of the crime have to be committed with intent and knowledge. In addition, Article 25(3)(e) RS requires special intent (*dolus specialis*) to destroy, in whole or in part, a national, ethnical, racial or religious group as such is required.

As per the ICTR, “[t]he mens rea required for the crime of direct and public incitement to commit genocide lies in the **intent to directly prompt or provoke another to commit genocide**. It implies **a desire ... to create by his actions a particular state of mind** necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit

⁸³ *Prosecutor v Kalimanzira* (Appeal Judgement) ICTR-05-88-A (20 October 2010) para 156

⁸⁴ *Prosecutor v Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) para 556

⁸⁵ *ibid*, paras 673-674.

⁸⁶ Brendan Saslow, ‘Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide’ (2016) 48 *Case W. Res. J. Int’l L*, 440 <<https://scholarlycommons.law.case.edu/jil/vol48/iss1/20>> accessed 12 March 2024

⁸⁷ *Prosecutor v Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) para 556

⁸⁸ *Prosecutor v Karemera et al.* (Trial Judgement) ICTR-98-44 (29 September 2014) para 1595, referring to *Kalimanzira* (Appeal Judgement) ICTR-05-88-A (20 October 2010) para 156, fn. 410

genocide must themselves have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁸⁹

The *mens rea* can be inferred from a number of presumptions of fact.⁹⁰ In *Akayesu*, the ICTR considered “that it is possible to **deduce the genocidal intent** inherent in a particular act charged **from the general context of the perpetration of other culpable acts systematically directed against that same group**, whether these acts were committed by the same offender or by others.

Other factors, such as **the scale of atrocities** committed, their general nature, in a region or a country, or furthermore, **the fact of deliberately and systematically targeting victims on account of their membership of a particular group**, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”⁹¹

It follows that evidence for grave breaches of international humanitarian law and potential commission of ICC crimes, even if they *per se* do not amount to genocide, may reinforce the requisite *mens rea* for the commission of incitement to genocide.

According to the ICTR, genocidal intent “may be inferred from deeds and utterances. It may also be inferred from the general context of the perpetration, in consideration of factors such as: [...] **the use of derogatory language towards members of the group**”⁹².

As suggested by the ICTY, “[r]ather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts [...], the Trial Chamber should expressly have considered **whether all of the evidence, taken together, demonstrated a genocidal mental state**”⁹³, namely that the accused’s statements must be considered in light of the totality of the evidence and the context in which they were made.

⁸⁹ *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 560

⁹⁰ *ibid*, para 523

⁹¹ *ibid*, para 523

⁹² *Prosecutor v. Mikaeli Muhimana* (Judgment) ICTR-95-1B-T (28 April 2005) para 496

⁹³ *Prosecutor v. Milomir Stakic* (Judgment) IT-97-24-A (22 March 2006) para 55

III. ANALYSIS OF INCITING STATEMENTS

3.1 Yoav Gallant (fugitive)

In its Order of Provisional Measures (the ‘Order’), the ICJ noted that “On 9 October 2023, Mr Yoav Gallant,⁹⁴ Defence Minister of Israel,⁹⁵ announced that he had ordered a ‘complete siege’ of Gaza City and that there would be ‘no electricity, no food, no fuel’ and that ‘everything [is] closed’.⁹⁶ On

⁹⁴ Yoav Gallant served more than 30 years in the military, including as the Head of the Gaza Division, before being appointed Minister of Defence in December 2022. He was the IDF commander of the Southern Command in Operation “Cast Lead” in Gaza (December 2008-January 2009). Based on alleged war crimes in this Gaza operation, a petition to the Israeli Supreme Court (ISC) sought to annul his promotion to the Chief of Staff of the IDF. Gallant eventually was not appointed, albeit for other misdemeanours. As the Head of the Ministry of Defence and a member of the war cabinet, Gallant has designed and orchestrated the post-7/10 campaign in Gaza. In addition to its political leverage, Gallant also exerts significant influence over the Israeli society, as demonstrated by the public outcry in response to an attempt by the Israeli Prime Minister (PM) to dismiss him in March 2023. Tens of thousands of protesters took to the streets and blocked roads across the country and even abroad to reverse this decision, in an unprecedented night that is remembered since as “Gallant’s night”. The morning after a general strike was announced by the public sector and partially even by the private sector, until eventually the Israeli PM reversed its decision. Yoav Gallant has had a ability to influence the military course of events in the conflict because of his senior position. A former military general, his influence on the troops on the grounds exceeded his formal political authority. In November 2024, the Israeli Prime Minister dismissed Yoav Gallant, this time successfully, and the PTC issued against him an arrest warrant for war crimes and crimes against humanity committed in Gaza between October 2023 and May 2024. He is still at large. See H CJ 7823/10 ‘Yesh Gvul’ v ‘The Advisory Committee on the Appointment of Senior Officials’, the Government of Israel and Gen. Yoav Gallant (18 January 2011), the undersigned acted as co-counsel in this case. <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C10/230/078/s04&fileName=10078230_s04&type=4> accessed 2 December 2024; See also Hareetz, ‘Group Asks Court to Bar Galant From Serving as IDF Chief’ (17 January 2011) <<https://www.haaretz.com/2011-01-17/ty-article/group-asks-court-to-bar-galant-from-serving-as-idf-chief/0000017f-df0e-d3a5-af7f-ffae477e0000>> accessed 2 August 2024, The Guardian, ‘Israel: mass protests after sacking of minister who opposed judicial overhaul’ (26 March 2023) <<https://www.theguardian.com/world/2023/mar/26/benjamin-netanyahu-fires-defence-minister-yoav-gallant-judicial-overhaul>> accessed 2 August 2024. International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024; The Times of Israel, ‘Netanyahu fires Gallant, says no trust in defense minister at time of war’ (5 November 2024) <https://www.timesofisrael.com/liveblog_entry/netanyahu-fires-gallant-says-no-trust-with-defense-minister-at-time-of-war/> accessed 1 December 2024

⁹⁵ In the absence of constitution, the legal configuration of political authority over Israeli armed forces is found in one of the sets of ‘basic’ laws. ‘Basic’ laws have a constitutional normative status. After defining the IDF as the armed force of Israel (Article 1), the Basic Law explains in its Article 2 on Subordination to Civil Authority that (b) “The Minister in charge of the Army on behalf of the Government is the Minister of Defence.” According to Basic Law: The Military, Article 3(b), the Chief of the General Staff, the supreme command level in the Army, is also “subject to the authority of the Government and subordinate to the Minister of Defence.” See ‘Basic Law: The Army, approved by the Knesset on 31 March 1976 and published in Sefer Ha-Chukkim (‘the registry of laws’) No. 806. Basic Law: The Army of 1976, The Army (9 April 1976) <<https://www.refworld.org/legal/legislation/natlegbod/1976/en/28150>> accessed 2 August 2024. The Ministry of Defense is “responsible for security on the political, military and civilian level. The ministry focuses on building the strength of the Israel Defense Forces”. See ‘Ministry of Defense’ (Israeli Government Website) <https://www.gov.il/en/departments/ministry_of_defense/govil-landing-page#:~:text=The%20Ministry%20of%20Defense%20is,supports%20local%20industries%20and%20more> accessed 2 August 2024.

⁹⁶ @KnessetTV (Youtube channel, 09 October 2023) <<https://www.youtube.com/watch?v=1nxvS9VY-t0>> accessed 2 August 2024 translation in Emanuel Fabian, “Defense minister announces ‘complete siege’ of Gaza: No power, food or fuel”, The Times of Israel (9 October 2023) <https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/> accessed 2 August 2024

the following day, Minister Gallant stated, speaking to Israeli troops on the Gaza border: ‘**I have released all restraints . . . You saw what we are fighting against. We are fighting human animals. This is the ISIS of Gaza. This is what we are fighting against . . . Gaza won’t return to what it was before. There will be no Hamas. We will eliminate everything.** If it doesn’t take one day, it will take a week, it will take weeks or even months, we will reach all places.’⁹⁷

The first statement was made following an assessment at the IDF Southern Command in Beersheba during a ‘situation update meeting’ with other members of the IDF and was **broadcasted by the media**.⁹⁸ The second statement was made while Yoav Gallant was touring southern Israel along the Gaza border, **directly exchanging with soldiers on the ground**, and was broadcasted by the media.

The two statements were made two and three days after 7 October 2023, respectively, namely after PM Netanyahu had declared war and retaliatory airstrikes on Gaza had begun, but before the large-scale ground assault on the Gaza Strip only started on 28 October 2023. These statements were thus among the first official roadmaps issued by Israeli officials in charge of national security on the upcoming deployment of armed forces and the military strategy that would be followed in Gaza.

Direct

The impact of the statements and their characterization as core military guidelines for the armed forces is evident from the addressees of these statements – the Israeli soldiers who were about to invade Gaza – the way the fighting unfolded on the ground in the months after these statements were made, as well as their recurrent diffusion in the media and specifically their subsequent resonance in the discourses of other Israeli officials and influencers.

Whilst both statements do not contain the word genocide explicitly, when considered in their context they are essentially calling for genocide in Gaza and therefore meet the **directness element**.⁹⁹ In the context of Gaza and specifically the military campaign in Gaza, a call to initiate and maintain a

⁹⁷ *South Africa v Israel*: Order of Provisional Measures, para 52. See also @KipaVod (Youtube channel, 10 October 2023) <<https://www.youtube.com/watch?v=I9wx7e4u-xM>> accessed 2 August 2024. Translation in “Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks”, Bloomberg (10 October 2023) <<https://www.youtube.com/watch?v=vtjHcnNB0E8>> accessed 2 August 2024

⁹⁸ @KnessetTV (Youtube channel, 09 October 2023) <<https://www.youtube.com/watch?v=1nxvS9VY-t0>> accessed 2 August 2024

⁹⁹ *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T (2 December 2008) para 388

‘complete siege’ (“everything is closed”) is not an innocent method of warfare, as the crimes based on which an arrest warrant against Gallant was issued attest.¹⁰⁰

Gaza was already under siege for years. To impose a ‘complete’ siege means doing something else. That something is explained by the suspect: the prevention of even the most minimal means for physical survival (‘no electricity’, ‘no fuel’), with specific and explicit reference to starvation of the civilian population, in itself a war crime under the Rome Statute (‘no food’).¹⁰¹

Deprivation of basic means to physically survive as collective punishment may also amount to a genocidal act of deliberately inflicting on a group condition of life calculated to bring about its physical destruction, in whole or in part, within the meaning of Article 6(c) RS. Calling to do so, qualifies as a call ‘with respect to the crime of genocide’ within the meaning of Article 25 (3)(e) RS.

Gallant did address the administrative and military executives who have the power to initiate and maintain the complete blockade that is indiscriminately directed against the whole population of ‘human animals’ in Gaza – be them civilians, persons *hors de combat*, toddlers, women, or the elders.

Few days after the suspect’s statement, electricity was completely shut down, and the access to water from all sources dropped by 95%.¹⁰² The Israeli forces have been denounced for blocking aid delivery entering Gaza and threatening international humanitarian organisations acting there. As per the World Health Organization (WHO), 93% of the population in Gaza was and still is facing varying crisis levels of hunger, and there is not enough water to fulfil even the most basic needs of the population.¹⁰³

Gallant requested his audience to make sure that “Gaza won’t return to what it was before” and promised to do whatever it takes so “we will eliminate everything”. Gaza will not return to what it was before, with 5% of the population killed, maimed or injured, about 8% fled the strip, about 90% are internally displaced, about 70% of houses and other essential facilities destroyed, and so on.

¹⁰⁰ The PTC found that “there are reasonable grounds to believe that [Gallant and Netanyahu] intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, and medicine and medical supplies, as well as fuel and electricity, from at least 8 October 2023 to 20 May 2024.” in International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

¹⁰¹ Article 8(2)(b)(xxv) RS (war crime of starvation); See also ‘Rule 53 - The use of starvation of the civilian population as a method of warfare is prohibited’ in Henckaerts & Doswald-Beck (2005).

¹⁰² Natasha Hall, Anita Kirschenbaum & David Michel, ‘The Siege of Gaza’s Water’ (CSIS: 12 January 2024) <<https://www.csis.org/analysis/siege-gazas-water>> accessed 2 August 2024

¹⁰³ WHO, ‘Lethal combination of hunger and disease to lead to more deaths in Gaza’ (21 December 2023) < [Lethal combination of hunger and disease to lead to more deaths in Gaza \(who.int\)](https://www.who.int/news/lethal-combination-of-hunger-and-disease-to-lead-to-more-deaths-in-gaza)> accessed 2 August 2024

Gallant encourages his audience to completely annihilate Gaza in a widespread and systematic manner, geographically (“we will reach all places”) and temporally (“if it doesn’t take one day, it will take a week, it will take weeks or even months”).

The ‘We’ pronoun refers to first and foremost the IDF, then also to the Israeli government and public. Elimination of ‘everything’ covers IDF’s scorched-earth policy of indistinctive physical destruction of people and property in Gaza, in parallel to and even after ‘there will be no Hamas’. The content of this call, therefore, corresponds to several elements of the genocide under Articles 6(a)(b)(c) RS. The fact that at least some of these elements materialised on the ground evidence ‘backwards’ the directness of the crime of incitement to genocide.

Just before the land invasion, Gallant armed his soldiers with the most important weapon: impunity. The soldiers are told that in their quest to achieve the genocidal goal of “conditions of life calculated to bring about the destruction of part of the civilian population in Gaza” *a-la-PTC*, Gallant has “**released all restraints**” – not few or some but all – and hence they can act completely lawlessly. As the person in charge of the army, by ‘restraints’ Gallant seems to refer to customary rules that are regulating armed conflicts such as the principles of distinction between civilians and combatants,¹⁰⁴ between civilian objects and military objectives,¹⁰⁵ and that of proportionality,¹⁰⁶ all of which have been allegedly disregarded during the military campaign in Gaza. Gallant appears to suggest the suspension of these rules is justified because the attacks of 7/10 merit not only a revenge but one that reflects an exceptional extent of gravity. By instrumentalizing the victims of other atrocity crimes, Gallant equips tens of thousands of soldiers with a *carte blanche* to commit their own atrocities, without the fear of being held to account.

The genocidal process of dehumanization is not limited to enemy forces and the mob who participated in the 7/10 crimes but refers to the entire population of more than 2 million Gazans. On 7/10/23, according to Gallant, the Israeli army and public “saw what we are fighting against. we are fighting **human animals**”, and hence there is no room for distinction between the unlawful and lawful, culprits

¹⁰⁴ Rule 1. ‘The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.’ in Henckaerts & Doswald-Beck (2005)

¹⁰⁵ Rule 7. ‘The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.’ in Henckaerts & Doswald-Beck (2005)

¹⁰⁶ Rule 14. ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.’ in Henckaerts & Doswald-Beck (2005)

and innocent, protected groups and legitimate targets. Not because there are no civilians in Gaza, but because there are no humans there. The reference to the entire population rather than to those who took part in hostilities on 7/10 is in correlation with the need to ‘eliminate everything’, ‘release all restraints’, ‘reach all places’ and so on. For if Hamas military forces and political supporters are animals, so do their relatives, people around them, their children, even the unborn.

Blurring the lines between the human or civilized and the non-human or uncivilized is the context in which the inciting statement is made and should be assessed. The bread and butter of every genocidal enterprise, it is the outcome of a collective action and a joint effort. In such multi-actor scenario, the words and actions of one actor reciprocally feed the minds and conducts of other actors. Also in the present case the rhetoric of non-distinction has been repeatedly used by other prominent Israeli officials and influencers. When Minister Avi Dichter says that “We are now rolling out the Gaza Nakba”,¹⁰⁷ or when Minister Amichai Eliyahu says that “[w]e wouldn’t hand the Nazis humanitarian aid”¹⁰⁸, they are not speaking in isolation but in a continuum where every additional statement draws on the previous ones and legitimizes the next ones.

This narrative of non-differentiation between civilians and combatants seems to have been translated into a warfare method on the ground, possibly using means and methods such as the Lavender AI system¹⁰⁹ and the creation of ‘kill zones’ in Gaza,¹¹⁰ turning everyone to a legitimate target. The civilian death toll, the extent of the destruction and the cleansing of entire inhabited areas, making 90% of the population, more than 1.8 million people, displaced – directly relate to statements made by the minister in charge of the IDF.¹¹¹ Whilst it is not a requisite element of the inchoate crime of incitement to genocide, the PTC found there are ‘reasonable ground to believe’ that Gallant’s

¹⁰⁷ Haaretz, ‘We’re rolling out Nakba 2023,’ Israeli Minister says on Northern Gaza Strip evacuation’ (12 November 2023) <<https://www.haaretz.com/israel-news/2023-11-12/ty-article/israeli-security-cabinet-member-calls-north-gaza-evacuation-nakba-2023/0000018b-c2be-dea2-a9bf-d2be7b670000>> accessed 2 August 2024

¹⁰⁸ Kan News, ‘Minister Amichai Eliyahu: Atomic bomb on Gaza? This is one of the possibilities’ (5 November 2023) <<https://www.kan.org.il/content/kan-news/politic/596470/>> accessed 2 August 2024, translation in The Times of Israel, ‘Far-right minister: Nuking Gaza is an option, population should ‘go to Ireland or deserts’ (5 November 2023) <https://www.timesofisrael.com/liveblog_entry/far-right-minister-nuking-gaza-is-an-option-population-should-go-to-ireland-or-deserts/> accessed 2 August 2024

¹⁰⁹ The Guardian, ‘The machine did it coldly’: Israel used AI to identify 37,000 Hamas targets’ (3 April 2024) <<https://www.theguardian.com/world/2024/apr/03/israel-gaza-ai-database-hamas-airstrikes>> accessed 2 August 2024

¹¹⁰ Common Dreams, ‘Israeli Newspaper Details IDF’s Creation of ‘Kill Zones’ in Gaza’ (1 April 2024) <<https://www.commondreams.org/news/israel-kill-zones-gaza>> accessed 2 August 2024

¹¹¹ Amnesty International, ‘New evidence of unlawful Israeli attacks in Gaza causing mass civilian casualties amid real risk of genocide’ (12 February 2024) <<https://www.amnesty.org/en/latest/news/2024/02/israel-opt-new-evidence-of-unlawful-israeli-attacks-in-gaza-causing-mass-civilian-casualties-amid-real-risk-of-genocide/>> accessed 2 August 2024

genocidal call to eliminate everything by depriving the population of food, electricity and fuel, has materialized on the ground:

“The Chamber found that there are reasonable grounds to believe that the lack of food, water, electricity and fuel, and specific medical supplies, created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children due to malnutrition and dehydration.”¹¹²

The Audience

As set out above, the question of the “addressees”, meaning the audience towards which the statement is directed, is crucial in asserting the ‘direct’ element of incitement to genocide. Both statements were directly made in a military context to a military audience. Looking at the video that was broadcasted on the Knesset Youtube Channel, it appears that the first statement was held in a closed room meeting where Yoav Gallant is surrounded by individuals in military uniforms. On the video that was broadcasted online, Yoav Gallant appears wearing a bullet-proof vest and is surrounded by a group of soldiers to whom he is directly talking. The use of the second person pronoun clarifies that the primary addressees were the military personnel present on these specific occasions, even if the call is more broadly addressed to the Israeli army as a whole, and is also aimed at informing the general public of the Israeli strategy through the dissemination of the videos.

The position and seniority of the speaker, the identity of the addressees, and the content of the message conveyed, establish a reasonable grounds to believe that Yoav Gallant’s statements have *directly* incited others to commit genocide.

Public

The statements also *publicly* incited others to commit genocide. In a digital era coupled with the emergence of new forms of media, the manner in which the statement reaches and impacts the audience matters. Once a speech is filtered through a medium that can be accessed without limitation by an undefined audience, it is a broadcast and may be considered as ‘public’.¹¹³

¹¹² International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

¹¹³ Saslow (2016) 446

Although Gallant's statements were made in relatively private settings and addressed to a 'physical' audience, their dissemination via various media platforms render them public. The first statement, for example, was published on the Knesset's Youtube channel, a governmental communication tool that counts 66,700 subscribers, and reused in many press articles. Whereas the second was broadcasted on several media channels, one of which counts around 19,400 subscribers. The immense public reach of both videos means that **their audience was neither selected nor limited**.

Once a message is publicly accessible, it might be easily proliferated through other social media platforms, further increasing its impact and audience. Nowadays, content on social media can reach millions of 'unspecified' people. Because Gallant's inciting statement has been communicated with no limitation to an undefined and unselected audience, it meets the 'public' element of the crime.¹¹⁴

Mens Rea

Similar to the crimes for which the PTC issued arrest warrants, investigation and prosecution of the crime does not require to fully establish the mental element of the crime. All that is required prior to the interrogation of the suspect is a reasonable ground to believe that Gallant has the requisite *Mens Rea* for the purpose of Article 25(3)(e) RS.

As a verbal crime, Gallant's statements 'speak' for themselves, the content of Gallant's speech quite straightforwardly evidences his *mens rea*. In addition, the context of the 7/10 attacks is circumstantial evidence, providing a powerful motive and incentive to commit the crime. Also the general genocidal environment in which the statements were made is "an indicator that incitement to violence was the intent of the statement."¹¹⁵ Finally, the repetitive use of dehumanising language by Gallant prior to 7/10/23, form a pattern of hateful statements directed toward the targeted group, further corroborating the mental element of this crime.

In 2002, Gallant became the military secretary to former Prime Minister Ariel Sharon, a former army general. Sharon himself was held responsible as a defense minister for the 1983 massacre of Palestinians by a Lebanese Christian military at the Sabra and Shatila refugee camps.¹¹⁶ In 2005, Gallant became head of the IDF's southern command (the Gaza division), where he "put the entire

¹¹⁴ The case law on incitement via social media is still scarce, but the ECtHR has dealt with a case of incitement to hatred, discrimination and violence deriving from a Youtube video. See *Belkacem v Belgium* App no [34367/14](#) (ECtHR, 27 June 2017) para 33

¹¹⁵ *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1022

¹¹⁶ CNN, 'Ariel Sharon: Hero or butcher? Five things to know' (11 January 2014) <<https://edition.cnn.com/2014/01/11/world/meast/ariel-sharon-5-things/index.html>> accessed 2 August 2024

theatre on a more acting footing”.¹¹⁷ He commanded the infamous Operation Cast Lead which resulted in the death of about 1,400 Palestinians. A UN report reviewed the potential commission of war crimes (from both sides) during this conflict,¹¹⁸ the Israeli NGO B’Tselem called to investigate Gallant for “grave violations of human rights”,¹¹⁹ and, as noted above, another Israeli NGO petitioned the Israeli Supreme Court, arguing that alleged war crimes in Gaza renders his appointment as the Chief of Staff of the IDF unreasonable and, consequently, should be annulled.¹²⁰

Personal and direct testimonies are consistent with these reports and cases. Gallant’s deputy testified that “[i]n every operation... [Gallant] was always the guy who wanted to extend it, or to be more decisive... The only thing he thinks about morning, noon, and evening is how to destroy the enemy, that’s it.”¹²¹ When Gallant says, therefore, that “[we] will eliminate everything... It will take weeks or even months, we will reach all places”¹²², or when he orders to attack “through the air, land, with tanks, with bulldozers, by all means, there are no compromises”,¹²³ it is clear that he is willing to reach his ‘military objective’ at all costs and with no compromises.

Gallant has been a vocal advocate of Israeli settlements, which have been recognized as illegal under international law and amount to a war crime *per se*.¹²⁴ When Gallant was appointed Minister of Defence, the Head of the ‘Yesha’ [the West Bank] Council, Shlomo Neeman, stated that “Yoav

¹¹⁷ Tablet Magazine, ‘Israel’s Man in Black’ (9 January 2024) <<https://www.tabletmag.com/feature/yoav-gallant-profile-armin-rosen>> accessed 2 August 2024

¹¹⁸ UNGA, ‘Situation of human rights in the Palestinian territories occupied since 1967’ (25 August 2009) para 24 <<https://documents.un.org/doc/undoc/gen/n09/494/11/pdf/n0949411.pdf?token=E8uvumn4QgOZhOGLiX&fe=true>> accessed 2 August 2024

¹¹⁹ B’Tselem, ‘Investigate Galant’s responsibility for grave violations of human rights in Operation Cast Lead’ (24 August 2010) <https://www.btselem.org/press_releases/20100824> accessed 2 August 2024

¹²⁰ HCJ 7823/10 ‘Yesh Gvul’ v ‘The Advisory Committee on the Appointment of Senior Officials’, the Government of Israel and Gen. Yoav Gallant (18 January 2011); the undersigned acted as co-counsel in this case. <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C10/230/078/s04&fileName=10078230_s04&type=4> accessed 2 December 2024; See also Hareetz, ‘Group Asks Court to Bar Galant From Serving as IDF Chief’ (17 January 2011) <<https://www.haaretz.com/2011-01-17/ty-article/group-asks-court-to-bar-galant-from-serving-as-idf-chief/0000017f-df0e-d3a5-af7f-ffae477e0000>> accessed 2 August 2024

¹²¹ Tablet Magazine, ‘Israel’s Man in Black’ (9 January 2024) <<https://www.tabletmag.com/feature/yoav-gallant-profile-armin-rosen>> accessed 2 August 2024

¹²² @KipaVod (Youtube channel, 10 October 2023) <<https://www.youtube.com/watch?v=l9wx7e4u-xM>> accessed 23 April 2024. Translation in “Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks”, Bloomberg (10 October 2023) <<https://www.youtube.com/watch?v=vtjHcnNB0E8>> accessed 23 April 2024

¹²³ Law For Palestine, ‘Database of Israeli Incitement to Genocide: Decision Makers’ (15 Janvier 2024) no 2 <<https://law4palestine.org/wp-content/uploads/2024/01/1-Database-of-Israeli-Incitement-to-Genocide-15th-January-2024-DECISION-MAKERS.pdf>> accessed 2 August 2024

¹²⁴ UNSC, ‘Resolution 2334’ (23rd December 2016) S/RES/2334, para 1: “the establishment by Israel of settlements in the Palestinian territory, has no legal validity and constitutes a flagrant violation under international law.”

Gallant is a man who has done a lot for the settlement of Judea and Samaria”.¹²⁵ During a visit to Bet-El settlement in 2018, the (then) Housing Minister said: “It is necessary to say in a loud and clear voice. The realisation of Zionism in the Land of Israel is the settlement in Judea, Samaria, the Jordan Valley [three areas of the West Bank-O.S.], the Arava, the Negev and the Galilee.”¹²⁶

In times of conflict, language is a powerful weapon.¹²⁷ It shapes the narrative which in turn determines whether lethal weapons will be used, in what manner, against who, and for how long. The dehumanising language and annihilation rhetoric repeatedly used by Gallant in these and other statements evidence his intent to destroy the Palestinians in Gaza, in whole *or in part*, as a specific group. Dehumanisation is first and foremost a linguistic project, aimed at depriving people from their human qualities, personality, and dignity. In a genocidal context, humans are not deprived of their rights. They are robbed of their humanity. Because dehumanised groups are portrayed as non- or less human, it is easier to disconnect from their suffering and neutralise public outrage.¹²⁸

Historically, dehumanising language has always preceded genocide and is accordingly considered as a “preparatory step on the path to mass killing.”¹²⁹ Genocide Watch ranks dehumanisation as the third out of the eight stages of genocide: “Denial of the humanity of others is the step that permits killing with impunity [...] Dehumanisation overcomes the normal human revulsion against murder.”¹³⁰

Jews were likened to “rats” or “vermin”, the Tutsi were referred to as “snakes” or “cockroaches”, and Gallant depicted Gazans as “human animals”. The assault on Palestinians in the Gaza strip has been partly fuelled by decades of anti-Palestinians racism spread by the Israeli government and media.¹³¹

¹²⁵ Al-Monitor, ‘Israel’s new defence minister: Netanyahu loyalist, settlers’ friend’ (29 December 2022) <<https://www.al-monitor.com/originals/2022/12/israels-new-defence-minister-netanyahu-loyalist-settlers-friend>> accessed 2 August 2024

¹²⁶ The Palestine Chronicle, ‘Israeli Minister Awarded Prize for Supporting Illegal Settlements’ (29 August 2018) <<https://www.palestinechronicle.com/israeli-minister-awarded-prize-for-supporting-illegal-settlements-video/>> accessed 2 August 2024

¹²⁷ New Lines Magazine, ‘Language Is a Powerful Weapon in the Israel-Palestine Conflict’ (27 November 2023) <<https://newlinesmag.com/argument/language-is-a-powerful-weapon-in-the-israel-palestine-conflict/>> accessed 2 August 2024

¹²⁸ “Dehumanization is a form of moral exclusion” by which some people are located “outside the boundary in which moral values, rules, and considerations of fairness apply” in Nick Haslam, ‘The Many Roles of Dehumanization in Genocide’ in Leonard S. Newman (ed) *Confronting Humanity at its Worst: Social Psychological Perspectives on Genocide* (OUP, 2019) 122 <<https://academic.oup.com/book/37362/chapter-abstract/331335701?redirectedFrom=fulltext>> accessed 2 August 2024

¹²⁹ Haslam (2019) 119

¹³⁰ Gregory H. Stanton, ‘The 8 staged of Genocide’ (Briefing Paper, Genocide Watch) <<http://www.genocide-watch.com/images/8StagesBriefingpaper.pdf>> accessed 2 August 2024

¹³¹ Institute for Palestine Studies, ‘On the Dehumanization of the Palestinians’ (23 October 2023) <<https://www.palestine-studies.org/en/node/1654481>> accessed 2 August 2024

Gallant’s dehumanising language, therefore, is an indicator for his intent to destroy the Palestinians in Gaza as a specific group. After making a specific reference to Gallant’s statement, the UN Special Rapporteur on violence against women and girls, found that the “genocidal and dehumanising rhetoric about the Palestinian people, including women and children, by top Israeli Government officials and public figures... make the Israeli Government’s intention to destroy the Palestinian people, in whole or in part, absolutely and consistently clear.”¹³²

Finally, **the PTC has already found reasonable grounds to believe that Gallant had the requisite *mens rea* to commit ICC crimes other than incitement to genocide**, which substantiate the criminal mindset of the suspect. Given the close affinity between the crimes against humanity and war crimes Gallant is charged with and the crime of incitement to genocide, it is more likely than not that the suspect had also the requisite *mens rea* for the commission of incitement to genocide.

The PTC considered that there are reasonable grounds to believe that Gallant “**intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, and medicine and medical supplies, as well as fuel and electricity**, from at least 8 October 2023 to 20 May 2024... This finding is based on the role of ... Mr Gallant in impeding humanitarian aid in violation of international humanitarian law and their failure to facilitate relief by all means at its disposal... The aforementioned restrictions together with cutting off electricity and reducing fuel supply also had a severe impact on the availability of water in Gaza and the ability of hospitals to provide medical care...”

The PTC also “found reasonable grounds to believe that... Mr Gallant bear[s] criminal responsibility for the **war crime of starvation** as a method of warfare” and that “there are reasonable grounds to believe that the lack of **food, water, electricity and fuel**, and specific medical supplies, **created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children** due to malnutrition and dehydration”. The PTC thus found that “there are reasonable grounds to believe that **the crime against humanity of murder was committed...**”.

¹³² OHCHR, ‘Women bearing the brunt of Israel-Gaza conflict: UN expert’ (Press Release, 20 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/women-bearing-brunt-israel-gaza-conflict-un-expert>> accessed 2 August 2024 (“Palestinians as a whole have reportedly been described “human animals” and calls have been made to inflict on them a second *Nakba*”)

The PTC also found that, by **intentionally** limiting or preventing medical supplies and medicine from getting into Gaza, in particular anaesthetics and anaesthesia machines”, Gallant is “also responsible for inflicting great suffering by means of inhumane acts on persons in need of treatment. Doctors were forced to operate on wounded persons and carry out amputations, including on children, without anaesthetics, and/or were forced to use inadequate and unsafe means to sedate patients, causing these persons extreme pain and suffering. This amounts to the **crime against humanity of other inhumane acts.**” The PTC “also found reasonable grounds to believe that... **the population was targeted based on political and/or national grounds.** It therefore found that **the crime against humanity of persecution** was committed.”

Whilst the war crimes and crimes against humanity Gallant is accused of do not require to establish intent, the fact that Gallant called for and decided on deprivation of food, electricity and fuel, that the PTC found there was actual lack of food, electricity and fuel, and that the PTC found that this inciting call and decision making on the part of Gallant resulted in one of the genocidal acts within the meaning of Article 6 RS, necessarily constitutes, ‘with respect to genocide’, a call inciting to others to commit genocide within the meaning of Article 25(3)(e) RS:

“lack of food, water, electricity and fuel, and specific medical supplies, created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children due to malnutrition and dehydration.”

Since Gallant made his statements, other officials have repeatedly emphasised that all Palestinians are collectively responsible for the attacks of 7/10 and hence no differentiation should be made between civilians and combatants. If the fight is against animals, the foes should be treated as such, slaughtered in masses without any moral questioning. Gallant is not only a former army general. He is also a politician talking to his base. As shown below, in this race to the bottom, his inciting statements under Article 25(3)(e) also incited other public figures to make similar inciting statements.

3.2 Isaac Herzog

In its Order for Provisional Measures, the ICJ stated that: “On 12 October 2023, Mr Isaac Herzog,¹³³ President of Israel, stated, referring to Gaza: “We are working, operating militarily according to rules

¹³³ Isaac Herzog is the President and the head of the State of Israel. He has been working for the State of Israel for more than 20 years, having served as government secretary, Member of the Knesset, and head of several Ministries. The President's influence derives from its symbolic function as a unifying force that reflects the core principles of the state. He must foster national unity at home, represent the country abroad, and is supposed to bring Israeli citizens together

of international law. Unequivocally. **It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not aware, not involved. It is absolutely not true.** They could have risen up. They could have fought against that evil regime which took over Gaza in a coup d'état. But we are at war. We are at war. We are at war. We are defending our homes. We are protecting our homes. That's the truth. And when a nation protects its home, it fights. And we will fight until we'll break their backbone.”¹³⁴

This statement was made during a press conference to foreign media held in English,¹³⁵ which is largely understood in Israel. The press conference was broadcasted in international and national media (including with subtitles). Herzog's statement was made on 12 October 2023, in the midst of widespread Israeli airstrikes on Gaza, **in response to a journalist raising the issue of civilian casualties** as a result of the Israeli bombings.

Direct

By stating that an “entire nation [...] is responsible”, Herzog is targeting a particular “national, ethnic, racial or religious group, as such”. By rejecting the possibility that not all civilians are “involved” in Hamas' activity, he calls to extend the attack and destruction to the national group as a whole, with no distinction between civilians and combatants, innocent and those who take direct part in hostilities.

By setting the objective to “break their backbone”, Herzog encourages a collective “we” to destroy the core of a collective “they”. The break of the backbone is physical, through killings and causing serious bodily or mental harm; but it is also societal, via institutional destruction and creation of living conditions calculated to destroy this group as such – both are genocidal acts under Article 6 RS.

through common values. When he was elected President, he was quite unanimously qualified as someone wise and rational, even by the opposition media. Hence, his declarations have weight and influence on citizens with various political orientations. In addition, he is the descendant of a dynasty of influential Israeli figures. His father was former Israeli president Chaim Herzog and his grandfather was a leading Zionist figure and the first Ashkenazi Chief Rabbi of Israel at its creation. His family is thus widely respected in Israel. Finally, as the former Chairman of the Jewish Agency for Israel, Herzog played a particular role within the Israeli and Jewish diaspora. Therefore, he occupies a powerful position and is able to exert an immense amount of influence on both the general public, individual soldiers and the political elite.

¹³⁴ *South Africa v Israel*: Order of Provisional Measures, para 52 <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> accessed 2 August 2024 citing ITV News, 'Israeli president Isaac Herzog says Gazans could have risen up to fight 'evil' Hamas' (13 October 2023) <<https://www.itv.com/news/2023-10-13/israeli-president-says-gazans-could-have-risen-up-to-fight-hamas>> accessed 2 August 2024

¹³⁵ Herzog was answering a question by a journalist (What can Israel do to alleviate the impact of this conflict on 2 million civilians, many of whom have nothing to do with Hamas ?) ITV News, 'Israeli president Isaac Herzog says Gazans could have risen up to fight 'evil' Hamas' (13 October 2023) <<https://www.itv.com/news/2023-10-13/israeli-president-says-gazans-could-have-risen-up-to-fight-hamas>> accessed 2 August 2024

Finally, to motivate his audience to follow his words, Herzog argues that Palestinians have brought this situation upon themselves. Palestinian civilians are bearing the responsibility for their own targeting because they have not “risen up” and “fought against that evil regime which took over Gaza in a coup d’état.”

Designating the group as a whole as guilty legitimizes its collective punishment, a typical mechanism to normalize and justify genocide to the public.¹³⁶ As a lawyer, Herzog knows very well that the punishment of all for the crimes of some is unlawful and that collective punishment is a war crime.¹³⁷

Herzog’s statement was made during a press conference to foreign media. But it was broadcasted in Israel and reached Israelis through local media outlets. In its application to the ICJ, South-Africa underlined that Giora Eiland, another suspect in this Communication, “echoed” the words of Herzog by “repeatedly [underscoring] that there should be no distinction between Hamas combatants and Palestinians civilians,”¹³⁸ indicating that the military and political elite received Herzog’s message.

The number one citizen is addressing the entire nation and his message is that out of two million people there is not a single person that is innocent in Gaza. This message according to which everyone is a legitimate target until the individual and collective ‘backbone’ is broken, has been received by both the military and political elite and the Israeli mob. Notwithstanding it is not a requisite element of the crime of incitement to genocide, the President’s message has been implemented, shaping the nature and extent of the military campaign in Gaza. In these circumstances, there are reasonable grounds to believe that Isaac Herzog’s statements have *directly* incited others to commit genocide.

Public

President Herzog addressed foreign journalists. His declaration was thus made in a closed setting to a selected and limited audience. As noted above, however, it is the broadcasting of the incriminating message that renders the incitement statement public.¹³⁹ Herzog’s statement was broadcasted in both

¹³⁶ Alicia Campbell, ‘The Language of Genocide’ (Harvard Political Review 27 October 2022) <<https://harvardpolitics.com/the-language-of-genocide/>> accessed 2 August 2024

¹³⁷ Rule 103. ‘Collective Punishments are prohibited.’ in Henckaerts & Doswald-Beck (2005)

¹³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Gaza (South Africa v Israel)* (Application Instituting Proceedings) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> accessed 1 december 2024

¹³⁹ *Prosecutor v Nzabonimana* (Appeal Judgment) ICTR-98-44D-A (29 September 2014) para 385

international and Israeli media, it was spread to a significant number of unselected people without any limitation,¹⁴⁰ and hence it is considered public for the purpose of Article 25(3)(e) RS.

Mens Rea

Both the text and context of Herzog's statement evidence his "intent to directly prompt or provoke another to commit genocide"¹⁴¹, including "the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."¹⁴²

Unlike Yoav Gallant, Herzog is not considered a right wing but a centrist. He presents himself as a defender of unity within Israeli society. In the past he opposed violence towards Palestinians. But it is his moderate reputation and liberal politics that was instrumental in the propagation of the post-7/10 genocidal environment of blood feud from the political margins of ideological extremists to the entire society, literally across the board, irrespective of political orientation.

The binary division not between a friend and a foe but good and evil is a recurrent theme in Herzog's discourse. In an interview to CNN, for example, he stated: "We will uproot evil so that there will be good for the entire region and the world."¹⁴³ To MSNBC he said: "This war is a war that is not only between Israel and Hamas [...] It is a war that is intended, really, truly, to save western civilization ... We are attacked by [a] Jihadist network, an empire of evil ... and this empire wants to conquer the entire Middle East, and if it weren't for us, Europe would be next, and the United States follows."¹⁴⁴

Herzog too blurs the lines this time with respect to the warring parties. He submits that the war is not against Hamas but the entire 'empire of evil'. Because that empire wants to conquer no less than the entire global north, it is not Israel that is fighting but the entire Western civilization. The adoption of colonial and racial theories enables to spark fear by depicting the entire group of Palestinians in Gaza

¹⁴⁰ For example, a video of this press conference broadcasted on the Israeli media 'i24NEWS' Youtube channel was viewed more than 332,000 times and generated more than 3,000 comments. i24NEWS English [Youtube channel], 'President Herzog holds press conference of day 6 of Israel-Hamas war' (12 October 2023) <https://www.youtube.com/watch?v=Om3KRrL_6vM> accessed 2 August 2024

¹⁴¹ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 560; *Prosecutor v Nahimana et al* (Appeals Judgement) ICTR-99-52-A (28 November 2007) paras 678, 1034

¹⁴² *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 560; *Prosecutor v Nahimana et al* (Appeals Judgement) ICTR-99-52-A (28 November 2007) paras 678, 1034

¹⁴³ CNN, 'Newsroom. One-On-One With Israeli President Isaac Herzog Transcript' (15 October 2023) <<https://transcripts.cnn.com/show/cnr/date/2023-10-15/segment/01>> accessed 2 August 2024

¹⁴⁴ MSNBC, 'Israeli president: War against Hamas intended 'to save the values of Western civilization' (5 December 2023) <<https://www.msnbc.com/ana-cabrera-reports/watch/israeli-president-herzog-discusses-latest-in-war-against-hamas-199411269896>> accessed 2 August 2024

as an enemy of not Israel but humanity and subsequently to legitimize and normalize its collective destruction.

The President of Israel is mainly a symbolic figure who is accordingly examined by speeches rather than deeds. Yet Herzog did not only talk but also acted. On 25 December 2023, the Head of State visited soldiers and was photographed signing on a missile. Like his inciting statement, this photo too was published in Herzog's X account and then diffused in mainstream and social media.

These words and deeds of the Israeli President establishes reasonable grounds to believe Herzog had the requisite *mens rea*, which must be further examined in the course of investigation and prosecution. This is even more so given Herzog's own acknowledgement of the inciting nature of his statement and his belated attempt to deny its ordinary meaning and common interpretation.

After the Chief Justice of the ICJ cited Herzog's inciting statement in the Court's decision, Herzog responded on-camera, lamenting that "there is something shocking in the fact that the 'post-truth' phenomenon has permeated even the most important institutions". He argued that "the way they **distorted my words** - using very partial and fragmented parts of them - was intended to support an unfounded legal construction. It disgusted me."¹⁴⁵

Claiming that his words were distorted suggests that the lawyer Herzog was fully aware of the inciting nature and the criminal implication of the allegedly 'distorted' or 'taken-out-of-context' statement, which now he is minimizing by denying its interpretation by the ICJ.

This state of affairs establishes in itself at least a reasonable ground to believe the crime has been committed. In these circumstances of conflicting versions, in which the suspect admits the criminality of the statement on the one hand but rejects its interpretation or imputation to him on the other – only a criminal investigation can crystalize the facts.

3.3. Israel Katz

On October 12th Israel Katz,¹⁴⁶ the current Minister of Defence and minister of Energy and Infrastructure at the time of the 7th October attack, tweeted: "Humanitarian aid to Gaza? No electrical

¹⁴⁵ Ynet, 'Herzog Zo'em: Be'Hag Ivu Et Dvarai, Ze Orer Bi Sh'at Nefesh (Herzog Furious: At The Hague, My Words Were Distorted, It Filled Me With Disgust)' (28 January 2024) <<https://www.ynet.co.il/news/article/rjhzbn56>> accessed 2 December 2024

¹⁴⁶ Israel Katz has been a member of the Knesset since 1998 representing the Likud party and has served on several ministry positions, including Minister of Intelligence Affairs, Minister of Agriculture, Minister of Transportation and

switch will be turned on, **no water hydrant will be opened** and no fuel truck will enter until the Israeli abductees are returned home”¹⁴⁷. The ICJ quoted Israel Katz’s statements from the following day. On 13 October 2023, Katz posted on X:¹⁴⁸ “We will fight the terrorist organisation Hamas and destroy it. **All the civilian population in [G]aza is ordered to leave immediately**. We will win. **They will not receive a drop of water or a single battery until they leave the world.**”¹⁴⁹

Minister Katz was responding to a tweet of the American congresswoman Alexandria Ocasio-Cortez, in which she described Katz’s previous call to stop the supply of electricity, water and fuel to Gaza as a “collective punishment and a violation of international law.”

In his response to Ocasio-Cortez, **Katz does not deny the accusation made** or, like Herzog, claims his words were ‘distorted’. On the contrary, Katz reiterates his previous claim that “they will not receive a drop of water” and explicitly manifest the genocidal intent underlying this ‘order’, noting the order will be imposed “until **they** leave the world”, that is, until their complete and collective annihilation.

A Minister of Energy **orders** not to provide water, not even ‘a drop’, in order to ensure the entire civilian population of Gaza will die, is a paradigmatic example of **direct** incitement to commit genocide. Reiterating this **public** call after being accused of inflicting a collective punishment and violating international law, reflects admission of the *actus reus* and reveals the requisite *men rea* of this crime.

Minister of Finance. In the IDF he served as a soldier, squad leader and platoon leader of the Paratroopers Brigade from 1973 to 1977. While he currently serves as Minister of Foreign Affairs and sits in the Security Cabinet of Israel, he held the position of Minister of Energy and Infrastructure at the time the statements under review were made. According to the government’s website, the Ministry of Energy and Infrastructure “is responsible for all of Israel’s energy sectors and its natural resources, including electricity, fuel, LPG, natural gas, conservation of energy, water, sewage, petroleum explorations, minerals, earth science and marine research and more. The Ministry supervises the public and private bodies operating in these fields, while regulating the market.” Government of Israel, ‘Ministry of Energy and Infrastructure’ (Israeli Government Website) <https://www.gov.il/en/departments/about/about_ministry_of_energy> accessed 2 August 2024

¹⁴⁷ [@Israel_katz](https://twitter.com/Israel_katz/status/1712356130377113904) (X [formerly Twitter], 12 October 2023) <https://twitter.com/Israel_katz/status/1712356130377113904> translation in The Guardian, ‘First Thing: no power, water or fuel for Gaza until hostages are freed, Israel says’ (12 October 2023) <<https://www.theguardian.com/us-news/2023/oct/12/first-thing-no-power-water-fuel-gaza-until-hostages-freed-israel-says>> accessed 2 August 2024

¹⁴⁸ *South Africa v Israel*: Order of Provisional Measures, para 52 <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> accessed 2 August 2024

¹⁴⁹ [@Israel_katz](https://twitter.com/Israel_katz/status/1712876230762967222) (X [formerly Twitter], 13 October 2023) <https://twitter.com/Israel_katz/status/1712876230762967222> accessed 2 August 2024

Direct

Katz's statements evidence his intent to deprive millions of basic means necessary for their physical survival and his intent to do so until they die ("leave the world"). This lethal intent has materialised in the form of complete blockade of humanitarian aid in the first phase of the war and a partial one in subsequent phases: The PTC found reasonable grounds to believe this the civilian population in Gaza was "**intentionally** and knowingly deprived... of objects indispensable to their survival, including food, **water**, and medicine and medical supplies, as well as **fuel** and **electricity**, from at least 8 October 2023 to 20 May 2024."¹⁵⁰

Katz's statement echoes the above-mentioned statement of Gallant, which was made only three days earlier. Both inciters refer to a complete siege which the PTC found deliberately inflicted conditions of life calculated to bring about the destruction of the targeted group, as per Article 6(c) RS, rendering the inciting call of Katz 'in respect of the crime of genocide', as per Article 25(3)(e) RS.

Before this 'complete siege' was imposed on Gaza, the sole power plant in Gaza was running on fuel largely delivered by Israel, was able to function at a quarter of its full capacity and was providing electricity discontinuously. Before this 'complete siege' was imposed on Gaza, 10% of drinking water was provided for by Israel and the other 90% was mainly coming from sewage-treatment and desalination plants, which either run on fuel coming from Israel, or have been destroyed since.¹⁵¹

A month after the statements were made, the UN Special Rapporteur on the human rights to safe drinking water and sanitation Pedro Arrojo-Agudo warned that "the impact on public health and hygiene will be unimaginable", stating that: "every hour that passes with Israel preventing the provision of safe drinking water in the Gaza strip, in brazen breach of international law, puts Gazans at risk of dying of thirst and diseases related to the lack of safe drinking water".¹⁵²

If the PTC found reasonable ground to believe that the imposition of these restrictions were deliberately designed to "inflict on the group conditions of life calculated to bring about its physical

¹⁵⁰ International Criminal Court, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

¹⁵¹ Center for Strategic & International Studies, 'The Siege of Gaza's Water' (12 January 2024) <<https://www.csis.org/analysis/siege-gazas-water>> accessed 2 August 2024

¹⁵² OHCHR, 'Israel must stop using water as a weapon of war: UN expert' (Press Release, 17 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/israel-must-stop-using-water-weapon-war-un-expert>> accessed 2 August 2024

destruction in whole or in part” under Article 6 RS, then there are also reasonable grounds to believe that the calls and orders of the Ministers with the power and authority to do so amount to direct incitement to commit this genocidal act under Article 25(3)(e) RS.

Content

Not only the prevention of basic means such as energy and water, also the forced transfer of the targeted population may amount to a deliberate infliction of condition calculated to destroy that group. Whilst calling “all the civilian population in [G]aza is **ordered** to leave immediately” – which may be a war crime and/or crime against humanity *per se* – “does not by itself constitute a genocidal act, [...] it can be an additional means by which to ensure the physical destruction of a group”¹⁵³, for example by showing that the coerced displacement is part of a plan whose objective is to create conditions that ensure all members of the targeted group would “leave this world”.¹⁵⁴ South Africa argued before the ICJ that “the forced displacements in Gaza are genocidal, in that they are taking place in circumstances calculated to bring about the physical destruction of Palestinians in Gaza”.¹⁵⁵

Mass displacement can also amount to ethnic cleansing, which in itself may precede, be part of, or even form a genocide. The UN Commission of Experts defined ethnic cleansing as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”¹⁵⁶ These practices can “[...] constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could fall within the meaning of the Genocide Convention.”¹⁵⁷ In a context of widespread military attacks carried out against one specific group, forced displacement may fall within the crime of ‘ethnic cleansing’, which is “a form of genocide”¹⁵⁸.

¹⁵³ *Prosecutor v Tolimir* (Trial Judgment) ICTY-05-88/2-T (12 December 2012) para 741

¹⁵⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgement of 3 February 2015) [2015] ICJ Rep 3, para 163 <<https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf>> accessed 2 August 2024

¹⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Application instituting proceedings) [29 December 2023] General List No. 192, para 60 (*South Africa v Israel*: Application Instituting Proceedings) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> accessed 2 August 2024.

¹⁵⁶ UNSC, ‘Letter dated 9 February 1993 from the secretary-general addressed to the President of the Security Council’ (Interim report, 10 February 1994) S/25274 para 55 <<https://digitallibrary.un.org/record/197158?v=pdf>> accessed 2 August 2024

¹⁵⁷ UNSC, ‘Letter dated 9 February 1993 from the secretary-general addressed to the President of the Security Council’ (Interim report, 10 February 1994) S/25274 para 56 <<https://digitallibrary.un.org/record/197158?v=pdf>> accessed 2 August 2024

¹⁵⁸ UNGA, ‘The situation in Bosnia and Herzegovina’ (7 April 1993) A/RES/47/121 p 2 <<https://digitallibrary.un.org/record/158781?v=pdf>> accessed 2 August 2024

Who are those ‘they’ who will not get a drop of water until they die? No third person plural subject is mentioned before the pronoun “they”, but rather two singular subjects: “the terrorist organisation Hamas” and “all the civilian population in Gaza”. Together, Hamas and “all the civilian population of Gaza”, form the plural third person pronoun ‘they’, echoing this time the statement of suspect Herzog, whose inciting statement was made only one day earlier: “it is an entire nation out there that is responsible. It is not true this rhetoric about civilians not aware, not involved...”.

The timing of the statements, shortly after 7/10, further substantiate the material and mental elements of the crime. At that time, the IDF was preparing its troops for a land invasion to Gaza. These statements were thus among the first official instructions issued on energy and water. Their impact and characterization as strategic goals is evident from their reuse in the media and their resonance in the discourses of other Israeli officials. As the PTC found, there are reasonable grounds to believe that weaponizing access to water and energy has been a war tactic of Israel from day one. Deprivation of means necessary for the physical survival of the targeted group falls within the ambit of Article 6(c) RS. A public call to do so amounts to incitement to genocide under Article 25(3)(e) RS.

Audience

The audience of the statement is a key component of the directness requirement. The publication of both statements on social media, the first in Hebrew and the second in English, has provided *unlimited* access and exposed the statements to an *unselected* audience of Hebrew and English speakers in Israel and abroad.

Hebrew is spoken by virtually all Israeli Jews, 85% of Israelis are estimated to speak English to some degree.¹⁵⁹ In addition, by responding to a US lawmaker with more than 13 million followers, Katz’s message reached audiences in the US, Israel’s main ally and arm provider, a country of more than 330 Million people including 5,700,000 American Jews and between 500,000 and 800,000 Israelis.

The inciting message has reached its primary addressees: the civil and military executors on the ground, the political base of the Minister, and the general public in Israel. Four days later, for example, the member of the Knesset (MK) and former journalist Boaz Bismuth reiterated the Gallant-Hetzog-

¹⁵⁹ PoliLingua, ‘Languages Spoken in Israel’ (20 April 2023) <<https://www.polilingua.com/blog/post/languages-spoken-in-israel.htm#:~:text=English%20%2D%20English%20is%20a%20widely,speak%20English%20to%20some%20degree>> accessed 2 August 2024. Also X provides a built-in translation button that requires no more than one click, in case of non-Hebrew speakers.

Katz narrative, that “even the ‘innocent citizens’ - the cruel and monstrous people from Gaza took an active part [...] there is no place for humanitarian gesture”.¹⁶⁰ Two weeks later, Katz’s colleague, the Minister of Heritage Amichai Eliyahu, said that humanitarian aid should not be provided to the Gazan population as “[w]e wouldn’t hand the Nazis humanitarian aid”.¹⁶¹

To sum, the text of the statement, its context of vendetta, the authority and seniority of its author, and its broad and relevant audience, establish a reasonable ground to believe that Israel Katz’s statements have *directly* incited others to commit genocide.

Public

The means through which the incitement is disseminated plays a crucial in determining whether the public element of the crime has been met. The use of digital means often renders the physical place in which the statement was made meaningless. For it is not the public setting of the physical place that matters but rather whether “speech is filtered through a medium that can be accessed without limitation...”.¹⁶² As mentioned above, it has been accepted that videos on social media may be a means for incitement to hatred, discrimination, and violence,¹⁶³ reaching unspecified audience at times of millions. Indeed, Katz’s first tweet gathered **more than 1.5 million views** and the second one **more than half a million views**, fulfilling the ‘public’ element of the crime of incitement to genocide.

Mens Rea

Israel Katz is a staunch advocate of annexation, supporting ongoing settlement expansion and advocating for full Israeli control over the West Bank.¹⁶⁴ As a Minister of Transport, Katz presented a plan to create a railway linking several illegal Israeli settlements around Jerusalem.¹⁶⁵ As a Minister of Intelligence, Israel Katz proposed the annexation of five settlements into the Jerusalem

¹⁶⁰ [@BismuthBoaz](https://twitter.com/BismuthBoaz/status/1713812686784311358) (X [formerly Twitter], 16 October 2023) <<https://twitter.com/BismuthBoaz/status/1713812686784311358>> accessed 2 August 2024

¹⁶¹ Kan News, ‘Minister Amichai Eliyahu: Atomic bomb on Gaza? This is one of the possibilities’ (5 November 2023) <<https://www.kan.org.il/content/kan-news/politic/596470/>> accessed 2 August 2024 translation in The Times of Israel, ‘Far-right minister: Nuking Gaza is an option, population should ‘go to Ireland or deserts’ (5 November 2023) <https://www.timesofisrael.com/liveblog_entry/far-right-minister-nuking-gaza-is-an-option-population-should-go-to-ireland-or-deserts/> accessed 2 August 2024

¹⁶² Saslow (2016) 446

¹⁶³ *Belkacem v Belgium*, App no [34367/14](https://hudoc.echr.coe.int/eng/?i=001-175941) (ECtHR, 27 June 2017) para 33 <<https://hudoc.echr.coe.int/eng/?i=001-175941>> accessed 2 August 2024

¹⁶⁴ The Jerusalem Post, ‘Israel Katz’ (Presentation) <<https://www.jpost.com/tags/israel-katz>> accessed 2 August 2024

¹⁶⁵ International Middle East Media Center, ‘Katz: “Settlement Construction Will Resume In September” (5 May 2010) <<https://imemc.org/article/58605/>> accessed 2 August 2024

municipality.¹⁶⁶ As a Minister of Finance, he *inter alia* approved the transfer of 31 million dollars to so-called ‘settlements protection measures’.¹⁶⁷

The common strand to intent to forcibly remove population and commit war crimes, and intent to destroy a population and call for genocide, is ethnic cleansing. In Katz’s case, the former provides the context for the latter, past discourses and deeds support a genocidal interpretation of his current response to the attacks of 7/10.

At any rate, in Katz’s case no such inference is needed. For Katz himself provides a rare opportunity to his mental state with respect to his statements. After congresswoman Ocasio-Cortez argued his first statement is a collective punishment in breach of international law, Katz was necessarily aware of the alleged criminality of his statement. Yet he did not argue in response that his words were not said or taken out of context. Rather, he consciously revealed his genocidal intent by responding with yet another incriminating, inciting statement.

Katz’s *mens rea* is established based on not one but two direct and public calls to commit genocide. In fact, these are not only abstract calls but also concrete orders. In his capacity as the Minister responsible of water, it is his call to decide whether they will or “**they will not receive a drop of water or a single battery until they leave the world**”. In other words, in Katz’s case the inciting call to commit a genocidal act is also the participation in this act and potentially other crimes under the ICC’s jurisdiction, jointly with or through others, as a civilian superior ordering his subordinates.

3.4 Benjamin Netanyahu (fugitive)

On 28 October 2023, the Israeli Prime Minister Benjamin Netanyahu¹⁶⁸ held a press conference which was broadcasted by the Government Press Office and diffused by all Israeli media channels. In his

¹⁶⁶ i24News, ‘Israeli minister supports annexing West Bank settlements into Jerusalem’ (10 July 2017) <<https://www.i24news.tv/en/news/israel/150064-170710-israeli-minister-supports-annexing-west-bank-settlements-into-jerusalem>> accessed 2 August 2024

¹⁶⁷ ahramonline, ‘Israel expands settlements on the West Bank’ (7 February 2024) <<https://english.ahram.org.eg/NewsContent/50/1203/517297/AlAhrm-Weekly/World/Israel-expands-settlements-on-the-West-Bank.aspx>> accessed 2 August 2024

¹⁶⁸ At the beginning of his political career, Benjamin Netanyahu caught the public eye by presenting himself as a fervent opponent to the Oslo peace process. He participated in huge protests denouncing the former Prime Minister Yitzhak Rabin, sometimes even calling for his death. He had notably been seen stirring up the crowd, standing next to banners reading “Death to Arabs”. This kind of incitement to political violence fuelled the atmosphere that led to Rabin’s assassination a few weeks later. Netanyahu was elected as Prime Minister for the first time in 1996, some months after the aforementioned events. He has been holding ministerial roles almost continuously for more than 25 years. He has also been the chairman of Likud since 1993. He is currently serving his third mandate as Prime Minister and is thus the chief executive of the State of Israel. He is the highest political authority in the country and can be considered as the most influential Israeli political figure worldwide. This status grants him considerable power over the Israeli political elite and

speech, Netanyahu invoked the Biblical story of Amalek: “you must **remember what Amalek has done to you**, says our Holy Bible. **We remember. And we are fighting**”.¹⁶⁹

On 3 November 2023, in a letter titled “Letter from PM Netanyahu to Our Soldiers and Commanders in the Swords of Iron War”, which was published on the platform X and the Israeli Government’s official website, Netanyahu asserted that “[t]his is the war between **the sons of light and the sons of darkness**. We will not let up on our mission until the light overcomes the darkness — the good will defeat the extreme evil that threatens us and the entire world.”¹⁷⁰

In that letter, Netanyahu once again referred to Amalek.¹⁷¹ The relevant biblical passage reads as follows: ‘Now go, attack Amalek, and proscribe all that belongs to him. **Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses**’.¹⁷²

militaries. As he has been holding key political positions for the last three decades, Netanyahu has played an important part in the radicalisation of Israeli society. He has cultivated a charismatic personality that serves his populist approach, based on class resentment and religious traditionalism to appeal to the broadest audience. He has succeeded in making his government revolve around himself by giving positions almost exclusively to loyalists or far-right radicals. His security discourse has led Israel to adopt a certain indifference towards the suffering of Palestinians. Moreover, his general refusal to consider peace processes with the Palestinian authority, and his recurring antagonization of the Palestinian people has contributed to a drift of Israeli society towards extremist ideologies. Overall, as the face of the Israeli state, and despite the growing resentment among the population towards his government, he remains the most powerful and influential politician in Israel. The Guardian, ‘The Netanyahu doctrine: how Israel’s longest-serving leader reshaped the country in his image’ (21 November 2023) <<https://www.theguardian.com/world/2023/nov/21/the-netanyahu-doctrine-how-israels-longest-serving-leader-reshaped-the-country-in-his-image>> accessed 2 August 2024. The Israeli Prime Minister takes office after the Israeli Parliament approves his/her government. Israel: Basic Law of 2001, The Government (19 August 1968). <<https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawTheGovernment.pdf>> accessed 2 August 2024.

¹⁶⁹ @IsraeliPM (Youtube channel, 28 October 2023) <<https://www.youtube.com/watch?v=IIPkoDk6isc>> accessed 2 August 2024 Translation in, Sky News, ‘Israel-Hamas war: ‘We will fight and we will win’, says Benjamin Netanyahu’ (28 October 2023) <<https://news.sky.com/video/israel-hamas-war-we-will-fight-and-we-will-win-says-benjamin-netanyahu-12995212>> accessed 2 August 2024

¹⁷⁰ @IsraeliPM_heb (X [formerly Twitter], 3 November 2023) <https://twitter.com/IsraeliPM_heb/status/1720406469055500583> accessed 2 August 2024. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Application instituting proceedings) [29 December 2023] General List No. 192, para 101 (*South Africa v Israel: Application Instituting Proceedings*) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> accessed 2 August 2024

¹⁷¹ @IsraeliPM_heb (X [formerly Twitter], 3 November 2023) <https://twitter.com/IsraeliPM_heb/status/1720406463972004198> accessed 2 August 2024

¹⁷² Sefaria, I Samuel 15:1-34, JPS (1985) <https://www.sefaria.org/I_Samuel.15.1-34?lang=bi> accessed 2 August 2023. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Application instituting proceedings) [29 December 2023] General List No. 192, para 101 (*South Africa v Israel: Application Instituting Proceedings*) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> accessed 2 August 2024

Direct

Content

In the Jewish tradition, Amalek is the symbol of the ultimate evil and eternal foe. Amalek was the first enemy nation to fight the Israelites after their exodus from Egypt, and **God promises to Moses to eradicate any memory of its existence** ‘under the sky’, and to fight Amalek for generations.

In another story God commands King Saul to “go and smite Amalek and confiscate all that he has and have no mercy on him...”. Saul does not fully obey God’s order, a decision which costs him his kingdom. By analogizing Amalek to Palestinians, the lesson is that **having mercy for Palestinians may lead to the destruction of the third kingdom**, i.e., the State of Israel. It is either they or us.

Another story depicts an attack on the Negev and Tziklag, a settlement some scholars believe was located not far from Gaza. Amalek burns Tziklag and **take hostage the women and children**. The Israelites are crying, frustrated by their leadership and seek revenge. After securing God’s support, David launches a retaliatory attack, after which all women and children are liberated.

The Torah lists two Amalek-related *mitzvahs*:¹⁷³ **to never forget the evil deeds of Amalek, and to obliterate Amalek**. The command to destroy Amalek implies that no trace of its existence should be left.¹⁷⁴ Israelites are called to “spare no one, but kill alike men and women, infants and sucklings...”.

Netanyahu’s “we remember”, followed by “and we are fighting”, couple past and present, fusing the two *mitzvahs* into one: **the act of remembering is entangled with remembering to act**, what was done by Amalek is intertwined with the obligation to destroy Amalek. Calling to spare no one from the collective destruction of Palestinians in Gaza is justified by remembering what this group has committed to Israelis on 7/10/23.

The dichotomy between “the sons of the light” and “the sons of darkness” incites the audience to view the people in Gaza as inherently evil. If the targeted group is an existential threat to the “entire world” justifies the call to fight “until the light overcomes the darkness” and not a single member of

¹⁷³ Mitzvahs refer to divine commandments to the Jewish people. Chabad, ‘What is a Mitzvah?’ (n.d.) <https://www.chabad.org/library/article_cdo/aid/1438516/jewish/Mitzvah.htm> accessed 2 August 2024

¹⁷⁴ Chabad, ‘Who were Amalek and the Amalekites?’ (n.d.) <https://www.chabad.org/library/article_cdo/aid/3942715/jewish/Who-Were-Amalek-and-the-Amalekites.htm> accessed 2 August 2024

this group is spared and survives ‘under the sky’. In the first months of Israel’s campaign, explosives equivalent to two nuclear bombs¹⁷⁵ have been used for this purpose.

Timing

The press conference was held by Netanyahu on 28 October 2023, as “additional ground forces from Israel entered Gaza”.¹⁷⁶ On 27 October, communications were cut off, and the following day, the IDF announced the expansion of its ground operation in Gaza, marking the beginning of the land invasion.¹⁷⁷ Netanyahu himself stated that the second phase of the war had begun.¹⁷⁸ Therefore, the statement was made at a crucial time, when soldiers were just arriving in Gaza. In this temporal context, such words from the highest political authority in the country, at the launch of an unprecedented attack, in retaliation to the worst atrocities against Jews since WWII, amounts to a direct call to commit genocide, irrespective of whether the audience of this call followed it or not.

On 2 November 2023, days after the land invasion and the deployment of the IDF in different areas of Gaza started, a siege was imposed on Gaza City. A day later, on 3 November 2023, Netanyahu’s letter to soldiers and commanders was sent and published.¹⁷⁹ Here too the temporal context of Netanyahu’s statement, just after the soldiers and commanders had boots on the ground and started exerting their lethal power over the targeted group, supports the qualification of this statement as a direct incitement to commit genocide.

Audience

The addressees of this direct call to commit genocide in a biblical fashion and scale have listened and obeyed, as demonstrated not only by the unprecedented rate of civilian casualties but also by the death toll of children and women, wiping out entire families. Only one month after the beginning of the

¹⁷⁵ *ibid*, para 24

¹⁷⁶ Sky News, ‘Israel-Hamas war: ‘We will fight and we will win’, says Benjamin Netanyahu’ (28 October 2023) <<https://news.sky.com/video/israel-hamas-war-we-will-fight-and-we-will-win-says-benjamin-netanyahu-12995212>> accessed 2 August 2024

¹⁷⁷ CNN World, ‘IDF announces expanded ground operation in Gaza, amid communications blackout in the enclave’ (28 October 2023) <<https://edition.cnn.com/2023/10/27/middleeast/israel-gaza-ground-operations-airstrike-intl/index.html>> accessed 2 August 2024

¹⁷⁸ NBC News, ‘Netanyahu says war has entered second phase as troops prepare for ‘long and difficult’ battle’ (28 October 2023) <<https://www.nbcnews.com/news/world/netanyahu-says-war-entered-second-phase-troops-prepare-long-difficult-rcna122629>> accessed 2 August 2024

¹⁷⁹ CNN World, ‘Crisis in Gaza as Israel warns of long war with Hamas’ (2 November 2023) <https://web.archive.org/web/20231102190053/https://www.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-02-23/h_8b638e928ef6886c41b8954f3a197a15> accessed 2 August 2024

attacks on Gaza, already “dozens of families over five generations have been wiped out”.¹⁸⁰ As of March 2024, the death toll rose to over 30,000 Palestinians, including more than 13,000 children.¹⁸¹

According to the EU’s High Representative and Vice-President Josep Borrell, on 25 November 2024 all “humanitarian operations in Gaza are expected to stop... because there is no more food and there is no more fuel. Hospitals have been turned into battlefields. Homes, schools, shelters, boys and girls, everyone has been coming under attack. The figures of number of children being killed are terrifying. In Gaza, everywhere is a frontline, no one is safe, and nowhere is safe. Families in Gaza are facing an impossible choice: to flee from violence – but to flee where if there is no safe place? – or to stay and starve. Parts of Northern Gaza are at imminent risk of famine. And in Central and Southern parts of the Gaza Strip, very few humanitarian actors are still working, and they report severe hunger... **No food, no fuel... In Gaza there is an apocalyptic situation. Someone said that the people in Gaza were reduced to behave as animals. That is what is happening. They made them to behave as animals – but they are human beings... There is no more society in Gaza. There are only individuals fighting for their survival. To survive one day more before being killed by the bombs. I said it yesterday and I want to repeat [it]: this is a war against children. The most frequent age of the casualties in Gaza is young children between five years and nine years old.** The world cannot afford this situation. In the name of Humanity, in the name of [those who] believe that every human being deserves dignity, this massacre has to stop...”¹⁸²

Netanyahu’s analogy between Palestinians and Amalekites hinges on a story his audience, Jewish Israelis, is familiar and can identify with. It contextualizes the war in Gaza as part of a theological eternal battle that is thousands of years’ old Hebrews/between Israel and Amalek/Palestine. In fact, the figure of Amalek has been used throughout history to incite and justify genocide also elsewhere.¹⁸³

¹⁸⁰ OHCHR, ‘Gaza: UN experts call on international community to prevent genocide against the Palestinian people’ (Press Release, 16 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>> accessed 2 August 2024

¹⁸¹ UN HRC: Anatomy of a Genocide 1

¹⁸² European Union External Action, ‘Jordan: Press remarks by the High Representative/Vice-President Josep Borrell after meeting with Deputy Prime Minister and Minister for Foreign Affairs Ayman Safadi’ (21 November 2021) <https://www.eeas.europa.eu/eeas/jordan-press-remarks-high-representativevice-president-josep-borrell-after-meeting-deputy-prime_en> accessed 1 December 2024

¹⁸³ Matthew Patrick Rowley, ‘Child Sacrifice, Conquest and Cosmic War: On the Harmful Habitation of Biblical Texts’ (2017) 34(2) Transformation 139

In the Pequot War, the English used Amalek to justify their genocidal war against Native Americans, and Hutu pastors compared the Tutsis to Amalek to foster genocidal tendencies among their public.¹⁸⁴

In the press conference, Netanyahu addressed the “people of Israel” but also the military, expressing his support and that of the population. Whereas the aforementioned letter specifically addresses “soldiers, men and women” and “all of the dear security forces”, alongside the entire Israeli society, to which it was disseminated by mainstream and social media.

The incitement to a biblical genocide, therefore, makes a direct reference to a collective memory that is shared across among diverse Jewish audiences of military personnel, their family and friends, the political and military elite and the general population in Israel.¹⁸⁵ On 14 November 2023, for example, a few days after Netanyahu’s statements, Israeli hip hop duo Ness Ve Stilla released a song, whose lyrics directly refer to Amalek: “We’ve brought the entire army against you and we swear there won’t be forgiveness, sons of Amalek.”¹⁸⁶ As of April 2024, the song reached more than 22 million views on Youtube alone and was streamed more than 6 million times on Spotify. This song also uses the figure of Amalek to call for extreme violence against Palestinians, showcasing that Netanyahu’s statements had to be understood in the popular culture as a call for genocide.

Public

Both the press conference and the letter was broadcasted by the Government Press Office and in turn published by several media outlets. The video of the conference, for example, was published on the Israeli Prime Minister’s Youtube channel, and garnered more than 71,000 views. In view of their widespread broadcast to an unselected and unlimited audience via traditional and social media, Netanyahu’s statements meet the requisite ‘public’ element of the crime.

¹⁸⁴ Gerard Vant’ Spijker, ‘Focused on Reconciliation: Rwandan Protestant Theology: After the Genocide’ (2017) 34(1) Transformation 68

¹⁸⁵ As of 2023, 73% of the Israeli population was Jewish. The figure of Amalek is well-known in Israel, as its story is re-told before the Jewish holiday of Purim each year. Furthermore, the comprehension of the reference to Amalek is not limited to Jews, as it has become part of mainstream culture over the years. Jewish Virtual Library, ‘Vital Statistics: Latest Population Statistics for Israel (5 February 2024) <https://www.jewishvirtuallibrary.org/latest-population-statistics-for-israel#google_vignette> accessed 25 April 2024; ABC, ‘What is the biblical story of ‘Amalek’? And why is it being used in South Africa’s ICJ case against Israel?’ (30 January 2024) <<https://www.abc.net.au/news/2024-01-31/biblical-story-amalek-south-africa-icj-genocide-case-israel/103403552>> accessed 2 August 2024

¹⁸⁶ @Ness_Ve_Stilla (Youtube channel, 14 November 2023) <<https://www.youtube.com/watch?v=1rk3n9V-aQs>> accessed 2 August 2024

Translation in, ABC, ‘What is the biblical story of ‘Amalek’? And why is it being used in South Africa’s ICJ case against Israel?’ (30 January 2024) <<https://www.abc.net.au/news/2024-01-31/biblical-story-amalek-south-africa-icj-genocide-case-israel/103403552>> accessed 2 August 2024

Mens Rea

The post-7/10 genocidal environment is “an indicator that incitement to violence was the intent of the statement.”¹⁸⁷ Netanyahu, the longest-serving PM in the country’s history, having served for a total of over 16 years, has played a key role in creating this environment decades *before* 7/10, and instrumentalised this now widespread sentiment for his personal and political ends *after* 7/10.¹⁸⁸

This adherence to extremist ideologies has been interpreted as a factor suggesting the existence of individual criminal intent in the jurisprudence of several tribunals, including the ICC. In *Ongwen*, the OTP highlighted the Lord's Resistance Army’s (LRA) ideological basis, particularly its leader’s messianic beliefs and the group's use of religious language, to argue that the involvement of the defendant was driven by the group's extremist ideology, thus forming part of his criminal intent.¹⁸⁹

In *Nahimana*, the ICTR included evidence of hate propaganda and the dissemination of extremist ideologies in its analysis of the defendants’ intent to incite violence against the Tutsi population in the *et al* case.¹⁹⁰

Netanyahu has made constant use of religious or mythological references in his dehumanising rhetoric in order to instil a collective sense of existential threat. By framing the war in Gaza as “a struggle between the sons of light and the sons of darkness”¹⁹¹, for example, he makes reference to one of the earliest Jewish texts. That in the ultimate war good prevails and evil is eradicated is part and parcel of our collective Judeo-Christian imaginary.¹⁹²

¹⁸⁷ *Prosecutor v Nahimana et al* (Judgement and Sentence) ICTR-99-52-T (3 December 2003) para 1022

¹⁸⁸ His extreme-right coalition, for example, declared its intent to “advance and develop settlement in all parts of the land of Israel – in the Galilee, Negev, Golan Heights, and Judea and Samaria”, that is, to commit war crimes on an industrial scale. Al Jazeera, ‘Netanyahu gov’t says West Bank settlement expansion top priority’ (28 December 2022) <<https://www.aljazeera.com/news/2022/12/28/netanyahu-govt-says-west-bank-settlement-expansion-top-priority>> accessed 2 August 2024

¹⁸⁹ *Prosecutor v Ongwen* (Judgement) ICC-02/04-01/15 (4 February 2021)

¹⁹⁰ *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Judgment) ICTR-99-52-T (3 November 2003)

¹⁹¹ Government of Israel, ‘Excerpt from PM Netanyahu’s remarks at the opening of the Winter Assembly of the 25th Knesset’s Second Session’ (Ministry of Foreign Affairs Press Release, 16 October 2023) <<https://www.gov.il/en/pages/excerpt-from-pm-netanyahu-s-remarks-at-the-opening-of-the-knesset-s-winter-assembly-16-oct-2023>> accessed 2 August 2024

¹⁹² The War and Sons of Light Against the Sons of Darkness, also known as the War Scroll, one of the seven original Dead Sea Scrolls discovered in Qumran in 1947, which outlines the different stages of a dualistic confrontation between the "Sons of Light" (members of the community) and the "Sons of Darkness" (foes of the Community). This conflict between good and evil is at the core of one of the foundation myths of the Jewish people, according to which a war will occur at the end of time to allow both the victory of the forces of light and the final destruction of the forces of darkness. Britannica, ‘The War of the Sons of Light Against the Sons of Darkness’ (updated 21 March 2024) <<https://www.britannica.com/topic/The-War-of-the-Sons-of-Light-Against-the-Sons-of-Darkness>> accessed on 2 August 2024

By portraying all Gazans as dangerous “bloodthirsty monsters” feeds the fear of Israelis of the ‘other’ but also evidences the genocidal intent of the PM. For if Palestinians are “barbarians”, they are not capable of a rational negotiation and all they understand is violence.

When the speaker is a head of State, the use of such dehumanising language is indicative for his intent to destroy the Palestinians as a specific group of people, which in turn is translated to an expectation his audience to materialize this intent. Netanyahu’s above-mentioned statements meet the material and mental elements of the crime of direct and public incitement to commit genocide under the RS.

On 21 November 2024, the PTC issued arrest warrant against Netanyahu for crimes against humanity and war crimes. The PTC “considered that there are reasonable grounds to believe” that Netanyahu “**intentionally** and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, and medicine and medical supplies, as well as fuel and electricity, from at least 8 October 2023 to 20 May 2024.” This finding is based on the role Netanyahu had “in impeding humanitarian aid in violation of international humanitarian law and their failure to facilitate relief by all means at its disposal... Furthermore, the Chamber found reasonable grounds to believe that no clear military need or other justification under international humanitarian law could be identified for the restrictions placed on access for humanitarian relief operations. Despite warnings and appeals made by, *inter alia*, the UN Security Council, UN Secretary General, States, and governmental and civil society organisations about the humanitarian situation in Gaza, only minimal humanitarian assistance was authorised. In this regard, the Chamber considered the prolonged period of deprivation and **Mr Netanyahu’s statement** connecting the halt in the essential goods and humanitarian aid with the goals of war. The Chamber therefore found reasonable grounds to believe that Mr Netanyahu... bear[s] criminal responsibility for the **war crime of starvation** as a method of warfare. The Chamber found that there are reasonable grounds to believe that the lack of food, water, electricity and fuel, and specific medical supplies, **created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children** due to malnutrition and dehydration,” which according to the PTC establish “reasonable grounds to believe that the crime against humanity of murder was committed”. In addition, “by **intentionally** limiting or preventing medical supplies and medicine from getting into Gaza, in particular anaesthetics and anaesthesia machines”, Netanyahu is also “responsible for inflicting great suffering by means of inhumane acts on persons in need of treatment. Doctors were forced to operate on wounded persons and carry out amputations, including on children, without

anaesthetics, and/or were forced to use inadequate and unsafe means to sedate patients, causing these persons extreme pain and suffering. This amounts to the crime against humanity of other inhumane acts. The Chamber also found reasonable grounds to believe that the abovementioned conduct deprived a significant portion of the civilian population in Gaza of their fundamental rights, including the rights to life and health, and that the population was targeted based on political and/or national grounds. It therefore found that the crime against humanity of persecution was committed.” Finally, the PTC found reasonable grounds to believe that Netanyahu bears criminal responsibility as civilian superior for the war crime of intentionally directing attacks against the civilian population of Gaza.¹⁹³

Similar to the case of Gallant, therefore, the determinations of the PTC substantiate the allegations against Netanyahu, specifically with respect to his *mens rea*: first, the PTC reaffirms the addressees of the inciting statements committed atrocious acts which correspond to the content of Netanyahu’s statements, corroborating ‘backwards’ their genocidal nature; second, the PTC found reasonable grounds to believe Netanyahu had the requisite *mens rea* for the commission of crimes against humanity and war crimes, which may increase the likelihood the same criminal mindset also had a genocidal *mens rea*; third, the PTC found that Netanyahu had the requisite *mens rea* as a co-perpetrator and/or as a civilian superior of his subordinates to create “conditions of life calculated to bring about the destruction of part of the civilian population in Gaza, which resulted in the death of civilians, including children...”. Whilst the PTC found this conduct constitute the crimes against humanity of murder, this is also a genocidal act under Article 6 RS which is in correlation with and further support the genocidal intent that is emerging from the inciting statements themselves.

3.5 Bezalel Smotrich

On 8 October 2023, the Minister of Finance and the ‘Minister within the Ministry of Defense’ Bezalel Smotrich¹⁹⁴ stated [...] that “[we] need to deal a blow that hasn’t been seen in 50 years and **take down**

¹⁹³ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

¹⁹⁴ Bezalel Smotrich is the head of the ‘Religious Zionism’ party, part of ‘Religious Zionism – Jewish Power’ list, a racist, extreme right and the third largest political power in the last elections to the Knesset. After the 2022 election, Smotrich’s party formed a coalition with Netanyahu’s party, in exchange for concessions on West Bank sovereignty, settlement expansion and discriminatory legislation. Smotrich has been holding the position of Minister of Finance since December 2022, and was appointed a ‘minister within the ministry’ of Defence in February 2023. This latter appointment granted him authority over the “Civil Administration” of the West Bank, which reflects, at minimum, *de facto* annexation of this territory, which is no longer governed by the temporary military sovereign but directly by the Israeli government. See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including*

Gaza.¹⁹⁵ The next day, on 9 October 2023, Smotrich stated that: “[T]he unequivocal goal of the war we are in the midst of is [...] the complete dismantling of [military and] **civilian capacities.**”¹⁹⁶

On 4 November 2023, Smotrich said on national Israeli TV: “I don’t see a big difference between Hamas and the Palestinian Authority. **The Arabs are the same Arabs.**”¹⁹⁷ On 14 November 2023 Smotrich reaffirmed his support for “**the voluntary emigration of Gaza Arabs** to countries around the world”, calling it the “right humanitarian solution.” He stated that “...[t]he State of Israel will no longer be able to accept **the existence of an independent entity** in Gaza.”¹⁹⁸

On 27 November 2023, Smotrich equated all Palestinians, this time not in Gaza but in the West Bank, to Nazis: “**There are two millions Nazis in Judea and Samaria**, who hate us exactly as do the Nazis of Hamas-ISIS in Gaza.”¹⁹⁹

On 31 December 2023, Smotrich depicted Gaza as a “ghetto” and **Gazans as “not innocent”**. He further justified withholding humanitarian aid, such as fuel deliveries, by labelling it as “power for terrorism.” Speaking to Israel’s Channel 12, he advocated for “completely changing the reality in Gaza, having a conversation about settlements in the Gaza Strip”, having a presence in Gaza “in a civilian fashion”, and retaining security control over the enclave.²⁰⁰ According to Smotrich, the only solution is either elimination or displacement by encouraging or imposing emigration: “**If in Gaza there will be 100,000 or 200,000 Arabs and not 2 million, the entire conversation of the ‘day after’ will look different.**”²⁰¹ The following day, Smotrich reiterated his characterisation of Gaza as

East Jerusalem (Advisory Opinion of 19 July 2024) General List No 186 [2024] <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>> accessed 1 December 2024

¹⁹⁵ The Times of Israel, ‘By abducting over 100 people into Gaza, Hamas has put Netanyahu in a political bind’ (8 October 2023) <<https://www.timesofisrael.com/by-abducting-over-100-people-into-gaza-hamas-has-put-netanyahu-in-a-political-bind/>> accessed 2 August 2024

¹⁹⁶ Law For Palestine, *Database of Israeli Incitement to Genocide on Legislators* (2024), no 3 <<https://law4palestine.org/wp-content/uploads/2024/01/2-Database-of-Israeli-Incitement-to-Genocide-15th-January-2024-LEGISLATORS.pdf>> accessed 2 August 2024

¹⁹⁷ Benzi Sanders (X, 4 November 2023) <<https://twitter.com/BenzionSanders/status/1720899287695929411>> accessed 2 August 2024

¹⁹⁸ Reuters, ‘Israeli minister calls for voluntary emigration of Gazans’ (14 November 2023) <<https://www.reuters.com/world/middle-east/israeli-minister-calls-voluntary-emigration-gazans-2023-11-14/>> accessed 2 August 2023

¹⁹⁹ The Times of Israel, ‘There are 2 million ‘Nazis’ in West Bank, says far-right Finance Minister Smotrich’ (28 November 2023) <<https://www.timesofisrael.com/there-are-2-million-nazis-in-west-bank-says-far-right-finance-minister-smotrich/>> accessed 2 August 2024

²⁰⁰ The New Arab Staff, ‘Israel’s Smotrich repeats call for displacement of Gazans after war’ (31 December 2023) <<https://www.newarab.com/news/israels-smotrich-repeats-call-displacement-gazans>> accessed 2 August 2024

²⁰¹ The Jerusalem Post, ‘Smotrich: Day after is different with only 200,000 Arabs in Gaza’ (31 December 2023) <<https://www.jpost.com/israel-hamas-war/article-780229>> accessed 2 August 2024

a “hothouse of 2 million people who want to destroy the State of Israel.” He emphasised his stance by asserting that “not one shekel will go to the Nazi terrorists in Gaza”. During his faction’s meeting at the Knesset, he reiterated his stance, encouraging “voluntary migration of Gaza’s residents to countries that will agree to take in the refugees”.²⁰²

On 26 January 2024, Smotrich restated his frank position: “...the Judges in the Hague who care about the situation of the Gazans are invited to call on the countries of the world to open their doors and assist in the reception and rehabilitation of the residents of Gaza.”²⁰³ During a conference advocating for the resettlement of the Gaza Strip on 28 January 2024, he said: “Israeli soldiers waging war in Gaza will remain as settlers and rebuild settlements. We have to come back to inherit the land.”²⁰⁴

On 29 April 2024, during a public event he stated: “We must not do the job halfway. Rafah, Deir al Balah, Nuseirat, **total extermination, erase the memory of the Amalek living under this sky.** There is no place under these beautiful skies and of the Lord of our world for such evil, this place **does not exist, cannot possibly exist.** This is delusional: we are negotiating with those who **should never have existed.**”²⁰⁵

On 4 July 2024, it was reported that Smotrich, speaking during a radio interview, said on Palestinians with Israeli citizenship, which constitute about 21 per cent of the Israeli population: “[i]t is impossible not to talk about the great threat posed by Israeli Arabs, as there are huge numbers of Arabs within our country... they possess quantities of weapons and ammunition, and have missiles for sabotage

²⁰² The Times of Israel, ‘Smotrich doubles down on resettlement of Gazans, rejecting US criticism’ (3 January 2024) <<https://www.timesofisrael.com/smotrich-doubles-down-on-resettlement-of-gazans-rejecting-us-criticism/>> accessed 11 April 2024

²⁰³ @bezaleism (X [formerly Twitter], 26 January 2024) <<https://x.com/bezaleism/status/1750884993528692949?s=20>> accessed 2 August 2024

²⁰⁴ @EpshtainItay (X [formerly Twitter], 28 January 2024) <<https://twitter.com/EpshtainItay/status/1751681988161913326>> accessed 2 August 2024; Also on 1 February 2024, he tweeted: “The ‘settler violence’ campaign is an anti-Semitic lie spread by the enemies of Israel with the aim of discrediting the pioneer settlers and the settlement enterprise and harming them, and through them discrediting the entire State of Israel [...] With the help of God, I will continue to act fearlessly to strengthen and develop Jewish settlement in all parts of the Land of Israel and to strive for sustainable peace, which will only be achieved when the hope of the Arabs to establish an Arab state on the ruins of the Jewish state is dashed.” See @bezaleism (X [formerly Twitter], 1 February 2024) <<https://twitter.com/bezaleism/status/1753093349031252194>> accessed 2 August 2024

²⁰⁵ @MiddleEastEye (Youtube, 30 April 2024) <<https://www.youtube.com/watch?v=9v6F3MLF41g>> accessed 1 December 2024

and hand grenades stolen from Israeli army bases, and they live in communities... **this is an existential threat to the state of Israel.**”²⁰⁶

On 5 August 2024, speaking about Israel's decision to allow humanitarian aid to enter Gaza, it was reported that Smotrich said that **starving two million Gazans “to death” may be the “right and moral”** to do, but the “world won't let us.”²⁰⁷

On 25 November 2024, speaking behind the title “the national camp is preparing for the Trump administration”, Smotrich revealed that the genocidal plan for Gaza is only a pilot for the bigger ethnic cleansing planned for the West Bank. At a conference organized by the ‘Yesha’ Council, an umbrella group representing Israeli municipalities in the West Bank,²⁰⁸ Smotrich said that “encouraging voluntary immigration, I think this is also an opportunity that opens up with the new administration. The less we talk, the more we can do... like in Judea and Samaria [the West Bank – O.S.]... **We can create a situation where in two years Gaza will have less than half its population.** It's a different world. All the discussions on ‘the day after’ will look different... This is a huge key for Judea and Samaria... There will be voluntary immigration from Gaza. **It's clear to everyone that there is a model.**”²⁰⁹

Direct

Smotrich’s statements are not about lack of distinction between civilians and combatants. Rather, there is no difference between the Palestinian Authority and Hamas; there is no difference between Palestinians citizens of Israel, the ones under military rule in the West Bank and the targeted group in Gaza; there is no difference between Palestinians and other Arabs because Palestinians have never existed, do not exist and should not exist; the task is to finish the 1948 ‘job’, not ‘half job’ but ‘total

²⁰⁶ Middle East Monitor, ‘Smotrich: Arab citizens of Israel are ‘existential threat’ (4 July 2024) <<https://www.middleeastmonitor.com/20240704-smotrich-arab-citizens-of-israel-are-existential-threat/>> accessed 1 December 2024

²⁰⁷ Haaretz, ‘Israeli Finance Minister Smotrich: Starving Gazans 'To Death' May Be Moral, but World Won't Let Us’ (5 August 2024) <<https://www.haaretz.com/israel-news/2024-08-05/ty-article/israeli-finance-minister-starving-gazans-to-death-may-be-moral-but-world-wont-let-us/00000191-22e1-dd23-a7dd-2aed4b050000>> accessed 1 December 2024

²⁰⁸ @EpshtainItay (X [formerly Twitter], 25 November 2024) <https://x.com/hanan_green/status/1861107210492752054> accessed 1 December 2024

²⁰⁹ @EpshtainItay (X [formerly Twitter], 25 November 2024) <https://x.com/hanan_green/status/1861107210492752054> accessed 1 December 2024; Times of Israel, ‘Smotrich says half of Gazans can be ‘encouraged’ to leave within two years’ (26 November 2024) <<https://www.timesofisrael.com/smotrich-says-half-of-gazans-can-be-encouraged-to-leave-within-two-years/>> accessed 1 December 2024; Israel Hayom, ‘smvtryts: "apshr lkbvsh at 'ezh vldll at havklvsyyh bhtsy btkv shntyym" (Smotrich: "It is possible to occupy Gaza and reduce the population by half within two years")’ (26 November 2024) <<https://www.israelhayom.co.il/news/politics/article/16847025>> accessed 1 December 2024

extermination’; there is not even a difference between different Arab nationalities and ethnicities because ‘all Arabs are the same’: Nazis who pose an existential threat, millions who should be eliminated or, at best, expelled (‘voluntary emigration’) from mandatory Palestine.

The dehumanization, demonisation and ‘nazification’ of Palestinians activate the Israeli collective trauma of the Holocaust, instrumentalizes the post-trauma of the 7/10 attacks to justify the unprecedented and indiscriminate response to the 7/10 attacks, and facilitate the commission of war crimes, crimes against humanity and potentially genocidal acts against Palestinians in Gaza and more broadly Palestinians in Israel and the oPt and Israel.

If Palestinians are ‘Nazis’, their survival is tantamount to extermination of all Jews, and hence their collective destruction is literally a matter of life or death, an existential self-defence. Accordingly, the deliberate effort to alter the demographic composition of Gaza necessitates the creation of conditions rendering it uninhabitable for Palestinians and conducive to their ethnic cleansing, be it by mass killings or forced displacement.

Content

Starving civilian population to death, diluting a population from two million people to less than one, totally extermination of entire cities and refugee camps, completely dismantling and ‘taking down’ Gaza, destroying civilian ‘capacities’ and ‘encouraging’ the departure of the targeted group from its land - are all genocidal acts within the meaning of Article 6 RS. Smotrich incites others to commit against Palestinians in Gaza within the meaning of Article 25(3)(e) RS. Whilst incitement to genocide does not require to show a genocide has been committed or attempted, the conduct of the addressees of Smotrich’s statements corresponds, at least to some extent, to his inciting calls.²¹⁰ Like other suspects, therefore, by attributing collective responsibility to Palestinians and dismissing the possibility of non-involved, innocent civilians, Smotrich provides the justification for his call to apply a punitive approach whose target is ‘Gaza’, i.e., the entire Palestinian population.

Audience

²¹⁰ Haaretz, 'Parshanut: HaMashber HaHumanitari BeAza Alul Lehitpotzet Bifaneiha Shel Yisrael (Analysis: The Humanitarian Crisis in Gaza Could Blow Up in Israel's Face)' (7 October 2024) <https://www.haaretz.co.il/news/politics/2024-10-07/ty-article/.premium/00000192-6369-de36-adfe-efe9e1840000> accessed 2 December 2024

Such genocidal rhetoric by a Minister in the Ministry of Defence encourages not only Smotrich's political base but also countless commanders and soldiers deployed in Gaza, willing to commit killings, inflict serious bodily or mental harm, and create conditions of life calculated to bring about Gazans' physical destruction, in whole or in part, within the meaning of Articles 6(a), (b) and (c) RS. As a member of the Israeli cabinet and holding a casting vote power in Netanyahu's coalition, Smotrich's voice and ideology represent a significant faction. As such, his statements are also addressed to other politicians and public figures, creating a race to the bottom by incentivizing other coalition fractions to make similar or worse inciting statements. His genocidal calls, accompanied by threats to leave the coalition if not followed, have shaped the government's response post 7/10.

Based on the content and audience of his numerous statements, there are reasonable grounds to believe that Smotrich *directly* incited others to commit genocide within the meaning of Article 25(3)(e) RS.

Public

Most of Smotrich's statements were either made in public settings or leaked or otherwise diffused to the public, ultimately even reaching the application of South-Africa to the ICJ. Most of the above-cited statements were widely broadcasted via various international and Israeli media outlets, thus gaining a lot of publicity. This dissemination allowed Smotrich's words to reach a significant number of people, amplifying the impact of his rhetoric beyond its initial audience.²¹¹ Some of Smotrich's statements were broadcasted on national television, for example in the program 'the patriots',²¹² one of the most popular shows on Channel 14.²¹³ Broadcasted at 19:30, just before prime-time news, the show reaches a broad domestic audience with typically right-wing political orientation. With the accessibility and prevalence of social platforms and online streaming, Smotrich's statements can be

²¹¹ One statement, for example, was notably wired by AP News, 'Israeli hostage crisis in Hamas-ruled Gaza becomes a political trap for Netanyahu' (8 October 2023) <<https://apnews.com/article/palestinians-israel-military-prisoners-hostage-hamas-soldiers-e75729364f8c0b453da272365c16d136#>> accessed 2 August 2024; The Times of Israel 'By abducting over 100 people into Gaza, Hamas has put Netanyahu in a political bind' (8 October 2023) <<https://www.timesofisrael.com/by-abducting-over-100-people-into-gaza-hamas-has-put-netanyahu-in-a-political-bind/>> accessed 2 August 2024; The New York Post, 'Hamas threatens to execute Israeli hostages — including toddlers — leaving Jewish state in desperate race to free them from terrorists' (9 October 2023) <<https://nypost.com/2023/10/09/hamas-threatens-to-execute-israeli-hostages-on-camera/>> accessed 2 August 2024

²¹² [@Patriots](https://www.youtube.com/channel/UC@Patriots) [youtube channel]

<https://www.youtube.com/playlist?list=PL8E54R76rowCcCO_n_HQf36o1RF3_oD3z4> accessed 15 April

²¹³ The Times of Israel, 'As divisions sharpen, an incendiary right-wing news channel finally finds an audience' (20 July 2023) <<https://www.timesofisrael.com/as-divisions-sharpen-an-incendiary-right-wing-news-channel-finally-finds-an-audience/>> accessed 2 August 2024

indefinitely viewed and shared by an undefined audience, further extending its reach. Smotrich statements, therefore, qualify as *public* according to the well-settled case law set out above.

Mens Rea

Repeated calls for the eradication of the physical structures and the societal fabric of the Palestinian polity in Gaza reveal an intent to bring about the collective destruction of the targeted group, ‘as such’, in whole or in part. These calls were made years before the 7/10 attacks. They are part and parcel of a coherent fundamentalist vision and genocidal plan which ultimately plans to kill or deport all ‘Arabs’ currently present mandatory Palestine. This is why even Israel’s closest allies such as the United States and France consider him *persona non grata* and repeatedly condemn his incitements. It is in this context that his *mens rea* with respect to his numerous statements over the years should be assessed, since, as noted above, adherence to extremist ideologies has been interpreted as a factor suggesting the existence of individual criminal intent in the jurisprudence of several tribunals, including the ICC.

Smotrich has vigorously advocated for ultra-nationalist policies aligned with messianic Zionism and racist ideology. As a settler of Kdumim, located in the West Bank, Smotrich’s political project is to annex the Palestinian territories to Israel whilst denying the political existence of Palestinians and eliminating their physical presence.

Smotrich has publicly expressed his desire for the State of Israel to be turned into a Jewish theocracy, a ‘Greater Israel’ where the Palestinian Authority does not exist. A self-declared “homophobe, racist, fascist”,²¹⁴ his plan to expand Jewish sovereignty over ‘biblical’ Israel contains inflammatory and racist rhetoric targeting Palestinians and fostering hostile and divisive atmosphere.

The above-cited numerous statements are not isolated, but part of a broader, consistent pattern, demonstrating his entrenched genocidal campaign towards Palestinians – in both word and deeds - over the years.

In 2005, during protests against the Israeli disengagement from Gaza, Smotrich was arrested on suspicion of terrorism. At the time of his arrest he was in possession of 700 litres of gasoline. He was

²¹⁴ The Times of Israel, ‘Smotrich: My voters don’t care if I’m a homophobe or fascist; my word is my bond’ (16 January 2023)
<<https://www.timesofisrael.com/smotrich-my-voters-dont-care-im-a-homophobic-fascist-but-my-word-is-my-word/>>
accessed 2 August 2024

suspected of wanting to blow up Ayalon Highway, the main highway in Tel-Aviv and the center of Israel.²¹⁵

In April 2016, Smotrich tweeted that he supports segregation of Arab and Jewish women in hospital maternity wards: “It is natural that my wife would not want to lie down next to someone who just gave birth to a baby that might want to murder her baby in another 20 years.”²¹⁶

In 2017, Smotrich expressed his admiration for the biblical genocidaire Joshua bin Nun²¹⁷ and shared insights on his published “Israel’s Decisive Plan”,²¹⁸ which suggests annexing the entire West Bank and flooding it with settlers and settlements while giving Palestinians three options: “a life of subjugation under Israeli rule, emigration, or a *shahid* [martyr] death.”²¹⁹

In 2021, Smotrich said to Arab lawmakers: “You’re here by mistake, it’s a mistake that Ben-Gurion didn’t finish the job and didn’t throw you out in 1948”,²²⁰ echoing the ethnic cleansing during the Nakba.

On February 26, 2023, in response to the killing of two settlers in the village of Huwara in the West Bank, it was reported that Smotrich called for “IDF strikes the cities of terror and its perpetrators mercilessly, with tanks and helicopters, in a way that will convey that ‘the landlord’ [Israel – O.S.] has gone mad.”²²¹

²¹⁵ The Times of Israel, ‘Former Shin Bet deputy chief said to claim MK Smotrich planned terror attack’ (18 March 2019) <<https://www.timesofisrael.com/former-shin-bet-deputy-chief-said-to-call-hardline-mk-smotrich-a-terrorist/>> accessed 2 August 2024

²¹⁶ Haaretz, ‘Israeli Lawmaker: My wife wouldn’t want to give birth next to an Arab woman’ (5 April 2016) <<https://www.haaretz.com/israel-news/2016-04-05/ty-article/.premium/israeli-lawmaker-my-wife-wouldnt-want-to-give-birth-next-to-an-arab-woman/0000017f-f782-d47e-a37f-ffbe2cc90000>> accessed 2 August 2024; See also Haaretz, ‘The face of Israel’s far right wants to ‘abort’ Palestinian hope’ (3 December 2016) <<https://www.haaretz.com/israel-news/2016-12-03/ty-article-magazine/.premium/the-face-of-israels-far-right-wants-to-abort-palestinian-hope/0000017f-f2f8-d497-a1ff-f2f875960000>> accessed 2 August 2024

²¹⁷ Haaretz, ‘The Israeli Lawmaker Heralding Genocide Against Palestinians’ (23 May 2017) <<https://www.haaretz.com/opinion/2017-05-23/ty-article/.premium/the-israeli-mk-heralding-genocide-against-palestinians/0000017f-e2ae-d804-ad7f-f3feb9200000>> accessed 2 August 2024

²¹⁸ Hashiloach, ‘Israel’ Decisive Plan’ (n.d.) <<https://hashiloach.org.il/israels-decisive-plan/>> accessed 1 December 2024

²¹⁹ Mondoweiss, ‘Another mainstream israeli voice [Israel's Decisive Plan](#) - השילוח warns of Apartheid’ (22 February 2023) <<https://mondoweiss.net/2023/02/another-mainstream-israeli-voice-warns-of-apartheid/>> accessed 2 August 2022

²²⁰ The Times of Israel, ‘Smotrich at Knesset: Ben-Gurion should have ‘finished the job’, thrown out Arabs’ (13 October 2021) <<https://www.timesofisrael.com/smotrich-at-knesset-ben-gurion-should-have-finished-the-job-thrown-out-arabs/>> accessed 2 August 2024

²²¹ Bahazit, ‘Betsalel Smotrich: Leshader LeMechablīm "SheBa'al HaBayit Hishtage'a" (Bezalel Smotrich: Signal to the Terrorists "The Master of the House Has Gone Mad")’ (26 February 2024) <<https://bahazit.co.il/%D7%91%D7%A6%D7%9C%D7%90%D7%9C-%D7%A1%D7%9E%D7%95%D7%98%D7%A8%D7%99%D7%A5-%D7%9C%D7%A9%D7%93%D7%A8->

On the same day, nearly four hundred Israeli settlers killed a Palestinian, wounded more than a hundred, and burned dozens of Palestinian homes and cars in the village of Huwara, with the complicity of the Israeli army, according to the Israeli investigative media +972. This attack was condemned even by President Herzog and described as a “pogrom” by the Chief of Staff of the Central Command of the Israeli Defense Forces, Yehuda Fuchs. Six settlers were arrested, then released.²²²

On March 1, 2023, during an event organized by the Haaretz’s “The Marker” business conference, a journalist asked Smotrich why he had publicly “liked” a post calling for the complete eradication of the village of Huwara that same day. Smotrich answered: “Because **I think the village of Huwara should be wiped out. I think the state of Israel should do it** - God forgive me, not individuals”.²²³

On 6 March 2023, ‘individual’ inflicted more violence against villagers of Huwara,²²⁴ and on 19 June 2024, two settlers were sent to 3 and 3.5 years in prison for having attacked, injured and destroyed property Palestinian from Huwara, and for having done so **for racial reasons**.²²⁵

On 20 March 2023, speaking from a podium that depicted a map of Israel that incorporated Jordan and parts of Syria and Lebanon, Smotrich denied Palestinian identity: “Is there a Palestinian history or culture? There is none. [...] **There is no such thing as Palestinians because there is no such**

[%D7%9C%D7%9E%D7%97%D7%91%D7%9C%D7%99%D7%9D-%D7%A9%D7%91%D7%A2%D7%9C-%D7%94%D7%91%D7%99%D7%AA/](https://www.972mag.com/smotrich-american-jews-huwara/) accessed 2 December 2024

²²² +972 Magazine, ‘The Danger of Treating Smotrich as an Anomaly’ (9 March 2023) <<https://www.972mag.com/smotrich-american-jews-huwara/>> accessed 2 December 2024

²²³ @btselem (X [formerly Twitter], 1 March 2023) <<https://x.com/btselem/status/1630933607979139074>> accessed 2 December 2024; The Times of Israel, ‘Israel should ‘wipe out’ Palestinian town of Huwara says senior minister Smotrich’ (1 March 2023)

<<https://www.timesofisrael.com/israel-should-wipe-out-palestinian-town-of-huwara-says-senior-minister-smotrich>> accessed 2 August 2024.

²²⁴ @aljazeeraenglish (YouTube channel, 2 March 2023) <https://www.youtube.com/watch?v=wONIMICgu_o> accessed 2 December 2024

²²⁵ See TP-70404-03-23 The State of Israel v Rabin (detainee) et al., Central District Court (Lod), Verdict (19 June 2024) <https://img.haaretz.co.il/bs/00000190-2fc4-d7e0-abf0-efcc25b90000/82/d8/3940a2394dc29be0c6d0ec0b5df9/%D7%A8%D7%91%D7%99%D7%9F-%D7%95%D7%92%D7%A8%D7%95%D7%9F-%D7%92%D7%96%D7%93-%D7%AA%D7%A7%D7%99%D7%A4%D7%94-%D7%95%D7%A4%D7%A6%D7%99%D7%A2%D7%94-%D7%91%D7%A0%D7%A1%D7%99%D7%91%D7%95%D7%AA-%D7%9E%D7%97%D7%9E%D7%99%D7%A8%D7%95%D7%AA-%D7%9E%D7%9E%D7%A0%D7%99%D7%A2-%D7%92%D7%96%D7%A2%D7%A0%D7%99.pdf>> accessed 2

December 2024; See also Haaretz, ‘Onshei Ma’asar LeShnei Mitnachalim SheTakfu BeGarzen Mishpacha Plestinit BeHuwara (Prison Sentences for Two Settlers Who Attacked a Palestinian Family with an Axe in Huwara)’ (19 June 2024) <https://www.haaretz.co.il/news/politics/2024-06-19/ty-article/00000190-2f9f-d700-a7f0-afffbbe70000> accessed 2 December 2024

thing as the Palestinian people. [...] Do you know who are the Palestinians? I'm Palestinian", he said, also mentioning his ancestors as the "real Palestinians."²²⁶ ²²⁷.

In conclusion, both the material and the mental elements of the crimes have been established. Consequently, there are reasonable grounds to believe that Smotrich, in respect of the crime of genocide, directly and publicly incited others to commit genocide under Article 25(3)(e) RS.

3.6 Itamar Ben-Gvir

On 17 October 2023, Minister of National Security Itamar Ben-Gvir²²⁸ stated: "As long as Hamas does not release the hostages it is holding - **the only thing that needs to enter Gaza is hundreds of tons of explosives** by the Air Force, and **not an ounce of humanitarian aid.**"²²⁹ In a televised interview on 10 November 2023, Ben-Gvir also said:²³⁰ "...[t]hose who hand out candy, those who support, those who sing – **they are all terrorists, they too should also be assassinated.**"²³¹

Direct

Content

Ben-Gvir's inciting statements are not made in the abstract. Like Smotrich, he too has been inciting to violence, racism and terrorism against Palestinians for years. Like Smotrich, he too is a political casting vote in the government. His opinion and statements are a dominant voice in the decision making of the cabinet and government, and on a number of occasions Ben-Gvir threatened that if his proposals would not be adopted, there will be no government and Netanyahu would lose his coalition.

²²⁶ The Times of Israel, 'Smotrich says there's no Palestinian people, declares his family 'real Palestinian'' (20 March 2023)

<<https://www.timesofisrael.com/far-right-lawmaker-bezalel-smotrich-declares-himself-his-family-real-palestinians/>> accessed 2 August 2024

²²⁷ CNN, 'Israeli minister says there's no 'such thing as a Palestinian people,' inviting US rebuke' (21 March 2023) <<https://edition.cnn.com/2023/03/21/middleeast/israel-smotrich-palestinians-intl/index.html>> accessed 2 August 2024

²²⁸ Itamar Ben Gvir has been leading the extreme right party Jewish Power (*Otzma Yehudit*) since 2019, which was part of the joint list 'Religious Zionism – Jewish Power' in the last elections to the Knesset. He is a settler in *Kiryat Arba*, one of the most radical settlements in the occupied West Bank, and is currently the Minister of National Security, in charge of, *inter alia*, the Border Police and Prisons Service.

²²⁹ @YehudaShaul (X [formerly Twitter], 25 October 2023) <<https://twitter.com/YehudaShaul/status/1717219201096499426>> accessed 2 August 2024

²³⁰ *South Africa v Israel*: Application Instituting Proceedings, para 101

²³¹ Channel 12, 'Interview with Itamar Ben-Gvir' (10 November 2023) translated by @QudsNen (X [formerly Twitter], 12 November 2023), <<https://twitter.com/QudsNen/status/1723784790682358189>> accessed 2 August 2024; replay available @יהודה שחול (Youtube channel, 11 November 2023) <<https://www.youtube.com/watch?v=2yRl-cc-D3w>> accessed 2 August 2024 [10:30 onwards]

“Hundreds of tons of explosives” were indeed dropped on two million Palestinians in Gaza, which killed and caused serious physical or mental harm to more than 5% of the population. Without “an ounce of humanitarian aid” two million Palestinians in Gaza cannot survive, and indeed the lack of minimal means for physical survival killed and caused serious harm to countless others, *inter alia* by preventing births. Together, therefore, these statements deliberately inflict on the targeted group conditions of life calculated to bring about, its physical destruction, in whole or in part.

These statements fall within the ambit of Article 6 RS and thus are ‘in respect of the crime of genocide’. They also materialized on the ground: as cited above, the PTC found that there are reasonable grounds to believe that the *intentional* deprivation of humanitarian aid created genocidal conditions intended, at least in part, to destroy the targeted group. Consequently, the PTC has issued arrest warrants against the superiors orchestrating this policy.

Using starvation and man-made humanitarian disasters as a method of war is a war crime and a crime against humanity. Specifically, depriving 2 million *civilians* from the minimal means for their survival has nothing to do with the release of hostages, who are held by *combatants* of several non-state armed groups. Whilst the pronoun “they” in the sentence “[t]hey too should be assassinated” covers groups that are not directly taking part in hostilities (e.g., “those who sing”; “those who hand out candy”), according to Ben-Gvir no distinction should be made and everyone should be targeted in the same fashion. Like other suspects, therefore, Ben-Gvir equates Gazans with Hamas ‘terrorists’,²³² an equation that has been normalized after decades of inciting, racist and at times genocidal calls against Palestinians in Gaza, Palestinians in other parts of the oPt and Israel, and generally against ‘Arabs’.

Audience

A minister and a political leader, Ben-Gvir has immense capacity and power to influence large parts of the population. He is especially popular among the young population of Israel, including soldiers in mandatory service (18-21 years old).²³³ Published at first in Hebrew, the audience of the statement of 17 October 2023 was domestic: commanders and soldiers on the ground, politicians in his and rival parties, and the general public. All these groups understand the message this tweet conveys, which is

²³² See for ‘War on terror’, ICRC, ‘War on terror’ in Online Casebook. *How Does Law Protect in War?* (n.d.) <https://casebook.icrc.org/a_to_z/glossary/war-terror> accessed 2 August 2024

²³³ Haaretz, ‘Why So Many Young Israelis Adore This Racist Politician’ (13 September 2022) <https://www.haaretz.com/israel-news/elections/2022-09-13/ty-article-magazine/.highlight/why-so-many-young-israelis-adore-this-racist-politician/00000183-3743-db19-abcb-37fb61520000> accessed 2 December 2024

in line with the message communicated by the other suspects and reflects a rare consensus among Israelis – from the centrist President to the most extreme right and racist politicians: all Palestinians are terrorists, no one is innocent and thus no one – from toddlers to the elders – should be spared.

On 25 March 2024, the Special Rapporteur on human rights situation in Palestine observed that “[t]here is cogent evidence that **these [inciting] statements have been internalized and acted upon by troops on the ground**. Israeli soldiers have, including on social media channels run by the Israeli military, referred to Palestinians as “terrorists”, “roaches”, “rats”, and **have repeated terms articulated by political leaders**, chanting that “there are no ‘uninvolved civilians’”, while also calling for the building of settlements in Gaza, “occupy[ing] Gaza... wip[ing] off the seed of Amalek”, boasting about killing “families, mothers, and children”, humiliating detained Palestinians, detonating dozens of homes, destroying entire residential neighbourhoods, and desecrating cemeteries and places of worship.”²³⁴

Timing

Ben-Gvir made the first statement on 17 October 2023, before the ground invasion of Gaza and while the aerial bombing campaign was ongoing.²³⁵ At the same period, UN officials repeatedly called to ensure safe passage of humanitarian aid. On the *same* day UNRWA said that “water remains a key issue in Gaza, as people will start dying if they don’t get water. Concerns over dehydration and waterborne diseases are high, given the collapse of water and sanitation services, including today’s shutdown of Gaza’s last functioning seawater desalination plant. [...] 600,000 litres of fuel are needed in Gaza per day to operate water and desalinization plants. Fuel reserves at all hospitals across Gaza are expected to last for an additional 24 hours only. The shutdown of backup generators would place the lives of thousands of patients at serious risk.”²³⁶ The humanitarian crisis, therefore, had already been imminent. Urgent warnings (‘utter catastrophe’) were given out by UN agencies. In this context of alarmed warnings, Ben-Gvir’s statement calls to deliberately inflict on the targeted group conditions of life calculated to bring about its physical destruction under Article 6(c) RS.

²³⁴ UN HRC, Anatomy of a Genocide, para 53

²³⁵ Al Jazeera, ‘Israel stages large overnight ground raid into Gaza Strip’ (26 October 2023) <<https://www.aljazeera.com/news/2023/10/26/israel-stages-large-overnight-ground-raid-into-gaza-strip>> accessed August 2024; Reuters, ‘What we know about Israel’s invasion of Gaza so far’ (30 October 2023) <<https://www.reuters.com/graphics/ISRAEL-PALESTINIANS/MAPI/movajdladpa/#mapping-israels-ground-invasion-of-gaza>> accessed 2 August 2024

²³⁶ UN Office of the Spokesperson for the UN Secretary-General, ‘Highlights of the Noon Briefing by Stéphane Dujarric’ (17 October 2023) <<https://www.un.org/sg/en/content/highlight/2023-10-17.html>> accessed 2 August 2024

Ben-Gvir made the second statement on 10 November 2023, more than two weeks after the ground invasion to Gaza. By then, 11,000 people had been killed.²³⁷ On the *same* day, in a Security Council briefing,²³⁸ the director of the WHO described the dire situation of hospitals and health workers, and called for “unfettered access to deliver humanitarian aid to the civilians of Gaza, who are not responsible for this violence, but are suffering in ways that we in this room cannot imagine.”²³⁹

This temporal context underscores the heated atmosphere in which Ben-Gvir made his televised statement. The labelling of all Palestinians in Gaza as terrorists enabled their collective destruction in the form of indiscriminate and disproportionate attacks on civilian objectives such as hospitals.

The content, audience and timing of Ben-Gvir’s statements, therefore, provide a reasonable ground to believe that these statements made constitute a *direct* call for genocide under to Article 25(3)(e) RS.

Public

Since 17 October 2023, Ben-Gvir’s tweet²⁴⁰ can be accessed without limitation by an undefined audience. By 25 October 2023, only a week later, it has already reached a wide audience of **2.1 million**

²³⁷ Reuters, ‘US voices concern over killing of Palestinians as Gaza death toll tops 11,000’ (10 November 2023) <<https://www.reuters.com/world/middle-east/gaza-officials-say-hospitals-come-under-new-israeli-attacks-2023-11-10/>> accessed 2 August 2024. On the same day, a yard at the Al Shifa Hospital in Gaza City, where thousands of displaced Palestinians were sheltering, was hit. Al Jazeera ‘Israel strikes Gaza’s biggest hospital complex, health officials say’ (10 November 2023) <<https://www.aljazeera.com/news/2023/11/10/israel-strikes-gazas-biggest-hospital-complex-health-officials-say>> accessed 2 August 2024; The Times of Israel, ‘Nov. 10: IDF says blast at Shifa caused by errant Gazan missile aimed at troops nearby’ (10 November 2023) <<https://www.timesofisrael.com/liveblog-november-10-2023/>> accessed 2 August 2024; UN News, ‘News in Brief 10 November 2023’ (10 November 2023) <<https://news.un.org/en/audio/2023/11/1143442>> accessed 2 August 2024; During an attack on the Al-Buraq School in Gaza 25 people were killed. Al Jazeera, ‘At least 25 people killed in Israeli attacks on Gaza City school’ (10 November 2023) <<https://www.aljazeera.com/news/2023/11/10/gaza-hospital-says-received-50-bodies-after-strikes-on-school>> accessed 2 August 2024; Reuters, ‘US voices concern over killing of Palestinians as Gaza death toll tops 11,000’ (10 November 2023) <<https://www.reuters.com/world/middle-east/gaza-officials-say-hospitals-come-under-new-israeli-attacks-2023-11-10/>> accessed 2 August 2024; Intense attacks on Northern Gaza, including around the main hospital, prompted thousands of Palestinians who had sought shelter there to flee South. AP News, ‘Thousands who were sheltering at Gaza City’s hospitals flee as Israel-Hamas war closes in’ (10 November 2023) <<https://apnews.com/article/israel-hamas-war-news-11-10-2023-98025565691cc44304074b3e25d11ae5>> accessed 2 August 2024.

²³⁸ Security Council Report, ‘The Middle East, including the Palestinian Question: Open Briefing’ (10 November 2023) <<https://www.securitycouncilreport.org/whatsinblue/2023/11/the-middle-east-including-the-palestinian-question-open-briefing.php>> accessed 2 August 2024

²³⁹ WHO, ‘WHO Director-General's remarks at the Emergency Meeting of the United Nations Security Council – 10 November 2023’ (10 November 2023) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-emergency-meeting-of-the-united-nations-security-council---10-november-2023>> accessed 2 August 2024

²⁴⁰ @YehudaShaul, (X [formerly Twitter], 25 October 2023) <<https://twitter.com/YehudaShaul/status/1717219201096499426>> accessed 2 August 2024

views (and 3,054 likes, 2,191 reposts and 2,815 comments). The hostilities in Gaza are still ongoing, and the inciting tweet is still accessible.

Ben-Gvir's second statement was broadcasted as part of a television interview on 10 November 2023 on the Israeli Channel 12 in the show 'Meet the Press'.²⁴¹ This statement too, therefore, was disseminated to a significant number of unselected people, without any limitation. An excerpt of his interview which includes the inciting statement was broadcasted on his party's YouTube channel²⁴² the day after. As of 16 April 2024, it was viewed more than 40,003 times, had around 489 comments and 954 likes,²⁴³ evidencing the long-term and wide impact the interview had, one which exceeds the specific broadcasting time of a TV show.

Both statements, therefore, qualify as public statements according to the established jurisprudence set out above, and thus meet the 'public' criterion under Article 25(3)(e) of the Rome Statute.

Mens rea

The above-cited statements establish in themselves that Ben-Gvir had "the intent to directly prompt or provoke another to commit genocide"²⁴⁴, including "the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."²⁴⁵

The context in which these statements were made is a second indication of the mental element of the crime: a general environment of blood feud, shortly after Israeli-Jews had suffered the worst pogrom since the Holocaust, amid an unprecedented military campaign.

A third indication is Ben-Gvir's years' long use of dehumanising language against 'Arabs'. A fourth indication is Ben-Gvir's ideology. Ben-Gvir's racist views are similar to those of Smotrich.²⁴⁶ The previous leader of Ben-Gvir's party, Michael Ben-Ari, was banned from running for election due to

²⁴¹ Channel 12, 'Interview with Itamar Ben-Gvir' (10 November 2023) translated by @QudsNen (X [formerly Twitter], 12 November 2023), <<https://twitter.com/QudsNen/status/1723784790682358189>> accessed 2 August 2024; replay available @עוצמה יהודית (Youtube channel, 11 November 2023) <<https://www.youtube.com/watch?v=2yRl-cc-D3w>> accessed 2 August 2024 [10:30 onwards]

²⁴² *ibid*

²⁴³ *ibid*

²⁴⁴ *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 560

²⁴⁵ *ibid*

²⁴⁶ The Times of Israel, 'Otzma Yehudit head says Kahane was 'holy'; backs expulsion of 'disloyal' Arabs' (5 February 2021) <<https://www.timesofisrael.com/otzma-yehudit-head-says-kahane-was-holy-backs-expulsion-of-disloyal-arabs/>> accessed 2 August 2024

his racist comments.²⁴⁷ Ben-Gvir himself is heavily influenced by the late Rabbi Meir Kahane.²⁴⁸ Kahane was the leader of the Kach party, the first party to be banned from being elected to the Knesset on the ground of **racism** in 1988.²⁴⁹ Kahane, who demanded that non-Jews in Israel either become slaves or face deportation,²⁵⁰ was convicted for **terrorism**.²⁵¹ Ben-Gvir joined Kahane's party Kach in the 1980s and quickly became a devoted disciple of Kahane's ideas.²⁵² He refers to Kahane as a "hero" and "holy".²⁵³ As a Kahanist, Ben-Gvir calls for the expulsion of 'disloyal' Palestinian citizens of Israel.²⁵⁴ Ben-Gvir is also known to be an admirer of the mass murderer Baruch Goldstein,²⁵⁵ whose framed photo is hanged in his office.²⁵⁶ In a video from 1995, Ben-Gvir is shown dressed as Goldstein for the Jewish holiday of Purim and calling him a "hero".²⁵⁷ In an interview, he boasted damaging the then Israeli PM Yitzhak Rabin's car. In the interview, the journalist asks: "Did you manage to remove the emblem from Rabin's car, to tear off the emblem?", and Ben-Gvir answers: "The emblem is an emblem, and **it symbolizes that just as we reached this emblem, we can reach Rabin**". The journalist asks: "Is it possible to attack the prime minister's car? Is it possible to attack

²⁴⁷ The Times of Israel, 'Netanyahu says Ben Gvir will be in coalition, but 'not fit' to be a minister' (16 February 2021) <<https://www.timesofisrael.com/netanyahu-says-ben-gvir-will-be-in-coalition-but-not-fit-to-be-a-minister/>> accessed 2 August 2024

²⁴⁸ Haaretz, 'Explained | Why Racist Rabbi Meir Kahane Is Roiling Israeli Politics 30 Years After His Death' (21 February 2019) <<https://www.haaretz.com/israel-news/elections/2019-02-21/ty-article/.premium/why-racist-rabbi-meir-kahane-is-roiling-israeli-politics-30-years-after-his-death/0000017f-f6f7-d887-a7ff-fef720220000>> accessed 2 August 2024; The Times of Israel, 'Otzma Yehudit head says Kahane was 'holy'; backs expulsion of 'disloyal' Arabs' (5 February 2021) <<https://www.timesofisrael.com/otzma-yehudit-head-says-kahane-was-holy-backs-expulsion-of-disloyal-arabs/>> accessed 2 August 2024; The Times of Israel, 'Netanyahu says Ben Gvir will be in coalition, but 'not fit' to be a minister' (16 February 2021) <<https://www.timesofisrael.com/netanyahu-says-ben-gvir-will-be-in-coalition-but-not-fit-to-be-a-minister/>> accessed 2 August 2024

²⁴⁹ The Times of Israel, 'Otzma Yehudit head says Kahane was 'holy'; backs expulsion of 'disloyal' Arabs' (5 February 2021) <<https://www.timesofisrael.com/otzma-yehudit-head-says-kahane-was-holy-backs-expulsion-of-disloyal-arabs/>> accessed 2 August 2024

²⁵⁰ The Nation, 'Netanyahu Is Letting Israel's Fascists Enter by the Front Door' (23 March 2021) <<https://www.thenation.com/article/world/israel-kahane-biden-fascist/>> accessed 2 August 2024

²⁵¹ YNET News, 'Inside radical right-wing group Lehava' (1 March 2015) <<https://www.ynetnews.com/articles/0,7340,L-4610561,00.html>> accessed 2 August 2024

²⁵² The Nation, 'Netanyahu Is Letting Israel's Fascists Enter by the Front Door' (23 March 2021) <<https://www.thenation.com/article/world/israel-kahane-biden-fascist/>> accessed 2 August 2024

²⁵³ The Times of Israel, 'Otzma Yehudit head says Kahane was 'holy'; backs expulsion of 'disloyal' Arabs' (5 February 2021) <<https://www.timesofisrael.com/otzma-yehudit-head-says-kahane-was-holy-backs-expulsion-of-disloyal-arabs/>> accessed 2 August 2024

²⁵⁴ *ibid*

²⁵⁵ Baruch Goldstein killed 29 people and wounded 125 by shooting them in a Hebron mosque during Purim/Ramadan, see <https://en.wikipedia.org/wiki/Cave_of_the_Patriarchs_massacre> accessed 2 August 2024.

²⁵⁶ The Nation, 'Netanyahu Is Letting Israel's Fascists Enter by the Front Door' (23 March 2021) <<https://www.thenation.com/article/world/israel-kahane-biden-fascist/>> accessed 2 August 2024; Al Jazeera, 'Who is Israel's far-right, pro-settler Security Minister Ben-Gvir?' (27 August 2023) <<https://www.aljazeera.com/news/2023/8/27/who-is-israels-far-right-pro-settler-security-minister-ben-gvir>> accessed 2 August 2024

²⁵⁷ @theIMEU, (X [formerly Twitter], 3 March 2021) <<https://twitter.com/theIMEU/status/1366887768564056077>> accessed 2 August 2024

a minister like that and walk around freely?” Ben-Gvir answers: “When the prime minister does things that are serious, I think that definitely, serious things can be done against him”. On 4 November 1995, an extreme right militant, affiliated with Ben-Gvir circles, **assassinated the Israeli PM Rabin**.²⁵⁸

In 2008 Ben-Gvir was **convicted of incitement to racism and for supporting a terrorist organisation** (Kach).²⁵⁹ He has been indicted for similar incitements **more than 50 times**.²⁶⁰ He has been convicted for destroying property,²⁶¹ and has also been accused of paying teenagers to vandalise Palestinian property.²⁶²

Because of his extreme views and convictions, he was exempted from compulsory conscription in the IDF and was initially prevented from taking the Bar exam.²⁶³ As a lawyer he defended activists from the extreme right who were accused of terrorism and hate crimes.²⁶⁴ He represented *Lehava*, an organisation that is advocating against any personal or professional relations between Jews and non-Jews. *Lehava* too is inspired by Kahane.²⁶⁵ During demonstrations, the organisation used racist slogans such as “Death to the Arabs”, “Shuafat's on fire”²⁶⁶, “Muhammad is dead”, “Jews – revenge”

²⁵⁸ @aviransemo3885 (YouTube channel, 23 June 2019) <<https://www.youtube.com/watch?v=JQ0sXLYOOeg>> accessed 2 December 2024

²⁵⁹ Times of Israel, ‘High Court rejects petition to disqualify far-right Ben Gvir as a minister’ (21 February 2024) <<https://www.timesofisrael.com/high-court-rejects-petition-to-disqualify-far-right-ben-gvir-as-a-minister/#:~:text=The%20Jerusalem%20District%20Court%20in,Jewish%20group%20that%20was%20banned>> accessed 2 August 2024. “Racist incitement” prohibited under Article 144A-D of the Israeli Penal Law 5737-1977 and “Supporting a terrorist organization”, punishable under Article 4 of the Prevention of Terrorism Ordinance No. 33; The Times of Israel, ‘High Court rejects petition to disqualify far-right Ben Gvir as a minister’ (21 February 2024) <<https://www.timesofisrael.com/high-court-rejects-petition-to-disqualify-far-right-ben-gvir-as-a-minister/#:~:text=The%20Jerusalem%20District%20Court%20in,Jewish%20group%20that%20was%20banned>> accessed 2 August 2024.

²⁶⁰ The Nation, ‘Netanyahu Is Letting Israel’s Fascists Enter by the Front Door’ (23 March 2021) <<https://www.thenation.com/article/world/israel-kahane-biden-fascist/>> accessed 2 August 2024

²⁶¹ Al Jazeera, ‘Who is Israel’s far-right, pro-settler Security Minister Ben-Gvir?’ (27 August 2023) <<https://www.aljazeera.com/news/2023/8/27/who-is-israels-far-right-pro-settler-security-minister-ben-gvir>> accessed 2 August 2024

²⁶² New Yorker, ‘Itamar Ben-Gvir, Israel’s Minister of Chaos’ (20 February 2023) <<https://www.newyorker.com/magazine/2023/02/27/itamar-ben-gvir-israels-minister-of-chaos>> accessed 2 August 2024

²⁶³ Encyclopaedia Britannica, ‘Itamar Ben-Gvir’ (30 April 2024) <<https://www.britannica.com/biography/Itamar-Ben-Gvir>> accessed 2 August 2024

²⁶⁴ Israel National News, ‘Are police afraid of Itamar Ben-Gvir?’ (12 August 2016) <<https://www.israelnationalnews.com/news/216321>> accessed 2 August 2024; The Nation, ‘Netanyahu Is Letting Israel’s Fascists Enter by the Front Door’ (23 March 2021) <<https://www.thenation.com/article/world/israel-kahane-biden-fascist/>> accessed 2 August 2024

²⁶⁵ Haaretz, ‘Explained | Why Racist Rabbi Meir Kahane Is Roiling Israeli Politics 30 Years After His Death’ (21 February 2019) <<https://www.haaretz.com/israel-news/elections/2019-02-21/ty-article/.premium/why-racist-rabbi-meir-kahane-is-roiling-israeli-politics-30-years-after-his-death/0000017f-f6f7-d887-a7ff-fef720220000>> accessed 2 August 2024; The Times of Israel, ‘Otzma Yehudit head says Kahane was ‘holy’; backs expulsion of ‘disloyal’ Arabs’ (5 February 2021) <<https://www.timesofisrael.com/otzma-yehudit-head-says-kahane-was-holy-backs-expulsion-of-disloyal-arabs/>> accessed 2 August 2024

²⁶⁶ A reference to the brutal killing of a Palestinian teenager in 2014, see @MiddleEastEye (X [formerly Twitter], 17 June 2021) <<https://twitter.com/MiddleEastEye/status/1405465248648290304>> accessed 2 August 2024

and “Gaza is a graveyard”.²⁶⁷ They repeatedly committed racist attacks, including on schools.²⁶⁸ He is personally involved in the organisation *Lehava* as well and claimed that he supports them legally to help the cause, not to earn money.²⁶⁹

In light of this years’ long pattern of incitement to racism, violence and allegedly genocide, PM Netanyahu claimed he is ‘not fit’ to be a minister.²⁷⁰ Yet, after the last elections Netanyahu appointed him as a minister of ‘national security’, a ministry that was formerly called ‘internal security’ and whose authority was expanded following Ben-Gvir’s demands. A petition filed to the High Court of Justice sought to annul his appointment, arguing his appointment is ‘unreasonable’ given his criminal record,²⁷¹ but the Court rejected the case, finding the appointment is not *extremely* unreasonable.²⁷²

Ben-Gvir is known for provoking Palestinians, for instance, by leading marches of “more than 1,000 ultranationalist settlers” to the Al-Aqsa compound.²⁷³ During a ‘tour’ in Sheikh Jarrah neighbourhood in East Jerusalem he threatened Palestinians with a gun, and called a police officer to shoot at

²⁶⁷ YNET News, ‘Inside radical right-wing group Lehava’ (1 March 2015) <<https://www.ynetnews.com/articles/0,7340,L-4610561,00.html>> accessed 2 August 2024

²⁶⁸ Haaretz, ‘Shin Bet: Anti-Arab Activists Admit to J’lem School Arson’ (11 December 2014) <<https://www.haaretz.com/2014-12-11/ty-article/shin-bet-jlem-school-arson-carried-out-by-lehava-activists/0000017f-db58-db22-a17f-fff95fe70000>> accessed 2 August 2024; The Times of Israel, ‘Police arrest head of anti-assimilation group Lehava’ (16 December 2014) <<https://www.timesofisrael.com/police-arrest-head-of-anti-assimilation-group-lehava/>> accessed 2 August 2024; YNET News, ‘Inside radical right-wing group Lehava’ (1 March 2015) <<https://www.ynetnews.com/articles/0,7340,L-4610561,00.html>> accessed 2 August 2024; Israel National News, ‘Are police afraid of Itamar Ben-Gvir?’ (12 August 2016) <<https://www.israelnationalnews.com/news/216321>> accessed 2 August 2024

²⁶⁹ YNET News, ‘Inside radical right-wing group Lehava’ (1 March 2015) <<https://www.ynetnews.com/articles/0,7340,L-4610561,00.html>> accessed 2 August 2024

²⁷⁰ The Times of Israel, ‘Netanyahu says Ben Gvir will be in coalition, but ‘not fit’ to be a minister’ (16 February 2021) <<https://www.timesofisrael.com/netanyahu-says-ben-gvir-will-be-in-coalition-but-not-fit-to-be-a-minister/>> accessed 2 August 2024

²⁷¹ The Times of Israel, ‘High Court rejects petition to disqualify far-right Ben Gvir as a minister’ (21 February 2024) <<https://www.timesofisrael.com/high-court-rejects-petition-to-disqualify-far-right-ben-gvir-as-a-minister/#:~:text=The%20Jerusalem%20District%20Court%20in,Jewish%20group%20that%20was%20banned>> accessed 2 August 2024

²⁷² The Times of Israel, ‘High Court rejects petition to disqualify far-right Ben Gvir as a minister’ (21 February 2024) <<https://www.timesofisrael.com/high-court-rejects-petition-to-disqualify-far-right-ben-gvir-as-a-minister/#:~:text=The%20Jerusalem%20District%20Court%20in,Jewish%20group%20that%20was%20banned>> accessed 2 August 2024

²⁷³ Al Jazeera, ‘Who is Israel’s far-right, pro-settler Security Minister Ben-Gvir?’ (27 August 2023) <<https://www.aljazeera.com/news/2023/8/27/who-is-israels-far-right-pro-settler-security-minister-ben-gvir>> accessed 2 August 2024; Al Jazeera, ‘Israel’s Ben-Gvir enters Al-Aqsa: Why was it seen as provocative?’ (3 January 2023) <<https://www.aljazeera.com/news/2023/1/3/israel-ben-gvir-enters-al-aqsa-why-was-seen-provocative-explainer>> accessed 2 August 2024

Palestinian stone-throwers.²⁷⁴ He advocated for changing the IDF's rules of engagement and opening fire which were too lenient in his view.²⁷⁵

In 2023, Ben-Gvir said that his family's right to travel around the West Bank was more important than the right of Palestinians ('Arabs') living there.²⁷⁶ He called for the settlement of Gaza, and the forced displacement or 'voluntary' departure of Palestinians from Gaza.²⁷⁷

On 20 November 2023, Ben Gvir **called to behead all terrorists**, 'head after head'.²⁷⁸ On 12 February 2024, he said he would **shoot children and women** should they approach the wall: "Anyone who approaches in order to harm security must receive a bullet, otherwise we will see October 7 again."²⁷⁹ He later clarified that he "[d]oes not apologize and does not stutter... We must not return to the 6/10 concept!".²⁸⁰ On 11 March 2024 Ben-Gvir protested the relocation of about seventy orphans from Gaza to the West Bank by Israel.²⁸¹

²⁷⁴ The Times of Israel, 'Extremist MK Ben Gvir pulls out gun during Sheikh Jarrah clash' (14 October 2022) <<https://www.timesofisrael.com/extremist-mk-ben-gvir-pulls-out-gun-during-sheikh-jarrah-clashes/>> accessed 2 August 2024

²⁷⁵ The Jerusalem Post, 'Ben-Gvir takes shots at IDF chief in Israeli cabinet meeting' (11 February 2024) <<https://www.jpost.com/israel-hamas-war/article-786342>> accessed 2 August 2024; The New Arab, 'Israeli minister Ben-Gvir says army can shoot women, children in Gaza' (13 February 2024) <<https://www.newarab.com/news/ben-gvir-says-israeli-army-can-shoot-women-children-gaza>> accessed 2 August 2024

²⁷⁶ Haaretz, 'Ben Gvir: HaZchut Sheli LeChaim Chashuva Yoter MiZchut HaTnua Shel HaAravim' (Ben Gvir: My Right to Life Is More Important Than the Arabs' Right to Movement)' (23 August 2023) <https://www.haaretz.co.il/news/politi/2023-08-23/ty-article/0000018a-23f3-da97-a7cb-67f770fb0000> accessed 2 December 2024

²⁷⁷ Reuters, 'Israeli ministers join ultranationalist conference urging Gaza resettlement' (29 January 2024) <<https://www.reuters.com/world/middle-east/israeli-ministers-join-ultranationalist-conference-urging-gaza-resettlement-2024-01-29/>> accessed 2 August 2024. The Jerusalem Post, 'Israel's gov't split on who should control Gaza after war' (12 November 2023) <<https://www.jpost.com/israel-news/politics-and-diplomacy/article-772928>> accessed 2 August 2024; @YehudaShaul, (X [formerly Twitter], 26 December 2023) <<https://twitter.com/YehudaShaul/status/1739641272350962084>> accessed 2 August 2024

²⁷⁸ @YehudaShaul, (X [formerly Twitter], 26 December 2023) <<https://twitter.com/YehudaShaul/status/1739641250611937632>> accessed 2 August 2024

²⁷⁹ Middle East Monitor 'Ben-Gvir calls on Israel army to shoot Gaza's children, women' (12 February 2024) <<https://www.middleeastmonitor.com/20240212-ben-gvir-calls-on-israel-army-to-shoot-gazas-children-women/>> accessed 2 August 2024; for a similar translation: The Jerusalem Post, 'Ben-Gvir takes shots at IDF chief in Israeli cabinet meeting' (11 February 2024) <<https://www.jpost.com/israel-hamas-war/article-786342>> accessed 2 August 2024

²⁸⁰ [self-translation] @itamarbengvir (X [formerly Twitter], 11 February 2024) <https://twitter.com/itamarbengvir/status/1756672068781838387?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1756672068781838387%7Ctwgr%5E747e39ce17b02a1de911668184b8dacaf365b157%7Ctwcon%5Es1&ref_url=https%3A%2F%2Fwww.jpost.com%2Fisrael-hamas-war%2Farticle-786342> accessed 2 August 2024

²⁸¹ In slightly different translations: The Jerusalem Post 'Israel moves 70 orphans from Gaza to the West Bank - report' (11 March 2024) <<https://www.jpost.com/breaking-news/article-791364>> accessed 2 August 2024; The Times of Israel, 'IDF said to transport Gazan orphans to West Bank via Israel without cabinet's OK' (11 March 2024) <<https://www.timesofisrael.com/idf-said-to-transport-gazan-orphans-to-west-bank-via-israel-without-cabinets-ok/>> accessed 2 August 2024

These indications are few samples but they suffice to constitute a reasonable grounds to believe that Ben-Gvir acted with the requisite *mens rea* when he allegedly committed the crime of direct and public incitement to commit genocide. This pattern of incitement to racism and violence towards Palestinians took the form of a plan to destroy the Palestinian group in Gaza as such, as the statements of 17 October and 10 November 2023 illustrate. This and other statements of Ben-Gvir therefore were inciting others to commit genocide within the meaning of Article 25(3)(e) of the Rome Statute.

3.7 Zvi Yehezkeli

On 20 October 2023, journalist Zvi Yehezkeli²⁸² stated on Israeli TV (Channel 13): “If the definition is to destroy Hamas, you have to destroy everyone connected to Hamas. And everyone connected to Hamas is the government, the commanders, military personnel, supporters, clans, and everyone who kicked out the Palestinian Authority in 2007 and established the Hamas government. **It’s hundreds of thousands.** And in order to reach this goal, you have to do it first and then see what happens.” When asked by the presenter: “Do you think that the State of Israel can kill hundreds of thousands of Palestinians in the Gaza Strip and this thing will pass?” He responded: “There is a report... that a **million Palestinians have already left to the south of Gaza. And anyone who stayed there [north] is considered a terrorist.**”²⁸³

On 19 December 2023, Yehezkeli stated on Channel 13: “In my opinion, the IDF should have launched a **more fatal attack with 100,000 killed** in the beginning. **Yes, there are 20,000 Hamas members [...]** I don’t know who was and who wasn’t involved. **And who is or isn’t innocent [...]** The moment 1,400 people were killed, we should have launched such a fatal attack...” When asked by the presenter: “But those 100,000, Zvika, you really want to kill them?” He added: “1,400 people were killed [...] you need to be more fatal than the attack we saw.”²⁸⁴

²⁸² Zvi Yehezkely is an Israeli journalist and head of the Arab desk at Israeli News 13, known for his investigative reporting on Arab and Muslim societies. His work often portrays these communities through a securitized lens, emphasizing themes of extremism and terrorism. Yehezkely’s documentaries, including undercover investigations in Europe, have faced accusations of perpetuating stereotypes and Islamophobia. He is residing in the Gush Etzion settlement bloc.

²⁸³ @Middleeasteye (Instagram, 1 November 2023) <<https://www.instagram.com/middleeasteye/reel/CzGiuZ8oB6D/>> accessed 2 August 2024

²⁸⁴ @MiddleEastEye (Youtube channel, 20 December 2023) <<https://www.youtube.com/watch?v=NuuEYyvyElQ>> accessed 2 August 2024

Direct

Content

As per Yehezkeli, to destroy Hamas, “everyone **connected** to Hamas” must be destroyed as well. Not combatants but civilians, not military but political members. The call is not abstract but concrete: if **Hamas is composed of 20,000, the IDF should kill “hundreds of thousands”, or ‘just’ 100,000.** Because Hamas killed 1,400 Israelis, all Palestinians in Gaza should be considered terrorists. A direct incitement to indistinctively retaliate through mass violence and collective punishment. Yehezkeli calls for a “more fatal attack” whilst explicitly admitting that **he does not “know who is or isn’t innocent”**, conveying the message any such distinction is irrelevant.

The call “to be more fatal” and cause more civilian harm is *directly* addressed to the political decision-makers, commanders, and soldiers. The employer of Yehezkeli took no disciplinary or other measures against him, demonstrating the extent to which the intentional mass killing of innocent Palestinian civilians has been normalised by mainstream media. Yehezkeli played a key role in shifting the discourse within Israeli society, from targeting ‘Hamas’ to everyone, from thousands to tens of thousands to hundreds of thousands.

Timing

By 20 October 2023, the date Yehezkeli called to destroy not only Hamas but also everyone who is ‘connected’ to Hamas, 4,137 Palestinians had been killed.²⁸⁵ Israel was still grappling with the aftermath of the attacks whilst enjoying virtually unanimous support from the international community. By 19 December 2023, the date Yehezkeli criticized the extreme right government on national TV by saying the attack need to be “more fatal”, at least 19,667 Palestinians were killed in Gaza, about 70 percent of them women and children.²⁸⁶

Audience

Zvi (Zvika) Yehezkeli is a Israeli television journalist. Until recently he was the Arab affairs correspondent and head of the Arab desk position at channel News 13, one of the three major Israeli

²⁸⁵ OCHA, ‘Hostilities in the Gaza Strip and Israel | Flash Update #14’ (20 October 2023) <<https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-14>> accessed 2 August 2024

²⁸⁶ OCHA, ‘Hostilities in the Gaza Strip and Israel | Flash Update #73’ (20 December 2023) <<https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-73-enarhe>> accessed 2 August 2024

television channels, and the one that is considered politically to be left-oriented. Appearing for more than 15 years on Channel 13 (formerly Channel 10) and considered one of the most famous Israeli ‘experts’ for the Arab world, Yehezkeli is an exceptionally popular political figure in Israel.

Because the IDF relies on reserve service, Yehezkeli’s statements on national TV reached many soldiers that have been or soon would be called to service as well as their relatives. His call to destroy not only Hamas but also everyone ‘connected’ to it was addressed to a broad audience encompassing both the political and military decision-makers, and the ‘simple’ soldiers interpreting and implementing the formers’ orders on the ground.

The message conveyed to this audience is that the already unprecedented military campaign that is unfolding is not enough, that there is no attack that would be sufficiently fatal, at least not until the death toll reaches “hundreds of thousands” or at minimum “100,000”, irrespective of and without even checking “who was and who wasn’t involved”, “who is or isn’t innocent”.

Yehezkeli’s popularity and especially his pseudo-expertise with respect to ‘the Arabs’ has had and still has a direct and immense impact on the mindset of both ordinary soldiers and senior politicians and generals. The statements’ broadcast on national television further amplifies this impact, shaping public opinion and reinforcing the perception that such actions are necessary, legitimate and justified.

The content, audience, and timing of Yehezkeli’s statements provide a reasonable ground to believe they qualify as *direct* call to commit genocide within the meaning of Article 25(3)(e) RS.

Public

Zvi Yehezkeli’s statements were made on the national television channel he works for, which ensured extensive publicity and wide reach. Channel 13 is a prominent broadcaster in Israel and as such it is attracting significant attention from the public, media, and policymakers. For this reason, the Israeli PM Netanyahu attempted several times to shut it down or to have it bought or controlled by his supporters. Because the political orientation of Yehezkeli’s reporting and opinion conflicts with the general agenda of this media platform, his statements gain even more traction.

Be that as it may, Yehezkeli's statements have reached a broad audience, directly or via diffusion on social media, where Yehezkeli has more than 400,000 followers.²⁸⁷ Hence, both statements qualify as public statements according to the established jurisprudence set out above.

Mens Rea

On 12 October 2023, during an interview on Israel National News Channel Arutz Sheva, an extract of which later shared on his Youtube channel, Yehezkeli said: "If, during the war, we think of the Gazan children instead of the slaughtered [Israeli] children - we will lose."²⁸⁸

On 26 October 2023, on Channel 13, Yehezkeli revealed that Israel had carried out a premeditated attack on the **family** of Al-Jazeera correspondent Wael Dahdouh: "Generally we know the target. For example, today there was a target: the **family** of an Al Jazeera reporter. In general, we know."²⁸⁹

This is thus no longer about distinction between combatants and civilians or culprits and innocents. This is no longer about the proportionality between the military advantage and the collateral civilian casualties. Yehezkeli sees no problem neither with a journalist like him being not a collateral but the primary target, no problem with assassinating his innocent family members, and no problem with assassinating also the family not as collateral damage but as the military target itself.

An Israeli 'journalist' knows albeit only 'in general' what the target is. But Yehezkeli openly admits he does not know, and seemingly does not care, whether the known target is innocent, or not. For the intentional killing of a colleague's family is arguably a part of a broader campaign, one against freedom of press and free speech, one that is intended to prevent the national and international communities from knowing who Israel chooses to target, and more broadly what is currently unfolding in Gaza.

On 19 March 2024, in an interview on Israel's Kol Barama radio station, Yehezkeli said: "In order to destroy Hamas and its capabilities, you need to take measures, just like in the northern Gaza Strip, to destroy all the capabilities in general. **You need to bring Gaza to the point of a humanitarian**

²⁸⁷ 308,941 followers on Facebook, 79,900 on TikTok, 32,900 on Instagram, and 11,100 on Youtube as of 2 August 2024

²⁸⁸ @ArabDesk10 (Youtube channel, 12 October 2023) <<https://www.youtube.com/watch?v=r4QCdr34Rmc>> accessed 2 August 2024

²⁸⁹ Middle East Eye, 'Israeli journalist admits that Al Jazeera journalists' family was targeted in bombing' (26 October 2023) <<https://www.middleeasteye.net-update/israeli-journalist-admits-al-jazeera-journalists-family-was-targeted-bombing>> accessed 2 August 2024

disaster, and then, maybe, which I think would also be a mistake, rebuild and bring a Palestinian regime... **the Gaza Strip has no future**, unless we change the rules of the game there.”²⁹⁰

In this statement, Zvi Yehezkeli calls to deliberately inflict on the group of Palestinians in Gaza conditions of life calculated to bring about its physical destruction, in whole or in part, within the meaning of Article 6(c) RS. It is reasonable to believe that the *mens rea* of this statement is similar to the *mens rea* that accompanied Yehezkeli’s other statements, and so there is more than a reasonable ground to believe mental element of the crime has been established.

On 16 July 2024, Yehezkeli was interviewed in the podcast of Haaretz, where he was confronted with his genocidal statements:

Journalist: “...You said that 100,000 Gazans should be killed, you were accused of genocide... do you regret that statement?”

Yehezkeli: “I don't regret it...I can explain it...Israel should have gone for the big deal [hostages\prisoners deal- O.S.]... then **to go and massacre 100,000 people** connected to Hamas...”.

Journalist: “You called it a massacre yourself now”.

Yehezkeli: “Right, what does it matter what I call it... **I call killing 100,000 Hamasniks.**”

Journalist: “... But can a democratic country do something like that?... One hundred thousand Hamasniks, some not involved... Not all of them are Hamasniks in Gaza...”.

Yehezkeli: “Come on, explain to me who isn't a Hamasnik in Gaza? I'd love to know... A teacher in a Hamas school, is he a Hamasnik?... **Hamas is a regime... even if he's a teacher, a kindergarten teacher, even if he was an official who transfers salaries, as far as I'm concerned, is a Hamas man... If your goal is to overthrow the Hamas regime, these people are targets...**”.

Journalist: “...**But there are already proceedings against Israel in The Hague for less serious things, some of them, by the way, for statements made by politicians or journalists. You said those things after the proceedings began, so you're not in it, but a massacre of 100,000 Hamas members is something significant...**”

²⁹⁰ @MiddleEastEye (Youtube channel, 21 March 2024) <<https://www.youtube.com/shorts/a-L9ICYu80>> accessed 2 August 2024

Yehezkeli: "... It should have been **an opening blow, and that is... deterrence... That is what makes an impression in the Middle East...** If you ask me what would have made an effect...".

Journalist: "Would the international community let you... kill 100,000 people...?"

Yehezkeli: "...There is an international understanding that what you do in the first month or two is something you can't do afterwards...".²⁹¹

Like Herzog and Katz, Yehezkeli received a second opportunity to reflect on his inciting statements and deny, take back or otherwise distance himself from them. Instead, he reiterated his sincere and straightforward position, according to which a Hamas member is not limited to combatants or civilians taking direct part in hostilities, but rather to every person that is part of its bureaucratic and civilian apparatus: the teachers, doctors, social workers, public servants and so on. Yehezkeli's *mens rea*, therefore, reveals an intent to massacre masses of Palestinians for the purpose of deterrence.

Yehezkeli's dehumanizing rhetoric has played a significant role in the plausible commission, *a-la-ICJ*, of genocidal acts in Gaza. The substitution of names with numbers, the reduction of countless tragedies to statistics, the normalization of targeting civilians, then journalists, then families of journalists, the complete disregard to human lives, the dehumanization of these lives – may explain the unprecedented figures of civilian casualties as well as the overall death toll.

In conclusion, there is reasonable grounds to believe that Yehezkeli's statements amount to direct and public incitement to commit genocide under Article 25(3)(e) Rome Statute.

3.8 Giora Eiland

Also Giora Eiland's²⁹² statements were part of the evidence submitted to the ICJ. Based on South-Africa's body of evidence the Court cited three of the suspects identified in this Communication, and ordered the Israeli government to prevent and punish inciters to genocide.

²⁹¹ Haaretz, 'HaPodcast HaShvu'i: Ma Omed MeAchorei HaMashber HaPolitik HaNochachi? (The Weekly Podcast: What Is Behind the Current Political Crisis?)' (16 July 2024) <https://www.haaretz.co.il/digital/podcast/weekly/2024-07-16/ty-article-podcast/00000190-baa1-d3a7-a79e-faf3604d0000> accessed 2 December 2024

²⁹² Giora Eiland is a retired Major General of the IDF and a former head of the Israeli National Security Council. He played a significant role in shaping Israeli defense policy, particularly in the context of the Israeli-Palestinian conflict. Eiland has been a vocal proponent of hardline security measures and unilateral approaches, advocating for controversial strategies that have drawn international criticism.

On 7 October 2023, the retired IDF major general, the former head of the Israeli National Security Council, the soon-to-be adviser to the Israeli Defense Minister in the current war, wrote the following:

“This is what Israel has begun to do — **we cut the supply of energy, water and diesel to the Strip... But it’s not enough. In order to make the siege effective, we have to prevent others from giving assistance to Gaza... The people should be told that they have two choices: to stay and to starve, or to leave. If Egypt and other countries prefer that these people will perish in Gaza, this is their choice”.²⁹³**

On 10 October 2023, in an article in one of the most popular newspapers and online new platforms, Yedioth Aharonot \ Ynet, Eiland called for Gaza to be made uninhabitable:

“The State of Israel has no choice but **to make Gaza a place that is temporarily, or permanently, impossible to live in.** The translation of such a decision requires the following steps: First, **to inform the residents of Gaza today that if they want to remain alive, then within 12 hours they must either leave for Egypt or gather on the seashore. Every building will be a military target.** Second, they must evacuate the UNRA schools and the Shifa Hospital, and immediately after that the Air Force will attack these targets, since the bunkers under them are Hamas headquarters. Third, **not to be satisfied with stopping the flow of electricity, diesel and water to Gaza, but to gradually attack the targets that provide these vital needs,** and if necessary also to block with fire any vehicle passage from the city of Rafah to the north. **Creating a severe humanitarian crisis in Gaza is a necessary means to achieve the goal. There is nothing to fear from international pressure... We are in a situation of either us or them, and the conclusion is clear.**²⁹⁴

Another statement cited in the South African application to the ICJ comes from an article published in Yedioth Ahronoth on 19 November 2023. The article, titled “Let’s not be intimidated by the world”, which was also reposted on X by the suspect Bezael Smotrich:

“...**Israel is not fighting against a terrorist organization but against the State of Gaza.** The State of Gaza is indeed led by Hamas, and this organization has succeeded in recruiting all the resources of its State, the support of most of its residents, and the absolute loyalty of its civil administration...”

²⁹³ Fathom, ‘A new turning point in the history of the State of Israel. Most people don’t understand that’ (7 October 2023) <<https://fathomjournal.org/opinion-a-new-turning-point-in-the-history-of-the-state-of-israel-most-people-dont-understand-that/>> accessed 2 August 2024

²⁹⁴ YNET, ‘This is not revenge. It’s either us or them’ (10 October 2023) <<https://www.ynet.co.il/yedioth/article/yokra13625377>> accessed 2 August 2024

in this sense, **the State of Gaza is very similar to Nazi Germany**, where a similar process had taken place. Since this is the precise description of the situation, **the fighting should be handled accordingly...** **“Who are the ‘poor’ women of Gaza? They are all the mothers, sisters or wives of Hamas murderers.** On the one hand they are part of the infrastructure supporting the organization, on the other hand if they will experience a humanitarian disaster, then presumably Hamas fighters and more junior commanders will be going to understand that the war is useless and that it is better to prevent irreversible harm to members of their families... The way to win the war faster and at a lower price for us obligates **systems’ collapse on the other side and not only killing of more Hamas combatants. The international community warns us of a humanitarian disaster in Gaza and of severe epidemics. We must not shy away from this, as difficult as that may be. After all, severe epidemics in the south of the Gaza Strip will bring victory closer and will reduce casualties among IDF soldiers. And no, it’s not cruelty *per se*, because we do not support the suffering of the other side as an end but as a means...”** When senior Israeli figures say in the media ‘It’s either us or them’ we should crystalize the question of who is ‘them’. **“They’ are not only Hamas fighters with weapons, but also all the ‘civilian’ officials, including hospital administrators and school administrators, and also the entire Gaza population** who enthusiastically supported Hamas and cheered on its atrocities on October 7th.”²⁹⁵

As shown below, similar to Ben-Gvir and Smotrich, also Eiland’s inciting statements were not a response to the 7/10 attacks, but a coherent position he consistently advocated for years before 2023. Eiland continued to incite others to commit genocidal acts also a year after the 7/10 attacks. In September 2024, a body called “the forum of reserve commanders and combatants” introduced a pilot of Eiland’s plan, titled “The Generals’ Plan - the initiative of major general Giora Eiland”.²⁹⁶

The first phase of the plan “demand the evacuation and departure of all the citizens remaining in the area [from Netzarim corridor to the northern border - O.S] (about 300,000 people)... to the south within a period of one week. At the end of the time that will be given, it will be announced that the northern area of the Gaza Strip is a closed military area. The second phase of the plan imposes “a complete and tight siege... which includes... preventing the entry of supplies, including food, fuel

²⁹⁵ Yedioth Ahronoth, ‘Let’s not be intimidated by the world’ (Print, 19 November 2023) in @bezalelsm (X [formerly Twitter], 19 November 2023) <<https://twitter.com/bezalelsm/status/1726198721946480911>>

Translation by Talula Sha, Tweet (19 November 2023), <<https://twitter.com/TalulaSha/status/1726267178201362438>> (emphasis added) accessed 2 August 2024

²⁹⁶ @hamefakdim-bemiluim (YouTube channel, 4 September 2024) <<https://www.youtube.com/watch?v=IeHnWp1JmzI>> accessed 2 December 2024

and water. The lifting of the siege will only be possible if the enemy trapped in this area, about 5000 terrorists, lay down their weapons and surrender. After the surrender of the enemy, it will be possible to enter and purify the area of Gaza City almost without an enemy”. According to Eiland’s initiative, implementation of this plan “will bring the surrender of Hamas closer”, and if it does not, “it will be possible to carry out this plan in other areas (Rafah, the center camps, etc.)”. In addition, it is ‘assumed’ that the “pressure through supply control will bring a hostage deal closer and allow it to be carried out under more favorable conditions for Israel”.²⁹⁷

The “Generals’ Plan” demonstrates how an incitement to genocide by a private individual who is no longer part of the IDF chain of command, like Eiland, can have an influential impact on the commission of allegedly genocidal acts on the ground, even without officially adopting the plan.

Eiland’s plan to starve the population in order to forcibly transfer it, to block entry of humanitarian aid, and to target all buildings and people who decide or have no choice but to remain in the declared area. This is the situation that is unfolding as of October 2024 in North-Gaza.

On 22 September 2024, PM Netanyahu told the Security and Foreign Affairs committee of the Knesset that discussions have begun on Eiland’s “Generals’ Plan”.²⁹⁸ As of October 2024, there is evidence from multiple sources that Eiland’s plan is being formally or informally implemented.

On 13 October 2023, “politico” reported that the “Israeli Prime Minister Benjamin Netanyahu is examining a plan to seal off humanitarian aid to northern Gaza in an attempt to starve out Hamas militants, a plan that, if implemented, could trap without food or water hundreds of thousands of Palestinians unwilling or unable to leave their homes... One official with knowledge of the matter said parts of the plan are already being implemented... No trucks of food, water or medicine have entered the north since Sept. 30, according to the U.N. and the website of the Israeli military agency overseeing humanitarian aid crossings”.²⁹⁹

²⁹⁷ Hamefakdim-Bemiluim, 'Tochnit HaAlufim - Yozmat HaAluf BaMil' Giora Eiland - Takzir (The Generals' Program - An Initiative by Retired General Giora Eiland - Summary)' (n.d.) <<https://hamefakdim-bemiluim.org/%D7%AA%D7%95%D7%9B%D7%A0%D7%99%D7%AA-%D7%94%D7%90%D7%9C%D7%95%D7%A4%D7%99%D7%9D/>> accessed 2 December 2024

²⁹⁸ Mako, 'Ma Ya'ale BeGoral Retzuat Aza? "Tochnit HaAlufim" SheNetanyahu Hechel L'Dun Ba (What Will Become of the Gaza Strip? "The Generals' Plan" Netanyahu Began to Discuss)' (22 September 2024) <https://www.mako.co.il/news-military/2024_q3/Article-32312f632e91291027.htm> accessed 2 December 2024

²⁹⁹ Politico, 'Netanyahu Mulls Plan to Empty Northern Gaza of Civilians' (13 October 2024) <<https://www.politico.com/news/2024/10/13/netanyahu-mulls-plan-to-empty-northern-gaza-of-civilians-00183574>> accessed 2 December 2024

Also “Haaretz” reported that according to IDF commanders in the field, “the decision to move to operate in the north of the Gaza Strip... was mainly intended to put pressure on the population of Gaza, who are required to move once again from the area to the coastal area as winter approaches. It is not impossible that what is being carried out now prepares the ground for the decision of the political echelon to prepare the northern Gaza Strip for the implementation of the siege and starvation plan of Major General Giora Eiland, according to which all residents of the northern Gaza Strip will be evacuated to humanitarian areas in the southern Gaza Strip, **and those who choose to remain in the northern Gaza Strip will be considered a Hamas militant whose targeting is permissible.** Also, while the population of the south of the Gaza Strip will receive humanitarian aid - **in the north of the Gaza Strip they will starve the residents if they decide to stay there...**”.³⁰⁰

On 16 October 2024 “Haaretz” reported that the US Vice President Kamala Harris unusually condemned Israel, citing a UN report indicating that no food shipment has entered the northern Gaza Strip for almost two weeks, which is in line with “politico” reporting.³⁰¹

This has been confirmed on 23 October 2024 when, in a submission to the Israeli High Court of Justice, the Israeli government admitted that **for two weeks it deliberately and knowingly prevented entrance of humanitarian aid** to the protected population in the north of the Gaza Strip and that it continues to withhold aid even now from the residents of Jabalia.³⁰²

“Haaretz” reports that “[t]he far-right parties interfere in the decision-making, and are assisted by reserve officers in the command headquarters and the divisions. This is related to the “Generals’ Plan” put together by reserve Major General Giora Eiland with other retired officers. The ultimate goal of these plans is to push several hundreds of thousands of Palestinians who are still staying there from the north of the Gaza Strip, beyond the Gaza River in its center. **Ideas arise such as targeted shooting near a population, and even moves to starve it.** They did not receive official approval

³⁰⁰ Haaretz, 'B'khirim B'Ma'arechet HaBitachon Me'arikhim: HaMemshalah Zancha Et HaMo'am U'Mekademet Sipuch Zochal Be'Aza (Senior Officials in the Security Establishment Estimate: The Government Abandoned Negotiations and is Advancing a Slow Annexation in Gaza)' (13 October 2024) <<https://www.haaretz.co.il/news/politics/2024-10-13/ty-article/.premium/00000192-8282-de72-afba-b2d79d410000>>accessed 2 December 2024

³⁰¹ Haaretz, 'Parshanut BeHateqefah U'BeHagana, Yisrael Mekabelet Tazkoret LeTlu'ata Be'Aravim (Analysis: In Attack and Defense, Israel Receives a Reminder of Its Dependence on the U.S.)' (16 October 2024) <<https://www.haaretz.co.il/news/politics/2024-10-16/ty-article/.highlight/00000192-9156-d9c2-a7f3-9d568b540000>>accessed 2 December 2024

³⁰² HCJ 2280/24 Gisha et al. v. The Government of Israel et al. “Response of the Respondent to the Request for an Interim Measure dated 14/10/24” (23 October 2024). See [Hebrew] <<https://static.gisha.org/uploads/2024/10/2280-24-23-10-24-%D7%AA%D7%92%D7%95%D7%91%D7%94-%D7%9C%D7%A6%D7%95-%D7%91%D7%99%D7%A0%D7%99%D7%99%D7%9D-%D7%9C%D7%94%D7%92%D7%A9%D7%94.pdf>>accessed 2 December 2024

from the chain of command in the IDF, but the very engagement with them, and the political involvement of right-wing parties and media organizations, seeps down... Three reserve soldiers serving in the Gaza Strip, told “Haaretz” separately that “the ‘generals’ plan’ is actually being implemented in the field, even if the General Staff and the Southern Command have not officially adopted it. ‘The commanders openly say that the Eiland Plan Promoted by the IDF’,” ...’the goal is to give a deadline to residents who live north of the Netzer area to move to the south of the Strip. **After the date, anyone in the north will be considered an enemy and killed.** It does not meet any standard of international law. People sat down and wrote an order with charts and an operational idea, **at the end of which they shoot those who are not ready to evacuate.** The very existence of this idea is unfathomable’.”³⁰³

According to a journalistic investigation, “a fierce attack began on 5 October 2024 on the north of the Gaza Strip - the Air Force, artillery, and later, the ground entry of the forces of Division 162. The residents of Beit Hanun, Beit Lahia and Jablia were ordered to move south... Dozens of injured and dead among the displaced persons were reported, mainly in the Jabaliya area. And gradually the atrocities were revealed... The IDF scattered explosive barrels and flattened hundreds of houses; soldiers documented themselves setting whole buildings on fire. Within days, Jabaliya looked like an apocalyptic vision of the end of the world... in the “Generals’ Plan”, the civilian population was allotted a week to evacuate before the area was declared a closed military area. In practice, there was no such week. From the first moment, the IDF treated the northern Gaza Strip as a military area where any movement would result in deadly fire... The encirclement of the north of the Gaza Strip was accompanied by a complete blockade of the entry of food and medicine, and appeared to be a deliberate policy of starvation. According to the UN food program, the starvation actually began on October 1, i.e. 5 days before the military operation. These things received official approval, implicitly, from the American demand from Israel, on October 15, to allow aid to enter the northern Gaza Strip... The hundreds of dead and wounded during the last two weeks are pouring into the three only hospitals in the northern Gaza Strip... the hospitals are no longer able to provide medical care for these quantities of casualties, and are now housing only a few dozen seriously wounded... Already in the first days of the operation, the IDF ordered the three hospitals to evacuate within 24 hours, otherwise everyone inside them would be captured or die. Not exactly the "week of mercy" that the “Generals’

³⁰³ Haaretz, 'Parshanut BeHateqefah U'BeHagana, Yisrael Mekabelet Tazkoret LeTlu'ata Be'Aravim (Analysis: In Attack and Defense, Israel Receives a Reminder of Its Dependence on the U.S.)' (16 October 2024) <<https://www.haaretz.co.il/news/politics/2024-10-16/ty-article/.highlight/00000192-9156-d9c2-a7f3-9d568b540000>> accessed 2 December 2024

Plan” provides. Kamal Adwan Hospital and its surroundings were shelled by the IDF at the beginning of the operation and in the sequel, the fuel supply is cut off, which puts intensive care patients and babies in the incubators at immediate risk... On October 18, the IDF bombed the Indonesian Hospital and Al-Awda Hospital. As a result of the power outage at the Indonesian Hospital, two patients died. The next day, the Indonesian hospital ceased to function...The picture is starting to clear up. The “Generals’ Plan” is not only a scam but also an operational flop. The population that received threats... is not ready to voluntarily evacuate to flying shells and projectiles. Even on the brink of death, a person will prefer the known suffering over the unknown horror... The extermination was the stage of intimidation, the terror phase, the IDF's way of convincing the residents of the northern Gaza Strip to evacuate "voluntarily". But that wasn't enough either. Then infantry were sent to the shelters of the displaced and forced them, with pulled canes, to go outside and start marching south (after the men were separated and taken for questioning or arrest). All signs show that Israel does not plan to let the displaced return. In this sense, the destruction in northern Gaza is different from anything we have seen before. The IDF really makes sure to burn, destroy and raze every building after the Palestinians leave - and sometimes even on top of them...”³⁰⁴

Direct

Eiland’s calls to intentionally either kill or force the departure of the targeted population from Gaza, to intentionally create humanitarian crisis that would starve and spread severe plagues among its members, to intentionally halt the supply of basic means for a minimal physical survival such as water, to intentionally prevent third parties such as UN bodies from providing these means, to intentionally “attack the targets that provide these vital needs”, to intentionally make Gaza temporarily or permanently inhabitable (‘impossible to live in’), to declare every building in Gaza as a military target, to give hundreds of thousands of people 12 hours to leave their homeland or be displaced along the seashore, to target “**all the mothers, sisters and wives**” of ‘terrorists’, to go beyond the killing of Hamas combatants and bring a total collapse of the civil system and social fabric, to treat the targeted group with cruelty as a means to the end of winning the war, to target

³⁰⁴ Idan Lando, 'Hashmada U'Transfer BeTzafon Retzuat Aza: Me'aver Le'Termit Tochnit HaAlufim (Destruction and Transfer in Northern Gaza Strip: Beyond the Deception of the Generals' Plan)' (22 October 2024) <https://idanlandau.com/2024/10/22/%D7%94%D7%A9%D7%9E%D7%93%D7%94-%D7%95%D7%98%D7%A8%D7%A0%D7%A1%D7%A4%D7%A8-%D7%91%D7%A6%D7%A4%D7%95%D7%9F-%D7%A8%D7%A6%D7%95%D7%A2%D7%AA-%D7%A2%D7%96%D7%94-%D7%9E%D7%A2%D7%91%D7%A8-%D7%9C%D7%AA%D7%A8/?utm_source=pocket_shared> accessed 2 December 2024

“‘civilian’ officials, including hospital administrators and school administrators, and also the entire Gaza population” as a whole – each of these calls is a *direct* call inciting others to commit killing members of the targeted group, to cause serious bodily or mental harm to members of the group, to deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part, or to impose measures intended to prevent births within the group within the meaning of Articles 6 and 25(3)(e) of the Rome Statute.

After 9 October 2023, Gazans’ access to water from all sources dropped by 95%. By mid-november 2023, all of Gaza’s wastewater treatment plants and most of its 65 sewage pumping stations were forced to shut down. 70% of Gazans resort to drinking salty and contaminated water. A month after Eiland’s statement, almost half of key water and sanitation facilities were destroyed or damaged.³⁰⁵

Extermination through starvation has been recognized as a form of genocide.³⁰⁶ Forcible displacement is an element of ethnic cleansing, which could fall within the meaning of the Genocide Convention.³⁰⁷ Yet Israel has been and is still defying the ICJ order to take “immediate and effective measures” to ensure sufficient humanitarian assistance and enable basic services.³⁰⁸

Critical crossings remained closed for long periods and many logistical and administrative obstacles have been put in place to prevent widespread aid from entering Gaza. Experts and NGOs on the ground have been reporting that Israel is generating “famine-like conditions”, “while obstructing and undermining the humanitarian response.”³⁰⁹

Infectious diseases and epidemics have spread in an unprecedented way. They are aggravated by the intentional destruction of Gaza’s hospital system. 24 hospitals have been damaged in Gaza since the start of conflict, tremendously overstressing hospital capacity. An unprecedented number of

³⁰⁵ Center for Strategic and International Studies, ‘The Siege of Gaza’s Water’ (12 January 2024) <<https://www.csis.org/analysis/siege-gazas-water>> accessed 2 August 2024

³⁰⁶ The Conversation, ‘La notion de génocide: entre l’histoire, le droit et la politique’ (20 June 2023) <<https://theconversation.com/la-notion-de-genocide-entre-l-histoire-le-droit-et-la-politique-203121>> accessed 2 August 2024

³⁰⁷ UN Office on Genocide Prevention and the Responsibility to Protect, ‘Ethnic cleansing’ (n.d.) <<https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>> accessed 2 August 2024

³⁰⁸ Amnesty International, ‘Israel defying ICJ ruling to prevent genocide by failing to allow adequate humanitarian aid to reach Gaza’ (26 February 2024) <<https://www.amnesty.org/en/latest/news/2024/02/israel-defying-icj-ruling-to-prevent-genocide-by-failing-to-allow-adequate-humanitarian-aid-to-reach-gaza/>> accessed 2 August 2024

³⁰⁹ Al Jazeera, ‘Israel’s blocking of aid creating ‘apocalyptic’ conditions in Gaza’ (7 March 2024) <<https://www.aljazeera.com/news/2024/3/7/israels-blocking-of-aid-creating-apocalyptic-conditions-in-gaza>> accessed 2 August 2024

respiratory infections, inflammatory skin diseases, diarrhoea and cases of malnourishment have been witnessed, in part due to the consumption of unsafe water and the lack of medical supplies.³¹⁰

In December 2023, UNRWA Commissioner Philippe Lazzarini described the situation in Gaza as “a living hell”, stating that “the people in Gaza are now crammed into less than one third of the original territory.” He added that it was “unrealistic to think that people [would] remain resilient in the face of unliveable conditions of such magnitude”.³¹¹

Eiland’s “it’s us or them” rhetoric is used to justify the targeting of the group ‘as such’ (school and hospital administrators, mothers and daughters, “the entire Gaza population”). It is used to justify the overall objective of this campaign, as the death or deportation dilemma this group is facing to date reflects. It is used to justify the necessary means, *a-la-Eiland*, to achieve this end.

Eiland’s call to perpetrate mass and indiscriminate killings, to forcibly transfer 90% of the population, to starve and spread severe epidemics, to target all civil buildings and infrastructure, was driven by his explicit and open “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”, namely a straightforward and *direct* call inciting others to commit genocide as per Articles 6 and 25(3)(e) of the Rome Statute. As noted above, the PTC found this goal has been achieved, and there are reasonable grounds to believe that these incitement and policies intentionally created conditions calculated to bring about the destruction of Palestinians in Gaza

Public

Eiland is a prominent and greatly influential public figure. He has had a very successful career as a Major General of the IDF, serving as Head of the Planning Branch and Head of the Operational Branch. He was also the head of the Israeli National Security Council, which is the “headquarters for issues related to foreign affairs and national security of the prime minister and government”, responsible for designing and planning the national security policy of Israel.³¹² These appointments

³¹⁰ UNICEF, ‘UNICEF State of Palestine Humanitarian Situation Report No. 15 (Escalation)’ (17 January 2024) <<https://reliefweb.int/report/occupied-palestinian-territory/unicef-state-palestine-humanitarian-situation-report-no-15-escalation-11-17-january-2024>> accessed 2 August 2024

³¹¹ @MiddleEastEye (Youtube channel, 14 December 2023) <<https://www.youtube.com/watch?v=IrUKLpwpDME>> accessed 2 August 2024

³¹² Government of Israel, ‘National Security Council’ (2 December 2021) <<https://www.gov.il/en/pages/about-the-nsc>> accessed 2 August 2024

of Eiland evidences the influence he has on top military and political elites of Israel. His opinion and his knowledge are highly valued on defence and military strategies matters.³¹³

During the past year, Eiland was advising the former Defense Minister Yoav Gallant, one of the two Israeli nationals against whom the PTC issued arrest warrants for the alleged commission of war crimes and crimes against humanity against Palestinians in Gaza. Alongside Eiland Gallant is also a suspect of incitement to genocide in the present case, whose statements were also cited in the ICJ decision that ordered the Israeli Government to prosecute and punish inciters to genocide.

More importantly, Eiland is also a regular commentator in Israeli TV, appearing almost every night in the most popular news program in the country (channel 12's '*Hamahadura Hamerkazit*'). This double role positions Eiland in a very powerful place: his audience is at the same time the minister in charge of the military, and the general public as a whole.

Eiland is not seen as biased. He is affiliated with the liberal centre and even the Zionist left. He often criticises PM Netanyahu and his government. A former IDF general, he enjoys heroic aroma. He is perceived as a rational analyst and credible expert. This is why his inciting statements reach various audiences and have unprecedented impact. This also why they are so dangerous: whilst the content is at times more extreme than that of the most extreme right wing politicians, the form and medium are perceived as highly institutional and mainstream. Indeed, on 19 November 2023, the Finance Minister Bezalel Smotrich published a picture of the above-cited Eiland's column in Yedioth Ahronot on his X account, commenting: "I agree with every word of Giora Eiland in this column."³¹⁴

In his statements, Eiland directly addresses "the State of Israel" (or use "we" pronoun) which includes its government, population and public institutions. He also specifically targets the Israeli military and the political decision-makers. His first statement, for example, seems to be based on his status as a senior veteran and is formulated as an objective advice to the military on how to impose an effective siege. Wherea in another statement he addresses and incites "senior Israeli figures", calling them to clarify their position on "who is 'them'", explaining that the foe is not Hamas but all Palestinians.

Giora Eiland's statements were published and broadcasted in various print and online outlets: Fathom, Ynet, Yedioth Ahronot and channel 12 news. Fathom is a journal published by the Britain Israel

³¹³ In 2007, Eiland founded a consulting company ('GIORA EILAND LTD') that provides advice on defence, security and policy matters for governments and multinational organisations.

³¹⁴ @bezaleism (X [formerly Twitter], 19 November 2023) <<https://twitter.com/bezaleism/status/1726198721946480911>> accessed 2 August 2024

Communications and Research Centre (BICOM), a UK-based organisation. It covers many topics such as the economy and politics of Israel and the Middle East. Yediot Ahronoth is considered as Israel's number-one paper and is one of the top print dailies.³¹⁵

Ynet is the online media of Yediot Ahronoth. It is the most read information website in the country.³¹⁶ These media thus attract a very broad audience and are read, watched, and shared by most Israelis. As the statements were also relayed on social media and other news outlets, they reached a significant and unselected audience. Eiland's statements are considered public based on their printed publication, TV and online broadcast, as well as the broadness and nature of their audience.

To sum, Eiland's statements fulfil the material element of the crime of inciting others to commit genocide under Article 25(3)(e) of the Rome Statute.

Mens Rea

Giora Eiland has been one of the most vocal Israeli public figures since the beginning of the conflict. Often referred to as a 'thinking officer',³¹⁷ he is regarded in Israeli society as a rather pleasant expert speaker with an impressive and successful military career. As mentioned above, these distinctive traits make him particularly dangerous: unlike Smotrich or Ben-Gvir, he did serve in the IDF.

Eiland's public credibility stems from his ostensibly 'complex' and yet versatile perspective. In 2004, Eiland described the Gaza Strip as a "huge concentration camp"³¹⁸ and in 2014 he acknowledged that "misery and starvation" might be the outcome of the **2014** Gaza War ('Operation Protective Edge').³¹⁹ At more or less the same time, however, he supported a policy of collective punishment in an op-ed titled "**In Gaza, there is no such thing as 'innocent civilians'**". Already a decade before 7/10/2023, therefore, Eiland explained that "**the right thing to do is to shut down the crossings, prevent the entry of any goods, including food, and definitely prevent the supply of gas and electricity.**"³²⁰

³¹⁵ BBC News, 'Israel media guide' (26 June 2023) <<https://www.bbc.com/news/world-middle-east-14629611>> accessed 2 August 2024

³¹⁶ Reporters Sans Frontières, 'Israël' (n.d.) < <https://rsf.org/fr/pays/isra%C3%AB>> accessed 2 August 2024

³¹⁷ AURDIP, 'Giora Eiland's Monstrous Gaza Proposal Is Evil in Plain Sight' (26 November 2023) <<https://aurdip.org/en/giora-eilands-monstrous-gaza-proposal-is-evil-in-plain-sight/>> accessed 2 August 2024

³¹⁸ WikiLeaks, 'Israeli Officials Brief Djerejian On Improved Regional Security Situation; Unilateral Disengagement Plans' (31 March 2004) <https://wikileaks.org/plusd/cables/04TELA VIV1952_a.html> accessed 2 August 2024

³¹⁹ The New York Times, 'Quest for Demilitarization of Gaza Is Seen Getting Netanyahu Only So Far' (30 July 2014) <<https://www.nytimes.com/2014/07/31/world/middleeast/quest-for-demilitarization-of-gaza-is-seen-getting-netanyahu-only-so-far.html>> accessed 2 August 2024

³²⁰ YNET News, 'In Gaza, there is no such thing as 'innocent civilians'' (8 May 2014) <<https://www.ynetnews.com/articles/0,7340,L-4554583,00.html>> accessed 2 August 2024

When Eiland said on 7 October 2023 that “the people should be told that they have two choices; to stay and to starve, or to leave”³²¹, therefore, he was not reacting to the 7/10 attacks, nor was he acting precipitously or talking in the heat of the moment: he was reiterating a “starve or surrender” policy that he has consistently promoted time and again over years.

Also the comparison between Palestinians and Nazis is not unique to the above-cited statement. In the past few months Eiland repeatedly compared Gaza with Nazi Germany. On 7 October 2023 he recalled that “[d]uring World War 2, the Brits didn’t hesitate to try and kill as many German civilians because they understood that it was part of the military effort to remove evil”³²². In November 2023 he said on Israeli TV channel12 that “**Gaza to a very large extent is actually a state that is a Nazi state**, where they managed to mobilise the entire civil society...”³²³ Here too these analogies have not emerged from the traumatic ground of the 7/10 attacks. A decade earlier, in May 2014, he responded the question “Why should Gaza's residents suffer?” by writing that “Well, they are to blame for this situation **just like Germany's residents were to blame for electing Hitler** as their leader and paid a heavy price for that, and rightfully so.”³²⁴

Known for speaking his mind in a forthright and open manner, therefore, substantiating the mental element of the crime is not a difficult task in Eiland’s case. As his statements attest, Eiland is one of the few Israelis who not only explicitly and publicly made inciting calls, **but also manifested full awareness of their foreseen genocidal consequences**: If Israel will create a humanitarian crisis in Gaza, it will inevitably compel “tens of thousands or even hundreds of thousands to seek refuge in Egypt or the Gulf” and “Gaza will become a place where no human being can exist”;³²⁵ if Israel puts such a pressure, it will become “an area where people cannot live until Hamas is destroyed”.³²⁶

³²¹ Fathom, ‘Opinion : ‘A new turning point in the history of the State of Israel. Most people don’t understand that’ (7 October 2023) <<https://fathomjournal.org/opinion-a-new-turning-point-in-the-history-of-the-state-of-israel-most-people-dont-understand-that/>> accessed 2 August 2024

³²² *ibid*

³²³ @amiros74 (X [formerly Twitter], 6 November 2023) <<https://twitter.com/amiros74/status/1721604033134174479>> accessed 28 April 2024

³²⁴ YNET News, ‘In Gaza, there is no such thing as ‘innocent civilians’ (8 May 2014) <<https://www.ynetnews.com/articles/0,7340,L-4554583,00.html>> accessed 2 August 2024

³²⁵ YNET News, ‘It’s time to rip off the Hamas band-aid’ (12 October 2023) <<https://www.ynetnews.com/article/sju3uabba>> accessed 2 August 2024

³²⁶ @ListenToTimesRadio (Youtube channel, 12 October 2023) <<https://www.youtube.com/watch?v=CRHz0dZwF2A>> accessed 2 August 2024

As early as 8 October 2023, Eiland states that “Israel has no interest in the Gaza Strip being rehabilitated”³²⁷. As noted above, two days later Eiland clarified “Israel has no choice but to make Gaza a place that is temporarily, or permanently, impossible to live in.”³²⁸

Eiland’s *mens rea* can be established based on the genocidal intent emerging from his post-7/10 statements. It can be derived from statements he made along a decade before 7/10/2023. But his awareness and intent to commit and call others to commit genocidal acts may equally be distilled from statements he made month later when, like Yehezkeili and Herzog, he he was granted a precious opportunity to reflect on his incriminating post-7/10 statements.

On 18 October 2024, in a lengthy interview with Haaretz newspaper, Eiland commented on what the journalist described as “statements... which normalized famine and epidemics as legitimate tools in the war against Hamas, **some of which he takes back here, and some of which he backs with a straight back** - managed to shock colleagues, friends and adoring subordinates”.

In the interview Eiland reiterates his plan known as “the generals’ plan”, which calls to impose a siege on the estimated 300,000 Palestinian civilians who are living in the north of the strip. Eiland explains that “Israel brings in a daily supply of both food and fuel, Hamas distributes the food and everyone is happy. **The right thing to do is to inform all 300,000 people who live here: You have one week to leave** here through two corridors that the IDF secures. It's not that I'm suggesting you, I'm telling you, the civilians, you have one week to leave. **In a week, no supplies will enter...**”.

The journalist asks him: “So for the hunger you suggested before, you actually want to add a transfer as well?” and Eiland replies: "It's not a transfer, it's inside the strip." The journalist asks: “you are forcing people to move out of their homes”. Eiland replies: “And until now, the IDF has not informed the people, 'Move from Philadelphia, move from Khan Yunis?' What is a transfer? From the first month we say leave a dangerous area to an area that is less dangerous. I also give food and water to those who go out, and set **a certain date beyond which whoever decided not to go out is their problem. The entire northern area of the Gaza Strip becomes a military zone, which I can attack because as far as I'm concerned there is only an enemy there, and I stop moving supplies there**”. Eiland submits this is lawful under international law, so the journalist asks: “**Do you know**

³²⁷ [@kann_news](https://twitter.com/kann_news/status/1725585143333622129) (X [formerly Twitter], 17 November 2023) <https://twitter.com/kann_news/status/1725585143333622129> accessed 2 August 2024

³²⁸ YNET News, ‘This is not revenge. It's either us or them’ (10 October 2023), <<https://www.ynet.co.il/yedioth/article/yokra13625377>> accessed 2 August 2024

the Rome Statute? In the sections defined as war crimes there is the section: Deliberate use of starvation of civilians as a method of warfare by depriving them of objects essential to their survival, including maliciously delaying the delivery of aid". Eiland answers: "I know very well. **It is allowed and even recommended to starve an enemy to death,** provided that you have allowed the civilians exit corridors beforehand. And this is exactly what I propose. In this area, only terrorists who surrender or starve to death will remain..."

Elsewhere the journalist directly confronts Eiland with the above-cited statements: "**Today** you speak in terms of a siege on Hamas fighters and economic pressure on fighters only. **On October 10,** you wrote: "**Creating a severe humanitarian crisis in Gaza is a necessary means to achieve the goal.**" **On November 19, in an article that no longer exists online, you wrote** "The international community warns us of a humanitarian disaster in Gaza and of severe epidemics. We must not shy away from this, with all the difficulty involved. **After all, severe epidemics in the southern Gaza Strip will bring victory closer and reduce casualties among IDF soldiers.**" **On December 3, you write about a desirable option for you: "a complete blockade of food, water and fuel entering Gaza."** Do you stand behind these things even now?

A year after the fact, after proceedings have been instituted and are pending before both the ICJ (genocide) and the ICC (crimes against humanity and war crimes), after the Prosecutor requested but the PTC have not yet issued arrest warrant against the Minister to whom he has advised, Eiland had understood he is at risk of international arrest and prosecution himself:

"I carelessly or irresponsibly used phrases that were partly **emotional**. This is very uncharacteristic of me. I usually try to be quite matter-of-fact and analytical. I admit, I did not express myself **carefully** when I spoke about starvation. **I did not mean starvation in the sense that this would be the result, that people would die of starvation, but that there will be a threat of starvation.** But I think that at an early stage after the start of the war I quite straightened out...**And I also say this in retrospect:** Gentlemen, it is legitimate for a country, when it is fighting an enemy country, to say to the enemy country 'humanitarian for humanitarian'. Because I also have a humanitarian problem, no less urgent. I have hostages. **Do you want food? Free the hostages.** I thought it was moral, to this day I still think it is moral."

Eiland also reaffirmed his position is not a response to the 7/10 attacks: "**For years I have been saying:** Gaza is a state ... **This narrative that there is a terrorist organization Hamas, and all the**

other residents of Gaza are good people, is simply not true. The people of Gaza are like the people of Nazi Germany. I'm not saying that they should be punished, but it's worth understanding that this is a war of the state of Israel." He further explained that "The Nazis, like others, starved a population in order to kill it. When I talk about not helping a country that is fighting you, it is a measure that **you assume will be effective in the sense that the other side will surrender before there is starvation there.** This is what happened in the American Civil War. **I admit that I used the terms carelessly,** but OK, I've learned to explain things **and I stand by the matter.**"³²⁹

The statements the journalist refer to were not made at an early stage but along months of war when the practices Eiland preached for were unfolding. As shown above, they are consistent with his past statements as early as ten years ago. They were not driven by emotion but by reason. In any event, the fact the perpetrator was driven by *emotion* rather than reason is not a criminal defence in international (or national) criminal law.

Furthermore, Eiland does not deny his intent to commit genocidal acts but rather regret he was careless by *revealing* his intent publicly. Be that as it may, he does not deny neither the content of his allegedly inciting statements nor the intent to create humanitarian crisis, inflict starvation and severe epidemics and forcibly transfer civilian population – in short, to destroy the targeted group as a whole.

Eiland's only argument is that these practices were means to the end of winning the war, not an end in itself ("I did not mean starvation in the sense that this would be the *result*, that people would die of starvation, but that there will be a *threat* of starvation"). As the journalist notes, this version is more Eiland's current view, a year after the war and whilst risk of arrest and prosecution hovers over Eiland's head, rather than an accurate description of his inciting statements from 2023.

But even this reconstructed version amounts to *inter alia* genocidal acts as per Article 6 RS: According to Eiland, his call to starve the population is used to obligate the latter to be forcibly transferred, allegedly to a place where it will be humanitarily protected. Alternatively, the purpose of his call to starve the targeted group was to use its suffering as leverage on Hamas, hoping that this pressure will make him free the Israeli hostages ("you want food? Free the hostages"). Both explanations however still reveal an intent to destroy the targeted group, in whole or in part, by

³²⁹ Haaretz, 'Giora Eiland Kara LeHare'iv Et Aza, U'Ib'd Rabi'im MiChaverav. HaIm Hu Metcharet? (Giora Eiland Called to Starve Gaza, and Lost Many of His Friends. Does He Regret It?)' (18 September 2024) <https://www.haaretz.co.il/magazine/2024-09-18/ty-article-magazine/.highlight/00000192-047b-d1bc-a1ff-267f8dd50000?utm_source=pocket_saves> accessed 2 December 2024

killings, seriously bodily harm, and creating conditions that would bring about its destruction – irrespective of the underlying rationales, military objectives or geopolitical context for doing so.

Finally, the fact the suspect himself acknowledges in hindsight his criminal behaviour in the ‘early’ stage of the war is nothing but admission of guilt, and at any rate it changes nothing with respect to the inciting effect his statements had in real-time over the addressees of his messages. Also, Eiland’s claim that his behaviour improved as the war advanced (“I think that at an early stage after the start of the war I quite straightened out...”) is quite detached from reality. As shown above, Eiland’s “Generals’ plan” is nothing but a pilot, experimenting in northern Gaza on 300-400,000 people what he is advocating since 7/10 should be done with the 2 million members of the targeted group. At best, Eiland moved from an intent to destroy the group as whole, to an intent to destroy the group in parts.

The *Haaretz* interview provide an extremely rare and precious opportunity to see through the crystal ball what was the *mens rea* of the suspect straight from the horse’s mouth. This interview alone suffices to establish the mental element of the crime. The suspect himself gets a chance to reflect, pronounce and reaffirm the factual veracity of his statements. Alas, the statements he assumes responsibility for and ‘take back’ only further self-incriminate him, for doing so is an acknowledgement of their genocidal nature and the inciting power they had in real-time. Whereas the statements and positions he still defends (“I also say this in retrospect”) are, well, a textbook of incitement to genocide. Be that as it may, today he fiercely claims that his “Generals’ Plan” is in accordance with international law, whereas in reality it is in itself genocidal under Article 6 RS.

Eiland calls to commit genocidal acts including by creating conditions calculated to destroy the existence of the targeted group as such, be it in order to improve the humanitarian condition of your own civilian population, to topple the terrorist regime of your foe or any other just or moral goal Eiland or the other suspects deem legitimate. In fact, the crime of incitement to genocide may be committed in full compliance with international humanitarian law.

Provided that the procedural conditions under the Rome Statute are met, Eiland’s statements constitute the commission of incitement to genocide under Article 25(3)(e) RS, for which he must be arrested, indicted, and tried.

C. THE LEGAL IMPLICATIONS AND THE EVIDENTIARY VALUE OF THE ICJ ORDER

Three of the eight suspects identified in this Communication were cited by the ICJ in connection with their inciting statements. Factually, the ICJ found there is a plausible risk that genocidal acts, including incitement to genocide, were committed against Palestinian in Gaza. Legally, the ICJ Ordered Israel to punish the inciters. This Section demonstrates that the ICJ's *factual* finding reaches the ICC evidentiary threshold for prosecuting incitement to genocide and seeking to arrest the inciters. The next Section shows that, in line with the principle of complementarity, the *legal* implication of Israel's failure to do so obligates the ICC Prosecutor to investigate and prosecute in Israel's stead.

*

In its Order of 26 January 2024, the ICJ took note of “a number of statements made by senior Israeli officials”³³⁰ and “call[ed] attention, in particular”, but not exclusively, to statements made by (then) Defence Minister Yoav Gallant, President Isaac Herzog, as well as the then Minister of Energy and Infrastructure and today's Defence Minister Israel Katz. The Court then moved to cite the three suspects' statements, which have been analysed in detail above.³³¹

The Court further took note of the findings 37 Special Rapporteurs, Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council, citing “discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials”. The Court further took note of the observations of the United Nations Committee on the Elimination of Racial Discrimination that was “[h]ighly concerned about the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October”.³³²

The Court found that “the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.”³³³

³³⁰ *South Africa v Israel*: Order of Provisional Measures, para 51

³³¹ *South Africa v Israel*: Order of Provisional Measures, para 52

³³² *South Africa v Israel*: Order of Provisional Measures, para 53

³³³ *South Africa v Israel*: Order of Provisional Measures, para 54

Based on this finding, in its third out of six provisional measures, the Court Ordered, by **sixteen votes to one**, that “[t]he State of Israel shall take all measures within its power to **prevent and punish** the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.”³³⁴ Prof. Aharon Barak, the former President of the Israeli Supreme Court and **ICJ ad-hoc judge for Israel also voted in favour** of this provisional measure. He too believed that incitement to genocide has been plausibly committed, the requisite standard for granting this provisional measure. He too believed Israel should punish the inciters and prevent further incitements.

The next Section demonstrates that Israel has failed to comply with the ICJ Order to punish the inciters and prevent further incitements. Consequently, in accordance with the principle of complementarity, this Order to prevent and punish incitement to genocide is redirected to the ICC Prosecutor. Provided that all other procedural requirements are met, the obligation to investigate and prosecute this Article 25(3)(e) crime is no different than any other Article 5 crimes the Prosecutor is currently investigating and prosecuting. Indeed, on 20 May 2024 the Prosecutor requested and on 21 November 2024 the PTC issued arrest warrants against two of the suspects in this Communication, finding there are *reasonable grounds to believe* that they *intentionally* created conditions calculated to bring about the partial destruction of the targeted group, a genocidal act under Article 6 RS.

True, the jurisdiction of the ICJ is limited to *States*. But the factual and legal determinations the ICJ made in its Preliminary Measures Order and its Modification have an evidentiary value *per se*, one that differs, for example, from the evidence South-Africa submitted to the Court to obtain this Order.

The evidentiary value of this Order is not confined to a certain forum or specific jurisdiction or Court. It has a legal meaning that exceeds the jurisdictional scope of the ICJ, one that can and indeed should be used against the States’ *agents* who are allegedly complicit in genocidal acts including incitement.

If the ICJ determined it is plausible the State of Israel is committing genocidal acts in Gaza, this determination applies not only to the State of Israel but also to its involved agents. There is no reason why the Israeli government will be held to account for incitement to genocide, but the officials inciting to genocide on its behalf will not. Both should be held to account before the ICJ and the ICC, respectively.

³³⁴ *South Africa v Israel*: Order of Provisional Measures, para 86

That crimes are committed by individuals and not abstract entities such as states is the bread and butter of international criminal law since Nuremberg.³³⁵ If the ICC upholds Jackson's truism, it has to rely on the ICJ factual and legal findings and extend the investigation on the Situation in the State of Palestine to include the crime of incitement to genocide under Article 25(3)(e) RS.

This Section therefore outlines the implications of the ICJ's Provisional Measures Order on the ICC investigation into the situation of Palestine (I), the broader context of a dialogue between the ICC and the ICJ and other international courts in which these implications are embedded (II), and the similarities between the ICC evidentiary standard of "reasonable grounds to believe" as per Article 58(1)(a) RS, and the ICJ's standard of "plausibility" (III).

I. LEGAL IMPLICATIONS OF THE ICJ PROVISIONAL MEASURES ORDER IN *SOUTH AFRICA V ISRAEL*

1. Provisional Measures: The Legal Meaning of a Factual Finding

The ICJ has "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."³³⁶ At first, the test to indicate such measures was lenient.³³⁷ This has changed in *LaGrand*,³³⁸ which introduced four criteria that must be met to indicate provisional measures. A fifth criterion has been added in *Belgium v Senegal*,³³⁹ that of "plausibility of rights".³⁴⁰

³³⁵ Trial of the major war criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, vol. I, Nürnberg 1947, p. 223 <<https://ia800504.us.archive.org/14/items/TrialOfTheMajorWarCriminalsBeforeTheInternationalMilitaryTribunalNuremberg14Nove/Trial%20of%20the%20major%20war%20criminals%20before%20the%20International%20Military%20Tribunal%2C%20Nuremberg%2C%2014%20November%201945-1%20October%201946%20Volume%201.pdf>> accessed 21 June 2024

³³⁶ 'Statute of the International Court of Justice' (1945) 33 UNTS 993, art 41

³³⁷ Robert Kolb, 'Digging Deeper into the "Plausibility of Rights" - Criterion in the Provisional Measures Jurisprudence of the ICJ' (2020) 19 Law & Prac Int'l Cts & Tribunals 365, 366

³³⁸ When the ICJ determined that provisional measures are legally binding on all parties. See *LaGrand Case (Germany v United States of America)* (Judgment) General List No. 104 [2001] <<https://icj-cij.org/sites/default/files/case-related/104/104-20010627-JUD-01-00-EN.pdf>> accessed 4 April 2024, para 109

³³⁹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Order on Provisional Measures of 28 May 2009) [2009] ICJ Rep. 139, para. 57

³⁴⁰ Massimo Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice' (2018) 31 Leiden Journal of International Law 641, 642; Kolb (2020) 366; Ewa Salkiewicz-Munnerlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* (Asser 2022) <<https://link-springer-com.access-distat.sciencespo.fr/book/10.1007/978-94-6265-475-4>> accessed 10 April 2024 65; Cameron Miles, 'Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice' (2018) 89 BYIL 1, 2

Since *The Gambia v Myanmar*, the Court applies this test before indicating provisional measures: (i) *prima facie* jurisdiction and possibly *prima facie* admissibility;³⁴¹ (ii) a link between the measures requested and the rights under the main claim;³⁴² (iii) plausibility of the rights asserted by the party requesting the measures;³⁴³ (iv) prejudice to those rights is capable of producing irreparable harm;³⁴⁴ (v) and real and imminent risk of prejudice to the rights invoked is capable of materialising before the final determination of the dispute (urgency).³⁴⁵

To grant provisional measures, all five criteria must be met,³⁴⁶ including the existence of plausible rights, and the risk of irreparable harm to them. The term ‘plausibility’ however “creates ambiguity and uncertainty”³⁴⁷ and the scope of these requirements is open to interpretation.³⁴⁸ The scholarship

³⁴¹ *South Africa v Israel*: Order of Provisional Measures, paras 31, 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Request for the Indication of Provisional Measures: Order) General List No. 178. [2020]

<<https://icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> accessed 7 June 2024, paras 37, 42; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (Ukraine v Russia)* (Request for the Indication of Provisional Measures: Order) General List No. 182. [2022] <<https://icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf>> accessed 7 June 2024, para 48; *Application of the Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment (Canada and the Netherlands v Syrian Arab Republic)* (Request for the Indication of Provisional Measures: Order) General List No. 188. [2023] <<https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf>> accessed 29 March 2024, para 46

³⁴² *South Africa v Israel*: Order of Provisional Measures, para 59; *Gambia v Myanmar*: Order of Provisional Measures, 56; *Ukraine v Russia*: Order of Provisional Measures, para 60; *Canada and the Netherlands v Syrian Arab Republic*: Order of Provisional Measures, para 58

³⁴³ *South Africa v Israel*: Order of Provisional Measures, para 55; *Gambia v Myanmar*: Order of Provisional Measures, para 61-63; *Ukraine v Russia*: Order of Provisional Measures, para 63; *Canada and the Netherlands v Syrian Arab Republic*: Order of Provisional Measures, para 63

³⁴⁴ *South Africa v Israel*: Order of Provisional Measures, para 66; *Gambia v Myanmar*: Order of Provisional Measures, paras 75; *Ukraine v Russia*: Order of Provisional Measures, para 74; *Canada and the Netherlands v Syrian Arab Republic*: Order of Provisional Measures, para 71

³⁴⁵ *South Africa v Israel*: Order of Provisional Measures, para 74; *Gambia v Myanmar*: Order of Provisional Measures, para 65; *Ukraine v Russia*: Order of Provisional Measures, para 77; *Canada and the Netherlands v Syrian Arab Republic*: Order of Provisional Measures, para 71

³⁴⁶ Lando (2018) 642; Kolb (2020) 366; Miles (2018) 1-2; Karin Oellers-Frahm and Andreas Zimmermann, *Article 41, in: Andreas Zimmermann and Christian Tams (eds.), The Statute of the International Court of Justice, A Commentary* (3rd edition, 2019) 1156-1159;

³⁴⁷ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Request for the Indication of provisional Measures: Order) [2011] General List No. 150 (Judge Koroma)

<<https://www.icj-cij.org/sites/default/files/case-related/150/150-20110308-ORD-01-01-EN.pdf>> accessed 15 April 2024

³⁴⁸ *Gambia v Myanmar*: Order of Provisional Measures (Judge ad hoc Kress)

<<https://icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-03-EN.pdf>> accessed 15 April 2024

clarifies that the ICJ does not merely determine the existence of one of the rights that the applicant claims to protect.³⁴⁹ Rather, “the ICJ uses the term ‘plausible’ also **in relation to facts** [...]”.³⁵⁰

The term ‘plausible’ is also used “**in relation to arguments** or allegations”³⁵¹ put forward by the applicant.³⁵² The Court does not examine the mere existence of the protected rights. Rather, its legal and factual assessment of the validity of the claim extends to the exercise and potential breach of these rights.³⁵³ It is the existence of a right, coupled with a factual determination of whether this right is plausibly irreparably impaired, that form the legal basis for granting provisional measures.

In fact, the ICJ does not assess plausibility of rights, but plausibility of the claim in the merits stage.³⁵⁴ Because provisional measures are supposed to quickly protect certain interests, the evidentiary standard is lower at the preliminary stage of granting provisional measures via interim orders.³⁵⁵ In practice, the Court “preserves the objects to which the right is linked (i.e. a set of facts), or [...] a way (or an array of ways) of exercising the right, or still a probability to see it so exercised.”³⁵⁶

The object of a legal right can never be protected merely by determining the theoretical existence of this right. An analysis, at a preliminary stage, must be performed on whether this legal right is in need of protection. This can only be done by a factual analysis on a casuistic basis.

The object and purpose of the indication of provisional measures is to preserve the respective rights of both parties.³⁵⁷ Indication of provisional measures, therefore, necessarily reflects a certain threat to a certain right which the measure is intended to eliminate, or at least to mitigate.

³⁴⁹ Kolb (2020) 375; Miles (2018) 32-33; Lando (2018) 667

³⁵⁰ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russia)* (Request for the Indication of Provisional Measures: Order [2017] General List No 166, (Separate Opinion Judge Cancado Trindade) <<https://icj-cij.org/sites/default/files/case-related/166/166-20170419-ORD-01-03-EN.pdf>> accessed 13 April 2024, para 38

³⁵¹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russia)* (Request for the Indication of Provisional Measures: Order [2017] General List No 166, (Separate Opinion Judge Cancado Trindade) <<https://icj-cij.org/sites/default/files/case-related/166/166-20170419-ORD-01-03-EN.pdf>> accessed 13 April 2024, para 38

³⁵² Kolb (2020) 375-376; Lando (2018) 654-657; Miles (2018) 13

³⁵³ Miles (2018) 32-34; Lando (2018) 667

³⁵⁴ Miles (2018) 32; Lando (2018) 657

³⁵⁵ Cameron Miles as cited in Kolb (2020) 383, footnote 81; Salkiewicz-Munnerlyn (2022) 50-51

³⁵⁶ Kolb (2020) 374

³⁵⁷ Article 41 ICJ Statute; stressed by Lando (2018) 664; Salkiewicz-Munnerlyn (2022) 24-30; Kolb (2020) 371

By ordering provisional measures, the ICJ determines the Respondent State poses a risk to rights protected by the Genocide Convention.³⁵⁸ This determination rests on a certain evidentiary basis (plausibility). The evidence forming this basis exists not in the Courtroom, but in the real world. This evidence is not limited to ICJ enforcement of state responsibility under the Genocide Convention, but equally applies to ICC enforcement of individual criminal responsibility under the Rome Statute.

The ICJ evidentiary standard for granting provisional measures is equivalent to the ICC standard for issuing arrest warrants or – at minimum – for opening an investigation. Accordingly, a factual finding that genocidal acts have plausibly been committed can be translated to a reasonable ground or reasonable basis to believe – respectively – that these acts has been committed. In the ICJ case, it is the crime of genocide, *including* incitement to genocide. In the present ICC Communication, it is the inchoate crime of public and direct incitement to commit genocide.

To conclude, the wording of the ICJ in its Provisional Measures Order does not explicitly distinguish between factual and legal determinations. But the case law and scholarly writing suggest that **the ICJ makes objective determinations on fact and law in its provisional measures**. In the context of the Genocide Convention, this means that the Court does not merely determine the plausible existence of a conventional right to be protected from genocide, which in any event all people enjoy.

That the legal right which the Applicant seeks to protect theoretically exists is a necessary but insufficient condition to grant provisional measures. To be successful, the Applicant must also show **there are *factual* indications that the Respondent *breaches* or *impairs* these legal rights**, and that there is an actual *threat* towards the preservation of these rights during the proceedings.

2. The Legal Implications of the Factual Findings in *South-Africa v Israel*

On 26 January 2024 the ICJ ordered six provisional measures against the State of Israel in the Application Concerning the Prevention and Punishment of Genocide (*South Africa v Israel*). Furthermore, on 16 February 2024 the ICJ issued a decision and on 28 March 2024 and 24 May 2024 the Court modified the original Provisional Measures Order. These Orders can be dissected into determinations based on facts (a) and law (b), which allow for the indication of these measures (c).

³⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures: Order) General List No. 192. [2024] (Judge Charlseworth) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> accessed 7 June 2024 (*South Africa v Israel*: First Modification or Provisional Measures)

(a) Factual Findings

The ICJ concluded the following factual determinations regarding the situation in the Gaza strip. On 26 January 2024 it found that: “the military operation... has resulted in a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure. [...] 25,700 Palestinians have been killed, over 63,000 injuries have been reported, over 360,000 housing units have been destroyed or partially damaged and approximately 1.7 million persons have been internally displaced.”³⁵⁹

The ICJ further noted that the civilian population “remains extremely vulnerable”³⁶⁰ and that “the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgement.”³⁶¹ Additionally, the Court recognised the 7 October attacks by Hamas,³⁶² and expressed its grave concern “about the fate of the hostages abducted,”³⁶³ calling “for their immediate and unconditional release.”³⁶⁴ In its decision on 16 February 2024, the ICJ stated that the most recent developments in the conflict in Gaza, especially in Rafah, “would exponentially increase what is already a humanitarian nightmare with untold regional consequences.”³⁶⁵

In its modification of provisional measures, on 18 March 2024, the Court noted that “the catastrophic humanitarian situation in the Gaza Strip that existed when it issued its Order of 26 January 2024 has deteriorated even further.”³⁶⁶ Furthermore, the ICJ observed that “Palestinians in Gaza are no longer facing only a risk of famine, as noted in the Order of 26 January 2024, but that famine is setting in, with at least 31 people, including 27 children, having already died of malnutrition and dehydration,”³⁶⁷ and that since the original Provisional Measures Order, “Israel’s military operation has reportedly led to over 6,600 additional fatalities and almost 11,000 additional injuries among Palestinians...”³⁶⁸

³⁵⁹ *South Africa v Israel*: Order of Provisional Measure, para 46

³⁶⁰ *ibid*, para 70

³⁶¹ *ibid*, para 72

³⁶² *ibid*, para 13

³⁶³ *ibid*, para 85

³⁶⁴ *ibid*, para 85

³⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Decision of the Court on South Africa’s request for additional Provisional Measures of 16 February 2024) ICJ Press release 2024/16 <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf>> accessed 7 June 2024

³⁶⁶ *South Africa v Israel*: First Modification of Provisional Measures, para 30

³⁶⁷ *ibid*, para 21

³⁶⁸ *ibid*, para 39

On 24 May 2024 the ICJ determined that Israel’s “military operations in Rafah and the resulting repeated large-scale displacement ... constitute a change in the situation”³⁶⁹ and that “the provisional measures indicated in its Order of 28 March 2024, as well as those reaffirmed therein, do not fully address the consequences arising from the change in the situation ... thus justifying the modification of these measures.”³⁷⁰

With regards to dehumanising language of Israeli officials that arguably amounts to incitement to genocide, the ICJ “has taken note of a number of statements made by senior Israeli officials.”³⁷¹ It called specific attention to three statements made by the Israeli Minister of Defence **Yoav Gallant**, the Israeli President **Isaac Herzog**, and the Minister of Foreign Affairs **Israel Katz**.³⁷²

The ICJ referred to statements made by these three suspects as examples of dehumanising language, indicating that the ICJ did not limit the obligation of the Israeli government, and if necessary, the ICC, to these particular statements or specific individuals.

(b) Legal Findings

Based on its own factual determinations, as well as of others by UN bodies³⁷³ and the above-mentioned inciting statements by Israeli officials, the ICJ established its legal findings.

In its first Provisional Measures Order, it considered that “the *facts* and circumstances mentioned above are *sufficient* to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide *and related prohibited acts identified in Article III*, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention.”³⁷⁴

The Court found there is a sufficient factual basis to legally determine that it is plausible that the right of Gazans to be protected from genocide and ‘related prohibited acts’ listed in Article III of the

³⁶⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Modification of the Order of 28 March 2024: Order) General List No. 192. [2024] <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> accessed 7 June 2024 (*South Africa v Israel*: Second Modification or Provisional Measures), para 29

³⁷⁰ *South Africa v Israel*: Second Modification or Provisional Measures, para 30

³⁷¹ *South Africa v Israel*: Order of Provisional Measures, para 51. The ICJ also took note of two warning messages of UNRWA. See *South Africa v Israel*: Order of Provisional Measures, para 50

³⁷² *ibid*, paras 51-52

³⁷³ *ibid*, paras 47-50

³⁷⁴ *ibid*, para 54

Genocide Convention – including “direct and public incitement to commit genocide”– may be breached and must be secured via legal intervention in the form of ordering provisional measures.

The Court further found that prejudice to these rights “is capable of causing irreparable harm”³⁷⁵ and that “there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, before it gives its final decision.”³⁷⁶ Finally, the ICJ noted that “a link exists between the rights claimed by South Africa that the Court has found to be plausible, and at least some of the provisional measures requested.”³⁷⁷

On 28 March, the ICJ made further legal determinations: “[T]aking account of the provisional measures indicated on 26 January 2024, the Court finds that the current situation before it entails a *further risk* of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision in the case.”³⁷⁸

On 24 May the ICJ found that “the current situation arising from Israel’s military offensive in Rafah entails a *further risk* of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency.”³⁷⁹

(c) Provisional Measures

On 26 January 2024, the ICJ ordered the six provisional measures, two of which are of central importance to this Communication. The first provisional measures ordered the State of Israel to “...take all measures within its power *to prevent* the commission of all acts within the scope of Article II of this Convention, in particular: (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; and (d) imposing measures intended to prevent births within the group.”³⁸⁰

³⁷⁵ *ibid*, para 66

³⁷⁶ *ibid*, para 74

³⁷⁷ *ibid*, para 59

³⁷⁸ *South Africa v Israel: First Modification of Provisional Measures*, para 40

³⁷⁹ *South Africa v Israel: Second Modification of Provisional Measures*, para 47

³⁸⁰ *South Africa v Israel: Order of Provisional Measures*, para 86(1)

The Court further ordered, with respect to the other acts prohibited under Article III of the Genocide Convention,³⁸¹ that “the State of Israel shall take all measures within its power *to prevent and punish the direct and public incitement to commit genocide* in relation to members of the Palestinian group in the Gaza Strip.”³⁸²

The Court is prudent in relation to genocidal acts under Article II of the Genocide Convention and only orders Israel to prevent the potential commission of these acts. The Court is less prudent in relation to other prohibited acts such as incitement under Article III of the Convention, ordering Israel not only to prevent commission of these acts in the future but also to punish arguably past acts.

The ICJ seems to rely on its factual determinations with respect to inciting statements by Yoav Gallant, Isaac Herzog, and Israel Katz when it implies that **inciting statements already exist**. Accordingly, the ICJ does not order Israel to punish inciting statements insofar they materialize. Instead, it straightforwardly orders the Israeli government to punish “*the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip*”.³⁸³

On 28 March 2024³⁸⁴ and 24 May 2024³⁸⁵ the ICJ issued additional orders. Both orders modify the provisional measures whilst *reaffirming* the measures that had been indicated in the earlier Orders.³⁸⁶

3. Application of ICJ *South Africa v Israel* to ICC # 01/18 (Situation in the State of Palestine)

In *South Africa v Israel* the ICJ found that the existence of the “rights of Palestinians to be protected from acts of genocide and related prohibited acts identified in Article III”³⁸⁷ in all of its Orders. As

³⁸¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention)

³⁸² *South Africa v Israel*: Order of Provisional Measures, para 86(3)

³⁸³ *ibid*, paras 50-54

³⁸⁴ The ICJ ordered Israel to “take all necessary and effective measures to ensure [...] the unhindered provision [...] of urgently needed basic services and humanitarian assistance, [...] as well as medical supplies and medical care to Palestinians throughout Gaza.” Additionally, the ICJ stressed – similarly to its first Order – that Israel must ensure that its “military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.” *South Africa v Israel*: First Modification of Provisional Measures, paras 45 and 51(2)(b).

³⁸⁵ The ICJ ordered Israel to “immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part”. Moreover, the Court ordered Israel to “take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide.” See *South Africa v Israel*: Second Modification of Provisional Measures, paras 57(2)(a) and 57(2)(c).

³⁸⁶ *South Africa v Israel*: First Modification of Provisional Measures para, 51(1); *South Africa v Israel*: Second Modification of Provisional Measures, para 57(1)

³⁸⁷ *South Africa v Israel*: Order of Provisional Measures, para 54; *South Africa v Israel*: First Modification of Provisional Measures, paras 25, 45; *South Africa v Israel*: Second Modification of Provisional Measures, para 24

shown above, “to conclude that at least **some of the rights claimed** by South Africa and for which it is seeking protection are **plausible**”, and specifically that “[t]his is the case with respect to the right of the Palestinians in Gaza to be protected from... *prohibited acts identified in Article III*” entails a series of factual determinations with distinct legal meaning and implications that exceeds the competence of the ICJ and is of relevance to the work of the Court across the street, the ICC.

That the legal right of Palestinians to be protected from acts of genocide under the Genocide Convention exists, that Israel plausibly breaches this right, and that this breach poses an actual threat to the preservation of the right of Palestinians to be protected from genocide – establishes as a matter of fact and law that Israel plausibly commits genocidal acts including incitements against Palestinians.³⁸⁸

Public and direct incitement to commit genocide within the meaning of Article 25(3)(e) RS corresponds Article III(c) of the Genocide Convention. The ICJ found that a breach of Article III of the Genocide Convention is plausible. Accordingly, in its third provisional measure, the ICJ ordered Israel to punish the inciters, which evidences the commission of this crime. The ICJ specifically cites three inciting statements by three senior Israeli officials, which further suggests there is a reasonable ground to believe the crime has been committed.³⁸⁹ This Order³⁹⁰ was reaffirmed in its Modification.³⁹¹

For the purpose of criminal enforcement, this finding is one piece of evidence among many in the evidentiary puzzle of the alleged crime. Reports and decisions of law enforcement agencies, fact finding missions, international, regional and national courts, as well as treaty bodies, may become an “essential exhibit” of evidence upon which a prosecutor or criminal court relies in determining “the main events”.³⁹²

No criminal prosecutor can turn a blind eye to a smoking gun in the form of judicial ruling by an international Court with respect to a crime within her jurisdiction. Like the ICJ, also the ICC “has to

³⁸⁸ This conclusion, while substantiated with facts stemming from other international bodies, is also drawn by the UK-based or qualified lawyers, legal academics and former members of the judiciary committed who claim that it demonstrates “a serious risk of genocide” in ‘UK Judges’ and Lawyers’ Open Letter Concerning Gaza’ (3 April 2024) p. 8 <<https://lawyersletter.uk/wp-content/uploads/2024/04/Gaza-letter-FIN-3-April.pdf>> accessed 2 December 2024

³⁸⁹ *South Africa v Israel*: Order of Provisional Measures, paras 50-54

³⁹⁰ *ibid*, para 86(3)

³⁹¹ *South Africa v Israel*: First Modification of Provisional Measures, para 51(1)

³⁹² *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) paras 429, 430, relying upon ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 168

base itself on the existence of objective indicia relating to the possible commission of genocide. If such indicia exist... the Court cannot take the position of a powerless bystander in the face of the possible commission of acts which are so offensive to the conscience of humanity.”³⁹³

The evidentiary weight of this judicial ruling is particularly heavy since it was not rendered by some local court but by the World Court whose bench is composed of 23 independent judges. One of the 23 judges is the former President of the Supreme Court of the allegedly *victimizing* country, Hon. Justice Aharon Barak. Justice Barak seems to adhere to the interpretation of the ‘plausibility’ threshold in the present Communication.

In his poignant Separate Opinion in the Modification of the Order for provisional measures, Justice Barak notes that “*any measures indicated by the Court must be based on a plausible intent to commit genocide. If intent is not plausible, no measures can be ordered under the Genocide Convention.*”³⁹⁴ **Israeli Justice Barak indicated not one but two measures against Israel.** According to Justice Barak, these measures are “based on a plausible intent to commit genocide”.

One of these provisional measures ordered Israel to *punish* Israelis who *incite* to commit genocide. The fact that the former Chief Justice of the Israeli Supreme Court supports such order further strengthens the evidentiary weight of the ICJ’s ruling. Unlike the other justices, Justice Barak sits among his people.³⁹⁵

As the next Section also shows, in defiance of the first Order, Israel did not engage in any effort to adhere to the Provisional Measures.³⁹⁶ Due to Israel’s non-implementation, the risk of irreparable prejudice against the rights of Palestinians to be protected from acts of genocide was aggravated. This prompted South Africa to request a modification of the first Order, which the ICJ *granted*.

The modification of the order added a provisional measure to ensure that humanitarian access is provided properly.³⁹⁷ More importantly, it ordered Israel to *ensure with immediate effect that its*

³⁹³ *South Africa v Israel*: First Modification of Provisional Measures (separate declaration of Judge Yusuf) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> accessed 13 April 2023 para 3

³⁹⁴ *South Africa v Israel*: First Modification of Provisional Measures (Separate Opinion Judge ad hoc Barak) para 6 <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> accessed 6 June 2024

³⁹⁵ *South Africa v Israel*: Order of Provisional Measures, para 86(3)

³⁹⁶ Human Rights Watch, ‘Israel Not Complying with World Court Order in Genocide Case: Failing to Ensure Basic Services, Aid’ (26 February, 2024) <<https://www.hrw.org/news/2024/02/26/israel-not-complying-world-court-order-genocide-case>> accessed 28 May 2024

³⁹⁷ *South Africa v Israel*: First Modification of Provisional Measures, para 51(2)(a)

military does not commit acts of genocide,³⁹⁸ an additional measure whose legal meaning seems to differ from the previous order, which generally ordered Israel to *prevent* acts of genocide,³⁹⁹ which has been independently reaffirmed.⁴⁰⁰

The ICJ determined that famine is no longer a risk but has in fact materialised. Similarly, it seems the ICJ had a reasonable ground to believe that also other risks associated with the irreparable prejudice against the plausible rights of the Palestinians under the Genocide Convention have also materialised. The *second* modification Order in which the ICJ ordered Israel *to halt its military operations* in Rafah – which has also been ignored by Israel – further supports this view.⁴⁰¹ Specifically, the ICJ’s reiteration of the first Order, including the Order to punish direct and public incitement to commit genocide, suggests the ICJ had reasonable grounds to believe that in light of Israel’s non-compliance, incitement to genocide persists.

As the previous Section showed, the ICC has jurisdiction over direct and public incitement to commit genocide under Article 25(3)(e) RS in so far the crime is not prosecuted by the competent national jurisdiction. The determination of the ICJ that Israel has not abided by its order to prevent and punish incitement to commit genocide, redirects this judicial order to the OTP of the ICC, in line with the principle of complementarity.⁴⁰² As the next Section shows, this failure of the Israeli government to comply with its obligations under the Genocide Convention is the legal point of departure for expanding the investigation into the situation in Palestine under the Rome Statute.

Furthermore, in its Order on 24 May 2024, Israel is ordered to ensure that an independent commission of experts, or something of the sort, is allowed access to investigate allegations of genocide, including incitement.⁴⁰³ As the next Section further shows, Israel has failed to comply also with this measure, which further reinforce the ICC’s jurisdiction to investigate and prosecute incitement to genocide.

II. STATE AND INDIVIDUAL RESPONSIBILITY FOR GENOCIDE: INTER-COURT DIALOGUE

The ICJ’s determination that Israel is plausibly committing genocide and incitement to genocide does not exist in a vacuum. The international legal order consists of two main international courts. The ICJ

³⁹⁸ *ibid*, para 51(2)(b)

³⁹⁹ *South Africa v Israel*: Order of Provisional Measures, para 86(1)

⁴⁰⁰ *South Africa v Israel*: First Modification of Provisional Measures, para 51(1)

⁴⁰¹ Patrick Kingsley, ‘Israel Continues to Fight in Rafah, Despite the World Court Order, Officials Say’ *NYTimes* (25 May 2024) <<https://www.nytimes.com/2024/05/25/world/middleeast/icj-idf-rafah-offensive.html>> accessed 28 May 2024

⁴⁰² Article 17(1)(a) RS

⁴⁰³ *South Africa v Israel*: Second Modification of Provisional Measures para 57(2)(c)

has jurisdiction over State responsibility, the ICC over individual criminal responsibility. The model governing state and individual responsibility for international crimes is dual, but the jurisprudence regulating these two distinct forms of liability frequently intersects, especially when they simultaneously adjudicate the same matter, for example in disputes related to Bosnia, Myanmar, Ukraine or Palestine. These international tribunals are in constant dialogue with each other and has a long and established history of reciprocal reliance on other Courts' findings of both facts and law.

(1) ICC reliance on the ICJ

In *Lubanga*, the ICC heavily quoted and referenced statements of law and facts by the ICJ. It relied upon both legal and factual assessments of the ICJ in *Democratic Republic of the Congo v Uganda*, which similarly dealt with the situation in the DRC.

The ICC accepted, for example, the ICJ's legal determinations that "territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised", and that the court would need to "satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."⁴⁰⁴

It also relied upon factual determinations that there was "**clear evidence** of the fact that Uganda established and exercised authority in Ituri as an occupying Power".⁴⁰⁵ It quoted several of the ICJ's findings, including "**persuasive evidence** that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district", and "the conduct of the UPDF as a whole", which was "clearly attributable to Uganda, being the conduct of a State organ".⁴⁰⁶

⁴⁰⁴ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 542, footnote 1651; *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) paras 212-3, footnotes 280-1, relying on ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 168, paras 172-3; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136, paras 78, 89

⁴⁰⁵ *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) para 214, footnote 282, relying on ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 168, para 175

⁴⁰⁶ *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) paras 215-6 footnotes 283, 285, relying on ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 168, paras 209, 213; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion of 29 April 1999) [1999] ICJ Rep 62, para 62

It thus **reiterated the ICJ's determination** that “the Republic of Uganda [...] violated the principle of non-use of force in international relations and the principle of non-intervention”, and can be considered as an occupying Power.⁴⁰⁷ Additionally, the ICC also accepted and applied the legal findings of the ICJ in *Nicaragua v United States of America*, that international and non-international conflicts may co-exist,⁴⁰⁸ and the ICJ's *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that Article 1 of the 1907 Hague Regulations, concerning the Laws and Customs of War, has become part of customary law.⁴⁰⁹

In the case of the arrest warrant for Omar Al Bashir, the ICC extensively referenced and relied upon both **legal and factual determinations of the ICJ**. It heavily cited the ICJ's judgment in *Bosnia and Herzegovina v Serbia and Montenegro* in defining the elements of genocide, including what constitutes a group for the purpose of genocide,⁴¹⁰ as well as requisite genocidal intent.⁴¹¹

In doing so, it referenced the legal reasoning and factual determinations which the ICJ had made in ruling that, while there was a clear pattern of mass-atrocities carried out against Bosnian Muslims, these acts were not committed with the requisite genocidal intent.⁴¹²

In determining whether certain documents provided an indication of genocidal intent, the ICC cited the ICJ, referencing its finding that a document which had been issued by the President of the National

⁴⁰⁷ *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) para 217, footnote 286, relying on ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (Judgment of 19 December 2005) [2005] ICJ Rep 168, para 345

⁴⁰⁸ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 540, footnote 1644, relying on *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits, Judgment of 27 June 1986) [1986] ICJ Rep 14, para 219

⁴⁰⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) para 274, footnote 368, relying on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136

⁴¹⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) paras 114, 135-137, 146, footnotes 133, 148, 149, 150, 152, 161-3, relying on ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 191-194, 198-200; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion of 28 May 1951) [1951] ICJ Rep 15, 23

⁴¹¹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) paras 138-44, footnotes 153-60, relying on ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 186-8, 190

⁴¹² *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) paras 183, 194, footnotes 207-8, 221, relying on ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 276-77, 319, 328, 334, 344, 354

Assembly of the self-proclaimed Serb Republic of Bosnia, Republic Srpska, did not constitute evidence of intent to destroy the Bosnian Muslim group.⁴¹³

The ICC also adopted the ICJ's approach in determining that hindrance of humanitarian assistance can be carried out for reasons other than intending to destroy a targeted group, and that such hindrance must be assessed in light of its "extent and systematicity, duration and consequences".⁴¹⁴

In *Katanga*, the ICC extensively referenced and relied upon both legal and factual findings of the ICJ. It explicitly stated that, in undertaking its review, it would have regard to "the Judgment of the International Court of Justice ("ICJ") of 19 December 2005", which would form an "essential exhibit" of evidence, upon which it would base its "rehearsal of the main events".⁴¹⁵

Throughout its entire judgement in this case, the ICC heavily relied on factual determinations of the ICJ.⁴¹⁶ Similarly, the ICC directly applied various legal statements of the ICJ, including in its application of the General Rule method of interpretation,⁴¹⁷ the "overall control" test,⁴¹⁸ the definition of what constitutes an international armed conflict⁴¹⁹ and the occupation of territory.⁴²⁰

(2) Reliance of Other International Criminal Tribunals on the ICJ

Also the *ad hoc* tribunals have relied on legal and factual determinations of the ICJ.⁴²¹ In several instances the ICTY has relied on the jurisprudence of the ICJ to determine that the law set out in the

⁴¹³ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) para 167, footnote 188, relying on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, para 392

⁴¹⁴ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) paras 181-2, footnotes 203-6, relying on ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 324, 327, 328

⁴¹⁵ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) paras 429, 430, relying upon ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 168

⁴¹⁶ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) paras 428, 436, 439, 440, 441, 442, 445, 447, 451, 515, 1199, 1200, 1203

⁴¹⁷ *ibid*, para 45, footnote 90

⁴¹⁸ *ibid*, para 1178, footnote 2737

⁴¹⁹ *ibid*, para 1177, footnote 2735

⁴²⁰ *ibid*, para 1179, footnote 2741

⁴²¹ The ICC has also extensively relied on determinations of the *ad hoc* tribunals in its judgments in various matters. See *Prosecutor v Joseph Kony and Vincent Otti* (Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58) ICC-02/04-01/05-20-US-Exp (19 August 2005) para 16, footnotes 25-28, relying on ICTR and ICTY, *Prosecutor v Edouard Karemi et al* (Rule 73 (B) of the Rules of Procedure and Evidence) ICTR-98-44-T (19 February 2004); *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Final System of Disclosure and the Establishment of a Time Table) ICC-01/04-01/06-102 (15 May 2006) para 14, footnote 28, relying on ICTY, Articles 20 and 21(2) Statute of the International Criminal Tribunal for the

Genocide Convention forms part of customary international law and constitutes *jus cogens*.⁴²² The ICTY even relied on a Separate Opinion of an *ad hoc* Judge in a case before the ICJ to submit that “intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterised as genocide”, referencing legal and factual determinations in relation to Serbs’ intent “to eliminate Muslim control of... parts of Bosnia-Herzegovina”.⁴²³

The ICTY has made extensive references to other determinations of the ICJ on other matters, including in relation to the principles of distinction and protection under humanitarian law,⁴²⁴ Article 3 of the Geneva Conventions of 1949 as a “minimum yardstick” in international armed conflicts,⁴²⁵ and the status of the Hague Regulations annexed to the Hague Convention of 1907 as customary international law.⁴²⁶

The exceptional instances in which the ICTY deviated from the jurisprudence of the ICJ were often related to a relevant difference between the ICTY and the ICJ. In *Tadić*, for example, the ICTY did not apply the “effective control” test enunciated by the ICJ. For the ICJ, the analysis of this concept was related to the imputation of a conduct to a state to establish its non-criminal responsibility,

Former Yugoslavia, *Prosecutor v Radislav Krstic* (Appeal Judgement) IT-98-33-TA (19 April 2004) para 211; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81) ICC-01/04-01/06-773 (14 December 2006) para 20, relying on ICTY, *Prosecutor v Momir Nikolic* (Judgement on Sentencing Appeal) IT-02-60/1-A (8 March 2006) para 96; *Prosecutor v Dragoljub Kunarac et al* (Judgement) IT-96-23&23/1-A (12 June 2002) para 41, *Prosecutor v Milan Milutinovic et al* (Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic’s Provisional Release) IT-05-87-AR65.1 (1 November 2005) para 11

⁴²² *Prosecutor v Radislav Krstic* (Trial Judgement) IT-98-33-T (2 August 2001) para 541, footnote 1195; *Prosecutor v Milomir Stakić* (Trial Judgement) ICTY-97-24-T (31 July 2003) para 500, footnote 1064; *Prosecutor v Goran Jelisić* (Judgement) IT-95-10 (14 December 1999) para 60, footnote 73; *Prosecutor v Radoslav Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) para 680, footnote 1690; *Prosecutor v Vidoje Blagojevic and Dragan Jokic* (Trial Judgement) ICTY-02-60-T (17 January 2005) para 639, footnote 2053; relying upon *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion of 28 May 1951) [1951] ICJ Rep 15, 23

⁴²³ *Prosecutor v Radislav Krstic* (Trial Judgement) IT-98-33-T (2 August 2001) paras 588-89, footnotes 1304-05; *Prosecutor v Vidoje Blagojevic and Dragan Jokic* (Trial Judgement) ICTY-02-60-T (17 January 2005) para 663, footnotes 2100-1, relying on ICJ, *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Order on further Requests for the Indication of Provisional Measures) (Separate Opinion of Judge Lauterpacht) [1993] ICJ Reports 325, 431

⁴²⁴ *Prosecutor v Stanilav Galić* (Appeal Judgement) IT-98-29-A (30 November 2006) para 87, footnote 271, relying on ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996) [1996] ICJ Rep 226, para 78

⁴²⁵ *Prosecutor v Halilovic* (Trial Judgement) IT-01-48-T (16 November 2005) para 25, footnote 53, relying on ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment of 27 June 1986) [1986] ICJ Rep 14, para 218

⁴²⁶ *Prosecutor v Pavle Strugar* (Trial Judgement) IT-01-42-T (31 January 2005) para 227, footnote 775, relying on ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136, para 89

whereas the ICTY parsed this concept to establish the jurisdiction of this tribunal over the criminal responsibility of the defendant.

Notwithstanding the apparent difference between these two cases, the ICTY nonetheless dedicated 16 pages to justify its position, demonstrating its profound commitment to take into account and often rely on factual and legal determinations of the ICJ.⁴²⁷ Indeed, in the same judgement the ICTY relied on several other legal and factual findings of the ICJ, relating to the invasion of the US embassy in Tehran,⁴²⁸ and UCLAs in the case of Nicaragua.⁴²⁹

In relation to the interpretation of the ICTY Statute, it explicitly stated that “[n]otwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation.”⁴³⁰

(3) Reliance of the ICJ on the ICC and Other International Criminal Tribunals

Not only the ICC and the *ad hoc* tribunals relied on the ICJ, also the ICJ relied on rulings of the ICC and the *ad hoc* tribunals in determining matters of fact and law. This is particularly so when the parallel proceedings concern the same conflict, as is the case in the present Communication. According to ICJ, “**proceedings before the ICC relating to the same conflict are relevant for the purposes of valuation**”.⁴³¹

In *Democratic Republic of the Congo v Uganda*, the ICJ stated that it “considers it helpful to refer to the practice of other international bodies that have addressed the determination of reparation

⁴²⁷ *Prosecutor v Dusko Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999) paras 115-145

⁴²⁸ *Prosecutor v Dusko Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999) paras 127, 133, footnotes 149, 159-2, relying on ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment of 24 May 1980) [1980] ICJ Rep 3, 13, 30, 35

⁴²⁹ *Prosecutor v Dusko Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999) para 134

⁴³⁰ *Prosecutor v Dusko Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999) para 282, footnote 346, relying on ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion of 3 March 1960) [1950] ICJ Rep 4, 8

⁴³¹ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations, Judgment of 9 February 2022) [2022] ICJ Rep 13, para 249

concerning mass violations in the context of armed conflict”.⁴³² It specifically relied on the ICC’s factual findings⁴³³ and determinations the ICC made regarding both *evidence*⁴³⁴ and reparations.⁴³⁵

In *Bosnia Herzegovina v Serbia and Montenegro*, the ICJ made extensive references to the findings of the ICTY, explicitly stating that it “*attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, [...] takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute*”.⁴³⁶ Similar approach was adopted by the ICJ in *Croatia v Serbia*, finding that relevant findings of the ICTR on both fact and law are “highly persuasive”, granting them significant weight.⁴³⁷

To sum, international courts and tribunals are in constant dialogue. They rely upon the legal and factual determinations of each other. Findings of one court become especially relevant to other courts adjudicating the same conflict or dispute. The evidentiary weight accorded to these findings is set according to the calibration of the different evidentiary standards governing these Courts. Orders of the ICJ on the same situation, the same crime, even the same suspects the OTP is investigating shall inform and guide the decision-making of the ICC Prosecutor. **This is particularly so in circumstances in which the ICJ orders a national jurisdiction to prosecute and punish a crime under the jurisdiction of the ICC.** As the next Section establishes, a failure of the concerned government of to comply with this order essentially means this ICJ order is now addressed to the ICC Prosecutor in accordance with the principle of complementarity. This is the case in the parallel ICJ and ICC proceedings in relation to the situation in Palestine, the ongoing conflict in Gaza and the crime of incitement to genocide. Following the indication of provisional measures by the ICJ in *South Africa v Israel*, the OTP must consider the evidentiary pertinence of this order, the relevance of its legal and factual determinations, and the consequences of non-compliance.

⁴³² *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations, Judgment of 9 February 2022) [2022] ICJ Rep 13, para 123

⁴³³ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations, Judgment of 9 February 2022) [2022] ICJ Rep 13, para 191

⁴³⁴ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations, Judgment of 9 February 2022) [2022] ICJ Rep 13, paras 123, 158

⁴³⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations, Judgment of 9 February 2022) [2022] ICJ Rep 13, paras 192, 249

⁴³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, paras 223, 296, 403

⁴³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment of 3 February 2015) [2015] ICJ Rep 3, paras 182, 469, 491

The ICJ finding, according to which Israeli officials are plausibly inciting to genocide, obligates the OTP to expand its investigation and include the crime of incitement to genocide, provided that the ICJ’s evidentiary standard for granting provisional measures meets (or surpasses) the requisite threshold for investigating this crime and, if necessary, arresting those suspected of its commission.

III. EQUATING THE ICJ’S PLAUSIBILITY STANDARD WITH THE ICC’S ‘REASONABLE GROUNDS’

The ICJ can grant provisional measures *only* when it finds that “the facts and circumstances... are sufficient to conclude that at least some of the rights claimed... are **plausible**.” The ICJ found that “[t]his is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide *and related prohibited acts identified in Article III...*”⁴³⁸

The ICC must open an investigation when it is satisfied that the evidence presented to it demonstrates that there is a ‘**reasonable basis to believe**’ that a crime under its jurisdiction has been committed. Both the OTP and the PTC found this is the case in the case in the Situation in the State of Palestine.⁴³⁹

The ICC may issue arrest warrants insofar there is a ‘**reasonable grounds to believe**’ the crime has been committed. Both the OTP and the PTC found this is the case with respect to crimes against humanity and war crimes in Gaza co-perpetrated by Netanyahu and Gallant, two of the suspects in this Communication.⁴⁴⁰

(1) The (Similar) Standard for Expanding an Investigation and Issuing Arrest Warrants

If the *State* of Israel is plausibly inciting to genocide, it necessarily means State agents or other individuals under its jurisdiction are plausibly participating in this crime. To open an ICC investigation against these individuals there must be a ‘reasonable basis to believe’ the crime has been committed. But *including* this crime in an already ongoing investigation does not seem to require this

⁴³⁸ *ibid*, para 54

⁴³⁹ Karim Khan, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ International Criminal Court (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 2 December 2024; International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁴⁴⁰ Karim Khan, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ International Criminal Court (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 6 June 2024; International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

evidentiary standard of proof. It suffices there was a reasonable basis to believe that crimes within the jurisdiction of the ICC, based on which the investigation was opened, have been committed.⁴⁴¹

When the OTP learns of an alleged perpetration of a new crime under its jurisdiction in a context of an already pending investigation, it has no discretion ('shall') but to extend its investigation to include that crime. The Rome Statute explicitly notes that, as part of the "[d]uties and powers of the Prosecutor with respect to investigations", "[t]he Prosecutor **shall...** [i]n order to establish the truth, **extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute.**"⁴⁴²

In so far this assessment finds that such criminal responsibility can be imputed to specific suspects and that there are reasonable grounds to believe they have co-perpetrated this new crime, the Prosecutor has to request the PTC to summon or issue arrest warrants against these individuals. The PTC issues arrest warrants if doing so is necessary "to ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; **or** (iii) Where applicable, **to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances**".⁴⁴³

In the present case, the PTC has already found reasonable grounds to believe that crimes related to incitement to genocide, which are within the jurisdiction of the Court and which arises out of **the same circumstances** have been committed; that in the course of committing these crimes, the two suspects whose arrest was sought by the Prosecutor created conditions *intended* to bring about partial destruction of the targeted group, potentially a genocidal act under Article 6 RS; that **conduct – be it by the two suspects whose arrest is requested or others - similar to the one for which the arrests were requested "appears to be ongoing"**, a finding that indicates that at least one of the grounds for issuing the arrest warrants was the obligation "to prevent the person from continuing with the commission of that crime **or related crime**". Based on these findings the PTC has already issued arrest warrants against two of the eight suspects identified in this Communication.

⁴⁴¹ Office of the Prosecutor 'Situation in Georgia: Summary of the Prosecution's Request for authorisation of an investigation pursuant to article 15' (13 October 2015) para 63 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Art_15_Application_Summary-ENG.pdf> accessed 21 June 2024

⁴⁴² Article 54(1)(a) RS

⁴⁴³ Article 58(1) RS

The findings of the PTC substantiate the third ground of arrest with respect to **all the eight suspects** in connection with the crime of incitement to genocide under Article 25(3)(e) RS. Consequently, the Prosecutor should request the PTC to amend the arrest warrant against Netanyahu and Gallant so they would include this new crime,⁴⁴⁴ and to issue arrest warrants against the six other suspects.

Finally, also the first two grounds for issuing arrest warrant are applicable to all the suspects identified in this Communication: all suspects refuse to acknowledge the jurisdiction of and to appear before the Court; and there is ample evidence that some of the suspects, as well as the head of the intelligence services of the country of nationality of the suspects, have already tried to “obstruct or endanger the investigation or the court proceedings” in this case.⁴⁴⁵

(2) ‘Reasonable Ground to Believe’

‘Reasonable grounds to believe’ is a higher standard of proof than ‘reasonable basis to believe’ and lower than ‘substantial grounds to believe’.⁴⁴⁶ The PTC defined the criterion in the Second Decision on the Prosecution's Application for a Warrant of Arrest for Omar Al Bashir.⁴⁴⁷ It entails that, for every element of the crime, the evidence must satisfy that the commission of each element is a ‘reasonable conclusion’ drawn from the evidence presented.⁴⁴⁸ However, just as the ICJ finding on ‘plausibility’ is provisional and may be different at the stage of a final judgement, also the ICC jurisprudence does not require the conclusion to be definitive. Such a conclusion would only be necessary in a sentencing judgement, when the standard of ‘beyond a reasonable doubt’ is applied.⁴⁴⁹

The PTC further elaborated on what guides its application of ‘reasonable grounds to believe’. It stated that it must be applied following relevant recognised human rights instruments, such as the European

⁴⁴⁴ Article 58(6) RS

⁴⁴⁵ Karim Khan, 'Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the Situation in the State of Palestine and Israel' (30 October 2023) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel>> accessed 2 December 2024; The Guardian, 'Revealed: Israeli Spy Chief ‘Threatened’ ICC Prosecutor Over War Crimes Inquiry' (28 May 2024) <<https://www.theguardian.com/world/article/2024/may/28/israeli-spy-chief-icc-prosecutor-war-crimes-inquiry>> accessed 2 December 2024; The Guardian, 'Revealed: Spying, Hacking, and Intimidation: Israel’s War on the ICC Exposed' (28 May 2024) <<https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed>> accessed 2 December 2024; Middle East Monitor, 'Israel’s ‘thug-like tactics’: Former ICC prosecutor breaks silence about threats and intimidation' (28 November 2024) <<https://www.middleeastmonitor.com/20241128-israels-thug-like-tactics-former-icc-prosecutor-breaks-silence-about-threats-and-intimidation/>> accessed 2 December 2024

⁴⁴⁶ William A. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 706

⁴⁴⁷ *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010)

⁴⁴⁸ *ibid* para 4

⁴⁴⁹ *ibid*

Convention on Human rights⁴⁵⁰ (ECHR) and the American Convention on Human Rights⁴⁵¹ (ACHR), which follows a ‘reasonable suspicion’ standard.⁴⁵² This threshold is used by the ECtHR when it assesses the legality of a lawful arrest or detention in criminal cases under Article 5(1)(c) ECHR.

‘Reasonable suspicion’ has been defined by the European Court of Human Rights (ECtHR) as “presupposing the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence” and “sufficient facts or information which would provide a plausible and objective basis for suspicion.”⁴⁵³ The purpose of detention in cases guided by Article 5(1)(c) ECHR is to “further the criminal investigation by way of confirming or dispelling the suspicion underlying the arrest.”⁴⁵⁴

The stage of summons or arrests in ICC proceedings is closer to the stage of *confirmation of charges*. Resorting to the ECtHR’s interpretation of ‘reasonable suspicion’ by the PTC suggests that ‘reasonable grounds to believe’ is akin to the standard in the middle of the criminal investigation phase. The wording ‘reasonable suspicion’ seems to be a lower level of evidence as it indicates a faint belief that a crime has occurred,⁴⁵⁵ as opposed to reasonable grounds which imply a firm belief.⁴⁵⁶

Lowering the evidentiary threshold for arrest warrants faced criticism from both the literature and former ICC judges.⁴⁵⁷ But the PTCs in *Katanga*, *Gbagbo* and *Ntanga* still referenced ‘reasonable suspicion’ in relation to the application of ‘reasonable grounds to believe’.⁴⁵⁸

⁴⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3

⁴⁵¹ American Declaration of the Rights and Duties of Man, OAS Res adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992)

⁴⁵² *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010) para 32; *Prosecutor v. Ahmad Harun and Ali Kushyab* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07 (27 April 2007) para 28

⁴⁵³ *Fox, Campbell and Hartley v. The United Kingdom*, ECtHR (1990) Series A, No. 182, para 32; *Labita v. Italy*, ECtHR (2000) Appl. No. 26772/95, para 156; *Murray v. The United Kingdom*, ECtHR (1994) Series A, No. 300, para 63

⁴⁵⁴ Michael Ramsden & Cecilia Chung, ‘Reasonable Grounds to Believe: An Unreasonably Unclear Evidentiary Threshold in the ICC Statute’ (2015) 13 J Int’l Crim Just 555, 564-565

⁴⁵⁵ *Fox, Campbell and Hartley v The United Kingdom*, para 32

⁴⁵⁶ Georghios M. Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Martinus Nijhoff, 2010) 109

⁴⁵⁷ *ibid*; Ramsden & Chung (2015) 564-5; Schabas (2010) 707;

⁴⁵⁸ *Prosecutor v Laurent Koudou Gbagbo* (Decision on the Prosecutor's Application Pursuant to Art. 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo) ICC-02/11-01/11 (30 November 2011) para 27; *Prosecutor v Boscon Ntaganda* (Decision on the Prosecutor's Application under Art. 58) ICC-01/04-02/06 (13 July 2012) para 16 (hereinafter ‘*Ntaganda* Decision’). *Prosecutor v Sylvestre Mudacumura* (Decision on the Prosecutor's Application under Article 58 against Sylvestre Muducamura) ICC-01/04-01/12 (13 July 2012) para 19, the last case concerning Article 58(1)(a), the Pre-Trial Chamber, in assessing whether ‘reasonable grounds’ existed to believe that war crimes were committed in the DRC referred back to the definition it provided in the second decision on the arrest warrant against Omar Al Bashir, without

To conclude, the evidentiary standard of ‘reasonable grounds to believe’ is in fact lower than its wording suggests. The evidentiary threshold must be interpreted as a ‘reasonable conclusion’ drawn from the presented evidence. Its application must be guided by the ‘reasonable suspicion’ standard **which has been defined as facts that present a *plausible*** and objective basis for suspicion.

3. From ‘Reasonable Grounds’ to ‘Plausibility’

On the evidentiary spectrum, plausibility can be located somewhere between the lower standard of ‘not frivolous’, and the medium standard of ‘possible’ or ‘reasonable’ existence.⁴⁵⁹ Lando argues that the object of the evidentiary standard of plausibility is ‘to protect respondent states against requests for provisional measures either lacking a plausible legal basis under international law, or not based on a plausible claim on the merits.’⁴⁶⁰ It acts as a safeguard for states against the misuse of the provisional measures system and it should preclude the use of binding measures as a political tool.⁴⁶¹

The view that the evidentiary standard of ‘not frivolous’ would be too low to prevent such political use is consistent with Miles’ understanding that ‘plausibility of rights’ refers to ‘plausibility of claims’.⁴⁶² ‘Plausibility’, therefore, tilts towards the medium standard of proof, i.e., ‘possible’ or ‘reasonable’ existence.

Investigative bodies which the ICJ refers to as evidence uses different evidentiary standards for similar claims. In the Provisional Measures Order in *The Gambia v Myanmar* the ICJ consistently cited the UN human rights fact-finding mission (FFM) in assessing plausibility. **This FFM used the standard of ‘reasonable grounds’, which the ICJ referenced four times as evidence for the ‘plausible rights’ criterion**, and the risk of irreparable prejudice to them.⁴⁶³

In *Canada and the Netherlands v Syria* the ICJ similarly cited two ‘reasonable grounds’ assessments by other bodies as evidence,⁴⁶⁴ and mentioned it once⁴⁶⁵ as a requirement under the

mentioning ‘reasonable suspicion’: However, This does not yet necessitate disregarding the ‘reasonable suspicion’ test as guidance, because the ‘reasonable conclusion’ test still does not provide a clear answer on its own. In *Gicheru* and in *Bett* the Single Judge did not elaborate any further on the definition of Article 58(1). The case did not concern one of the four crimes against peace but an offence against the administration of justice.

⁴⁵⁹ Kolb (2020) 380

⁴⁶⁰ Lando (2018) 667

⁴⁶¹ *ibid*

⁴⁶² Miles (2018) 44

⁴⁶³ *Gambia v Myanmar*, paras 54, 55, 73

⁴⁶⁴ *Canada and the Netherlands v. Syrian Arab Republic*, para 73

⁴⁶⁵ *ibid*, para 55

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁶⁶ (CAT). In other cases, **the Court’s assessment of ‘plausibility’ made further reference to the ‘reasonable suspicion’ or ‘reasonable grounds’ evidentiary threshold** found in other human rights instruments.⁴⁶⁷

To sum, ‘plausibility’ is a mid-level evidentiary standard, akin to ‘possible’ or ‘reasonable’ belief. It is further guided by the evidentiary standard of human rights institutions, which the ICJ refers to repeatedly. The ICC ‘reasonable grounds to believe’ standard, therefore, is reminiscent of the ICJ’s jurisprudence on the definition of plausibility.⁴⁶⁸

Consequently, the ICJ’s Orders according to which it is ‘plausible’ that Israel commits incitement to commit genocide under Article III of the Genocide Convention, suggests that there are ‘reasonable grounds to believe’ that individuals might be criminally liable for direct and public incitement to commit genocide in accordance with Article 25(3)(e) Rome Statute.⁴⁶⁹

The PTC decision to issue arrest warrants against two of the eight suspects identified in this Communication corroborates and reaffirms this argument, according to which the ICJ ‘plausibility’ standard is higher or equal to the ICC standard of ‘reasonable grounds to believe’.

In January 2024, the ICJ found it **plausible** that Israel has committed genocidal acts within the meaning of the Genocide Convention. One such act is “deliberately inflicting on the group **conditions of life calculated to bring about its physical destruction in whole or in part**”.⁴⁷⁰

In November 2024, the PTC of the ICC “found that **there are reasonable grounds to believe** that the lack of food, water, electricity and fuel, and specific medical supplies, **created conditions of life calculated to bring about the destruction of part of the civilian population in Gaza**, which

⁴⁶⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention)

⁴⁶⁷ Mona Rishmawi, ‘The Plausibility test in the Recent Provisional Measures Orders of the International Court of Justice’ (*EJIL: Talk!*, 18 December 2023) <<https://www.ejiltalk.org/the-plausibility-test-in-the-recent-provisional-measures-orders-of-the-international-court-of-justice/>> accessed 26 March 2024

⁴⁶⁸ Mona Rishmawi, ‘The Plausibility test in the Recent Provisional Measures Orders of the International Court of Justice’ (*EJIL: Talk!*, 18 December 2023) <<https://www.ejiltalk.org/the-plausibility-test-in-the-recent-provisional-measures-orders-of-the-international-court-of-justice/>> accessed 26 March 2024

⁴⁶⁹ For a similar reasoning and same conclusion see Alexandre S. Galand and Wim Muller, ‘The ICJ’s Findings on Plausible Genocide in Gaza and its Implications for the International Criminal Court’ (*Opinio Juris* 5 April 2024) <<https://opiniojuris.org/2024/04/05/the-icjs-findings-on-plausible-genocide-in-gaza-and-its-implications-for-the-international-criminal-court>> accessed 7 April 2024

⁴⁷⁰ Article II(c) of the Genocide Convention

resulted in the death of civilians, including children due to malnutrition and dehydration”, and that this potentially genocidal act under Article 6 RS provides “**reasonable grounds to believe that the crime against humanity of murder** was committed in relation to these victims.”⁴⁷¹

D. PROCEDURE

As established above, there are reasonable grounds to believe that the eight suspects identified in this Communication have committed the crime of incitement to genocide within the meaning of Article 25(3)(e) RS. In accordance with Article 54 RS, the investigation of this new crime should be conducted under the already ongoing investigation (ICC-01/18), which concerns ICC crimes in the oPt since 13 June 2014.⁴⁷² Statements by both the previous and the current Prosecutors reaffirms this procedural approach.⁴⁷³ Specifically, in 2023, the latter confirmed that the investigation which has commenced on 3 March 2021 “is ongoing and **extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023.**”⁴⁷⁴

Because the crimes alleged in the present Communication are falling within the scope of the ongoing investigation, there is no need to address the criteria for the *opening* a new investigation under Article 53(1) RS, as both the OTP and the PTC have found these criteria have been met in the case of the situation in the State of Palestine.⁴⁷⁵ Yet, at multiple stages of the proceedings, the fulfilment of procedural requirements, such as the admissibility of a case or the jurisdiction of the Court, can be challenged and re-assessed.⁴⁷⁶ Specifically, “[i]n selecting potential cases **within the situation**”, the

⁴⁷¹ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁴⁷² Fatou Bensouda, ‘Statement of the ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine’ International Criminal Court (3 March 2021) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>> accessed 14 August 2024; *Situation in the State of Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine) ICC-01/18 (20 December 2019) paras 2, 94-96

⁴⁷³ The Office of the Prosecutor, ‘Summary of Preliminary Examination Findings on the situation Palestine’ (20 December 2019) para 9 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>> accessed 31 July 2024

⁴⁷⁴ Karim Khan, ‘Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties’ International Criminal Court (17 November 2023) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>> accessed 8 July 2024

⁴⁷⁵ The Office of the Prosecutor, ‘Summary of Preliminary Examination Findings on the situation Palestine’ (20 December 2019) para 1 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>> accessed 3 July 2024

⁴⁷⁶ Under, e.g., articles 19, 53(2)(b), 58(1)(a) RS. Under regulation 33 of the OTP, the Prosecutor shall select cases based on the “factors set out in article 53, paragraph 1 (a) to (c) in order to assess issues of jurisdiction, admissibility (including gravity), as well as the interests of justice.”

Prosecutor “shall consider the factors set out in article 53, paragraph 1 (a) to (c) in order to assess issues of jurisdiction, admissibility (including gravity), as well as the interests of justice”.⁴⁷⁷

Accordingly, the purpose of this Section is to establish the procedural elements of the potential cases that are arising out of this Communication, including an analysis of their admissibility and specifically the principle of complementarity: the ICJ Order to prevent and punish incitement to genocide, Israel’s failure to do so, and the Prosecutor’s obligation to investigate and prosecute in its stead.

I. THE INVESTIGATION INTO THE SITUATION IN THE STATE OF PALESTINE

In 2015, the State of Palestine accepted the Court’s jurisdiction over the occupied Palestinian territory (oPt). In 2018, Palestine referred to the Prosecutor the Situation in Palestine since 13 June 2014. In 2019, the Prosecutor announced that all statutory criteria had been met to open an investigation.⁴⁷⁸

Instead of opening an investigation, however, the Prosecutor referred the matter of territorial jurisdiction to the Pre-Trial Chamber.⁴⁷⁹ In 2021, PTC-I confirmed the Court’s territorial jurisdiction over the oPt, including **Gaza**,⁴⁸⁰ and subsequently the Prosecutor open an official investigation.⁴⁸¹

In 2023, the Prosecutor received additional referrals from several countries indicating potential crimes, including **genocide**.⁴⁸² In May 2024 the Prosecutor requested and in November 2024 the PTC issued arrest warrants against the suspects Netanyahu and Gallant, who are currently at large.⁴⁸³

⁴⁷⁷ Regulation 33 of the Regulations of the Office of the Prosecutor ICC-BD/05-01-09

⁴⁷⁸ See Article 12(3), 13 and 14 RS. See the Office of the Prosecutor, ‘State of Palestine: Situation in the State of Palestine’ ICC-01/18 (n. d.) <<https://www.icc-cpi.int/palestine>> accessed 14 August 2024

⁴⁷⁹ Fatou Bensouda, ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction’ International Criminal Court (20 December 2019)

<<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>> accessed 14 August 2024

⁴⁸⁰ *Situation in the State of Palestine* (Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’) ICC-01/18 (5 February 2021) 60

⁴⁸¹ Fatou Bensouda, ‘Statement of the ICC Prosecutor, Fatou bensouda, respecting an investigation of the Situation in Palestine’ International Criminal Court (3 March 2021)

<<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>> accessed 14 August 2024

⁴⁸² South Africa et al, ‘State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court’ (17 November 2023)

<<https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf>> accessed 14 August 2024

⁴⁸³ Karim Khan, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ International Criminal Court (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 6 June 2024; International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction

II. JURISDICTION

The Prosecutor *must* ('shall') investigate a crime "unless he... determines that there is no reasonable basis to proceed" under the RS.⁴⁸⁴ One such basis is jurisdictional: the evidence available to the Prosecutor must give rise to "a reasonable basis to believe that a crime *within the jurisdiction* of the Court has been or is being committed".⁴⁸⁵ If in the course of the investigation the Prosecute requests to issue arrest warrants, the PTC must be satisfied, *inter alia*, that "there are reasonable grounds to believe that the person has committed a crime *within the jurisdiction* of the Court".⁴⁸⁶

Ratione Temporis

The Court "may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3".⁴⁸⁷ On 1 January 2015, the State of Palestine has made a declaration under article 12(3) RS, accepting jurisdiction over crimes committed in the oPt since 13 June 2014. Because the alleged Article 25(3)(e) crimes occurred from 7 October 2023 onwards, the Court has temporal jurisdiction.

Ratione Materiae

Article 5 RS mentions four ICC crimes over which the Court has subject matter jurisdiction: Genocide, crimes against humanity, war crimes, and aggression. **Article 25(3)(e) establishes the 5th:** A person shall be criminally responsible and liable for punishment... if that person, "[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide".

As Section B showed, incitement to genocide is an inchoate crime. The purpose of its criminalizing is *inter alia* to prevent or terminate other genocidal acts. Its affinity and reference to the crime of genocide ("in respect of the crime of genocide") establishes the jurisdictional link to the genocidal acts detailed in Article 6 RS and, in turn, to the subject matter jurisdiction clause in Article 5 RS.

and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁴⁸⁴ Article 53(1) RS

⁴⁸⁵ Article 53(1)(a) RS

⁴⁸⁶ Article 58(1)(a) RS

⁴⁸⁷ Article 11(2) RS

Whilst commission or attempted commission of genocidal acts other than incitement in connection with Articles 25(3)(a)-(d) and (f) is grounded in Article 6 RS, Article 25(3)(e) RS has to explicitly affiliate the crime of incitement to Article 6 by specifying: “in respect of the crime of genocide”.

The ICC has subject matter jurisdiction over incitement to the crime of genocide, whereas incitement to commit any other ICC crime has been left outside the subject matter jurisdiction of the Court. The *sui generi* nature of incitement, which can be applied to one single crime on the one hand, but without requiring its commission or attempted commission on the other hand, emphasizes the main object and purpose of Article 25(3)(e) RS: to prevent the principal or auxiliary perpetration of this crime under one of the modes of liability listed in Articles 25(3)(a)-(d) RS.

Ratione Loci

Article 12(2)(a) of the Statute establishes that, in the case of a state-party referral, the Court may exercise its jurisdiction if “the State on the territory of which the conduct in question occurred” is a State Party or a State that has accepted the Court’s jurisdiction. In 2018, the State of Palestine referred the situation on its territory.⁴⁸⁸ In 2021, the PTC has found that Palestine “qualifies as ‘[t]he State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute” and that the Court’s territorial jurisdiction thus “extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”⁴⁸⁹

- (i) “The conduct in question”: the **constituent elements** of incitement

If “at least part of the conduct (i.e. the *actus reus* of the crime) must take place in the territory of a State Party”, the Court is able to assert jurisdiction.⁴⁹⁰ Because the *actus reus* of the crime of

⁴⁸⁸ Office of the Prosecutor, ‘State of Palestine: Situation in the State of Palestine’ ICC-01/18 (n.d.) <<https://www.icc-cpi.int/palestine>> accessed 19 August 2024

⁴⁸⁹ *Situation in the State of Palestine* (Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’) ICC-01/18 (5 February 2021) 60

⁴⁹⁰ *Pre-Trial Chamber III’s Decision on the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) para 61. See more in general paras 43-61. See also *Request Under Regulation 46(3) of the Regulations of the Court* (Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”) ICC-RoC46(3)-01/18 (6 September 2018) para 72. Territorial jurisdiction over transboundary crimes had already been discussed by the Prosecutor in Situation in the Republic of Korea. See International Criminal Court, Office of the Prosecutor, *Situation in the Republic of Korea. Article 5 Report* (2014) para 39

incitement is completed on the territory of a State party, the territorial jurisdiction under Article 12(2)(a) RS is established.⁴⁹¹

In this case the conduct is the inciting statement. This statement is composed of two elements. It has to be direct and public. The directness element is composed of its content and audience. The *content* of the statement refers to Gaza, and at least some of its *audience*, IDF troops, are in Gaza.

Also the public element of the crime takes place, in whole or in part, in Gaza. As explained in Section B, public incitement includes consideration of the statement's circumstances, including the *audience* and *medium* through which it was disseminated to the audience.

The audience is fundamental aspect of the public element of the crime. Without addressees there is no meaning to the public sphere in which the incitement is made. If there is no one to incite, there is no incitement and, in turn, no crime.

In the present case, the primary addressees of the above-cited statements, the 'others' who are expected to be incited by these statements, are first and foremost the mandatory and reserve commanders and soldiers operating in Gaza.

The *medium*, that is, the digital manner through which the statements were diffused and broadcasted, further indicates that the 'public' element has been partially taken place in Gaza. The mode of transmission of the inciting speech and its reception by the audience in Gaza is part of the *actus reus* which is realized on the territory of a State Party, and thus suffices for the assertion of territorial jurisdiction.⁴⁹²

All statements were available to wider audiences through publication on the internet (YouTube, social networks such as X, online mainstream and independent outlets, and so on), allowing for virtually limitless dissemination, reaching millions and permanently accessible *everywhere*, spreading across borders, including and specifically to Gaza. The digital mode of transmission is not only

⁴⁹¹ This approach to territorial jurisdiction is known as "constituent element theory" and has been endorsed by the ICC. See *Pre-Trial Chamber III's Decision on the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) para 56, 59-61

⁴⁹² Compare *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) para 50

geographically but also temporally unlimited, further increasing the diffusion of the statements of their addressees in Gaza.⁴⁹³

While there are different approaches to the territorialisation of online conduct, it is generally agreed that **the territorial location of users consuming the content** in question is sufficient for a Court to assert its jurisdiction on the entire conduct, wherever it may be initiated.⁴⁹⁴

As demonstrated by the wealth of responses and reposts to the statements analysed above, users located in Gaza and other territories of the oPt accessed, were exposed, and continue to access and be exposed to these inciting statements.⁴⁹⁵ Because the inciting statements were uploaded in Israeli territory, broadcasted to Gaza and other areas that are under the Court's jurisdiction, and received by users who consumed such statements therein, the Court has territorial jurisdiction over the conduct.

(ii) “The conduct in question” and its **effects**

Article 12(2)(a) Rome Statute may be also interpreted as establishing jurisdiction whenever *effects* of the conduct in question occur on the territory of a State Party.⁴⁹⁶ Under such approach, the Court has jurisdiction because the speculated effects and **victims** of the conduct are located in Gaza.

⁴⁹³ Oren Bigos, ‘Jurisdiction over Cross-Border Wrongs on the Internet’ (2005) 54 *The International and Comparative Law Quarterly* 603

⁴⁹⁴ Michail Vagias, ‘The Territorial Jurisdiction of the ICC for Core Crimes Committed Through the Internet’ (2016) 21 *Journal of Conflict & Security Law* 534-539. For applicable domestic case law, see Vagias’ interpretation of the *Toben* case and *Yahoo! Auction* case, at 532. Oren Bigos takes an even stricter approach. In his, ‘Jurisdiction over Cross-Border Wrongs on the Internet’ (2005) 54 *The International and Comparative Law Quarterly* 610, he argues that the user should suffer damage from the consumption of the content in order for jurisdiction to arise from the place of consumption itself. However, it should be noted that Bigos was addressing civil wrongs, including defamation and intellectual property – i.e. non-criminal cases, and pivotally not inchoate crimes. The fact that incitement to genocide is an inchoate crime is key in applying Bigos’ contribution to our case, for it is in the very nature of an inchoate crime that effects of the conduct are not a required element.

⁴⁹⁵ A more expansionary approach, instead, considers the visibility and accessibility of the content on the territory of a State Party sufficient for jurisdiction to arise. See for example Michail Vagias, ‘The Territorial Jurisdiction of the ICC for Core Crimes Committed Through the Internet’ (2016) 21 *Journal of Conflict & Security Law* 537. Here it is not necessary to further expand the argument in this sense, as a narrower approach already suffices for jurisdiction to be established.

⁴⁹⁶ In Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishing 2011) 161, the author argues that, if states are ready “to exercise their ‘long arm’ effects jurisdiction over arguably criminal anti-competitive practices”, there is no reason to believe that they did not intend to open this possibility to a Court created to “to prosecute and punish perpetrators of the most heinous crimes imaginable, which violate core values shared by all states in the world”. This approach to territorial jurisdiction is known as the “effects doctrine”. Its existence has been recognised by the ICC in *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar) ICC-01/19 (14 November 2019) para 56. The effects doctrine in international criminal law is reinforced by comparison with domestic practice in antitrust law and case law. See Vagias’ analysis in his *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (Bynkers Hoek Publishing 2011) 155-161

The inchoate nature of incitement to genocide commands that its effects do not need to materialise for the conduct to be criminalised. When dealing with inchoate offences, some domestic legal systems provide for **territorial jurisdiction when the ‘ulterior offence’**, the intended offence – in the case of incitement to genocide, genocide itself – **is intended to take place in the territory of the State.**⁴⁹⁷

All the statements analysed above refer to Gaza as the territory in which the incited genocidal acts should take place. The speculated effects, namely the speculated victims and the ulterior offence (genocide), are intended to take place in Gaza.

Incitement to genocide is an inchoate crime because of the urgency in prosecuting it as soon as it emerges, in order to prevent its genocidal effects from unfolding. The same rationale applies to the obligation to prosecute incitement irrespective where the statements were physically made, provided that their speculative effects are intended to take place in the territory of a State Party.

(iii) “The conduct in question”: the (potential) genocide

The ICJ determined that it is plausible that genocidal acts have been committed in Gaza. As established in the previous Section, this finding translates under the RS to a determination that there is a reasonable ground to believe that genocidal acts have been or will be committed.

Commission of acts under Article 6 RS in Gaza necessarily trigger the territorial jurisdiction over incitement to commit such acts under Article 25(3)(e). An attempt to commit genocidal acts in Gaza would also establish the territorial jurisdiction over the inciters of such attempt. A reasonable basis or ground to believe these acts have been committed or attempted is a sufficient evidentiary basis to substantiate *jurisdictional* link between the inciter and the subsequent genocidal conduct, at least in the phase of investigation and seeking arrest warrants.

As noted above, there is also room to argue that so long as the inciter calls to commit genocide in a territory of a state party, there is territorial jurisdiction irrespective of the geographical location of the inciter. Because the criminalization of incitement to genocide does not require commission or attempted commission of genocide, because the purpose of enforcing incitement is to prevent the genocide, the fact that the location of the *potential* genocide falls within the territory of the State party is sufficient to trigger the territorial jurisdiction of the Court. The ‘conduct’ in Article 25(3)(e) RS is

⁴⁹⁷ Cedric Rynjaert, ‘Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law’ (2009) 9 *International Criminal Law Review* 204-209

“in respect to genocide” under Article 6 RS, and the purported genocide occurs in Gaza. In other words, both the conduct of incitement, and the acts this conduct aims to prevent, take place in Gaza.

Articles 6-8 RS contain the *crimes* that must occur on the territory of the state party. Article 25 RS concerns *individual* criminal responsibility for these crimes. Article 25(1) RS vests the Court with “jurisdiction over natural *persons* pursuant to this Statute”. Article 25(2) RS explains that “[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible”.

Whilst the crime (or an element of the crime) needs to be within the territorial jurisdiction of the Court, the person who is individually responsible for this crime can be located anywhere. Territorial jurisdiction is about the location of the elements of the crime, not the location of the perpetrator.

Article 25(3)(e) RS specifies that “a *person* shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... [i]n respect of the crime of *genocide*, directly and publicly incites *others* to commit genocide”.

Article 25(3)(e) is a particular manifestation of the general principles of Article 25(1) and (2): for a natural person to be criminally liable it is sufficient that the crime, not the person, that needs to be within the jurisdiction of the Court.

The following parts of the conduct – a direct and public call inciting others to commit genocide – terminates in Gaza: the content of the direct call *refers* to Gaza, the public nature of the call *covers* Gaza, the incited “others” are *present* in Gaza, and the genocide (“in respect of the crime of genocide”) purportedly *occurs* in Gaza. The person who is individually and criminally responsible for the incitement, however, can be located anywhere across the globe. So long as part of the crime terminates in Gaza, the territorial jurisdiction of the Court has is triggered.

As noted above, the preventive purpose of criminalizing incitement to genocide is consistent with this reading. Genocide is not a singular event in a specific time and place but a spatial and temporal process. Inciting calls to commit genocide can be made in parallel to and even after the commission of genocidal acts. But they can also be and typically are the first step which logically and chronologically precedes other genocidal acts. Its inchoate nature, therefore, requires jurisdiction to be asserted whenever genocide may potentially materialise in a territory of a State Party.

- (iv) Genocide as Joint Criminal Enterprise: co-perpetration and civilian superiors

In November 2024, the PTC issued arrest warrants against two of the suspects identified in this Communication, Netanyahu and Gallant, for crimes against humanity and war crimes. Similar to the crime of incitement, although these (and other) suspects were physically present in Gaza on multiple occasions, these crimes too were committed in Gaza whilst the suspects were in Israel.

According to the PTC, “each of these two suspects “bear criminal responsibility for the following crimes as **co-perpetrators** for committing the acts jointly with others: the war crime of starvation as a method of warfare; and the crimes against humanity of murder, persecution, and other inhumane acts. The Chamber also found reasonable grounds to believe that Mr Netanyahu and Mr Gallant each bear criminal responsibility as **civilian superiors** for the war crime of intentionally directing an attack against the civilian population.”⁴⁹⁸

Similar to other international crimes, also genocide is a complex crime, one whose execution typically involves the immense apparatus of power of a State or an organization. The most responsible actors, such as head of states and ministers, can commit these crimes only with or through others. They design and plan the crime, order and incite others to commit it, oversees its execution, without being physically present in the crime scene, or even in its territorial jurisdictional scope. Like the crime of incitement, they are orchestrating these crimes with words and statements, addressed to other co-perpetrators and subordinates, who then commit or attempt to commit the crime.

This is particularly so in the case of the crime of crimes. There is no such thing as a lone *genocidaire*.⁴⁹⁹ Genocidal acts including incitement to genocide are crimes whose perpetration is a result of a collective action. They require a multi-actor scenario and often an operation of a complex apparatus of power. This joint venture includes primary and secondary perpetrators, superiors and subordinates, principals and auxiliaries, actors who are complicit but absent from the crime scene.

⁴⁹⁸ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁴⁹⁹ According to Schabas, “it is nearly impossible to imagine genocide that is not planned and organized either by the State itself or a State-like entity, or by some clique associated with it” in William A Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 *The Journal of Criminal Law and Criminology* 966

The most senior and responsible culprits are typically far in time and place from the actual crime. They design policies, take decisions, and make statements to their army and population days and weeks before their addressees act. They can be located thousands of kilometres away from their victims.⁵⁰⁰

The location of the inciter thus has no bearing on the territorial jurisdiction over the crime of incitement “in respect of the crime of genocide” *in Gaza*. The inciter is part of a joint criminal enterprise whose common goal is to destroy the targeted group in Gaza. Whilst some co-perpetrators may be removed from the scene, they all share the responsibility for their relative contribution to the commission of the crimes.

Article 12(2)(a) RS requires the Court to ascertain jurisdiction over the crime and not the criminal. Accordingly, it does not preclude the attribution of individual criminal responsibility to perpetrators who are located outside or at the border of a territory of a state party but co-perpetrating crimes inside this territory, in this case, inciting others in Gaza to commit genocide against Palestinians in Gaza.

III. ADMISSIBILITY

As noted above, investigation of the alleged crime of incitement to genocide is falling within the scope of the already ongoing investigation on the situation in the State of Palestine, whose opening was found to be admissible by the Prosecutor and the PTC.⁵⁰¹ States’ activities however may change over time and “a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*.”⁵⁰² The Prosecutor, certain States, the accused and the Court may challenge or examine admissibility also at later stages of the proceedings.⁵⁰³

⁵⁰⁰ The situation may be assimilated to that analysed in Anonymous Author, ‘Territorial Jurisdiction of the International Criminal Court over the Russian Leadership: Locus Delicti in Complicity Cases’ (2022) *EJIL:Talk!* <<https://www.ejiltalk.org/territorial-jurisdiction-of-the-international-criminal-court-over-the-russian-leadership-locus-delicti-in-complicity-cases/>> accessed 19 August 2024

⁵⁰¹ Fatou Bensouda, ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction’ International Criminal Court (20 December 2019) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>> accessed 20 August 2024

⁵⁰² *The Prosecutor v Germain Katanga* (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/14-01/18 (25 September 2009) para 56

⁵⁰³ See Articles 17-19 and 53 RS. See also International Criminal Court, Rules of Procedure and Evidence (2002, as amended 2018) Rule 62. There is a debate over the definition of a ‘case’. In the stricter definition, a case starts with the issuance of a warrant of arrest or summons under Article 58 of the Rome Statute. However, with the formulation of Article 53(2) “upon investigation”, it appears that a (hypothetical) case could be considered in the broader sense and exists already earlier during investigations. For an overview over the discussion about using terminology “case” or “situation”, see ICC-OTP ‘Informal expert paper: The principle of complementarity in practice’ (2003) 9-10, fn 10 <<https://www.icc-otp.org/informal-expert-paper-the-principle-of-complementarity-in-practice>>

3.1 Complementarity

3.1.1 Notice and Deferral

The principle of complementarity emphasises the primary responsibility states have to investigate and prosecute crimes within their national jurisdiction and the residual responsibility the ICC has as a Court of last resort.⁵⁰⁴ Article 18(1) RS accordingly requires the Prosecutor to notify all States Parties as well as non-State parties which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned upon the initiation of an investigation.

Upon notification, Article 18(2) RS enables the State in question to request a deferral to its national jurisdiction on the basis that it “is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States.”⁵⁰⁵ A deferral request has to be submitted “no later than one month from the time [the State] was notified or otherwise acquired knowledge of the Prosecutor’s intention to investigate”.⁵⁰⁶

[cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf](https://www.cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf)

accessed 20 August 2024

⁵⁰⁴ Although the term “complementarity” is not explicitly mentioned in the Rome Statute, it has been used by several negotiators of the Statute. The court pays great attention to its application in practice. In the situation in Iraq/UK, the Prosecutor closed the preliminary examinations because it found that none of the potential cases arising from the situation would be admissible before the ICC due to complementarity issues. It concluded that UK authorities have not remained inactive and have instead initiated a number of domestic criminal proceedings (OTP ‘Situation in UK/Iraq. Final report’ (9 December 2020) para 495). Similarly, in Colombia, the OTP declared the situation inadmissible based on the assessment of complementarity and decided not to proceed with an investigation. It found “that the national authorities of Colombia were not inactive, unwilling or unable to genuinely investigate and prosecute Rome Statute crimes” and determined that the preliminary examination, which had been conducted for 17 years, had to be closed (OTP ‘Report on the Situation in Colombia’ (30 November 2023) para 65). During the preliminary examination, the Colombian authorities had time to investigate and prosecute domestically. The Office even “decided to encourage Colombia’s efforts to the extent this appeared genuine and help[ed] the authorities to prioritise their work” (OTP ‘Report on the Situation in Colombia’ (30 November 2023) para 9). The closure of preliminary examinations was accompanied by the signing of a Cooperation Agreement between the OTP and the government of Colombia “inspired” by the principle of complementarity to support and sustain Colombia’s accountability processes (OTP ‘Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia’ (28 October 2021)). The “shadow of the ICC”, that is, the threat of its involvement, affected the situation in the country in many ways (Jennifer Easterday ‘Beyond the ‘shadow’ of the ICC: Struggles over control of the conflict narrative in Colombia’ in: De Vos C, Kendall S, Stahn C (eds) *Contested Justice. The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 432-455). Both decisions underscore the rigorous assessment process undertaken by the ICC to determine the admissibility of a situation and the careful consideration given to complementarity to ensure that the Court’s intervention is justified and necessary.

⁵⁰⁵ See, e.g., *The Situation in the Islamic Republic of Afghanistan* (‘Deferral Request made pursuant to Article 18(2) of the Rome Statute’) ICC-02/17-139-Anx1 (26 March 2020) 2 <https://www.cpi.int/sites/default/files/RelatedRecords/CR2020_01538.PDF> accessed 21 August 2024

⁵⁰⁶ Jo Stigen, ‘The Relationship between the International Criminal Court and National Jurisdictions - The Principle of Complementarity’ (Martinus Nijhoff Publishers 2008) 134

The requesting State must **have already started a criminal investigation**⁵⁰⁷ and it must provide **substantiating information** concerning this investigation including “tangible evidence, of probative value and a sufficient degree of specificity, demonstrating that concrete and progressive investigative steps have been or are currently being undertaken to ascertain the responsibility of persons **for alleged conduct falling within the scope of the authorised ICC investigation.**”⁵⁰⁸

In the present case, on 3 March 2021, following the PTC-I’s decision concerning jurisdiction, the OTP announced the initiation of an investigation into the Situation in Palestine. On 9 March 2021, the then Prosecutor provided a notification of this investigation to the relevant States, including Israel and Palestine, pursuant to article 18(1) RS. The Palestinian Authority (PA) announced that “its ability to conduct proceedings is curtailed by the occupation”,⁵⁰⁹ and have welcomed the decision to investigate: “[t]his long-awaited step serves Palestine’s vigorous effort to achieve justice and accountability as indispensable bases for peace”.⁵¹⁰

Israel responded on 8 April 2021, asserting that the notice was not sufficiently specific. On 9 April 2021 the Prosecutor sought to clarify whether Israel was asserting its right to have the investigation deferred pursuant to article 18(2) RS and, if so, whether further information was sought under rule 52(2) of the ICC Rules of Procedure and Evidence (ICC Rules). Israel responded by reiterating that since the notification was not sufficiently specific, it “effectively precluded Israel from making any request of the OTP in response to the Prosecutor’s letter.”⁵¹¹

In a press release, the Israeli PM announced “that the court is acting without authority... Israel is a nation of laws that knows how to investigate itself... Israel reiterates its unequivocal position... the

⁵⁰⁷ The Prosecutor, pursuant to Article 18(2) of the Rome Statute, shall then defer to the State’s investigation. If the State does not sufficiently demonstrate that it has investigated or is investigating its nationals or others under its jurisdiction within the meaning of Article 18(2), the Pre-Trial Chamber should authorise the resumption of the investigation. See *Situation in the Republic of the Philippines* (Prosecution’s request to resume the investigation into the situation in the Philippines pursuant to article 18(2)) ICC-01/21-46 (24 June 2022) paras 30, 43

⁵⁰⁸ Karim Khan, ‘ICC Prosecutor, Mr Karim A.A. Khan QC, notifies Pre-Trial Chamber I of a request from the Republic of the Philippines to defer his investigation under article 18(2) of the Rome Statute’ International Criminal Court (23 November 2021) <<https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-notifies-pre-trial-chamber-i-request-republic-philippines>> accessed 21 August 2024

⁵⁰⁹ *Situation in the State of Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine) ICC-01/18 (22 January 2020) para 180

⁵¹⁰ The Guardian ‘ICC opens investigation into war crimes in Palestinian territories’ (3 March 2021) <<https://www.theguardian.com/law/2021/mar/03/icc-open-formal-investigation-war-crimes-palestine>> accessed 21 August 2024

⁵¹¹ Israel submission in *Situation in the State of Palestine* (Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice) ICC-01/18 (23 September 2024) pages 4-5. <<https://www.lawfaremedia.org/article/israel-responds-to-the-icc-prosecutor%27s-request-for-arrest-warrants>> accessed 2 December 2024

court in The Hague lacks the authority to open an investigation against it... The unacceptable interference of the court lacks any legal basis and contravenes the goals for which it was established... Israel is committed to the rule of law and will continue to investigate any accusation against it”.⁵¹²

On 1 May 2024, Israel notified the OTP that it “is willing and able to investigate and, where necessary, prosecute any alleged violations of international law relating to the current conflict,” and requested that the Prosecutor “defer any investigation it may be conducting in relation to any alleged criminal acts attributed to Israeli nationals or others within Israel’s jurisdiction, in favour of Israel’s processes for review, examination, investigation and proceedings under its national legal system...”.⁵¹³ On 7 May 2024 the OTP responded. Referring to the 2021 correspondence, the Prosecutor asserted that because Israel “**expressly declined to make an application for deferral of the investigation within the prescribed time limit**, Israel has no standing now, under the Statute, to make such an application.”

On 20 May 2024, the Prosecutor publicly announced that he had filed an application seeking warrants of arrest in respect of, *inter alia*, Israel’s Prime Minister, Mr. Benjamin Netanyahu, and Israel’s Minister of Defence, Mr. Yoav Gallant, for Crimes Against Humanity and War Crimes.⁵¹⁴

On 21 November 2024, the PTC issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant. The warrants allege that from at least 8 October 2023 until at least 20 May 2024, Netanyahu and Gallant were co-perpetrators of war crimes, including the use of starvation as a method of warfare, and crimes against humanity such as murder, persecution, and other inhumane acts. Additionally, they are accused as civilian superiors for intentionally directing attacks against the civilian population.⁵¹⁵

⁵¹² Government of Israel ‘PM Netanyahu Holds Discussions on Israeli Policy regarding the Statement of the International Court in The Hague on the Opening of an Investigation against the State of Israel’ (8 April 2021) <https://www.gov.il/en/pages/spoke_court080421> accessed 21 August 2024

⁵¹³ Israel submission in *Situation in the State of Palestine* (Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice) ICC-01/18 (23 September 2024) pages 4-5. <<https://www.lawfaremedia.org/article/israel-responds-to-the-icc-prosecutor%27s-request-for-arrest-warrants>> accessed 2 December 2024

⁵¹⁴ Karim Khan, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ International Criminal Court (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 2 December 2024

⁵¹⁵ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

3.1.2 Grounds of inadmissibility

Article 19 RS allows the Court to determine the admissibility of a case. It allows States with jurisdiction over a case to challenge its admissibility, in most cases once, at the pre-trial stage, on grounds referred to in Article 17 RS. It allows the *Prosecutor* to request a ruling on admissibility *or jurisdiction*.⁵¹⁶

In the case of Palestine the Prosecutor used Article 19(3) RS. In her submission, however, the Prosecutor requested the PTC to rule *not on admissibility* but on jurisdiction.⁵¹⁷ In its decision, the PTC noted that the “Prosecutor has concluded that the potential cases concerning crimes allegedly committed by members of the Israeli authorities... **would currently be admissible**, while her assessment of the admissibility of potential cases regarding crimes allegedly committed by members of the Israeli Defense Forces is ongoing and will be kept under review.”⁵¹⁸

As the OTP notes elsewhere, “[t]he complementarity test under Article 17... contains a **two-step** inquiry. The first phase determines whether the national authorities are **active** in relation to the **same case** (i); only if this is the case, a second phase examines whether this activity is vitiated by **unwillingness** or **inability** of the authorities to carry out the proceeding **genuinely**” (ii).⁵¹⁹

3.1.2.1 Activity in Relation to the Same Case(s)

The PTC held that “admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”⁵²⁰

⁵¹⁶ See Articles 19(1), 19(2), 19(3) and 19(4) RS.

⁵¹⁷ Fatou Bensouda, ‘Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction’ International Criminal Court (20 December 2019) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>> accessed 22 August 2024

⁵¹⁸ *Situation in the State of Palestine* (Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’) ICC-01/18 (5 February 2021) 85

⁵¹⁹ Office of the Prosecutor ‘Situation in UK/Iraq. Final report’ International Criminal Court (9 December 2020) para 154 (emphasis added) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> accessed 22 August 2024

⁵²⁰ *Situation in the Republic of Kenya* (Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) para 50

In the present case, the suspects involved are likely to be at the focus of the ongoing investigation: against two of them the PTC has issued arrest warrants in connection with other crimes, three of them are cited by the ICJ in connection with the crime of incitement to genocide, and the evidence provided in this Communication posits all suspects are likely to be at the centre of future cases. Based on the findings and orders of the ICJ and the evidence provided in the present Communication, it is likely that the *inchoate* crime of incitement will be at the focus of the OTP investigation on Gaza.

The first step under Article 17(1)(a) is to determine “whether there are ongoing national investigations or prosecutions, or whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.”⁵²¹ The requirement is that existing national proceedings must “encompass **both the person and the conduct** which is the subject of the case before the Court”.⁵²² If the national authorities are conducting **genuine proceedings into the same alleged criminal conduct by the same person**, which is the subject of the case before the court, the Court shall declare the case inadmissible.⁵²³

Requests to Open a Criminal Investigation

The Israeli Legal Adviser to the Government and the Israeli Attorney General (AG) have been repeatedly alerted on multiple occasions, including with respect to some of the suspects named in this Communication. In **December 2023** a group of Israeli public figures, which included former MPs and ambassadors, reported the Legal Adviser to the Government and the Attorney General on inciting statements against Palestinians in Gaza.⁵²⁴

In **April 2024** the “Adalah Legal Center” wrote to *inter alia* to the Israeli Legal Adviser to the Government and the Israeli AG. In its letter, Adalah cited no less than **50 inciting statements**, some of which overlap the ones cited in the present Communication. **Adalah requested the AG to investigate senior public figures for incitement to genocide**. Adalah further recalled the statement the AG did before the ICJ, according to which his office conducts several examinations with respect

⁵²¹ *The Prosecutor v Germain Katanga* (Judgement on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) para 78

⁵²² *The Prosecutor v Thomas Lubanga Dyilo* (Public Redacted Version of Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58) ICC-01-04-01/06-1-Corr-Red (10 February 2006) para 31; see also Gideon Boas et al, *International Criminal Procedure* (Cambridge University Press, III Cambridge 2011) 72

⁵²³ Article 17(1)(a),(b) Rome Statute

⁵²⁴ @MichaelSfardLawOffice, (Facebook, 3 January 2024) <https://www.facebook.com/photo/?fbid=894239915840315&set=a.584711853459791&locale=he_IL> accessed 2 december 2024

to inciting statements, and the ICJ's own order obligating the AG to investigate incitement to genocide, and asked for information as to how many investigations for incitement to genocide have been opened since the outbreak of war.⁵²⁵

In **September 2024** lawyers wrote to the Legal Adviser to the Government and the AG on behalf of the Israeli “Zulat Institute – for equality and Human Rights” (‘Zulat’) and two other NGOs. Zulat listed **hundreds of inciting statements, including at least 50 statements that incite or support genocide** and/or extermination, and 150 that incite or support crimes against humanity and war crimes. Dozens of statements included calls for the mass deportation of the Gaza population and the use of starvation as a method of warfare, whereas dozens others were incited to racism against Gazans and the Palestinians as a whole.

The common strand to all inciting statements cited by Zulat is that they were all broadcasted by Channel 14. One of the four national TV channels in Israel, Zulat revealed an editorial line that amounts to **a systematic and widespread incitement to genocide**, crimes against humanity, war crimes and racism – on primetime. Broadcasted for free, virtually every day, to every home in Israel, the Channel's celebrities and influencers incited a large portion of Israeli society on an ongoing basis to commit genocide in Gaza: they described the Palestinian population in Gaza as “**rats**” and “**animals**”. They called to “**exterminate**” or “**cleanse**” the targeted group. They mocked images showing refugees fleeing their homes and the extent of the destruction in the Strip. They applauded the high death toll among civilians and encouraged the indiscriminate killings, maiming and otherwise injuring of as many Gazans as possible. For months Channel 14 displayed the total death toll in Gaza, which includes combatants and civilians alike, with the title: “terrorists killed”. The organizations' lawyers have concluded that Channel 14 “has become a platform for incitement to commit serious crimes”, citing the ICTR incitement to genocide case *Nahimana et al.* (the *Radio Télévision Libre des Mille Collines* case).⁵²⁶

⁵²⁵ Times of Israel ‘Rights group demands probes of potential genocide incitement in light of ICJ orders’ (10 April 2024) <<https://www.timesofisrael.com/rights-group-demands-probes-of-potential-genocide-incitement-in-light-of-icj-orders/>> accessed 26 August 2024

⁵²⁶ Michael Sfar Law Office, ‘Hasata B'Shidurei "Achshav 14"’ (‘incitement in the broadcasting of ‘Now 14’) (23 September 2024) <https://zulat.org.il/wp-content/uploads/2024/09/14_-__.pdf> accessed 2 December 2024 ; See also Haaretz, ‘Israel's Channel 14 Has Repeatedly Called for Genocide Against Palestinians in Gaza’ (24 September 2024) <<https://www.haaretz.com/israel-news/2024-09-24/ty-article-magazine/premium/israels-channel-14-has-repeatedly-called-for-genocide-against-palestinians-in-gaza/00000192-1f2e-d515-a1fa-5f3e99550000>> accessed 2 December 2024

Incitements to genocide were and still are broadcasted in primetime in virtually all main channels of Israeli national TV on a daily basis: the infamous Channel 14 is affiliated with the suspect Netanyahu, the Israeli Prime Minister; in the relevant period Channel 13 has employed as a journalist for ‘Arab affairs’ the suspect Yehezkeili; Channel 12 regularly hosts the suspect Eiland as an ‘expert’ on military matters; and Channel 11 regularly invites countless other inciters such as Eliyahu Yousian.⁵²⁷

Incitement to Genocide under Israeli Domestic Law

As noted above, in *South-Africa v. Israel* the AG acknowledged the inciting and criminal nature of some of these statements and promised the ICJ that several calls inciting to harm civilians in Gaza are being ‘examined’. In its Order the ICJ reiterated this promise and recalled that “**the Attorney General of Israel recently stated that a call for intentional harm to civilians may amount to a criminal offence, including that of incitement, and that several such cases are being examined by Israeli law enforcement authorities.**”⁵²⁸

As also noted above, and despite the Attorney General’s statement, the ICJ nonetheless **cited inciting statements made by three of the eight suspects identified in the present Communication**. More importantly, as also noted above, the ICJ dedicated one of its provisional measures to **order the Israeli AG to punish inciters to genocide**.

Genocide including incitement to genocide are the only international crimes that are codified and criminalized under Israeli domestic Law. In fact, the Israeli ‘Law on the Prevention and Punishment of the Crime of Genocide, 1950’ (the Israeli Genocide Law) not only “follows the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the United Nations... (December 9, 1948), was signed on behalf of the State of Israel, and... to be ratified by the State of Israel”, but also go farther noting that the Israeli Genocide Law “shall remain in effect, whether or not the treaty enters into force or remains in force”.⁵²⁹

⁵²⁷ See, e.g., AhlulBayt News Agency, ‘Israeli Military Officer: “There Are No Innocents in Gaza, All 2.5 M Terrorists, We Must Kill 50,000”’ (30 October 2023) <<https://en.abna24.com/story/1406858>> accessed 2 December 2024

⁵²⁸ *South Africa v Israel*: Order of Provisional Measures, para 73 (emphasis added); Mr Gilad Noam, Deputy Attorney General for International Law, Ministry of Justice of the State of Israel stated: “As the Attorney General reaffirmed publicly recently, any statement calling for intentional harm to civilians contradicts the policy of the State of Israel and may amount to a criminal offence, including the offence of incitement. Several such cases are currently being examined by Israeli law enforcement authorities” in Israeli Ministry of Foreign Affairs, ‘Dr Gilad Noam - Concluding Israel’s arguments’ (12 January 2024) <<https://www.gov.il/en/Departments/General/concluding-israel-s-arguments>> accessed 21 August 2024

⁵²⁹ Article 10 of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide. See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

The definition of genocide in the Israeli Genocide Law mirrors the definition in the Genocide Convention, and the genocidal acts that are criminalized are the same conducts Articles 6 and 25(3)(e) RS criminalize.⁵³⁰ Under Israeli Genocide Law, a person guilty of incitement to commit genocide is as guilty as a person committing genocide.⁵³¹ Accordingly, the punishment for incitement to genocide is **death**, the same punishment for the commission of any other genocidal act. The legal defences in the penal code law which exempt from criminal responsibility are inapplicable.⁵³² The law has extraterritorial application. Thus, whether the conduct is territorial or extraterritorial, incitement to genocide in Gaza can be tried under Israeli Genocide Law.

All the suspects in this Communication are prosecutable by the Israeli legal system. Under Israeli Genocide Law, all persons committing a genocidal act are punishable, including when they are acting by virtue of the Law – be them private or public persons, government members or legislators.⁵³³

Government ministers and parliament members **do not enjoy functional or any other immunity** from criminal prosecution and punishment. By default, ministers and legislators have no immunity from criminal proceedings. Once they are indicted for a crime, they may **request** the Knesset to grant them one, after establishing the alleged criminal conduct was committed in their **official capacity**.⁵³⁴

Under ‘The Immunity of Members of Knesset, Their Rights and Duties Law’, incitement to racism, based on national-ethnic origin, as well as acts of terrorism against “Arabs... because they are... Arabs, in Israel or abroad” – are **conducts which are excluded from the immunity ministers and MPs** may, under certain conditions, enjoy.

The incriminating statements analysed in this Communication do not only constitute incitement to genocide. They equally amount to incitement to racism and may be considered as an act of terrorism against the broader group of Arabs, ‘because they are Arabs’, in Israel or abroad. In other word, the more minor form of incitement are absorbed by the crime of incitement to genocide.

⁵³⁰ Article 1 of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide. See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

⁵³¹ As well as conspiracy, attempt and participation in genocide. See Article 3 of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide. See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

⁵³² Although the existence of such defences or justifications reduce the punishment from death to imprisonment for a period of at least 10 years. See Articles 2 and 6 of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide. See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

⁵³³ Articles 4 and 5 of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide. See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

⁵³⁴ Articles 4 and 13 of the Israeli Law No. 5711-1951 ‘The Immunity of Members of Knesset, Their Rights and Duties Law, 1951’. See [Hebrew] https://www.nevo.co.il/law_html/law00/72245.htm

Be that as it may, until the suspect is criminally **indicted** in a criminal Court – as opposed to criminally investigated – Israeli public officials have no immunity. Needless to say, the suspects in this Communication who are private persons have no immunity from criminal enforcement whatsoever.⁵³⁵

Israel's Decision Not to Open a Criminal Investigation

On 9 January 2024, three days before the above-cited statement by Israel before the ICJ, the AG *published* a similar statement: "...Statements that call, among other things, for intentional harm to uninvolved civilians are contrary to current policy and may constitute criminal offenses, including offenses of incitement. Several cases are currently being examined by law enforcement agencies".⁵³⁶

On 2 June 2024, the "Israeli Democracy Guard", an Israeli NGO, petitioned the Israeli Supreme Court in its capacity is the High Court of Justice (HCJ). The petition was filed against the Legal Adviser to the Government, Adv. Gali Baharav-Miara and the Attorney General, Adv. Amit Isman (HCJ *Israeli Democracy Guard case*). The HCJ was requested to **annul** the decision to 'examine' inciting calls "by senior public figures, including Knesset members and government ministers", since it "has no legal authority, is not in accordance with the law and settled jurisprudence, and is contrary to the principle of equality before the law". Instead, the HCJ was requested to order the Respondents to open "a criminal investigation, in accordance with Section 59 of the Criminal Procedure Law"; in the alternative, the HCJ was requested to conduct a "preliminary examination", as defined in the directive of the Legal Advisor to the Government No. 4.2204 (2.10.2018)". The petitioners also requested an urgent hearing and that the petition will be processed on an expediated track, given that "proceedings being conducted against Israel and against senior Israeli officials in international courts, and Israel's obligations within the framework of these proceedings...".⁵³⁷

On 4 July 2024 *Haaretz* reported that the Israeli AG's Office "is currently examining numerous statements by public figures regarding the war in the Gaza Strip, **before deciding whether to open**

⁵³⁵ Arts. 1(A1)(3) and (4) of the Israeli Law No. 5710-1950 on the Prevention and Punishment of Genocide ("For the avoidance of doubt, acts, including statements, that are not accidental, by a Member of Knesset that contain any of the following, are not considered, for the purposes of this section, to be an expression of opinion or an act done in the performance of his duties or for the performance of his duties... (3) Incitement to racism based on color or race or national-ethnic origin; (4) Support for armed struggle by an enemy state or for acts of terrorism against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad."). See [Hebrew] https://www.nevo.co.il/law_html/law00/72514.htm

⁵³⁶ Ynet, 'Assessment: Criminal investigations against Eliyahu, Vattori and Saada will be considered - as a deterrent because of The Hague' (9 January 2024) <<https://www.ynet.co.il/news/article/bkt5dbsd6>> accessed 2 December 2024

⁵³⁷ HCJ 4489/24 The Israeli Democracy Guard v. The Legal Adviser to the Government and the Attorney General of Israel, "main application" page 1 (24 November 2024), (on file with the author).

a criminal investigation into their case. The examination is being done in the shadow of pressure from the Hague tribunals on Israel to investigate senior officials who called for harming the civilian population... more than 80 statements have been **examined** since the outbreak of the war, and regarding some of them, State Attorney General Amit Isman recommended continuing to secretly advance a criminal examination. The statements being examined include statements by Minister Amichai Eliyahu, who said that “an atomic bomb on Gaza is a possibility in a war,” and that “we would not have sent aid to the Nazis. There is no such thing as uninvolved people in Gaza”; by MK Yitzhak Kreuzer of Otzma Yehudit, who said that “Gaza needs to be flattened”; and by MK Nissim Vaturi, who said on the radio: “Gaza needs to be burned. There are no innocent people left there, those who remain need to be eliminated.” Other statements that the prosecution is examining are those of Foreign Minister **Yisrael Katz**, at the time Minister of Energy and Infrastructure, who said that “we will fight in Gaza and the entire civilian population will have to leave.” Statements by Defense Minister **Yoav Galant** and Prime Minister **Benjamin Netanyahu** are also being examined, which were also cited by the International Court of Justice in The Hague as an indication of Israel's intentions to harm civilians in the Strip. Among other things, Galant said that there would be no electricity, food, or fuel in Gaza, and Netanyahu spoke of the need to “wipe out the memory of Amalek.” In addition... Isman asked the Legal Adviser to the Government Gali Baharav-Miara to order an investigation of National Security Minister **Itamar Ben-Gvir** on suspicion of inciting **violence** against the residents of the Strip, following the minister's public statements about the methods of warfare that he said should be used in Gaza”.⁵³⁸ According to this report, the Israeli AG examined the **possibility** to open a criminal investigation with respect to **all the 2 of the 3 individuals cited by the ICJ**, and 4 of the 8 suspects identified in the present Communication, and some other influencing public figures who are not public officials.

On 8 August 2024, the Israeli Democracy Guard filed a FOIA petition (a motion under the Israeli Freedom of Information Law, 1998) to the District Court of Jerusalem. This administrative petition requested the Court to order the Respondent, the Israeli Ministry of Justice (MOJ), to provide the Petitioner with information regarding decisions “**to open an investigation or not to open an investigation, as well as decisions to open a preliminary examination or not to open a preliminary examination, against senior public figures, including members of Knesset and**

⁵³⁸ Haaretz, 'HaPraklitut Bochanat Hitbat'uyot Shel Sarim Ve'Chakim Al HaMilchama Be'Aza (The Attorney's office is Examining Statements by Ministers and Knesset Members on the War in Gaza)' (4 July 2024) <https://www.haaretz.co.il/news/politics/2024-07-04/ty-article/.premium/00000190-7a1a-d0b6-a9b1-7ffe36720000?utm_source=pocket_saves> accessed 2 December 2024

government ministers, who have called for Israel to violate its obligations under international law regarding the war in the Gaza Strip that allegedly amount to incitement to genocide” (the *FOIA Israeli Democracy Guar case*).⁵³⁹ The Respondent failed to answer and the Court ordered the Israeli government to provide the requested information.⁵⁴⁰

On 18 August 2024 it was reported that the AG has **recommended** the Legal Adviser to the Government to open a criminal investigation against the singer Eyal Golan, who was cited by South-Africa in its application to the ICJ as saying after the 7/10 attack that “[w]e need to wipe out Gaza and not leave a single person there”.⁵⁴¹ However, a day after this ‘recommendation’ was published, on 19 August 2024 the Israeli MOJ officially denied this publication, stating that “[a]ccording to **the State Attorney's decision, no criminal investigations have been opened** in this matter. The aforementioned decision was made prior to the publications in recent days on the subject”.⁵⁴²

The ‘recommendation’ and its subsequent withdrawal a day later were interpreted by Israeli jurists as **non-genuine** move: “The assessment in the legal system is that **if an investigation is opened, it will only be to “wink” at the International Court of Justice in The Hague**, which was outraged that the legal authorities in Israel are turning a blind eye to calls for incitement by leaders in Israel - ministers and MKs... Today, the Attorney General's Office clarified that an investigation has not been opened against Golan, but did not deny that a recommendation had been formulated. **‘In light of claims raised against the State of Israel in proceedings at the International Court of Justice in The Hague and in other contexts, in which it was claimed that Israel's actions do not comply with the rules of international law, and that the IDF should be stopped from fighting, the State Attorney's Office was asked to prepare a legal reference to statements made by political figures and other influential figures in Israel, regarding the events of October 7. **These are statements that came up in hearings at the Court in The Hague.** The legal reference to these matters was transferred several months ago to the Legal Advisor to the Government in preparation for a hearing ‘which took place**

⁵³⁹ ATM 19153-08-24 The Israeli Democracy Guard v The person in charge of providing information to the public at the Ministry of Justice et al., “main application”, 8 August 2024, page 1 (on file with the author).

⁵⁴⁰ ATM 19153-08-24 The Israeli Democracy Guard v The person in charge of providing information to the public at the Ministry of Justice et al, “judgment”, 18 November 2024 (on file with the author).

⁵⁴¹ Haaretz, 'Praklit HaMedinah Hemlitz Lift'och BeChakira Neged Eyal Golan, She'Kara "LeMechok Et Aza" (The State Prosecutor Recommended Opening an Investigation Against Eyal Golan, Who Called to "Erase Gaza")' (18 August 2024) <https://www.haaretz.co.il/gallery/music/2024-08-18/ty-article/00000191-66d4-d1ca-adb9-6efe26860000?utm_source=pocket_shared> accessed 2 December 2024

⁵⁴² Ynet, 'The Attorney General's Office does not deny that it made the recommendation, but clarifies: No investigation has been opened into Eyal Golan's case' (19 August 2024) <https://www.ynet.co.il/news/article/sy3mo6xs0?utm_source=pocket_shared> accessed 2 December 2024

in The Hague’... Law enforcement regarding incitement **to violence** among Israeli citizens since the war began has been uneven. While nearly 200 investigations and indictments have been filed against Arab-Israelis for **incitement to violence**, **not a single one has been filed against Jewish citizens**”.⁵⁴³

According to a more detailed report by *Haaretz*, the AG “**recommended** the Legal Adviser to the Government **not to open criminal investigations** against senior public figures, including ministers and MKs, who called for harming civilians in Gaza, the Attorney General's Office announced today... **These are statements that have been discussed at the International Criminal Court and the International Court of Justice in The Hague**, including those of Prime Minister Benjamin **Netanyahu**, Defense Minister Yoav Galant, and President Yitzhak **Herzog**. Among the considerations for Isman's [the AG’s-O.S.] recommendation in the opinion he forwarded to the Attorney General are the passage of time since the statements made when “blood was boiling”, **the decision of the International Court of Justice in The Hague not to order a halt to the fighting in the Gaza Strip**, and the public interest in conducting investigations. The decision whether to order the opening of an investigation rests with the advisor, Gali Baharav-Miara”.⁵⁴⁴

This report, therefore, reveals that the AG conducted ‘examinations’ also with respect to another suspect cited by the ICJ and identified in this Communication, Israeli President Yitzhak Herzog. In sum, the AG decided **not to open a criminal investigation with respect to all the 3 individuals cited by the ICJ and 5 out of 8 of the suspects identified in this Communication.**

The presumed decision not to open a single criminal investigation despite countless inciting statements was criticized even in Israel. One journalist wrote that the “State Attorney Amit Isman **created the appearance of investigating incitement in Jewish society in order to fool the Hague Tribunal** — but in reality he ignores the **illegal calls for war crimes and genocide in television studios**. His inaction in the face of incitement legitimizes violence on the ground”.⁵⁴⁵

⁵⁴³ Ynet, “‘A nod to The Hague’: The investigations that were not opened, and what is behind the discussions?’ (19 August 2024) <https://www.ynet.co.il/news/article/ryv1f5eia?utm_source=pocket_shared> accessed 19 August 2024

⁵⁴⁴ Haaretz, 'Praklit HaMedinah Hemlitz LiYo'amshit Lo Lechakor Sarim Ve'Chakim She'Karu Le'Pgo'a Be'azrakhim Be'Aza (The State Prosecutor Recommended to the Attorney General Not to Investigate Ministers and Knesset Members Who Called to Harm Civilians in Gaza)' (19 August 2024) <https://www.haaretz.co.il/news/law/2024-08-19/ty-article/00000191-6b03-dc6e-a991-ebff46d90000?utm_source=pocket_shared> accessed 2 December 2024

⁵⁴⁵ The Marker, 'Praklit HaMedinah Rofes Mul HaHasata. Yesh Lo Chelek Be'Churban HaArachim Be'Chavura HaYisraeli (The State Prosecutor is Lenient Against Incitement. He Has a Role in the Destruction of Values in Israeli Society)' (26 September 2024) <https://www.themarker.com/law/2024-09-26/ty-article/.highlight/00000192-29f7-dff0-a5f7-3ff7f2ee0000?utm_source=pocket_saves> accessed 2 December 2024

One of the most reputed law professors in the country, Mordechai Kremnitzer, noted that the “State Attorney Amit Isman's **recommendation not to investigate** ministers and members of Knesset who called for harming civilians in Gaza is extremely puzzling. Both from a moral and utilitarian perspective. **The reasons for the recommendation, as published, do not hold water.** The long time that has passed since these statements were first made also stems from the decision of the Attorney General's Office. It could have ordered the opening of an investigation right in the thick of the fighting at the beginning of the war. The fact that it did not do so then is now a strange and unconvincing reason not to investigate at all. A destructive **pattern of non-enforcement** of the law is emerging here, and it is enough for the prosecution to be negligent to prevent its enforcement.”⁵⁴⁶

Prof. Kremnitzer further noted that the case of incitement “**is one of the simplest and easiest investigations:** verifying the attribution of the words to the speakers, examining the words against the background of the circumstances in which they were uttered, and collecting testimony after a warning from the speaker. **Avoiding these illustrates how serious negligence is** involved here... Will circumstances of “boiling blood” also prevent the investigation of soldiers who murdered civilians? The leadership is expected to be able to restrain emotions and act calmly even during a storm of emotions. **When the heads of state call for harming civilians, it is clear that this immediately affects the fighters on the ground, who are in a constant and understandable emotional turmoil.** The leadership should restrain the desire for revenge and not encourage it. It should emphasize the distinction between terrorists and civilians and the prohibition on harming the latter. **The fact that the exact opposite is done makes the incitement particularly serious, because of the strength of its effect.** Both in terms of the inciter and in terms of the circumstances of time and background. **Here we are dealing with particularly serious cases of incitement to murder and perhaps even genocide. The latter is considered a particularly serious crime, punishable by death under Israeli law...**”⁵⁴⁷

Prof. Kremnitzer further pointed out that “[t]he accumulation of politicians' words, alongside similar statements made frequently in the media, has created an atmosphere of Gazan-civilian bloodshed.

⁵⁴⁶ Haaretz, 'Parshanut Et HaMatzlat Isman She'Lo Lechakor Chakim Mesitim Od Nifgosh Be'Hag (Analysis of Isman's Recommendation Not to Investigate Inciting Knesset Members: We Will Meet Again in The Hague)' (20 August 2024) <https://www.haaretz.co.il/news/law/2024-08-20/ty-article/.premium/00000191-6c32-d281-a7fd-ff3ff3d00000?utm_source=pocket_saves> accessed 2 December 2024

⁵⁴⁷ Haaretz, 'Parshanut Et HaMatzlat Isman She'Lo Lechakor Chakim Mesitim Od Nifgosh Be'Hag (Analysis of Isman's Recommendation Not to Investigate Inciting Knesset Members: We Will Meet Again in The Hague)' (20 August 2024) <https://www.haaretz.co.il/news/law/2024-08-20/ty-article/.premium/00000191-6c32-d281-a7fd-ff3ff3d00000?utm_source=pocket_saves> accessed 2 December 2024

The politicians who spoke in this way should not be cleared of responsibility. They are the cedars, their words are the flame, and the soldiers are the moss on the wall. It seems that in this matter, too, the tables have turned: the higher you climb the ladder of importance, the less responsibility is claimed. How can the recommendation of the State Attorney be justified at this time, when the investigations into the unjustified killing of civilians have not yet been exhausted? And in particular, the effect of the words on the actions was not examined at all...”.⁵⁴⁸

Prof. Kremnitzer also noted that **“[i]n South Africa's lawsuit against Israel at the International Court of Justice, incitement to genocide is set to play a crucial role. The State Attorney's recommendation somewhat strengthens this part of the lawsuit, as it indicates that there are legislators in Israel who call for the murder of civilians. Here, Israel will not be able to rely on the "principle of complementarity," as it openly announces that it has no intention of investigating the issue at all.** Even if the Attorney General decides not to accept the State Attorney's recommendation, our law enforcement system will remain tainted by the mere presentation of this recommendation. Even those who seek our well-being will now ask themselves whether we can trust an enforcement system in which the second most important person in it operates in this way”.⁵⁴⁹

Also Prof. Kremnitzer referred to the difficulty “to ignore the gap between this recommendation and the way Palestinians suspected of inciting terrorism are treated after October 7. Since the disaster, the Attorney General's Office has launched a tough and uncompromising enforcement campaign against people who posted extremist statements on social media. Most of them turned out to be anonymous with limited circulation and little influence. In many cases, no real connection was found between the content of the statements and the definition of incitement as an offense under the law. **Has the State Attorney lost sight of the critical distinction between crayfish and sharks? Or is the State Attorney also associating himself with Ben Gvir's school of thought,** for whom there is and cannot be Jewish terrorism (but there is no limit to what is considered incitement to terrorism when the suspect is Palestinian). This is selective enforcement in the worst sense of the term... It is impossible

⁵⁴⁸ Haaretz, 'Parshanut Et HaMatzlat Isman She'Lo Lechakor Chakim Mesitim Od Nifgosh Be'Hag (Analysis of Isman's Recommendation Not to Investigate Inciting Knesset Members: We Will Meet Again in The Hague)' (20 August 2024) <https://www.haaretz.co.il/news/law/2024-08-20/ty-article/.premium/00000191-6c32-d281-a7fd-ff3ff3d00000?utm_source=pocket_saves> accessed 2 December 2024

⁵⁴⁹ Haaretz, 'Parshanut Et HaMatzlat Isman She'Lo Lechakor Chakim Mesitim Od Nifgosh Be'Hag (Analysis of Isman's Recommendation Not to Investigate Inciting Knesset Members: We Will Meet Again in The Hague)' (20 August 2024) <https://www.haaretz.co.il/news/law/2024-08-20/ty-article/.premium/00000191-6c32-d281-a7fd-ff3ff3d00000?utm_source=pocket_saves> accessed 2 December 2024

to avoid the feeling that **the State Attorney's recommendation would never have come about if a kind of convention had not been created among Israelis that all Gaza residents are terrorists.**⁵⁵⁰

On 24 November 2024, the Legal Adviser to the Government delivered her response in H CJ *Israeli Democracy Guard case*. The Legal adviser to the Government notified the H CJ that on 18 November 2024, the Legal Advisor to the Government “decided not to open investigations into the statements for which an examination was conducted”. Accordingly, the Respondent requested the H CJ to reject the petition.⁵⁵¹

On 25 November 2024, following the judgment in the *FOIA Israeli Democracy Guar case*, the MOJ provided the petitioner the requested information in. In response to the query “know how many criminal investigations and/or preliminary examinations (as defined in the Attorney General's directive 4.2204) have been opened against public office holders in these matters since the outbreak of the war”, the MOJ answered that **“no criminal investigations or preliminary examinations have been opened.”** In response to that query “in how many cases it was decided to file an indictment and in how many cases the suspect was summoned for a hearing before being brought to trial”, the MOJ replied that **“there are no cases that meet your request, since no indictments were filed and no investigations or examinations were opened”**. In response to a request “to receive the names of the public office holders in respect of whom an “examination” and/or preliminary examination and/or criminal investigation was opened, and the details of the statements for which the procedure was opened”, the MOJ responded that **since “no decision was made to open an investigation and/or preliminary examination...no such information on the matter exists”**.⁵⁵²

On 25 November 2024 the Israeli newspaper Haaretz reported on the matter. The report noted that the Legal Adviser to the Government, Gali Beharev-Miara, decided to adopt the recommendation of the AG and **not open a single criminal investigation concerning inciting statements made by the suspects in this Communication**, or any other person. According to the report, “Beharev-Miara accepted the recommendation of the state attorney, who believed that **‘there is no public interest’** in

⁵⁵⁰ Haaretz, 'Parshanut Et HaMatzlat Isman She'Lo Lechakor Chakim Mesitim Od Nifgosh Be'Hag (Analysis of Isman's Recommendation Not to Investigate Inciting Knesset Members: We Will Meet Again in The Hague)' (20 August 2024) <https://www.haaretz.co.il/news/law/2024-08-20/ty-article/.premium/00000191-6c32-d281-a7fd-ff3ff3d00000?utm_source=pocket_saves> accessed 2 December 2024

⁵⁵¹ H CJ 4489/24 The Israeli Democracy Guard v. The Legal Adviser to the Government and the Attorney General of Israel, “Update Announcement by on the part of the Respondents” (24 November 2024), (on file with the author)

⁵⁵² ATM 19153-08-24 The Israeli Democracy Guard v The person in charge of providing information to the public at the Ministry of Justice et al, “Letter from MOJ to the Israeli Democracy Guard” 25.11.2024 (on file with the author).

investigating the statements... Since the outbreak of the war, more than 80 statements by senior Israeli officials against the residents of Gaza have been examined by the prosecutor's office". The decision "not to order an investigation into statements made by elected officials, including Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Galant, on suspicion of inciting harm to civilians in the Gaza Strip... The statements examined by the State Attorney's Office were also brought before the International Court of Justice as part of South Africa's petition against Israel." According to the report, "Baharav-Miara adopted the recommendation of State Attorney Amit Isman from August not to open an investigation, among other things **due to the time that had passed** since the statements were made, shortly after the massacre **when "blood was boiling,"** as he put it, and also **in light of the decision of the International Court of Justice in The Hague not to order a halt to the fighting** in the Gaza Strip. Isman also believed that there was no public interest in investigating the statements". The report notes that the "chairman of the Israeli Democracy Watch, Attorney Yuval Yoaz, who submitted the petition to the HCJ, said that Baharav-Miara **'has failed three times** in her role as someone who is supposed to act for the rule of law and the public interest. **Once** when she left the details regarding **statements by Israeli elected officials suspected of incitement to genocide** and the investigative steps taken in relation to them in the dark; the **second** time when she took a shaky and **legally unfounded legal procedure, not a full criminal investigation** or even a **preliminary examination**; and the **third** time when she **misled the International Court of Justice in The Hague**, when she conveyed that the serious inciting statements by Israeli politicians were being treated seriously and thoroughly, and in the end it turned out that the entire issue was being glossed over'."⁵⁵³

Conclusion: No Past or Current Criminal Investigations

Although Israel domesticated and criminalized the Genocide Convention, **none of the suspects is being or has been criminally investigated** or prosecuted by the Israeli authorities for incitement to genocide in accordance with Article 3 of the Israeli Genocide Law and in connection with the situation in Gaza: Not the three suspects cited by the ICJ, not the other five suspects mentioned in this Communication, and not any other person. Not before and not after the ICJ ordered Israel to do so. From 7/10/2023 to date, the Israeli authorities took no criminal investigative or prosecutorial action

⁵⁵³ Haaretz, 'Chashifat "Haaretz" HaYo'amshit Hor'ta She'Lo Lechakor Hitbat'uyot Shel Sarim Ve'Chakim Be'Chashad LeHasata Le'Pgi'a Be'azrahim Be'Aza (Haaretz Reveals: The Attorney General Ordered Not to Investigate Statements by Ministers and Knesset Members Suspected of Incitement to Harm Civilians in Gaza)' (25 November 2024) <https://www.haaretz.co.il/news/law/2024-11-25/ty-article/.premium/00000193-620a-df83-adb7-66bbc4c80000?utm_source=pocket_saves> accessed 2 December 2024

in relation to **any of the allegedly criminal acts**. Not the statements cited by the ICJ, not the ones cited in this Communication, not any other inciting statement among the countless incitements to genocide the AG has become aware of during this prolonged period.

The Israeli authorities **have not opened a single criminal investigation in connection with incitement to genocide or any other ICC crime**, such as war crimes or crimes against humanity. The AG's 'examinations' are by no means a criminal investigation. Rather, they are a non-formal, preliminary phase after which the AG considers **whether to recommend** someone else, the Legal Adviser to the Government, whether to open or not a criminal investigation. Then the Legal Adviser to the Government must then take another decision, i.e., **whether to adopt the AG recommendation** and open or not a criminal investigation. **On 18 November 2024 she has decided not to.**

The ICJ ordered Israel to prosecute incitement to genocide. Because the competence of the ICJ hinges on the Genocide Convention, this order can only be complied by prosecution of offence related to genocidal acts under Israeli domestic law. The Israeli AG, however, based his 'examination' **not on incitement to genocide but on other crimes of incitement** such as incitement to *violence, racism, or terrorism*, which are codified not in the Israeli Genocide Law but in the general penal code and the anti-terrorism law.⁵⁵⁴ These incitement crimes reflect a conduct that is less grave than incitement to genocide. The punishment for their commission is accordingly less harsh. Most of these offences are not offences of 'pure' conduct, but of a probable result. One of the elements of the offence of incitement to violence, for example, requires showing there was a probability that violence will occur as a consequence of the inciting statement. By contrast, as demonstrated above, incitement to genocide is an inchoate crime that may be prosecuted irrespective of whether genocide has actually been committed or even attempted. Because incitement to genocide is a more serious crime, the evidentiary threshold for its investigation is significantly lower than the offence(s) based on which

⁵⁵⁴ See Article 144D2 of the Israeli Penal Code: "Whoever publishes a call to commit an act of violence, or words of praise, sympathy or encouragement for an act of violence, support for it or identification with it (in this section – inciting publication), and based on the content of the inciting publication and the circumstances in which it was published, there is **a real possibility that it will lead to the commission of an act of violence**, is liable to imprisonment for five years."; See also Article 144B(a) of the Israeli Penal Code: "Anyone who publishes something with the intention of inciting racism is liable to five years in prison." See [Hebrew] https://www.nevo.co.il/law_html/law01/073_002.htm#Seif143. See also Article 24(b) of '[T]he Combating Terrorism Law, 2016: "Whoever does any of the following is liable to imprisonment for five years: (1) Publishes a direct call to commit an act of terrorism; (2) Publishes words of praise, sympathy or encouragement for an act of terrorism, support for it or identification with it, and based on the content of the publication and the circumstances in which it was published, there is **a real possibility that it will lead to the commission of an act of terrorism**." See [Hebrew] https://www.nevo.co.il/law_html/law00/141771.htm

the Israeli AG presumably conducted his purported ‘examinations’, ultimately deciding not to recommend the Legal Adviser to the Government to open a single criminal investigation.

To conclude, because these other incitement crimes do not stem from the Israeli Genocide Law, because their ‘examination’ is not a criminal investigation but a procedure aims to recommend whether to open one, because the aim of preparing this ‘legal reference’ was to circumvent proceedings pending before the ICJ and the ICC, because they do not fall within the jurisdictional scope of the Genocide Convention and fail to comply with the ICJ Order on the matter, because these ‘examinations’ resulted in a recommendation *not* to open criminal investigations, because this recommendation was adopted by the Legal Adviser to the Government, the deciding authority on the matter – **there have not been and there are no proceedings in Israel which encompass the suspects and conducts** which are the object of this Communication within the meaning of the RS. Consequently, the eight cases arising out of this Communication are admissible, in so far as the principle of complementarity is concerned.

Epilogue: ICC and Universal Jurisdiction

The legal implications of Israel’s failure to comply with the ICJ Order to prosecute inciters to genocide are not limited to the ICC Prosecutor. Also national jurisdictions are obliged to prosecute in so far they meet the procedural conditions for asserting their universal jurisdictions. Unlike the ICC, however, national legal systems typically require the presence of the suspect in their territory in order to prosecute and arrest the culprits, a precondition which severely limit their possibility to do so, let alone after the PTC issued the arrest warrants against Netanyahu and Gallant, a development which renders the entry and transit of the suspects abroad unlikely.⁵⁵⁵

Yet, on 13 November 2024 one of the suspects, the minister Bezalel Smotrich, was supposed to be the sole guest in a gala event that was organized in France by a Franco-Israeli extreme right organization. In a speech in the French national assembly, the French Prime Minister declared that Smotrich is a *persona non grata* for the French government. Although French officials will have no contact with him, the French PM noted, the PM has no legal means to prevent his private visit to the country. On 5 November 2024, however, a Franco-Palestinian victim filed a criminal complaint for

⁵⁵⁵ POLITICO, 'UK ‘looking at’ sanctions for ‘extremist’ Israeli ministers' (16 October 2024) <<https://www.politico.eu/article/uk-sanctions-for-extremist-israel-ministers-bezalel-smotrich-itamar-ben-gvir/>> accessed 2 December 2024; See also Jewish News ‘Hundreds Back Yachad Campaign Demanding UK Government Sanctions Israeli Far-Right Ministers' (12 November 2024) <https://www.jewishnews.co.uk/hundreds-back-yachad-campaign-demanding-uk-govt-sanctions-israeli-far-right-ministers/> accessed 2 December 2024

incitement to genocide with the French prosecutorial authorities.⁵⁵⁶ Following the submission of this complaint, Smotrich decided to cancel his visit to the country. Because processing of the complaint requires physical presence of the suspect, the authorities could not move forward with the case.⁵⁵⁷

3.1.2.2 Unwillingness or inability to genuinely investigate and prosecute

According to Article 17 RS, only insofar there were past or there are ongoing active criminal proceedings, the ability and willingness of the authorities to institute and advance these proceedings should be examined.⁵⁵⁸ Israel has not initiated any genuine investigations or prosecutions related to the alleged conduct of the eight suspects in this Communication. In case Israel would at some point decide to criminally investigate the eight suspects identified in this Communication for incitement to genocide, to recognize the jurisdiction of the ICC, *and* to submit an Article 17 RS challenge concerning the admissibility of these eight cases – such admissibility assessment will be made “on the basis of the facts as they exist **at the time of the proceedings** concerning the admissibility challenge.”⁵⁵⁹ Even if the Israeli authorities will meet the requirement to submit concrete and tangible “evidence of a sufficient degree of specificity and probative value”⁵⁶⁰ that they are conducting

⁵⁵⁶ TRT Français, 'Gala sioniste en France: une procédure pour génocide contre un ministre israélien (Zionist Gala in France: A Legal Procedure for Genocide Against an Israeli Minister)' (7 November 2024) <<https://www.trtfrancais.com/actualites/gala-sioniste-en-france-une-procedure-pour-genocide-contre-un-ministre-israelien-18229479>> accessed 2 December 2024; The undersigned co-represent the plaintiff in this case.

⁵⁵⁷ TRT Français, 'Gala Israel Forever: Smotrich annule sa visite à Paris (Israel Forever Gala: Smotrich Cancels His Visit to Paris)' (8 November 2024) <<https://www.trtfrancais.com/actualites/gala-israel-forever-smotrich-annule-sa-visite-a-paris-18231631>> accessed 2 December 2024

⁵⁵⁸ *The Prosecutor v Germain Katanga* (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) para 78. This step serves the purposes of addressing the genuineness of potentially ongoing proceedings: Office of the Prosecutor, 'Policy Paper on Preliminary Examination' (November 2013) para 58 <<https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy Paper Preliminary Examinations 2013-ENG.pdf>> accessed 28 August 2024

⁵⁵⁹ *The Prosecutor v Germain Katanga* (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) paras 56, 80. Yet, “[t]his does not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in light of new facts or evidence” as mentioned in Office of the Prosecutor 'Policy Paper on Preliminary Examination' International Criminal Court (November 2013) para 91 <<https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy Paper Preliminary Examinations 2013-ENG.pdf>> accessed 26 August 2024. The information used to assess the complementarity requirement in this communication reflects the status of information available at the time of submitting this Communication.

⁵⁶⁰ *The Prosecutor v Saif Al-Islam Gaddafi* (Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute') ICC-01/11-01/11-662 (5 April 2019) para 32 with reference to *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”) ICC-01/09-02/11 OA (30 August 2011) para 60.; See also ICC-OTP, 'Policy on Complementarity and Cooperation' (April 2024) <<https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf>> accessed 2 December 2024

investigations, it seems they would nonetheless fail to establish they are both able and willing to genuinely investigate and prosecute, *inter alia*, their own head of State and other senior ministers.⁵⁶¹

(1) Inability

As per Article 17(3) RS, inability refers to a total or substantial collapse or unavailability of the concerned national judicial system to the extent that the State is unable to genuinely carry out investigations or prosecutions, to obtain the accused or the necessary evidence, or is otherwise unable to exercise its judicial powers in the territory concerned. *Indicia* of inability are, amongst others, the “lack of necessary personnel, judges, investigators, prosecutor; lack of judicial infrastructure” and “lack of substantive or procedural penal legislation rendering system ‘unavailable’”.⁵⁶²

In June 2016, the State of Palestine notified the OTP that “the scope and capacity of the Palestinian government to provide services to citizens, including the *ability* to reach them and provide them with protection and conduct investigations is severely curtailed and sometimes completely undermined by the practices and limitations, and prohibitions imposed by the Israeli occupation forces”.⁵⁶³ Considering the situation in the State of Palestine since 7 October 2023, the difficulties in exercising its judicial powers across its territory⁵⁶⁴ seem to have significantly worsen, *inter alia* after the IDF destroyed the Palestinian Supreme Court, the Court of Appeal, the Court of First Instance, and the Magistrate in Gaza city,⁵⁶⁵ rendering its national judicial system unavailable.⁵⁶⁶

By contrast, Israel’s domestic judicial system has not totally or substantially collapsed. The State of Israel possesses a functioning judicial system and infrastructure composed of trained personnel with

⁵⁶¹ *The Prosecutor v Germain Katanga* (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) para 56; International Criminal Court, Regulations of the Office of the Prosecutor (entered into force 23 April 2009) ICC-BD/05-01-09 Regulation 29(4) <<https://www.icc-cpi.int/sites/default/files/RegulationsOTPEng.pdf>> accessed 26 August 2024

⁵⁶² ICC-OTP, ‘Informal expert paper: The principle of complementarity in practice’ (31 October 2003) para 50 <<https://www.legal-tools.org/doc/8mksx9/>> accessed 26 August 2024

⁵⁶³ Law for Palestine ‘Joint Communication to the Office of the Prosecutor of the International Criminal Court Regarding the Perpetration of the Crime of Genocide by Members of the Israeli War Cabinet’ (March 2024) para 46

⁵⁶⁴ International Criminal Court ‘Summary of the Decision on the admissibility of the case against Mr Gaddafi’ 5 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/pr911/Summary-of-the-Decision-on-the-admissibility-of-the-case-against-Mr-Gaddafi.pdf>> accessed 17 July 2024

⁵⁶⁵ @MiddleEastEye, (Youtube, 6 December 2023) <<https://www.youtube.com/watch?v=I6GqDuve5ho>> accessed 2 December 2024

⁵⁶⁶ Human Rights Council ‘Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21’ (24 June 2015) U.N. Doc. A/HRC/29/52 para 73

the capacity to carry out domestic criminal investigations and prosecutions effectively.⁵⁶⁷ The conviction of the president Moshe Katsav to seven years imprisonment,⁵⁶⁸ the conviction of the prime minister Ehud Olmert to more than two years imprisonment,⁵⁶⁹ the ongoing trial against Prime Minister Netanyahu,⁵⁷⁰ as well as the conviction and sentencing of several ministers to significant prison time,⁵⁷¹ show that Israel's criminal system is able to carry out criminal proceedings. As shown above, Israel also has a substantive and comprehensive legislation on the prosecution and punishment of genocide, which specifically criminalizes and sanctions the act of incitement to genocide. In the present situation, thus, Israel cannot be considered unable to carry out domestic criminal proceedings.

Because Palestine considers "its *ability* to conduct proceedings is curtailed by the occupation", the PTC I was worried that "if the Court does not exercise its jurisdiction in this situation, certain alleged crimes could not be investigated and, if the evidence so warranted, prosecuted"⁵⁷² – implying that Israel may not be *willing* to genuinely investigate and prosecute ICC crimes.

(2) Unwillingness

The ability of a criminal justice system may be objectively measured. Its willingness to prosecute, however, requires a more complex assessment, one that considers hidden motives and potential deception by the national authorities.⁵⁷³ The "unwilling" to investigate or prosecute criterion is "primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or

⁵⁶⁷ Law for Palestine, 'The Implications of the International Criminal Court's Investigation in Palestine in Light of Israel's Refusal to Cooperate: Scenarios and Legal Solutions' (2021) 3

<<https://law4palestine.org/wp-content/uploads/2021/08/Implications-of-iccs-investigation-and-israels-lack-of-cooperation-edited.pdf>> accessed 31 August 2024; Nir Kedar 'The Rule of Law in Israel' (2018) 23(3) *Israel Studies* 166-168, 170

⁵⁶⁸ BBC, 'Israel ex-President Moshe Katsav found guilty of rape' (30 December 2010) <<https://www.bbc.com/news/world-middle-east-12091982>> accessed 8 September 2024; The Jewish Chronicle, 'Katzav's rape conviction upheld by Supreme Court' (10 November 2011) <<https://www.thejc.com/news/israel/katzavs-rape-conviction-upheld-by-supreme-court-lzy7392f>> accessed 8 September 2024

⁵⁶⁹ BBC, 'Ehud Olmert: Corruption cases' (29 December 2015) <<https://www.bbc.com/news/world-middle-east-16426018>> accessed 8 September 2024

⁵⁷⁰ The Times of Israel, 'Court says Netanyahu must begin testimony in his corruption trial in December' (9 July 2024) <<https://www.timesofisrael.com/court-says-netanyahu-must-begin-testimony-in-his-corruption-trial-in-december/>> accessed 8 September 2024

⁵⁷¹ The Times of Israel, '10 Israeli public figures sentenced to jail terms' (14 May 2014) <<https://www.timesofisrael.com/10-israeli-public-figures-sentenced-to-jail-terms/>> accessed 8 September 2024

⁵⁷² *Situation in the State of Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine) ICC-01/18 (22 January 2020) para 180 (emphasis added)

⁵⁷³ Article 17(2) Rome Statute (emphasis added)

prosecute.”⁵⁷⁴ Article 17(2) RS sets out the three main factors by which the unwillingness of a state to conduct serious investigations is assessed:⁵⁷⁵

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of **shielding the person concerned from criminal responsibility** [...];
- (b) There has been an unjustified **delay in the proceedings** which in the circumstances is inconsistent with an intent to bring the person concerned to justice; [or]
- (c) The **proceedings were not or are not being conducted independently or impartially**, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Even if a criminal investigation or prosecution was to commence in Israel, the cases identified in this Communication would still be admissible and prosecutable by the OTP. Widespread structural and political deficiencies in Israel’s domestic investigative and prosecutorial render the competent authorities unwilling to genuinely enforce the law upon crimes committed against Palestinians.⁵⁷⁶

(a) Shielding high-level officials from criminal liability

Indicia of the intent to shield high-level officials from criminal liability include, *inter alia*, “manifestly insufficient steps in the investigation or prosecution” as well as the scope of the investigation, which determines whether the focus is on those most responsible of the most serious crimes or marginal perpetrators or minor offences.⁵⁷⁷ Evidence of shielding may exist in documentary form, including legislation.⁵⁷⁸

In its Order of Provisional Measures from 26 January 2024, the ICJ found that the Israeli Attorney General’s statement that Israeli law enforcement authorities are examining incitement cases to be

⁵⁷⁴ *Prosecutor v Gaddafi and Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”) ICC-01/11-01/11 OA 6 (24 July 2014) para 218

⁵⁷⁵ Valentina Azarov and Sharon Weill, ‘Israel’s Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice’ *International Criminal Law Review* (2012) 12(5) 2012, 910-911

⁵⁷⁶ Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc A/HRC/29/52 (24 June 2015) paras 618, 681

⁵⁷⁷ Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (November 2013) para 51, 49 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 8 September 2024

⁵⁷⁸ ICC-OTP ‘Informal expert paper. The principle of complementarity in practice’ (2003) 29 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> accessed 23 February 2024

“insufficient to remove the risk that irreparable prejudice will be caused before the Court issues its final decision in the case.”⁵⁷⁹ In February 2024, concerned by extrajudicial killings of Palestinians, UN experts – including the Special Rapporteur on the Occupied Palestinian Territories – emphasised “the international community’s long-standing concern at Israel’s culture of impunity in relation to alleged international law violations by its personnel. In the absence of a prompt investigation into the killings, the experts would urge an investigation by the Prosecutor of the International Criminal Court.”⁵⁸⁰

The unwillingness of the Israeli authorities to enforce crimes committed against Palestinians predates the 7/10 attacks and lasts for decades. The *Shehadeh* case is a paradigmatic example of how Israel shields high-level officials from criminal liability. This case involved the targeted killing of Hamas’ military leader in the Gaza strip Salah Shehadeh by the Israeli Defence Forces in 2002. During the operation, a one-ton bomb was dropped on the house in which Shehadeh was staying. Shehadeh and 14 civilians were killed and 140 were injured. Israel’s Military Advocate General (MAG)⁵⁸¹ and the Attorney General decided not to open a criminal investigation against those involved in approving the operation. On 9 September 2003, a petition filed to the HCJ requested the Court to review the decision and open criminal investigations, including against the then Air Force Commander Maj. Gen. Dan Halutz, the IDF Deputy Chief of General Staff Gabi Ashkenazi, the Minister of Defense Binyamin Ben-Eliezer and the Prime Minister of Israel Ariel Sharon.⁵⁸² The HCJ however decided to defer the case to a ‘Special Investigatory Commission for the Examination of the Targeted Killing Operation of Salah Shehadeh’ (‘the Commission’). The commission, composed of three former security and military personnel, was established only 5 years later, on 23 January 2008, by the then Prime Minister Ehud Olmert.⁵⁸³ In 2011, almost 10 years after the incident, the Commission found

⁵⁷⁹ *South Africa v Israel*: Application of Provisional Measures, para 73 (emphasis added)

⁵⁸⁰ OHCHR, ‘Israel’s alleged undercover killings in occupied West Bank hospital may amount to extrajudicial killings and war crimes: UN experts’ (09 February 2024) <<https://www.ohchr.org/en/press-releases/2024/02/israels-alleged-undercover-killings-occupied-west-bank-hospital-may-amount>> accessed 8 September 2024

⁵⁸¹ The MAG provides legal advice in emergencies and during warfare and is responsible for implementing the rule of law within the IDF through prosecution as mentioned in Military Advocate General’s Corps, ‘About the MAG Corps’ (30 December 2021) <<https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/about-the-mag-corps/>> accessed 8 July 2024

⁵⁸² HCJ ‘Ruling. Petition 8794/03’ <https://www.yumpu.com/en/document/view/21436436/hcj-8794-03-geneva-academy-of-international-humanitarian-law-#google_vignette> accessed 10 July 2024

⁵⁸³ Sharon Weill, ‘The Targeted Killing of Salah Shehadeh. From Gaza to Madrid’ (2009) *Journal of international criminal justice*, 7(3) (2009) 617-631

that Shehadeh’s targeted killing was legitimate and imperative, and decided not to open criminal investigations against the alleged high-level perpetrators.⁵⁸⁴

The systemic deficiencies characterizing the failure to investigate and prosecute the *Shehada* case have worsened and spread across the board over the years. The International Initiative “Ceasefire Centre for Civil Rights” has developed a map depicting nearly 500 Israeli court cases over six decades in which civilians sought compensation under tort law for loss of life, bodily injury, and property damage inflicted during armed activities.⁵⁸⁵ The vast majority of cases involve Palestinian civilians who were injured by Israeli security forces in the Gaza Strip and the West Bank. The map shows a pattern of systematic restriction judicial access for Palestinian victims and that Israel has increasingly extended its immunity from liability through laws and court judgements:⁵⁸⁶ “The Israeli legislature repeatedly broadened the scope of Israel’s immunity from liability to the extent that it is nearly impossible for claims against it to succeed and courts have rejected about nine out of ten claims. Simultaneously, Israeli courts have been far more lenient towards claims against the Palestinian Authority.”⁵⁸⁷

Israel’s *legislative* efforts to reinforce its system of immunity for security forces when using lethal force during operational activity or activity ‘against an act of terrorism’ function as further evidence of shielding high-level military and political echelons from justice. Israel’s *judicial* practice complements these efforts by ensuring that persons who are alleged to have committed international crimes in the State of Palestine are not subjected to genuine domestic investigations and are effectively shielded from liability.

A recent Communication to the ICC in the Situation in the State of Palestine depicts several Knesset’s draft laws that aim to shield security forces, leaders, and soldiers from potential prosecution. According to ‘Law for Palestine’, “these laws not only seek to grant immunity to Israeli security forces during operational activities but also undermine the role of the international and Israeli

⁵⁸⁴ Israel Prime Minister’s Office, ‘Salah Shehadeh—Special Investigatory Commission’ (27 February 2011) 5 <<https://www.gov.il/en/pages/spokeshchade270211>> accessed 28 April 2024

⁵⁸⁵ Ceasefire Center for Civilian Rights, ‘Mapping civilian harm claims against Israel and the Palestinian Authority before Israeli courts’ <<https://civilian-harm-map.ceasefire.org/>> accessed 10 July 2024

⁵⁸⁶ The Conversation, ‘Israel: supreme court’s double standard on liability is unfair to Palestinians’ (3 May 2022) <<https://theconversation.com/israel-supreme-courts-double-standard-on-liability-is-unfair-to-palestinians-181969>> accessed 28 April 2024

⁵⁸⁷ Ceasefire Center for Civilian Rights, ‘Israel’s justice system shields security forces from accountability – Launch of major new database’ (19 July 2023) <<https://www.ceasefire.org/israels-justice-system-shields-security-forces-from-accountability-launch-of-major-new-database/>> accessed 28 April 2024

domestic judicial mechanisms in reviewing the legality of these actions. The mere existence of these laws, bills and even debates indicate the existence of an intention to break international law”.⁵⁸⁸

(b) Unjustified delays in investigations

The examination of unjustified delays in investigations involves a determination “whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence in the circumstances of a lack of intent to bring the person(s) concerned to justice.”⁵⁸⁹

The *Shehada* case is no exception. A significant number of cases allegedly involving international crimes against Palestinians are characterised by an unjustified delay in proceedings. In 2003, for example, B’Tselem and other NGOs petitioned the HCJ, requesting the Court to order the MAG to investigate the deaths of eight Palestinians who were killed by IDF military actions.⁵⁹⁰ In 2011, eight years later, the HCJ dismissed the petition.⁵⁹¹ The length of HCJ proceedings often leads to a delay that “has an irreversible impact on the ability of establishing the facts required for a criminal trial”.⁵⁹²

The Israeli NGO Yesh-Din analysed 44 files and found that the average time from the end of an investigation until the Military Advocate-General’s Corps (MAGC) - the body which is granted prosecutorial authority by the MAG - decides, is 14 months. In a significant number of cases no decision had been reached even two years after the investigation concluded.⁵⁹³ The delay in initiating investigations significantly compromises the efficiency of the judicial procedure. Many investigations only begin months or even years after the incidents have occurred due to the MAG’s excessively prolonged decision-making process.⁵⁹⁴ A “default in opening an investigation in a timely

⁵⁸⁸ Law for Palestine, ‘Joint Communication to the Office of the Prosecutor of the International Criminal Court Regarding the Perpetration of the Crime of Genocide by Members of the Israeli War Cabinet’ (March 2024) para 308

⁵⁸⁹ Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (November 2013) para 52 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 28 April 2024

⁵⁹⁰ HCJ ‘B’Tselem – The Israeli Information Center for Human Rights in the Occupied Territories et al v Judge Advocate General Petition for Order Nisi’ (27 October 2003) 9594/03 <<https://hamoked.org/document.php?dID=7351>> accessed 17 July 2024

⁵⁹¹ Quoted from Hamoked ‘HCJ 9594/03 - B’Tselem et al. v. Judge Advocate General Updated Statement on Behalf of the Respondent’ (4 April 2011) <<http://hamoked.org/document.php?dID=Documents2094>> accessed 28 April 2024

⁵⁹² Azarov and Weill (2012) 915

⁵⁹³ YESH-DIN ‘Israel’s Compliance with the International Covenant for Civil and Political Rights.SHADOW REPORT TO THE FOURTH PERIODIC REPORT OF ISRAEL’ (8 September 2014) p 9 <[Volunteers for Human Rights SHohchrhttps://tbinternet.ohchr.org > DownloadDraft](https://tbinternet.ohchr.org/_DownloadDraft)> accessed 20 April 2024

⁵⁹⁴ ACRI ‘Does the mechanism for the investigation of violations of the laws of war comply with Israel’s obligations. Submission to the Turkel Commission’ (28 March 2011), Annex (b) detailing requests for the opening of investigations ACRI and Btselem filed to the MAG in 2005

manner is often coupled with the absence of any detail about the findings of the investigation, the reasons behind the decision to close the file or any new information about the circumstances”.⁵⁹⁵

The above examples are few but indicative of a pattern of delay in the proceedings, with the aim to avoid investigations in cases involving Palestinians, to shield the perpetrators from criminal liability.

(c) Lack of independence, impartiality, and supervision

Indicators for a lack of *independence* can be “the alleged involvement of the State apparatus, including those department[s] responsible for law and order, in the commission of the alleged crimes”, and “the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions”.⁵⁹⁶ The OTP assesses *impartiality* in light of indicators such as “connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes”.⁵⁹⁷

Human Rights Watch found that the Israeli military’s investigative practices and procedures lack impartiality. The military has seldom held Israeli soldiers accountable for wrongdoing, and current practices have had minimal deterrent impact. A key reason for this impunity is the reluctance of the MAG Advocate General’s office to investigate incidents, even when witnesses are available and the violation of international law is evident.⁵⁹⁸ Israel’s judicial system effectively guarantees the shielding of high-level political and military echelons from prosecution, by centralising all investigation and prosecution powers in the hands of the MAG – “a body which is neither independent nor impartial.”⁵⁹⁹

On “the rare occasions when the HCJ has affirmed the illegality of an army policy [...] its decisions have remained largely unenforced.”⁶⁰⁰ In 2005, the HCJ declared an IDF practice known as ‘Early Warning’ as illegal. The procedure allowed IDF soldiers soliciting the assistance of local Palestinian residents, in order to arrest wanted persons.⁶⁰¹ Yet, on 18 October 2007 the MAG decided to not

⁵⁹⁵ Azarov and Weill (2012) 923

⁵⁹⁶ Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (November 2013) para 53 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 2 December 2024

⁵⁹⁷ *ibid*, para 54

⁵⁹⁸ HRW ‘Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing’ (June 2005) 17(7) <<https://www.hrw.org/reports/2005/iopt0605/iopt0605text.pdf>> accessed 28 April 2024

⁵⁹⁹ Fédération internationale pour les droits humains ‘Shielded From Accountability. Israel's Unwillingness to Investigate and Prosecute International Crimes’ (September 2011) para 1.4 <https://www.fidh.org/IMG/pdf/report_justice_israel-final-3-2.pdf> accessed 28 April 2024

⁶⁰⁰ Azarov and Weill (2012) 919

⁶⁰¹ HJC ‘Adalah et al. v GOC Central Command, IDF et al’ HJC 3799/02 (6 October 2005)

prosecute Brigadier General Yair Golan, the IDF commander of the West Bank, for ordering an ‘Early Warning’ in five cases. Notwithstanding the investigation found that Golan knowingly violated army orders and the HJC’s judgement, Golan was subjected to a symbolic disciplinary sanction, not to a criminal conviction.⁶⁰²

Operation Cast Lead, which took place between 27 December 2008 and 18 January 2009, is another example. Although the HCJ ruled in 2005 that the military’s use of Palestinians as “human shields” is unlawful under Israeli and international law, during the operation the IDF repeatedly took over Palestinian homes and used Palestinians as “human shields”.⁶⁰³ In May 2009, the Palestinian Center for Human Rights submitted 490 criminal complaints to the MAG and civil complaints to the Israeli Ministry of Defense on behalf of 1,046 victims of the operation, requesting to opening investigations. They received only 40 responses in relation to these cases, almost all of which merely confirmed the receipt of those complaints.⁶⁰⁴

Although the HCJ should provide civilian supervision over the military justice system, in practice the Court tends to grant an extensive margin of appreciation to the MAG and the AG, especially concerning decisions to initiate or close a criminal investigation. As a result, the scope of judicial review of cases that may amount to international crimes is severely restricted, which eliminates the possibility of civil control: “The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the ‘margin of appreciation’ that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention. **I**

⁶⁰² B’Tselem ‘Chief of Staff censures Brig.-Gen. Yair Golan for ordering use of human shields’ (24 October 2007) <https://www.btselem.org/human_shields/20071024_yair_golan_reprimanded_by_chief_of_staff> accessed 28 April 2024

⁶⁰³ Amnesty International ‘Israel/Gaza. Operation ‘Cast Lead’: 22 days of death and destruction’ (2009) p 48 <<https://www.amnesty.org/en/wp-content/uploads/2021/06/mde150152009en.pdf>> accessed 28 April 2024

⁶⁰⁴ Furthermore, some courts imposed a “court guarantee of 20,000NIS [nearly 5,000 Euro] per claimant.” The guarantee had to be paid before the case could proceed and was imposed per claimant, resulting “in a situation whereby the greater the violation (and so the greater the number of claimants), the greater the financial barrier to justice.” Operation Cast Lead case clearly highlights the involvement of the Israeli State apparatus in creating a regime of immunity for alleged perpetrators. Palestinian Center for Human Rights ‘Status of Criminal and Civil Complaints Submitted to Israeli Authorities on behalf of Victims of Operation Cast Lead’ (18 January 2012) <<https://pchrgaza.org/en/status-of-criminal-and-civil-complaints-submitted-to-israeli-authorities-on-behalf-of-victims-of-operation-cast-lead/>> accessed 20 April 2024

Al Jazeera ‘Operation Cast Lead five years on: “We are still demanding justice”’ (19 January 2014) <<https://www.aljazeera.com/opinions/2014/1/19/operation-cast-lead-five-years-on-we-are-still-demanding-justice>> accessed 28 April 2024.

was unable to find even one case in which this Court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.⁶⁰⁵

Investigations by the MAG rarely lead to criminal prosecution and are mainly directed against lower-ranking soldiers, which are often confronted with disciplinary proceedings rather than criminal charges.⁶⁰⁶ The “close relationship between the military and political echelons in Israel – where most military policy decisions are made by political officials, who are in many cases former military officials – often render such investigations politically untenable.”⁶⁰⁷ Thus, Israel’s judiciary lacks independence and impartiality.

The adjudication of the Targeted Killing policy is paradigmatic example of both lack of proper law enforcement of alleged war crimes committed by the IDF and the lack of independence and impartiality of the judiciary. On 14 December 2006 the HCJ rendered its judgement in a petition which challenged the general policy of assassinating arrestable suspects.⁶⁰⁸ On 28 November 2008, confidential documents that were leaked to *Haaretz* newspaper revealed that Major General Yair Naveh, the Commander of the IDF’s Central Command, in charge of the West Bank, approved multiple targeted killing operations, in breach of the HCJ judgement and consequently Israeli law (alongside international law). When the journalist confronted Naveh, arguing these operations defy the HCJ ruling, Major-General Naveh replied: “**Leave me alone with the HCJ guidelines, I don't know when the HCJ guidelines were issued...** I know that targeted killing is approved... and I receive the instructions from the Operations Division.” When the journalist wondered why authorizations are granted to hit ‘unidentified’ (collateral, uninvolved civilians) people, Naveh answered, ignoring the fact that Shehada incident preceded and was the case triggering the HCJ proceedings and ruling: “And in Shehada there were no unidentified people? But these are not questions you should ask me. What passes... passes approvals **all the way to the prime minister**, and what is decided is absolute. Usually, these guys hung out with bad people around them, not with good people.”⁶⁰⁹

⁶⁰⁵ HCJ 5699/07 Jane Doe (A) v. The Attorney General (26 February 2008) para 10

⁶⁰⁶ Azarov and Weill (2012) 936

⁶⁰⁷ *ibid* 927

⁶⁰⁸ HCJ 769/02 Public Committee Against Torture v. Government, “judgement” 14.12.2006 <<https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government>> accessed 2 December 2024

⁶⁰⁹ Haaretz, 'Mismachim Sudi'im Shel Tzahal: HaRamatkal U'Tzameret Tzahal Ishru LeChasel Mevukashim U'Chafim MiPesha (Secret Documents of the IDF: The Chief of Staff and IDF Top Brass Approved the Elimination of Wanted and Innocent People)' (28 November 2008) <<https://www.haaretz.co.il/misc/2008-11-28/ty-article/0000017f-e3f6-df7c-a5ff-e3fe55550000>> accessed 2 December 2024

When Naveh was appointed Deputy Chief of Staff of the IDF, the second most important position in the army, a petition to the HCJ challenged his appointment based on the lack of criminal investigation in connection with Naveh's alleged war crimes and his general defiance toward the rule of law. After deliberation, however, the petition was rejected, and Naveh was appointed.⁶¹⁰ The whistle-blower leaking the incriminating evidence was criminally convicted and sent to prison, the Haaretz journalist publishing the story had fled the country, and ultimately was criminally convicted and punished.⁶¹¹

Finally, the lack of independence, impartiality, and supervision as a means to the end of shielding state agents from bearing criminal responsibility for the commission of international crimes is not limited to the IDF and equally applies to the GSS, the Israeli Secret Service (the Shin Bet). The Israeli policy of using torture against Palestinian detainees by GSS agents is paradigmatic example. Torture continued to be used in GSS investigations despite and after the HCJ landmark ruling on its illegality in 1999.⁶¹² In 2010 it was estimated that in the decade since the HCJ ruled on the matter, more than 500 complaints were filed to the MOJ against GSS agents. These however did not yield a single criminal punishment, conviction, indictment, prosecution or even a single criminal interrogation.⁶¹³

(d) Conclusion

The analysis of Israel's judicial practice and legal system showed that “[t]he structural and functional deficiencies of the Israeli legal system have resulted in investigations that fall far short of the relevant international standards and indicate the system's inherent unwilling[ness] to investigate and prosecute international crimes in accordance with international standards.”⁶¹⁴ Israel lacks genuine intent to hold

⁶¹⁰ HCJ 8707/10 Yoav Hess et. al., v. The Minister of Defense et. al., “judgement” 3.2.2011 <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C10%5C070%5C087%5Cb04&fileName=10087070_b04.txt&type=2> accessed 2 December 2024 (The undersigned acted as counsel in this case)

⁶¹¹ *ibid*; See also Haaretz, 'Leftists Petition Court to Stymie Naveh Promotion' (29 November 2010) <<https://www.haaretz.com/2010-11-29/ty-article/leftists-petition-court-to-stymie-naveh-promotion/0000017f-dba9-d3a5-af7f-fbaf1de30000>> accessed 2 December 2024; Globes, 'Bagatz Dacha Et HaAtira Neged Minui Yair Noveh LeRamatkal - Ach Mat'ach Bikoret (The Supreme Court Rejected the Petition Against the Appointment of Yair Naveh as Chief of Staff - But Criticized It)' (3 February 2011) <<https://www.globes.co.il/news/article.aspx?did=1000620472>> accessed 2 December 2024; Globes, 'Atira: Lo LeManot Et Yair Noveh LeSgan Ramatkal Acharat Parashat Kam (Petition: Do Not Appoint Yair Naveh as Deputy Chief of Staff Following the Kamm Affair)' (28 November 2010) <<https://www.globes.co.il/news/article.aspx?did=1000604157>> accessed 2 December 2024

⁶¹² HCJ 769/02 Public Committee Against Torture v. Government, “judgement” (14 December 2006) <<https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government>> accessed 2 December 2024

⁶¹³ Mann, Itamar and Shatz, Omer, ‘The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009’ *Unbound: Harvard Journal of the Legal Left*, Vol. 6, p. 74 and 79, 2010, Available at SSRN: <https://ssrn.com/abstract=1775175>

⁶¹⁴ Azarov and Weill (2012) 934

high-level perpetrators to account.⁶¹⁵ The three *indicia* of unwillingness are the means to this end: shielding the alleged perpetrators from criminal responsibility, unjustified delays of proceedings, as well as a lack of independence and impartiality.

As demonstrated above, the case of incitement to genocide is no different. Pseudo-proceedings (‘examinations’) on the basis of offences other than incitement to genocide were instituted for a twofold purpose, misleading the ICJ to believe Israel is complying with its Order to prosecute incitement to genocide, and preventing the ICC from doing just that in its stead. Whilst this fictitious façade resulted in decisions not to criminally investigate at all, the attempt to deceive, obstruct justice and circumvent proceedings, evidence a systematic and widespread unwillingness to genuinely enforce the law over international crimes committed against Palestinians, unwillingness that characterized past cases and is likely to be part and parcel of any future, potential investigation into the crime of incitement to genocide.

3.2 Gravity

Article 1 RS grants the ICC “the power to exercise its jurisdiction over persons for *the most serious crimes*”. Accordingly, Article 17(1)(d) RS sets a procedural threshold to ensure only cases that reflect “sufficient” gravity, as opposed to ‘marginal’ gravity, will be admissible.⁶¹⁶ The Appeals Chamber confirmed that “the determination of whether a particular case is of sufficient gravity to be admissible before the Court ‘goes to the exercise, as distinct from the existence, of jurisdiction’”.⁶¹⁷

Gravity is defined nowhere in the Rome Statute.⁶¹⁸ Based on the case law,⁶¹⁹ the OTP notes that “[t]he factors that guide the Office’s assessment of gravity include both quantitative and qualitative

⁶¹⁵ ICC-OTP ‘Informal expert paper: The principle of complementarity in practice’ (2003) 9-10, ftn, 10 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>> accessed 8 July 2024

⁶¹⁶ *Prosecutor v Al Hassan* (Appeals Chamber’s Judgment on the Appeal of Mr Al Hassan Against the Decision of Pre-Trial Chamber I) ICC-01/12-01/18-601-Red (19 February 2020) 53

⁶¹⁷ *ibid*, para 54; Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, UN A/CN.4/SER.A/1994/Add.1 (the ‘ILC 46th Session Report’) 52

⁶¹⁸ Priya Urs, *Gravity at the International Criminal Court: Admissibility and prosecutorial Discretion* (Oxford University Press 2024) 24

⁶¹⁹ see *Prosecutor v Al Hassan Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I) ICC-01/12-01/18 OA (19 February 2020) para 92; *Prosecutor v Francis Kenyatta and Mohammed Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012) para 50; *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation) ICC-01/13 (16 July 2015) para 21; *Prosecutor v Bahar Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 31

considerations, relating to the scale, nature, manner of commission and impact of the crimes”.⁶²⁰ An assessment of these criteria “must be made on a case-by-case basis”.⁶²¹ Yet, the eight cases in this Communication share certain characteristics, whose gravity is sufficient to meet these criteria.

Scale of the Crime

The scale of the alleged crime itself is a good gauge of the gravity of a crime. The scale “may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread”.⁶²² Whilst quantitative criteria give “some indication of the scope of victimhood within the context of a case”,⁶²³ “the number of victims [is] not determinative of the gravity of a given case”.⁶²⁴ Rather, the “existence of some aggravating or qualitative factors attached to the commission of crimes” may add to the gravity of the crime.⁶²⁵

The direct victims of the crime of *incitement* to genocide under Article 25(3)(e) RS are the two million members of the targeted group, Palestinians in Gaza, who are exposed to a risk of becoming direct victims of one of the genocidal acts constituting the crime of genocide under Article 6 RS.⁶²⁶ The indirect victims of this crime are additional five million members of the broader group of Palestinians, who are residing in the West Bank, East Jerusalem and Israel, and are at severe risk of being affected from the spill over of the inciting calls to commit genocide against the sub-group of Palestinians in Gaza. Indeed, some of the inciting statements may be interpreted or understood by the addressees as a call to commit genocide against the broader group and some of the suspects also made statements to that effect, targeting the group of Palestinians as such. Although incitement is an inchoate crime and hence the materialization of genocide is not a requisite element, the situation in the West Bank,

⁶²⁰ Office of the Prosecutor, ‘Policy Paper on case selection and prioritisation of the OTP’ (15 September 2016) para 32 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶²¹ *Prosecutor v Al Hassan Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I) ICC-01/12-01/18 OA (19 February 2020) para 2

⁶²² Office of the Prosecutor, ‘Policy Paper on case selection and prioritisation of the OTP’ (15 September 2016) para 38 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶²³ *Prosecutor v Al Hassan Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I) ICC-01/12-01/18 OA (19 February 2020) para 97

⁶²⁴ *Prosecutor v Abu Garda* (Pre-Trial Chamber I, Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red (8 February 2010) para 31

⁶²⁵ *Situation in the Republic of Kenya* (Decision Pursuan to Article 15 of the Rome Statute on the Application on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 march 2010) para 62

⁶²⁶ Palestinian Central Bureau of Statistics "Estimated Population in the State of Palestine Mid-Year by Governorate, 1997-2026" (2023)

East Jerusalem and Israel may establish a causal link between statements made by the suspects and the acts of the addressees of these statements in occupied Palestinian territories other than Gaza.⁶²⁷

The harm the victims of incitement to genocide incur is the risk of becoming victims of genocide. But other types of harm also come to mind in connection with incitement to genocide. One of them is the commission of crimes other than genocide against the targeted group as a consequence of the atmosphere of hate, legitimization and impunity these statements and their non-prosecution spark.

Whether the acts and omissions of the IDF in Gaza amount to genocidal acts within the meaning of Article 6 RS or merely to war crimes and crimes against humanity, the extent of damage caused by these acts may be imputed, at least in part, to the crime of *incitement* to genocide. This damage is unprecedented, first and foremost in terms of the unimaginable number of victims' deaths and bodily and mental injuries, which may reach 10% of the population of the targeted group. In addition, about 10% of the population has fled the Gaza strip and over 90% have been internally displaced, often multiple times. With more than 70% of the buildings in Gaza destroyed, the extent of material damage to houses, infrastructures and services creates conditions calculated to bring about the destruction, in whole or in part, of the targeted group.⁶²⁸ Finally, even if there were no hostilities in Gaza and the victims incurred no physical or material damage, the mental and psychological damage caused to more than two millions human beings by the risk of becoming victims of genocide, is in itself sufficient in terms of the scale of the crime.

In terms of spatial scope, the Court reiterated that the geographical parameter within which the alleged crimes occurred, is not, in and of itself, a relevant consideration for the assessment of gravity. Indeed, other cases deemed admissible by the court concerned alleged crimes occurring in a single location or a confined set of events occurring within a limited geographic scope, as small as a single village.⁶²⁹

⁶²⁷ Office of the High Commissioner for Human Rights, 'UN Human Rights Chief Deplores New Moves to Expand Israeli Settlements in Occupied West Bank' (8 March 2024) <<https://www.ohchr.org/en/press-releases/2024/03/un-human-rights-chief-deplores-new-moves-expand-israeli-settlements-occupied>> accessed 2 December 2024; CNN, 'Israeli Minister: Annexation of Occupied West Bank Is Inevitable' (11 November 2024) <<https://edition.cnn.com/2024/11/11/middleeast/israeli-minister-annexation-occupied-west-bank-intl/index.html>> accessed 2 December 2024; Also see, e.g., ITV News, 'Israeli president Isaac Herzog says Gazans could have risen up to fight 'evil' Hamas' (13 October 2023) <<https://www.itv.com/news/2023-10-13/israeli-president-says-gazans-could-have-risen-up-to-fight-hamas>> accessed 2 December 2024

⁶²⁸ See, e.g., UNOCHA, 'Reported impact snapshot | Gaza Strip (26 November 2024)' <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-26-november-2024>> accessed 1 December 2024; UNOSAT, 'UNOSAT FAO Gaza Strip Cropland Damage Analysis' (29 September 2024) <<https://unosat.org/products/3984>> accessed 1 December 2024; UNOSAT, 'UNOSAT Gaza Strip Comprehensive Damage Assessment' (29 September 2024) <<https://www.unosat.org/products/3985>> accessed 1 December 2024

⁶²⁹ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, (25 September 2009)

Whilst the geographical scale of the Gaza Strip should not be therefore of concern, the size of one of the densest places worldwide is more than sufficient in terms of the geographical scale of the crime.

The temporal scale of the crime similarly meets the gravity threshold. The statements analysed in this Communication span over a year of unprecedented, extreme, and ongoing manifestations of genocidal intent through direct and public calls inciting others to commit genocide in Gaza. These statements were and are still made whilst hostilities are taking place, by the party who is capable of performing genocide and prevails in the war. In circumstances of non-enforcement of these inciting statements, the risk the targeted group is exposed to is dramatically increased. These repeated calls can be linked to allegedly genocidal and in any event criminal acts that become more and more structured and organized over time. The above-mentioned “Generals’ Plan”, for example, which was drafted and advocated by the suspect Eiland, is currently being implemented in the form of ethnic cleansing in the north of Gaza, evidencing the exponentially growing risk victims, their relatives and descendants, are facing, with consequences that would last for generations.⁶³⁰

Nature of the Crime

The nature of the crime refers to the “specific factual elements of each offence”⁶³¹ and should be assessed by its relation to the violation of several fundamental human rights.⁶³² Mentioned once as an indicator for gravity,⁶³³ it remained undeveloped and has been inconsistently applied.⁶³⁴ Be that as it may, in the case of incitement to genocide the nature of the crime is intertwined with the most fundamental human rights, ones that are considered *jus cogens* norms, *erga omnes* obligations, and are part of customary international law.

The Manner of Commission of the Crime

The manner of commission of the crime should be considered “in light of, *inter alia*, **the means employed** to execute the crime, the extent to which the crimes were systematic or **resulted from a**

⁶³⁰ The Times of Israel, 'Netanyahu's Former Defense Minister Ya'alon: Israeli Leadership Dragging Country Down Path of Ethnic Cleansing in Gaza' (30 November 2024) <https://www.timesofisrael.com/liveblog_entry/ex-defense-minister-yaalon-israeli-leadership-dragging-country-down-path-of-ethnic-cleansing-in-gaza/> accessed 2 December 2024

⁶³¹ Office of the Prosecutor, 'Policy Paper on case selection and prioritisation of the OTP' (15 September 2016) para 39 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶³² *Prosecutor v Al Hassan Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I) ICC-01/12-01/18 OA (19 February 2020) para 122

⁶³³ *Prosecutor v Al Hassan Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I) ICC-01/12-01/18 OA (19 February 2020) para 57

⁶³⁴ Priya Urs, 'Gravity at the International Criminal Court'. (2024) Oxford University Press 57

plan or organised policy or otherwise **resulted from the abuse of power or official capacity**, the existence of elements of particular cruelty, including **the vulnerability of the victims** and any motives involving discrimination held by the direct perpetrators of the crimes”.⁶³⁵ Even in cases where there were few victims, “the manner in which the crime was committed and publicised”, and specifically if it “was cruel, dehumanising and degrading”⁶³⁶, was a primary indicator of their gravity.

The six public officials who are suspect in the present Communication are Israeli President, Prime Minister and three other Ministers. All the crimes they allegedly committed resulted from the abuse of their power and official capacity. All the inciting statements reflect particular cruelty vis-à-vis vulnerable civilians the direct perpetrators publicly incite to destruct on racist, dehumanizing and discriminatory grounds, that is, their membership of the targeted group. Finally, the alleged crimes were committed in the context of the war in Gaza and more broadly the Israeli-Palestinian armed conflict. Thus, the alleged crimes were part of a systematic attack, they resulted from a plan, and were part of an organized policy, with unprecedented means deployed for its implementation.

Impact of the Crime

The impact of the crimes allegedly committed may be assessed “in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities”.⁶³⁷

The first impact of the crime of incitement to genocide is the atmosphere of terror that strongly affect the victims as incitement creates the breeding ground for the potential commission of genocide. In addition, and as noted above, the inciting statements can lead to the commission of other international crimes whose commission has a detrimental impact on the victims. Finally, the most salient impact is of course the risk of materialization of genocide, the main harm the victims incur.

Given the scale, nature, manner of commission and impact of the crime, inciting others to commit genocide in Gaza is sufficiently grave to be deemed admissible as per Article 17(1)(d) RS.

⁶³⁵ Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016) para 40 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶³⁶ *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* (Second Warrant of Arrest) ICC-01/11-01/17-13 (4 July 2018) para 31

⁶³⁷ Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016) para 41 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

IV. INTERESTS OF JUSTICE

The notion of interests of justice is defined nowhere, not in the Rome Statute, not in the Rules of Procedure and Evidence. Procedurally, this notion is not part of neither the admissibility nor the jurisdictional requirements a certain investigation or case must meet to be processed. Its first appearance is rather late, in the contexts of “investigation and prosecution” (Part 5 RS).

Article 53(1) RS *obligates* (‘shall’) the Prosecutor, after evaluation of evidence, to *initiate* investigations into alleged ICC crimes. Whilst the Rome Statute leaves the Prosecutor no prosecutorial discretion, it does provide the Prosecutor three grounds based on which the Prosecutor may determine that “there is no reasonable basis to proceed” with a certain investigation or case.

The first two grounds for such exceptional (“unless”) determination are lack of jurisdiction (Article 53(1)(a) RS) or admissibility (Article 53(1)(b) RS). The third is a determination that can be made only after considering both “the gravity of the crime” and “the interest of the victims”: in so far there are “*substantial reasons to believe*” that an investigation would not serve the interest of justice”, the Prosecutor may decide not to proceed with a certain case or investigation (Article 53(1)(c) RS).

In addition, such determination has to be in line with the purpose and principles of the RS, including the interest in preventing and terminating serious crimes of concern to the international community, ending impunity, and guaranteeing a lasting respect for international justice.⁶³⁸ Only an ‘exceptional countervailing consideration’⁶³⁹ might substantiate a reasonable basis not to initiate (or proceed) with an investigation of a crime, which has been found to be both within the jurisdiction of the Court and to meet the admissibility criteria under the RS.

The interests of justice are mentioned only in a *negative* context. They can only be a ground *not* to initiate or proceed with an investigation. An exception to the Prosecutor’s obligation to investigate and prosecute, the presumption is that, by default, the interests of justice are in favour of enforcement.

⁶³⁸ Interests of justice differ from the interests of peace which do not fall within the mandate of the OTP. Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) 1 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>> accessed 15 July 2024

⁶³⁹ Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) 2 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>> accessed 15 July 2024

Accordingly, the RS does *not* require the Prosecutor to “affirmatively determine that an investigation would be in the interests of justice”,⁶⁴⁰ that is, to *positively* establish the interests of justice in order to investigate or prosecute.⁶⁴¹ According to Article 53(1)(c) RS, “if the Prosecutor determines that there is no reasonable basis to proceed” with an investigation, and this determination is based “*solely* on the basis of the interest of justice, the Prosecutor must inform the PTC of its decision.

Similarly, Article 53(2)(c) RS commands that “if, upon investigation, the Prosecutor concludes that there is not a sufficient basis” to prosecute because “prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”, then “the Prosecutor shall inform the PTC and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion”.

A referral by the Security Council or a State Party “reflects [sic] an expectation that the Prosecutor will proceed to investigate referred situations, while allowing the Prosecutor not to proceed in the limited circumstances set out [in the article 53].”⁶⁴² The Prosecutor shall proceed with an investigation “unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time”.⁶⁴³

Article 53(3) RS allows the referring entity to request the PTC to judicially review a Prosecutor’s decision not to proceed with investigation or prosecution. The referring party can decide to do so irrespective of the ground based on which the Prosecutor so decided, be it jurisdiction, admissibility, insufficient evidence to issue warrants under Article 58 RS, or interests of justice.

By contrast, the PTC cannot – on its own initiative – review a Prosecutor’s decision not to proceed with investigation or prosecution, with one sole exception: when the Prosecutor’s decision is *exclusively* based on the interests of justice. Furthermore, when a Prosecutor so decides, the decision

⁶⁴⁰ *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 (5 march 2020) para 49

⁶⁴¹ *Situation in the Republic of Burundi* (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”) ICC-01/17-X (25 October 2017) para 190

⁶⁴² *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 (5 march 2020) para 29

⁶⁴³ *Situation Situation in the Republic of Burundi* (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”) ICC-01/17-X (25 October 2017) para 190

not to proceed is suspended until and if the PTC confirms its legality. Finally, in line with the ‘negative’ nature of this procedural element, the PTC cannot review a ‘positive’ determination that an investigation or prosecution is in the interest of justice.

Granting the PTC a *proprio muto* authority to review *only* this ground, limiting this authority only to a negative determination, and the suspension of such negative determination until it is confirmed by the Chamber, highlight the extremely rare circumstances in which such decision can be made and survive a judicial scrutiny, as well as the need to conduct a careful, independent and impartial oversight over the Prosecution’s discretion in such exceptional cases.

In the present case, the Prosecutor has already decided to initiate an investigation. Since its inception, both the previous and the current Prosecutors proceeded with the investigation. Both Prosecutors were of the view, therefore, that this *investigation* serves the interests of justice within the meaning of Article 53(1)(c) RS.

As part of this investigation, the Prosecutor has recently requested the PTC to issue arrest warrants under Article 58 RS, against two of the eight suspects identified in this Communication, in relation to crimes other than incitement to genocide, which means that the Prosecutor is of the view that this *prosecution* is in the interests of justice, within the meaning of Article 53(2) RS. Furthermore, the PTC accepted the Prosecutor’s request, found reasonable grounds to believe the crimes have been committed, and issued the requested arrest warrants – further evidencing and advancing the interest of justice.

At both the investigative and prosecutorial phases, therefore, the Prosecutor was of the view the cases arising out of the situation in the State of Palestine are within the jurisdiction of the Court, are admissible, are based on sufficient evidence for the purpose of Article 58 RS (‘reasonable ground to believe’ the crimes have been committed) and are serving the interests of justice.

The present Communication is seeking to expand the ongoing investigation and prosecution to include the crime of incitement to genocide. For the purpose of establishing the interests of justice, this crime is no different than the crimes based on which the Prosecutor decided to initiate the investigation into the situation in the State of Palestine and to proceed with prosecution and arrests. If anything, it seems that investigation and prosecution of incitement to genocide would better serve the interests of justice.

Unlike the other crimes that are currently under investigation, investigation of the crime of incitement to genocide would rely *inter alia* on the *factual* findings of the ICJ, according to which it is plausible this crime has been and potentially is still being committed, an evidentiary threshold that is arguably equal or higher than the ICC standard for opening an investigation under Article 53 RS and issuing arrest warrants under Article 58 RS.

Unlike the other crimes that are currently under investigation, investigation and prosecution of this crime *legally* hinges on the failure of Israel to comply with the explicit and binding ICJ Order to prosecute and punish this crime, which procedurally obligates the Prosecutor to do so in its stead. Finally, the fact that initiating investigation and proceeding with prosecution of incitement to genocide is intended to prevent or terminate the commission of genocide, is perhaps the most dominant and persuasive factor in determining the interest of justice in this case.

The plausible commission of the crime, its non-investigation by Israel, the latter's defiance of the ICJ order, the fact that an investigation within the meaning of Article 53(1) has already been initiated, the fact that against two of the eight suspects identified in this Communication arrest warrants were requested and issued the meaning of Article 53(2) RS, each of these elements and certainly when they are taken together attest that currently there are no exceptional countervailing considerations or other specific circumstances which provide substantial reasons to believe it is not in the interests of justice to proceed with investigation and prosecution of the crime of incitement to genocide.

Article 53(4) RS notes that the Prosecutor "may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information". Given the new facts and information provided in this Communication, and in accordance with Articles 53(1)(c) and 53(2)(c) RS, in order to determine that the investigation and prosecution requested in this Communication is *not* in the interests of justice, the Prosecutor has to take into account "all the circumstances, including the *gravity* of the crime (i), the interests of *victims* (ii) and the age or infirmity of the *alleged perpetrator* (iii), and his or her *role in the alleged crime* (iv). As noted above, in case the interests of justice are the basis for not proceeding with an investigation on the basis of this Communication, the Prosecutor *must* inform the PTC and the State of Palestine of his reasoned conclusion.

An independent element of admissibility under Article 17 RS, the gravity of the crime of incitement to genocide has already been established above. Indeed, "[b]efore considering whether there are substantial reasons to believe that it is not in the interests of justice to initiate an investigation, the

Prosecutor will necessarily have already come to a positive view on admissibility, including that the case is of sufficient gravity to justify further action. These reflections demonstrate... the strong presumption in favour of initiating an investigation where the threshold of sufficient gravity is met.⁶⁴⁴

The interests of victims refers to “the taking into consideration of the views and concerns of victims in the course of the judicial process.”⁶⁴⁵ It entails the provision of both procedural and substantive justice for victims.⁶⁴⁶ Procedural justice is guaranteed in Article 68(1) RS which involves the protection of the victims’ rights during “their participation in proceedings, impact on decisions, and ability to shape outcomes”,⁶⁴⁷ notably the fairness of treatment in processes. Whereas substantive justice implies their interests in seeing justice done.⁶⁴⁸ Considering the interests of victims would mean taking heed of “the ultimate benefit of victims”⁶⁴⁹ which, in the context of incitement to genocide, is their right to be protected from becoming victims of genocide, *inter alia* by prosecuting inciting calls to commit one against them. This is what the ICJ ordered to do. This is what Israel did not do. And this is what the ICC has to do in its stead. Thus, the Prosecutor has to take the interests of the victims into account twice: their interest in prosecuting the crime of incitement *per se*, and their interest in not to become victims of yet another and much more serious crime, that of genocide.

As for considerations related to the eight suspects identified in the present Communication, they played a key role in “the overall commission of crimes”.⁶⁵⁰ The degree of their involvement is maximal simply because the conduct in this crime is by definition committed by a sole perpetrator, that is, the person making the direct and public call inciting others to commit genocide.

In so far genocidal acts have been committed in Gaza as a result of their statements, the seniority of their position in government in the case of the six public officials, or their immense influence as public figures in the case of the two private individuals, establish the mental element of the crime of

⁶⁴⁴ Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) 5 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>> accessed 17 July 2024

⁶⁴⁵ Separate Opinion of Judge Pikis in *Prosecutor v Lubanga* (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007) ICC-01/04-01/06 OA8 (13 June 2007) para 14 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_03066.PDF> accessed 17 July 2024

⁶⁴⁶ Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 2

⁶⁴⁷ *ibid* 3

⁶⁴⁸ *ibid*

⁶⁴⁹ Compare with Article 57(3)(e) Rome Statute

⁶⁵⁰ Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) 7 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>> accessed 15 July 2024

genocide and hence implicates them as co-perpetrators also in this crime. The obligation to investigate genocidal acts other than incitement, therefore, also tilts the interests of justice in favour of investigation and prosecution of incitement, as the crime under Article 25(3)(e) RS may establish the mental element of the more serious crime under Article 6 RS, serving as the basis for its investigation.

Finally, given the seriousness of genocidal acts, including incitement, the undersigned are of the view that little to no weight should be attributed to the age or infirmity of the suspects. To conclude, there are no substantial reasons to believe that the Prosecutor's decision to investigate and prosecute the suspects for incitement to genocide would not serve the interests of justice. Quite the opposite.

*

E. THE DUTY TO INVESTIGATE AND PROSECUTE INCITEMENT TO GENOCIDE

On 27 November 2023 the Prosecutor reaffirmed that his office's current investigation extends to allege crimes committed in Israel and Gaza from 7 October 2023 onwards.⁶⁵¹ On 30 October 2023 the Prosecutor stated that "Israel has clear obligations in relation to its war with Hamas... the laws of armed conflict".⁶⁵² On 3 December 2023 the Prosecutor once again warned that "the manner in which Israel responds... is subject to clear legal parameters that govern armed conflict".⁶⁵³ On 26 January 2024 the ICJ indicated Provisional Measures in *South-Africa v. Israel*. In light of Israel's failure to comply with these measures,⁶⁵⁴ on 28 March 2024 and again on 24 May 2024, the ICJ granted additional and modified the original provisional measures.

Some of Israel's failures to comply with the ICJ's orders were framed as crimes under the Rome Statute and prosecuted by the OTP. The ICJ Order to prosecute incitement to genocide was not. Legally, the principle of complementarity commands that the failure of Israel to comply with this

⁶⁵¹ Karim Khan, 'Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties' International Criminal Court (17 November 2023) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>> accessed 19 March 2024. This position is consistent with the OTP's initial position. See, e.g., Office of the Prosecutor, 'Summary of Preliminary Examination Findings on the situation in the State of Palestine' (20 December 2019) 3, para 7

⁶⁵² *ibid*

⁶⁵³ Karim Khan, 'ICC Prosecutor, Karim A. A. Khan KC, concludes first visit to Israel and State of Palestine by an ICC Prosecutor: "We must show that the law is there, on the front lines, and that it is capable of protecting all"' International Criminal Court (3 December 2023) <<https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-first-visit-israel-and-state-palestine-icc-prosecutor>> accessed 16 May 2024

⁶⁵⁴ Amnesty International, 'Israel Defying ICJ Ruling to Prevent Genocide by Failing to Allow Adequate Humanitarian Aid to Gaza' (28 February 2024) <<https://www.amnesty.org.au/israel-defying-icj-ruling-to-prevent-genocide-by-failing-to-allow-adequate-humanitarian-aid-to-gaza/>> accessed 16 May 2024

Order redirect and addresses this order to the ICC Prosecutor. Factually, the ICJ determination that it is plausible that incitement to genocide has been committed substantiate a reasonable ground to believe that the suspects committed this inchoate crime within the meaning of Article 25(3)(e) RS, irrespective of whether the crime of genocide has been committed under Article 6 RS or not.

Only one individual on earth has the power and responsibility to prosecute this horrendous crime. The failure to comply with the obligation to prosecute pursuant to the ICJ's order, undermines the credibility both the ICJ and the ICC. The inability or unwillingness to do so exposes two million members of the targeted group to an imminent risk of becoming victims of the crime of crimes, that is, genocide. Refraining from **publicly announcing** that the OTP is investigating incitement to genocide and considering requesting arrest warrants, against the inciters cited by the ICJ and those identified in this Communication, breaches the Prosecutor's duty to prevent and terminate ICC crimes. Also the PTC acknowledged that publication of this kind of decision has a cooling effect and may contribute to preventing future crimes or terminating ongoing ones. In its decision to publish the typically secret decision to issue arrest warrants against the suspects Netanyahu and Gallant, the PTC explained that it "decided to release the information below **since conduct similar to that addressed in the warrant of arrest appears to be ongoing. Moreover, the Chamber considers it to be in the interest of victims and their families that they are made aware of the warrants' existence**".⁶⁵⁵

Despite multiple State referrals after 7 October 2023 including with respect to alleged commission of genocidal acts, the ICC has remained unresponsive and specifically with respect to the ICJ Order to prosecute and punish incitement to genocide. In the meantime, numerous UN bodies, member states, agencies and experts have directly or indirectly taken measures to comply with the ICJ's findings and orders. On 25 March 2023, for example, the UNSC called for a ceasefire,⁶⁵⁶ and the Special Rapporteur on the situation in the occupied Palestinian territories reported that "there are reasonable grounds to believe that the threshold indicating Israel's commission of genocide is met."⁶⁵⁷ Canada,⁶⁵⁸

⁶⁵⁵ International Criminal Court, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁶⁵⁶ UNSC Res 2728 (25 March 2024) UN Doc S/RES/2728

⁶⁵⁷ UN HRC: Anatomy of a Genocide, para 7

⁶⁵⁸ Motion N° 658 (18 March 2024) House of Commons Journal 290, 3573 <<https://www.ourcommons.ca/Content/House/441/Journals/290/Journal290.PDF>> accessed 17 July 2024

Spain⁶⁵⁹ and Belgium,⁶⁶⁰ among others, have suspended the delivery of arms to Israel.⁶⁶¹ In the UK and other national jurisdictions the implications of the ICJ rulings are examined by national Courts.⁶⁶²

On 20 May 2024 the ICC Prosecutor filed applications for the issuance of arrest warrants before Pre-Trial Chamber I for three leaders of Hamas and two Israeli officials: the suspects Netanyahu and Gallant.⁶⁶³ The OTP has found that there are reasonable grounds to believe that Netanyahu and Gallant committed starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) RS, and extermination and/or murder, including in the context of deaths caused by starvation, as a crime against humanity, contrary to articles 7(1)(b) and 7(1)(a) RS.⁶⁶⁴

On 21 November 2024 the PTC accepted the applications and issued the warrants on the basis of these crimes, with the exception of the crime against humanity of extermination. The PTC noted that “[o]n the basis of material presented by the Prosecution... the Chamber could not determine that all elements of the crime against humanity of extermination were met”. Yet, “[t]he Chamber found that there are reasonable grounds to believe” that Israel inflicted “**conditions of life calculated to bring about the destruction of part of the civilian population in Gaza**”.⁶⁶⁵

This finding is not only an element of the crime of extermination within the meaning of Article 7(1)(b) RS. It is also a genocidal act within the meaning of Article 6(c) RS. What differs the crime against humanity of extermination from the crime of genocide is the *intent* to destroy a group in whole or in part.⁶⁶⁶ **If the PTC has already found reasonable grounds to believe that Israel created in Gaza conditions calculated to partly destroy the targeted group, the requisite intent for the purpose**

⁶⁵⁹ José Manuel Albares Minister of Economy, Commerce and Business Session Plenaria <<https://www.youtube.com/watch?v=IDPvTkyRV74&t=5373s>> accessed 3 April 2024

⁶⁶⁰ Wallonian Parlement, ‘Compte Rendu Avancé: Séance publique de commission’ *Commission des affaires générales et des relations internationales* (5 February 2024) <https://nautilus.parlement-wallon.be/Archives/2023_2024/CRAC/crac92.pdf> accessed 2 May 2024, page 6

⁶⁶¹ Ibid. The government of Belgium mentioned the ICJ’s Provisional Measures Order as a reason for its decision.

⁶⁶² In the Netherlands, for example, the Court of Appeal in the Hague ruled that the government must cease its export of F-35 fighter plane parts to Israel due to the clear risk of grave breaches of international humanitarian law carried out by Israel. See *Pax voor Vrede and others v de Staat der Nederlanden (Ministerie van Buitenlandse Zaken)* Den Haag 12 februari 2024 ECLI:NL:RBDHA:2023:19744 para 5.19

⁶⁶³ Karim Khan, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine’ International Criminal Court (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 6 June 2024

⁶⁶⁴ *ibid*

⁶⁶⁵ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁶⁶⁶ David Luban, ‘What the ICC Prosecutor Charged – and Didn’t Charge – in Gaza Warrants’ (*Just Security* 22 May 2024) <https://www.justsecurity.org/95985/icc-gaza-warrant-charges/?utm_source=pocket_saves> accessed 6 June 2024

of the mental element of the crime of genocide under Article 6 RS may be established by investigating the inciting statements and prosecuting the inciters under Article 25(3)(e) RS.

The Prosecutor’s applications for arrest warrants and the PTC’s decision to issue them are not publicly accessible. But the fact that in its press release the PTC has made no reference to the factual and legal findings of the ICJ may indicate that the latter’s reference to the statements of Gallant, Herzog and Katz, as well as the latter’s order to Israel to “prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip”⁶⁶⁷ – were not part “of material presented by the Prosecution”, based on which the PTC rendered its decision.

Whilst genocide is not a necessary consequence of the inchoate crime of incitement to genocide, the commission of crimes other than genocide, such as war crimes and crimes against humanity, which both the OTP and the PTC found reasonable grounds to believe have committed, may be a consequence of the two fugitives and/or the other six suspects who called to commit genocide against the targeted group. Non-enforcement of one of the **five** crimes under the jurisdiction of the ICC, therefore, risks contributing to the potential commission of the very same crimes the OTP is busy prosecuting. As noted above, the PTC has already determined that **crimes “similar to that addressed in the warrant of arrest appears to be ongoing.”**⁶⁶⁸ Prevention of these ongoing crimes is hence another reason to publicly announce that incitement to genocide is being investigated and potentially prosecuted within the scope of the investigation into the Situation in the State of Palestine.⁶⁶⁹

I. THE DUTY TO PREVENT: THE STATUTE, THE CRIME OF INCITEMENT, AND THE SUSPECTS

The Preamble of the Rome Statute declares that State Parties are determined “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.⁶⁷⁰ The OTP has stated that “the goals of the statute is to [...] prevent the recurrence of

⁶⁶⁷ *South Africa v Israel*: Indication of Provisional Measures, para 86(3)

⁶⁶⁸ International Criminal Court, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 1 December 2024

⁶⁶⁹ See also Amanpour, ‘Interview With ICC Chief Prosecutor Karim Khan; ICC Charges Hamas And Israeli Leaders’ *CNN* (20 May 2024) <<https://transcripts.cnn.com/show/ampr/date/2024-05-20/segment/01>> accessed 6 June 2024

⁶⁷⁰ Preambles must be taken into account when interpreting the context of a treaty following Article 31 of United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, (entered into force 27 January 1980)

violence”,⁶⁷¹ that the object and purpose of the Rome Statute is “the prevention of serious crimes of concern to the international community”,⁶⁷² and that prevention of crimes under its jurisdiction forms part of its mission.⁶⁷³

The Situation in the State of Palestine is a paradigmatic example of the impact the public warning of the OTP has on the prevention of international crimes. For example, since 2018 the Israeli government plans and the Israeli PM Netanyahu declared his intention to demolish the houses and expel the members of the Bedouin community of Khan-al-Ahmar from their land. The Israeli Supreme Court **authorised** the government to do so. Yet, After the ICC Prosecutor stated she is monitoring the situation in Khan-al-Ahmar and would “not hesitate to take any appropriate action”, the government preferred not to use the *carte blanche* its own Supreme Court provided, citing “security and diplomatic considerations”, and postponed the evacuation.⁶⁷⁴

Incitement is a *sui generis* crime. It applies *only* to genocide and not to any other ICC crime, because of the dominant role it plays in the dehumanization of the targeted group, the normalization of its victimization, and the creation of conditions allowing the commission of lethal genocidal acts. It is not a mode of perpetration but a stand-alone conduct, one that does not require commission of a ‘primary’ crime, because its criminalization is intended to pre-empt the commission of the primary crime altogether. Incitement generates the “support and acquiescence of the masses” which

⁶⁷¹ Office of the Prosecutor, ‘Policy paper on case selection and prioritisation’ (15 September 2016) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 3 April 2024, para 7

⁶⁷² Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>> accessed 4 April 2024, p. 1

⁶⁷³ Office of the Prosecutor, ‘Strategic Plan 2019-2021’ (17 July 2019) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf>> accessed 30 April 2024, para 1; Furthermore the Pre-Trial Chamber mentions it as an underlying value underlying the Statute in *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 (12 April 2019) para 34

⁶⁷⁴ Fatou Bensouda, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine’ International Criminal Court (17 October 2018) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-situation-palestine>> accessed 24 May 2024; Times of Israel, ‘High Court rejects petition that sought immediate razing of Khan al-Ahmar’ (17 May 2023) <https://www.timesofisrael.com/liveblog_entry/high-court-rejects-petition-that-sought-immediate-razing-of-khan-al-ahmar/> accessed 24 May 2024; Jeremy Sharon, ‘<https://www.timesofisrael.com/government-asks-high-court-not-to-force-immediate-demolition-of-khan-al-ahmar/#:~:text=In%202018%2C%20the%20High%20Court,international%20spotlight%20by%20the%20battle>’ (*The Times of Israel*, 24 April 2023) <<https://www.timesofisrael.com/government-asks-high-court-not-to-force-immediate-demolition-of-khan-al-ahmar/#:~:text=In%202018%2C%20the%20High%20Court,international%20spotlight%20by%20the%20battle>> accessed 24 May 2024; The Jerusalem Post, ‘Khan al-Ahmar can be razed if Israeli government wants to do so - High Court’ (7 May 2023) <<https://www.jpost.com/breaking-news/article-742324>> accessed 24 May 2024

sometimes “is the single prerequisite for atrocity truly to become epidemic”.⁶⁷⁵ Its commission is integral to the materialisation of genocide.⁶⁷⁶ Its prosecution integral to preventing genocide.⁶⁷⁷

On 28 March 2024, the ICJ noted in its modification of the provisional measures that the situation in Gaza is extremely concerning. There is still a high risk of famine, which has already caused multiple deaths of children.⁶⁷⁸ The situation has only worsened since. There is ample evidence that Israel implements in the north of Gaza the above-cited genocidal plan of the suspect Eiland (‘the Generals’ Plan’), with a view to ultimately implement the above-cited genocidal plan of the suspect Smotrich (‘the Decisive Plan’).

On 21 November 2024, the PTC issued arrest warrants. The suspects were not deterred by the PTC decision to issue arrest warrants against two of them. As a retaliatory response to the PTC’s decision, the suspect Ben-Gvir proposed Netanyahu to halt humanitarian aid to the Gaza Strip, whereas the suspect Smotrich sought to impose sanctions on the Palestinian Authority.⁶⁷⁹

These ‘plans’ and ‘proposals’ illustrate the lethal criminal potential the statements of the suspects have, given their influence and authority over their subordinates, the troops on the ground who execute the alleged crimes. Prevention of further commission of crimes and termination of the ones the PTC implied are ongoing, necessitate the prosecution and arrest of these ‘senior leaders’.⁶⁸⁰ This is also in line with the limited resources and the overall policy of the OTP to focus on the most responsible actors.⁶⁸¹

⁶⁷⁵ Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 172

⁶⁷⁶ Angela Heft and Laura A. Jonas, ‘From Hate Speech to Incitement to Genocide: The Role of the Media in the Rwandan Genocide’ (2020) 38(1) *Boston University International Law Journal* 1 <https://www.bu.edu/ilj/files/2020/08/Article_HeftJonas.pdf> accessed 1 April 2024

⁶⁷⁷ Susan Benesch, ‘Inciting Genocide, Pleading Free Speech’ (2004) 21 *WORLD POL’Y J.* 62, 63

⁶⁷⁸ *South Africa v Israel*: First Modification of Provisional Measures, para 21

⁶⁷⁹ Ynet, ‘Nightly Cabinet Discussion After Arrest Warrants Issued; Germany and Cyprus Consider How to Proceed’ [Hebrew] (22 November 2024) <<https://www.ynet.co.il/news/article/h1qxpppmkg>> accessed 2 December 2024

⁶⁸⁰ *Prosecutor v Lubanga* (Decision concerning Pre-Trial Chamber I’s decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo) ICC-01/04-01/06 (24 February 2006) para 54 (“because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”)

⁶⁸¹ Office of the Prosecutor, ‘Policy paper on case selection and prioritisation’ (15 September 2016) para 42 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 3 April 2024

II. THE PROSECUTOR’S DUTY TO EXTEND THE INVESTIGATION AND PROSECUTION

The ICJ found the commission of the crime of incitement to genocide is **plausible** and ordered its prosecution. The PTC implied that other ICC crimes, similar to the crimes for which arrest warrants were issued, appear to be **ongoing**. The common strand to the Rome Statute, the crime of incitement to genocide, and the OTP policy to prosecute the most responsible actors is the duty to prevent ICC crimes. This is also why the Prosecutor is obliged to extend the investigation on the situation in the State of Palestine and assess the criminal responsibility of the suspects under Article 25(3)(e) RS.

Under the Rome Statute, the OTP “shall be responsible for receiving... any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court”.⁶⁸² The Prosecutor is obliged *proprio motu* to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute”.⁶⁸³ Although the present situation emerged from state referral, which does not require an authorisation from the PTC, it was the ruling on a jurisdictional question the Prosecutor submitted to the PTC that paved the way for an opening of an investigation.

Once an investigation is pending, it “extends to all crimes within the jurisdiction of the Court”⁶⁸⁴ and to “all possible categories of perpetrators and may not a priori exclude any of them”,⁶⁸⁵ in so far the new facts are “sufficiently linked” to the situation under investigation.⁶⁸⁶ In November 2023, the Prosecutor reaffirmed that “this investigation [...] is ongoing and extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023”.⁶⁸⁷ In November 2024, the PTC upheld his position and rejected Israel’s challenge on the matter.⁶⁸⁸

⁶⁸² Article 42(1) RS

⁶⁸³ Article 54(1) RS

⁶⁸⁴ *Situation in Georgia* (Decision on the Prosecutor’s request for authorization of an investigation) ICC-01/15 (27 January 2016) para 64

⁶⁸⁵ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic republic and the Kingdom of Cambodia* (Decision on the ‘Application for Judicial Review by the Government of the Comoros’) ICC-01/13-111 (16 September 2020) para 42

⁶⁸⁶ Office of the Prosecutor, ‘Summary of Preliminary Examination Findings on the situation in the State of Palestine’ (20 December 2019) para 9 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>> accessed 17 July 2024

⁶⁸⁷ Karim Khan, ‘Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties’ International Criminal Court (17 November 2023) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>> accessed 19 March 2024

⁶⁸⁸ *Situation in the State of Palestine* (Decision on Israel’s request for an order to the Prosecution to give an Article 18(1) notice) ICC-01/18-375 (21 November 2024) <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180a0ebd9.pdf>> accessed 2 Decemebr 2024 ; Compare with *Situation in*

The duty to prevent ICC crimes is directly affected by the prosecutor's discretionary power over the selection and prioritisation of cases.⁶⁸⁹ Selection and prioritisation of cases can occur during investigation upon arrival of new facts⁶⁹⁰ and until an arrest warrant is issued,⁶⁹¹ and they ensue from the OTP's "overall basic size and capacity constraints".⁶⁹²

III. CASE SELECTION

One criterion of case selection are the charges. Their assessment requires the Prosecutor to "represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure [...] that the most serious crimes committed in each situation do not go unpunished."⁶⁹³ The Prosecutor must "pay particular attention to crimes that have been traditionally under-prosecuted".⁶⁹⁴ Notwithstanding the inchoate crime of direct and public incitement to commit genocide played a significant role in the commission of past genocides, and although the hostilities in Gaza are ongoing and the risk of genocide persists or being materialized, thus far it has never been prosecuted by the ICC.

The *degree of responsibility of the alleged perpetrators* is another criterion of case selection. This criterion is met in the present case given that it corresponds to "*inter alia*, the nature of the unlawful

the Islamic Republic of Afghanistan (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 (5 march 2020) paras 61,63. In *Afghanistan* the Chamber was of the view that "authorisation for an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's Request and incidents that are 'closely linked' to those incidents in the manner described by the Pre-Trial Chamber". Explanation for this decision is the unworkability in practice of submitting repeatedly "requests for authorisation of investigation as new facts are uncovered" but also the guarantee of independence of the Prosecutor from the pre-trial chamber and the threat to the efficient unwound of the Prosecutor's investigation. See also Policy paper on case selection and prioritisation, para 26 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶⁸⁹ Although the 'Policy Paper on case selection and prioritization' does not give rise to legal rights, it is however based on the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office, the prosecutorial strategy and other policy documents of the Office, as well as from the jurisprudence of the ICC. Therefore, it gives influential guidelines on what to prioritise. See Office of the Prosecutor, 'Policy Paper on case selection and prioritisation of the OTP' (15 September 2016) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 15 July 2024

⁶⁹⁰ *ibid* para 13: "Case selection and prioritisation will require regular updating on the basis of the information and evidence obtained during the course of investigations, any ongoing criminality, as well as the evolution of operational conditions that could impact the Office's ability to conduct successful investigations and prosecutions."

⁶⁹¹ *ibid*, para 13: "As such, case selection and prioritisation, as well as the preparation of the overall Case Selection Document, should be considered a dynamic process that seeks to continually refine the focus of the Office's investigations until such time as an article 58 application is made".

⁶⁹² *ibid*, para 11

⁶⁹³ *ibid*, para 45

⁶⁹⁴ *ibid*, para 46

behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity”.⁶⁹⁵

The crime’s *gravity* “is the predominant case selection criteria adopted by the Office”.⁶⁹⁶ Its assessment is not dissimilar “to gravity as a factor for admissibility under article 17(1)(d) [RS]. However, given that many cases might potentially be admissible under article 17, the Office may apply a *stricter test* when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17”.⁶⁹⁷ To assess this stricter threshold, the OTP considers, *inter alia*, “**the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes.**”⁶⁹⁸ As noted above, incitement to genocide carries an immense destructive potential as it plays a pivotal role in the commission of subsequent ICC crimes, including genocide.

IV. CASE PRIORITISATION

A comparative assessment across the selected future cases shows that whilst two of the eight suspects in this Communication are already the subject of an investigation for other serious crimes, according to both the ICC (PTC) and the ICJ, the alleged prohibited conduct of these two and potentially the other six suspects ‘appears to be ongoing’. Thus, investigation of incitement to genocide and, where required, prosecution of the inciters, would have a dramatic impact on the two million victims of this crime. The entire Gazan community would be affected from enforcement of this crime since such effective enforcement is likely to mitigate the risk of its exposure to other genocidal acts.

Investigations and prosecutions of incitement to genocide, therefore, would have a crucial impact on ongoing criminality and would contribute to the prevention of other crimes including genocide. These “strategic and operational case prioritisation criteria stand in no hierarchical order to each other. The specific weight to be given to each criterion will depend on the circumstances of each case.”⁶⁹⁹

*

In conclusion, legally the ICJ Order obligates the Prosecutor to substitute Israel in prosecuting inciters to genocide. Factually the ICJ findings evidence that there are reasonable grounds to believe that

⁶⁹⁵ *ibid*, para 43

⁶⁹⁶ *ibid*, para 6

⁶⁹⁷ *ibid*, para 36

⁶⁹⁸ *ibid*, para 50

⁶⁹⁹ *ibid*, para 52

Yoav Gallant, Isaac Herzog, Israel Katz, Benjamin Netanyahu, Bezalel Smotrich, Itamar Ben-Gvir, Zvi Yehezkeili and Giora Eiland have committed direct and public incitement to commit genocide within the meaning of Article 25(3)(e) RS.

This new body of evidence obligates the Prosecutor to extend the investigation on the situation in the State of Palestine and to select and prioritize the investigation of incitement to genocide, in order to terminate crimes the PTC found to be ongoing and prevent the commission of other crimes including genocide, in accordance with the preventive purpose of the Rome Statute, the inchoate crime under Article 25(3)(e) RS and the case law of the ICC.

Relief Sought

The victim respectfully requests the Prosecutor:

1. To extend the investigation into the situation in the State of Palestine in accordance with Article 54 RS.
2. To investigate and prosecute the crime of incitement to genocide within the meaning of Article 25(3)(e) RS.
3. To request the Pre-Trial Chamber to issue arrest warrants against the Suspects pursuant to Article 58 RS.
4. To publicly announce the extension of the investigation, in order to prevent and/or terminate the commission of further and/or ongoing ICC crimes, including genocide, in line with the object and purpose of the Rome Statute.

Dr. Omer Shatz, Adv.

Yale Law School (LLM 13', JSD 23')

Israel Bar 2009; ICC List of Counsel 2022