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No.: **ICC-01/18**  
Date: **6 August 2024**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**Public**

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

**Source:** Hostages and Missing Families Forum  
Raoul Wallenberg Centre for Human Rights

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

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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

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**States' Representatives**

**Amicus Curiae**

Mr Eli M. Rosenbaum; Professor David Chilstein; Professor John Quigley; High Level Military Group; European Centre for Law & Justice; Professor Steven E. Zipperstein; Mr and Mrs Serge and Beate Klarsfeld; Professors Yuval Shany and Amichai Cohen; the State of Palestine; Professor William Schabas; the Jerusalem Center for Public Affairs and the Institute for NGO Research; the Kingdom of Norway; the Organisation of Islamic Cooperation; Hungary; Republic of Argentina; the Touro Institute on Human Rights and the Holocaust; Canadian Union of Jewish Students (CUJS) and the World Union of Jewish Students (WUJS); Arab Organisation for Human Rights UK (AOHR UK); Assistant Professor Halla Shoaibi and Professor Asem Khalil; Centre for Israel and Jewish Affairs; the Palestine Independent Commission for Human Rights (ICHR); Law for Palestine; Professor Sascha Dominik Dov Bachman, Dr Deborah Mayersen, Professor Gregory

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

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

## **REGISTRY**

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### **Registrar**

Osvaldo Zavala Giler

### **Counsel Support Section**

### **Victims and Witnesses Unit**

### **Detention Section**

### **Victims Participation and Reparations Section**

### **Public Information and Outreach Section**

## I. INTRODUCTION

1. The Hostages and Missing Families Forum ("**the Hostages Forum**") and the Raoul Wallenberg Centre for Human Rights ("**the RWCHR**"),<sup>1</sup> remain aghast at the Prosecution's 20 May 2024 decision to pursue simultaneous arrest warrant applications against Hamas and Israeli leaders. They submit that:
  - a. the Article 58 Application in respect of Yahya Sinwar, Mohammed Deif and Ismail Haniyeh<sup>2</sup> should be granted on an expedited basis; and
  - b. the Article 58 Application in respect of Benjamin Netanyahu and Yoav Gallant should be dismissed as: (1) granting it would not accord with the interests of justice; (2) the Court does not have jurisdiction over Israeli nationals due to the Oslo Accords.

## II. THE INTERESTS OF JUSTICE

2. The Prosecution has failed to undertake a proper assessment as to whether the prosecution of Israeli leaders would be in the interests of justice prior to progressing to the stage of seeking arrest warrants. Article 53(2)(c) requires the Prosecution to assess the interests of justice prior to making a decision to initiate a prosecution. This assessment must take 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*".
3. The Appeals Chamber has previously held that the Pre-Trial Chamber is not empowered to review a determination by the Prosecutor that opening an investigation would be in the interests of justice when examining a request to

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<sup>1</sup> Represented by their counsel, Michelle Butler of Matrix Chambers in London.

<sup>2</sup> The Hostages Forum and the RWCHR note the plethora of recent news reports as to the 13 & 31 July 2024 deaths of Mohammed Deif and Ismail Haniyeh. However, in the absence of the provision of a death certificate by the Palestinian Authority to the Court proving their demise or the withdrawal by the Prosecution of its application for arrest warrants in respect of these individuals, it is respectfully submitted that the Pre-Trial Chamber should continue to rule on the Prosecutor's extant Article 58 Application.

authorise an investigation initiated *proprio motu* by the Prosecutor pursuant to Article 15 of the ICC Statute.<sup>3</sup> However, that ruling did not deal with investigations opened following the receipt of an article 14 referral, as is the case in the Situation in Palestine. Further, although the Pre-Trial Chamber's decision on whether to authorise the opening of an investigation pursuant to article 15(4) does not permit examination of issues of admissibility,<sup>4</sup> once an investigation reaches the stage of applications for an arrest warrant, the Court "*shall satisfy itself that it has jurisdiction in any case*" and "*may, on its own motion, determine the admissibility of a case*" (Article 19(1)).

4. The Appeals Chamber in the Afghanistan decision recognised the broader powers of review possessed by the Pre-Trial Chamber at this later stage, noting that "*specific procedural mechanisms based on the full participation of relevant parties, participants and States are provided for elsewhere in the legal framework ensuring that the Court pursues investigations and prosecutions only in relation to admissible cases*".<sup>5</sup> The Appeals Chamber's decision in the Situation in Afghanistan therefore does not operate to bar the Pre-Trial Chamber from reviewing the Prosecutor's assessment of the interests of justice when determining an Article 58 application for an arrest warrant.
5. Anxious consideration should have been dedicated by the Prosecution to the fate of the hostages prior to seeking simultaneous arrest warrants against Hamas leaders and Israeli leaders. As it is, the submission of simultaneous applications for warrants in respect of the democratically elected high-level officials of Israel

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<sup>3</sup> Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para 37: "the 'interests of justice' factor set out in article 53(1)(c) of the Statute, while part of the Prosecutor's consideration under article 15(3) of the Statute as per rule 48 of the Rules, is not part of the Pre-Trial Chamber's decision under article 15(4) of the Statute".

<sup>4</sup> Ibid, paras 40-41.

<sup>5</sup> Ibid, para 42.

and the political and military heads of a terrorist organisation, has created a false moral equivalence between their aims and conduct.

6. While the aim of the Israeli leadership is to secure the return of the hostages and prevent the occurrence of another 7 October 2023 attack, Hamas' aim, as described in its 1988 Covenant (which has never been explicitly revoked by Hamas) is the "obliteration" of Israel. Due to their conduct in carrying out acts of terrorism, Hamas' military and political wings have been the subject of sanctions for over twenty years<sup>6</sup> and Yahya Sinwar, Mohammed Deif and Ismail Haniyeh have each been the subject of various targeted sanctions listings.<sup>7</sup>
7. In part, due to the evidence provided to the Prosecution by witnesses whose testimony has been facilitated by the Hostages Forum and the RWCHR, Pre-Trial Chamber I will be well aware of the heinous crimes committed by Hamas on 7 October 2023 and thereafter, including the murder of approximately 1,200 people and the taking of 251 hostages. There is no dispute that the State of Israel's actions in Gaza followed this heinous attack by Hamas on Israel's civilian population on the morning of a Jewish Holy Day.
8. It is thus unsurprising that the Prosecution's simultaneous arrest warrant applications have been the subject of broad condemnation, including by an array of world leaders:
  - a. US President Biden: *"The ICC prosecutor's application for arrest warrants against Israeli leaders is outrageous. ... whatever this prosecutor might imply, there is no equivalence — none — between Israel and Hamas."*<sup>8</sup>

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<sup>6</sup> See EU Sanctions against Hamas-Izz al-Din al-Qassem, Council Common Position of 27 December 2001, amended to include the political wing of Hamas in 2003.

<sup>7</sup> See e.g., EU Council Decision (CFSP) 2024/2056, 26 July 2024; 2024 Canadian Special Economic Measures imposed in respect of 11 members of Hamas; US Executive Order 13224, 31 January 2018.

<sup>8</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/20/statement-from-president-joe-biden-on-the-warrant-applications-by-the-international-criminal-court/>

- b. US Secretary of State Blinken: *"there's still a possibility [of a hostage & cease fire deal] ... but it is challenged by ... the extremely wrongheaded decision by the ICC prosecutor yesterday, the shameful equivalence implied between Hamas and the leadership of Israel. I think that only complicates the prospects for getting such an agreement."*<sup>9</sup>
- c. UK Prime Minister Sunak: *"... this is a deeply unhelpful development... There is no moral equivalence between a democratically elected Government exercising their lawful right to self-defence and the actions of a terrorist group, and the actions of the ICC do absolutely nothing ... to get the hostages out or aid in."*<sup>10</sup>
- d. UK Foreign Secretary Cameron: *"I do not believe for one moment that seeking these warrants will help get the hostages out, ... frankly, this is mistaken in terms of position, timing and effect. To draw a moral equivalence between the Hamas leadership and the democratically elected leader of Israel is just plain wrong. ... countries all over Europe and the world are saying that."*<sup>11</sup>
- e. Germany's Ambassador to Israel Seibert: *"The simultaneous applications for arrest warrants ... have resulted in an incorrect implication of equivalence. ... The Hamas leaders are responsible for a barbaric massacre ... on 7 October. Hamas continues to hold Israeli hostages captive in unspeakable conditions, to fire missiles at Israel and use the civilian population in Gaza as human shields. Protecting and defending its citizens from this is the right and duty of the Israeli Government."*<sup>12</sup>

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<sup>9</sup> ABC News, Blinken calls ICC warrants complicate efforts for Israel-Hamas cease-fire deal, 21 May 2024, <https://abcnews.go.com/Politics/blinden-icc-warrants-wrongheaded-complicate-efforts-israel-hamas-cease-fire/story?id=110433427>

<sup>10</sup> HC Deb, 22 May 2024, c872 cited at : <https://researchbriefings.files.parliament.uk/documents/CBP-10007/CBP-10007.pdf>

<sup>11</sup> Ibid, HL Deb, 22 May 2024, c945.

<sup>12</sup> German Foreign Office, On the application of arrest warrants at the ICC, 20 May 2024, <https://www.auswaertiges-amt.de/en/newsroom/news/-/2657664>



- f. French Foreign Minister Séjourné: *"ces demandes simultanées de mandats d'arrêt ne doivent pas créer d'équivalence entre le Hamas et Israël. D'un côté, vous avez un groupe terroriste, qui s'est félicité des attentats du 7 octobre, qui les a revendiqués, et de l'autre côté, vous avez un État démocratique, Israël, qui doit respecter le droit international dans la conduite d'une guerre qu'elle n'a pas déclenchée elle-même."*<sup>13</sup>
- g. Italian Foreign Minister Tajani: *"[It is] unacceptable, to equate a government legitimately elected by the people in a democracy with a terrorist organisation".*<sup>14</sup>
- h. Czech Prime Minister Fiala: *"[The allegations against Israeli leaders are] appalling and completely unacceptable".*<sup>15</sup>
- i. Canadian Prime Minister Trudeau: *"... troubling though, is the sense of an equivalency between the democratically elected leaders of Israel and the bloodthirsty terrorists that lead up Hamas. I don't think that's helpful."*<sup>16</sup>
- j. Lithuanian Foreign Minister Landsbergus: *"It is an unexpected decision and perhaps a little surprising in its equation of the accused, because what is equated are the head of a democratic state and what we consider to be the head of a terrorist organization."*<sup>17</sup>
- k. Argentine Foreign Ministry: *"Argentina deems it wrong for the Prosecutor to equate the legitimate authorities of a democratic State with leaders of a terrorist*

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<sup>13</sup> <https://www.rfi.fr/fr/moyen-orient/20240521-cpi-stéphane-séjourné-plaide-pour-ne-pas-créter-d-équivalence-entre-le-hamas-et-israël>

<sup>14</sup> Israel's defence minister rejects ICC prosecutors' request, BBC News, 20 May 2024, <https://www.bbc.co.uk/news/articles/c9eev88xy59o#:~:text=Israeli%20Defence%20Minister%20Yoav%20Gallant,and%20Prime%20Minister%20Benjamin%20Netanyahu>.

<sup>15</sup> Ibid.

<sup>16</sup> ICC's 'sense of an equivalency' in its push to prosecute Israel and Hamas is troubling : Trudeau, 21 May 2024, National Post, <https://nationalpost.com/news/trudeau-international-criminal-court-israel-hamas>

<sup>17</sup> Lithuanian FM says arrest warrant request for Netanyahu 'surprising', 21 May 2024, LRT, <https://www.lrt.lt/en/news-in-english/19/2278521/lithuanian-fm-says-arrest-warrant-request-for-netanyahu-surprising>

*organization responsible for brutal crimes ... the Prosecutor's behaviour ... further hinders the efforts to secure the release of the hostages ...*"<sup>18</sup>

- l. Paraguay Foreign Ministry: *"The Government of the Republic of Paraguay regrets ... the equality established between democratically elected officials of Israel and the leaders of the terrorist group Hamas. The Government of Paraguay strongly rejects this interpretation ... It is essential to distinguish between a State that acts in defense of its people and a terrorist organization that commits atrocities."*<sup>19</sup>
  - m. Austrian Chancellor Nehammer: *"... The fact however that the leader of the terrorist organization Hamas whose declared goal is the extinction of the State of Israel is being mentioned at the same time as the democratically elected representatives of that very state is non comprehensible."*<sup>20</sup>
9. Tragically, the Prosecution's simultaneous applications for arrest warrants against Hamas leaders and Israeli high officials has had an adverse impact on the progress of negotiations for the release of the remaining Israeli hostages held in Gaza whose prospects of survival worsen with each day that passes. As Yahya Sinwar himself stated shortly after the Prosecution's 20 May 2024 announcement, *"We have the Israelis right where we want them"*.<sup>21</sup> The deleterious effect of the passage of time and the critical import of each day of delay to a hostage deal being achieved cannot be overemphasised. The Pre-Trial Chamber will no doubt

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<sup>18</sup> <https://cancilleria.gob.ar/en/announcements/news/press-release-icc-prosecutors-application-arrest-warrants-against-high-officials>

<sup>19</sup> <https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/comunicado-sobre-ordenes-de-arresto-contra-funcionarios-israelies>

<sup>20</sup> <https://www.haaretz.com/israel-news/2024-05-20/ty-article/.premium/gop-slams-absurd-icc-prosecution-israel-hopes-u-s-europe-will-sanction-court/0000018f-960b-ddc8-a5ff-973f1dcd0000>

<sup>21</sup> Said & Jones, "Gaza Chief's Brutal Calculation: Civilian Bloodshed will help Hamas", Wall Street Journal, 10 June 2024, <https://www.wsj.com/world/middle-east/gaza-chiefs-brutal-calculation-civilian-bloodshed-will-help-hamas-626720e7>

be cognisant that since the Article 103 Request for Leave was filed just over three weeks ago, 5 more hostages have lost their lives.

10. If the Prosecution had given due consideration to the current desperate plight of the remaining 111 hostages in Gaza, who have now been held, against their will and in unimaginable conditions of detention for over 304 days, and their urgent need for a hostage release deal to be reached, his office would not have initiated a prosecution of Israeli leaders at the same time as initiating a prosecution of Hamas leaders.
11. Sadly, the decision to seek simultaneous arrest warrants has had an invalidating and re-traumatising effect on: the hostages and their loved ones; the many people who were physically and / or mentally injured in the 7 October attacks; and on the family and friends of those killed or injured that awful day. Further, the experience of the victims of the 7 October attacks has been marginalised in the media and in public discourse as a result of the Prosecution's decision-making on timing.
12. The Prosecution's decision-making is particularly difficult to comprehend in circumstances where Hamas is both unwilling and unable to conduct investigations and / or prosecutions in respect of its own conduct, whereas Israel benefits from a fiercely independent prosecution and judiciary which are actively engaged in reviewing events in Gaza since 7 October 2023. Proceeding with the issuance of arrest warrants against Israeli leaders in these circumstances risks undermining the Court's legitimacy as it would not accord with the foundational principle of complementarity as conceived by the ICC Statute's drafters.
13. It is therefore respectfully submitted the Pre-Trial Chamber should:
  - a. prioritise the expeditious grant of arrest warrants against Hamas leaders; and
  - b. find that the prosecution of Israeli leaders would not serve the interests of justice.

### III. THE ABSENCE OF ICC JURISDICTION DUE TO THE OSLO ACCORDS

14. The Hostages Forum and the RWCHR continue to rely upon the submissions pertaining to the Oslo Accords which were contained in the submissions filed in the previous Article 19(3) proceedings in this Situation by Professor Cotler of the RWCHR in March 2020.<sup>22</sup>
15. For the avoidance of doubt, those submissions are not undermined by the ICJ's recent Advisory Opinion with respect to the actions and policies of Israel in the Occupied Palestinian Territory.<sup>23</sup> That Majority Opinion merely noted that the Oslo Accords "*cannot be understood to detract from Israel's obligations under pertinent rules of international law*".<sup>24</sup> However, the Joint Opinion of Judges Tomka, Abraham and Aurescu emphasized the binding nature and continued importance and relevance of OA as the "*main instrument of the Israeli-Palestinian relationship*".<sup>25</sup> Vice-President Sebutinde also recalled in her Dissenting Opinion the continuing binding nature of the Oslo Accords in allocating responsibilities between Israeli and Palestinian authorities.<sup>26</sup>
16. Further, the (since reversed) decision of Pre-Trial Chamber II relating to the Prosecutor's request to open an investigation with respect to crimes allegedly committed by members of the US armed forces in Afghanistan<sup>27</sup> (despite the existence of a bilateral agreement between the International Security Assistance Force ("ISAF") and the Interim Administration of Afghanistan providing for exclusive criminal jurisdiction for the conduct of ISAF personnel remaining with

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<sup>22</sup> Situation in the State of Palestine, Badinter et al, Observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence, 16 March 2020, ICC-01/18-97, paras. 49-56.

<sup>23</sup> ICJ Advisory Opinion, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, 19 July 2024.

<sup>24</sup> Ibid, para 102.

<sup>25</sup> ICJ Joint Opinion of Judges Tomka, Abraham and Aurescu, 19 July 2024, paras 40-59.

<sup>26</sup> ICJ Dissenting Opinion of Judge Sebutinde, 19 July 2024, paras 27 and 31.

<sup>27</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 24.

their respective national authorities<sup>28</sup>) does not offer substantial support for the proposition that the Oslo Accords are irrelevant to the scope of the Court's jurisdiction.

- a. First, the standards applicable for opening an investigation are different to those applicable to the issuance of an arrest warrant. The former does not necessitate a detailed examination of potential jurisdictional issues. Indeed, the Appeals Chamber expressly held in relation to the Situation in Afghanistan, that "*the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme*".<sup>29</sup> Contrarily, Pre-Trial Chambers have relied upon Article 19(1) to hold that determination as to whether the case falls within the jurisdiction of the Court is a pre-requisite for the issuance of warrants of arrest.<sup>30</sup>
- b. Second, Pre-Trial Chamber II's reasoning in relation to the ISAF-Afghanistan bilateral agreement was based only on article 98(2) of the ICC Statute, a provision concerning status of forces agreements, not other kinds of bilateral agreements, such as the Oslo Accords.<sup>31</sup>

17. It is submitted that Judge Kovacs' harmonized approach to the issue of jurisdiction and the relevance and applicability of the Oslo Accords, as set out in his Partly Dissenting Opinion to the 2021 Article 19(3) Decision in the Situation in the State of Palestine ought to be adopted by the Chamber.<sup>32</sup>

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<sup>28</sup> ISAF-Afghanistan, Military Technical Agreement, Annex A, para. 3, 14 January 2002.

<sup>29</sup> Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Judgment, 5 March 2020, ICC-02/17-138, para. 44.

<sup>30</sup> Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 13. See, amongst many others, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-Corr-Red, para. 18; Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", 27 June 2011, ICC-01/11-12, paras. 6-10.

<sup>31</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, para. 59.

<sup>32</sup> PTC I, ICC-01/18-142-Anx1, Partly Dissenting Opinion of Judge Kovacs, 5 February 2021, paras 282-366.

#### IV. CONCLUSION

18. The Hostages Forum and the RWCHR respectfully submit that:

- a. the Article 58 Application in respect of Yahya Sinwar, Mohammed Deif and Ismail Haniyeh should be granted on an expedited basis; and
- b. the Article 58 Application in respect of Benjamin Netanyahu and Yoav Gallant should be dismissed.

**Respectfully submitted:**



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*Yuval Sasson*  
*Hostages and Missing Families Forum*




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*Professor Irwin Cotler, PC, OC, OQ, Ad.E*  
*& Brandon Silver*  
*Raoul Wallenberg Centre for Human Rights*

Dated this 6<sup>th</sup> day of August 2024 at London, UK.