

**Cour
Pénale
Internationale**



**International
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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Amicus Curiae Observations Pursuant to Rule 103 (Eli M. Rosenbaum)

Source: Eli M. Rosenbaum

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

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I. Introduction

1. In my request of June 20, 2024 for leave to file Observations under Rule 103, I summarized my pertinent professional background as a former U.S. federal investigator and prosecutor of war criminals and human rights violators, from 1980 until my retirement from the U.S. Department of Justice in January 2024, and I stated that my proposed Observations would (1) detail strong indications of bias, including but not limited to unfair application of double standards, in the Prosecutor's application for the issuance of arrest warrants for the prime minister and defense minister of Israel for alleged crimes committed in the course of Israel's defensive military response to the aggression, mass murder, rape, torture, mutilation, kidnapping, and other crimes committed, beginning on October 7, 2023, principally by armed members of Hamas; and (2) urge that, prior to deciding on the Prosecutor's said application, Pre-Trial Chamber I obtain satisfactory answers from the Office of the Prosecutor (OTP) to questions that would be posed in my Observations regarding the integrity of the process that resulted in the Prosecutor's May 20 public announcement that he is applying for the issuance of warrants not only against three Hamas leaders but also against the senior Israeli officials.

2. Among those who have publicly criticized OTP's move to seek arrest warrants for Israeli Prime Minister Netanyahu and Defense Minister Gallant are legal experts, other commentators, and newspaper editorial writers on both major sides of the U.S. political divide. (For example, the *Wall Street Journal* predicted that "[g]iving Hamas a brief victory will be the court's epitaph"¹ and New York's *Daily News* complained that the Prosecutor "wrongly seeks Netanyahu's arrest and may sink his own court,"² with both newspapers accusing him of violating the ICC's "complementarity requirement"³ by reportedly not allowing Israeli authorities to demonstrate that they are willing and able to investigate and prosecute where appropriate, including by pursuing in good faith the hundreds of criminal and administrative investigations that they have already opened.) A number of world leaders⁴ have also denounced the Prosecutor's actions, including U.S. President Joseph Biden, who

¹ Editorial, "The ICC Disgraces Itself Over Israel," *The Wall Street Journal*, May 20, 2024, at <https://www.wsj.com/articles/international-criminal-court-israel-hamas-benjamin-netanyahu-karim-ahmad-khan-215d11dc>.

² Editorial, "The ICC prosecutor in the dock: Karim Khan Wrongly Seeks Netanyahu Arrest Warrant and May Sink His Own Court," *The Daily News* (New York, N.Y.), May 22, 2024, at <https://www.nydailynews.com/2024/05/22/the-icc-prosecutor-in-the-dock-karim-khan-wrongly-seeks-netanyahu-arrest-warrant-and-may-sink-his-own-court/>.

³ The ICC's complementarity requirement is described at length at, *inter alia*, <https://www.pgaction.org/ilhr/rome-statute/complementarity.html>.

⁴ See, e.g., Nathalie Weatherald and Ben Munster, "European leaders divided on ICC arrest warrant bid for Netanyahu," *Politico*, May 20, 2024, at <https://www.politico.eu/article/european-leaders-divided-icc-arrest-warrant-bid-for-israeli-hamas-officials-benjamin-netanyahu-yahya-sinwar-karim-khan-war-crimes-crimes-against-humanity/>.

termed the requests “outrageous,”⁵ and U.S. Secretary of State Antony Blinken, who called them “profoundly wrongheaded” and “quite frankly, shameful.”⁶ Secretary Blinken added that the principles of complementarity “do not appear to have been applied here amid the Prosecutor’s rush to seek these arrest warrants rather than allowing the Israeli legal system a full and timely opportunity to proceed.” The Secretary explained: “In other situations, the Prosecutor deferred to national investigations and worked with states to allow them time to investigate. The Prosecutor did not afford the same opportunity to Israel, which has ongoing investigations into allegations against its personnel.”⁷

3. Some have questioned OTP’s motives in seeking issuance of the arrest warrants.⁸ Moreover, on the day that the Prosecutor announced his application for arrest warrants, a State Department spokesman questioned OTP’s professionalism as well: “The Prosecutor’s staff was supposed to land in Israel today to coordinate the visit, and instead, Israel was informed that the Prosecutor’s staff didn’t get on their flight around the same time that the Prosecutor himself went on television to announce these charges. These circumstances call into question the legitimacy and credibility of this investigation.”⁹ To cite but one comparison : In 2004, OTP commenced its preliminary examination of war crimes and crimes against humanity committed in Colombia. OTP engaged with Colombian authorities for *years* and finally, in 2021, Prosecutor Khan closed the matter on complementarity grounds, on the basis that Colombian authorities “could not be characterised as being inactive, nor unwilling or unable to genuinely investigate and prosecute relevant Rome Statute crimes.”¹⁰

4. It is not intended here to revisit the arguments that have been advanced by those who question,¹¹ as I do, the factual and legal merits of the allegations underpinning the ICC arrest warrant requests for the Israeli officials, including on the basis of research casting serious doubt on the allegations of Israeli-caused famine¹² and research disproving death toll statistics

⁵ See text at <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/>.

⁶ See text at <https://www.state.gov/secretary-antony-j-blinken-at-a-solo-press-availability-3/>.

⁷ See text at <https://www.state.gov/warrant-applications-by-the-international-criminal-court/>.

⁸ See, e.g., Olivia Flasch and Ami H. Orkaby, “Questioning the Motives Behind the ICC Arrest Warrant Applications,” *The Jerusalem Post*, June 10, 2024 (updated June 11, 2024), at https://www.jpost.com/opinion/article-805790#google_vignette.

⁹ See text at <https://www.state.gov/briefings/departments-press-briefing-may-20-2024/>.

¹⁰ Undated OTP summary of Colombia preliminary examination, at <https://www.icc-cpi.int/colombia>.

¹¹ See, e.g., Jeremy Sharon, “Does ICC Prosecutor Khan Have a Case against Netanyahu and Gallant? Experts Doubt It,” *the Times of Israel*, May 21, 2024, at <https://www.timesofisrael.com/does-icc-prosecutor-khan-have-a-case-against-netanyahu-and-gallant-experts-doubt-it/>.

¹² See Seth J. Frantzman, “Experts: ICC and UN Blamed Israel for a Famine that Never Happened in Gaza – Exclusive,” *The Jerusalem Post*, June 18, 2024, at <https://www.jpost.com/israel-hamas-war/article-806739> (reporting on not-yet-published findings by two Columbia University professors).

issued by the Hamas-controlled Gaza Health Ministry (including the percentages given for women and children).¹³ I associate myself, in particular, with the analyses of Jonathan Panikoff, Director of the Atlantic Council’s Scowcroft Middle East Security Initiative, and West Point’s John Spencer, perhaps the world’s leading authority on urban warfare.¹⁴

II. Extensive Evidence Exists of OTP Bias and Unfair Treatment of Israeli Officials

5. The leaders of both Israel and Hamas are accused by OTP of responsibility for the same two international crimes – namely, war crimes and crimes against humanity. Given the Prosecutor’s unexplained failure to charge Hamas officials with genocide or with crimes against Palestinian civilians (*infra*), it is perhaps not surprising that some critics have accused him of implying an “equivalence” in the conduct of Israel – a democracy with a well-established legal system that applies a large body of independent statutory and case law and that has prosecuted even an Israeli president and now the sitting prime minister as well – and the conduct of Hamas, a terrorist group that, as the de facto governing authority in Gaza, launched the current war on October 7 and which, like the Palestinian Authority, publicly lionizes and *rewards*, rather than investigate or bring to justice, killers of Israelis and Jews.

6. The aforementioned criticism is largely a self-inflicted wound. Evidence providing the requisite “reasonable grounds to believe” that Hamas leaders were complicit in war crimes and crimes against humanity (and also genocide) was available in abundance by late last year. If the Prosecutor waited months to request the issuance of warrants for them until he felt ready to simultaneously do the same as to Messrs. Netanyahu and Gallant, it is not surprising that some observers are complaining that, to quote the *Wall Street Journal* editorial, he is “lumping together” the terrorist leaders with officials in Israel who are trying to free the hostages held by Hamas and root out Hamas terrorist battalions ensconced in Gaza. There, they wage war systematically in a way never before seen in the history of warfare, hiding behind and underneath *their own civilians*, specifically *in order to create more casualties*¹⁵

¹³ See, e.g., “How the Gaza Ministry of Health Fakes Casualty Numbers,” *Tablet magazine*, March 6, 2024, by Professor Abraham Wyner (University of Pennsylvania).

¹⁴ See, e.g., Panikoff, “The prosecutor made a strategic and moral mistake” (disputing OTP’s allegations and warning of “erosion of [the ICC’s] moral authority”), *New Atlanticist*, May 20, 2024, <https://www.atlanticcouncil.org/blogs/new-atlanticist/experts-react/experts-react-the-icc-prosecutor-wants-netanyahu-and-hamas-leaders-arrested-for-war-crimes/>; and Spencer analyses (explaining how Israel actually exceeds the rules of war and international humanitarian law) at <https://x.com/SpencerGuard/status/1752181728016277765>; <https://www.newsweek.com/ultimately-hamas-owns-every-death-gazacivilians-included-opinion-188715>, and <https://www.newsweek.com/ultimately-hamas-owns-every-death-gazacivilians-included-opinion-1887159>.

¹⁵ See, e.g., Natalie Encow (Foundation for the Defense of Democracies), “Hamas officials admit its strategy is to use Palestinian civilians as human shields,” at “November 1, 2023, at

among these human shields,¹⁶ all in pursuit of propaganda, political, and territorial conquest goals – in particular, (1) protecting Hamas fighters and other legitimate targets by exploiting Israel’s goal of avoiding civilian casualties where practicable and (2) inspiring condemnation of Israel through portrayal of Israeli forces as indiscriminately or even intentionally attacking civilians. This is a perverse strategy – and indeed is an entirely new paradigm of warfare – that could not have been imagined by those who originated and developed the law of armed conflict and international human rights law. But it is one that, regrettably, has had exceptional success.

7. The Hamas attack has included multiple *actus rei* of genocide, starting with the systematic slaughter of some twelve hundred people in a single day, from babies to elderly persons, perpetrating the worst mass killing of Jews since the Nazi Holocaust. Many victims were also raped, tortured, intentionally mutilated, and/or burned beyond recognition, atrocities that some Hamas perpetrators video-recorded and disseminated online. Hamas’s underlying genocidal intent has been clear for decades and can readily be discerned from the group’s longtime public agitation for the *physical elimination* of the Jews of Israel and beyond.¹⁷ The October 7 rampage should be seen as a realization of the command of Hamas’s founding covenant or charter (1988),¹⁸ which states that it is a religious duty to kill all Jews. A subsequent “Document of General Principles and Policies”¹⁹ was issued in 2017. It dealt with what had become by then the geopolitically awkward incitement to genocide of Hamas’s 1988 covenant by asserting that Hamas is not against Jews per se, but instead opposes the “Zionists who occupy Palestine” (§16), a phrase that is most naturally interpreted as referring to Israeli Jews, who constitute a national group. National groups, like religious, racial, and ethnic groups, are protected by the Genocide Convention and the ICC Rome Statute. The 2017 document, employing language reminiscent of the infamous “Protocols of the Elders of

<https://www.fdd.org/analysis/2023/11/01/hamas-officials-admit-its-strategy-is-to-use-palestinian-civilians-as-human-shields/>.

¹⁶ See, e.g., Jason Willick, “We can’t ignore the truth that Hamas uses human shields,” *The Washington Post*, November 14, 2023, at <https://www.washingtonpost.com/opinions/2023/11/14/hamas-human-shields-tactic/>. This is a tactic that was used by Hamas long before last year. See, e.g., NATO Strategic Communications Center of Excellence, “Hamas’ use of human shields in Gaza,” at https://stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf (covering the period 2008-14).

¹⁷ See, e.g., Bruce Hoffman, “Understanding Hamas’s Genocidal Ideology,” *The Atlantic*, October 10, 2022, at <https://www.theatlantic.com/international/archive/2023/10/hamas-covenant-israel-attack-war-genocide/675602/>

¹⁸ Text at <https://embassies.gov.il/holysee/AboutIsrael/the-middle-east/Pages/The-Hamas-Covenant.aspx>.

¹⁹ Text at <https://web.archive.org/web/20170510123932/http://hamas.ps/en/post/678/>.

Zion » antisemitic forgery,”²⁰ states that “the Zionist project” created an “illegal” nation that poses a danger to all of “mankind and its interests and stability.”²¹

8. Moreover, Hamas’s openly genocide-inciting 1988 charter has never been officially revoked. Instead, genocidal incitement has continued, such as in 2019, when Hamas’s Gaza-based television station, Al Aqsa TV, broadcast a speech by a senior Hamas official in which he openly exhorted Palestinians all over the world, “There are Jews everywhere! We must attack every Jew on planet Earth – we must slaughter and kill them, with Allah’s help.”²² Hamas has never repudiated or countermanded this genocidal command. To the contrary, a Hamas spokesperson candidly declared in an October 24 interview on Lebanese television that the October 7 “Al-Aksa Flood” operation will be repeated “again and again” until Israel’s “annihilation” is accomplished.²³ Under Art. 6 of the ICC Rome Statute,²⁴ proving genocide requires establishing genocidal *intent*, that is intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Hamas’s genocidal intent to eliminate the Jewish people has long been clear, particularly given Hamas’s explicit and repeated incitements to genocide. (Genocide is covered by Article 6 of the ICC’s governing statute and incitement to genocide by Article 25(3)(b) and (e).) However, even though Hamas has now actually *begun to act on* its oft-proclaimed genocidal ambitions (and openly promises *more* of the same), Prosecutor Khan continues OTP’s longtime practice of looking the other way.

9. As to double standards, it can also be fairly asked why the Prosecutor alleges that Israel’s prime minister and defense minister are responsible for intentionally killing innocent Palestinian civilians – a highly questionable accusation – but continues to give a free pass on deliberately killing civilians to *Russia’s* president, Vladimir Putin, whose military forces indisputably *have* been deliberately and lethally targeting Ukrainian civilians in large numbers

²⁰ The Protocols of the Elders of Zion is a fabricated and long-debunked text, first published in Russia in 1903, purporting to detail a Jewish plot for global domination. The 1988 Hamas Covenant stated that “Zionist scheming” for expansion far beyond Palestine “has been laid out in the ‘Protocols of the Elders of Zion’” (Covenant, Article 32). More than sixty years earlier, the Protocols had been notoriously credited by Hitler in his 1925-26 autobiographical manifesto *Mein Kampf* and later played a central role in German Nazi propaganda justifying the regime’s 1933-45 persecution of Jews – persecution that resulted, *inter alia*, in the mass murder of some six million Jewish persons. See, e.g., https://en.wikipedia.org/wiki/The_Protocols_of_the_Elders_of_Zion.

²¹ ICC Rome Statute Art. 6 defines genocide as the commission of killing or other specified acts with the “intent to destroy, in whole or in part” “a national group” or other listed type of group. Israel, moreover, is a member nation of the United Nations (since 1949). Art. 2, para. 4, of the 1945 U.N. Charter forbids employing “the threat or use of force against the territorial integrity or political independence of any state” <https://www.un.org/en/about-us/un-charter/chapter-1>

²² See video and text of Fathi Hammad’s address at <https://www.memri.org/tv/hamas-political-bureau-fathi-hammad-explosive-belts-knives-slaughter-kill-jews-all-over-world-israel-one-week-ultimatum>.

²³ See video and text at <https://www.memri.org/tv/hamas-official-ghazi-hamad-we-will-repeat-october-seven-until-israel-annihilated-victims-everything-we-do-justified>.

²⁴ Version of the ICC Rome Statute quoted is the one posted at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

ever since he launched Russia's unprovoked and unlawful full-scale invasion of Ukraine more than two years ago. Already by last November, more than 28,000 Ukrainian civilian casualties were reported by the United Nations²⁵ as having occurred during the Russian Federation's ongoing attempt to wipe their neighboring democracy off the map, presumably including the thousands killed during Russia's infamous siege and continuing occupation of Mariupol.²⁶ Russia's attacks on Ukrainian civilian populations and infrastructure, which Putin could order halted, continue.²⁷ (So far as is known, the ICC Prosecutor has sought Vladimir Putin's arrest solely on the basis of Russia's mass abduction of Ukrainian children.)

10. In keeping with standard, fair prosecutorial practice in modern legal systems, the Prosecutor refrained from making public the fact of his request for Putin's arrest warrant until Pre-Trial Chamber II actually *issued* the warrant. Meanwhile, Russia's abductions and "Russification" of Ukrainian children, along with other atrocities, continued while OTP gave the judges time needed to deliberate. But in the case of Netanyahu and Gallant, the Prosecutor made public the fact that he was *requesting* issuance of arrest warrants, without waiting for a decision to be rendered (much less giving Israel a full opportunity to potentially demonstrate that the ICC's complementarity requirement has not been met). An OTP spokesperson responded to a reporter's inquiry asking why the Gaza warrants announcement was made before the Court had considered the requests by stating that it was because the Prosecutor has "significant concern regarding the ongoing nature of many of the alleged crimes cited in the applications."²⁸ But the same was true as to Russia, and yet he delayed the Putin announcement until the Court decided on his request. Query whether the premature Gaza announcement was intended to generate public pressure on Pre-Trial Chamber I, on the possibility that one or more Judges might harbor doubts as to the sufficiency of the requests.

11. Israel has been forced into war to disempower the Hamas attackers in Gaza; to thereby discharge Israel's binding legal obligation under the Genocide Convention to, in the words of Article I of the Convention, "prevent genocide"²⁹; and to free the Israeli and other hostages

²⁵ See <https://ukraine.un.org/en/253322-civilian-deaths-ukraine-war-top-10000-un-says>.

²⁶ See, e.g., Human Rights Watch February 2024 report, "'Our City Was Gone': Russia's Devastation of Mariupol, Ukraine" at <https://www.hrw.org/feature/russia-ukraine-war-mariupol/report>.

²⁷ See, e.g., United Nations December 29, 2023 report on a presentation given by a senior U.N. official to the Security Council on continuing Russian attacks against civilian populations and infrastructure, December 29, 2023, at <https://press.un.org/en/2023/sc15550.doc.htm>.

²⁸ See Amanda Taub, "Why the ICC Prosecutor Went Public With Arrest Warrant Requests for Hamas and Israeli Leaders," *the New York Times*, May 22, 2024, at <https://www.nytimes.com/2024/05/22/world/europe/icc-warrants-israel-hamas-khan.html>.

²⁹ See text of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), at <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.I%20Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf>.

who have been unlawfully held in Gaza since the October 7 Hamas-led invasion. In the midst of this war, Israel, according to its statistics,³⁰ permitted and even facilitated the entry into Gaza, already by April 24, of approximately 500,000 tons of food and humanitarian supplies on more than 25,000 truck shipments, which equates to well over 200 kilos per Gaza resident. The Prosecutor nonetheless alleges that the Israeli officials have used “starvation . . . as a method of warfare” and have committed “extermination.” However, he levels no such allegations against the *Hamas* leaders for Hamas’s widespread and manifestly systematic diversion of these relief shipments from their intended civilian beneficiaries, or for the Hamas attacks that have destroyed food shipments, or for Hamas’s withholding from Palestinian civilians the vast stockpiles of food that Hamas secreted in its extensive tunnel network prior to October 7.³¹ Indeed, despite strong evidence that these actions that deprive Palestinians of food are part of an overall Hamas strategy to increase Palestinian suffering and casualties, including by intentionally preventing some Palestinian civilians from fleeing areas as to which Israeli military forces had given advance attack warning and simultaneously barring them from obtaining safe-haven in Hamas’s tunnels, *the Prosecutor does not allege that the Hamas leaders committed even a single crime against Palestinian civilians* – not even in using them by the thousands as human shields (a war crime) or in continuing recklessly and often indiscriminately to fire rockets at Israel despite learning, virtually from the start, that thousands of them misfire and land in Gaza,³² killing and wounding untold numbers of Palestinian civilians. (Since the Prosecutor has deemed the Gaza war both an international armed conflict (NIAC) between Israel and Palestine, and a non-international armed conflict (IAC) between Israel and Hamas running in parallel,³³ and as the Rome Statute expressly covers human shielding as a war crime in IACs (Art. 8(2)(b)(xxiii)), it was open to the Prosecutor to apply the IAC rules to this egregious Hamas violation.) This gross disparity in the treatment of the Hamas and Israeli leaders by OTP is another indication of bias, and it also has the baleful effect of bolstering in the eyes of Gazans (and foreign audiences) Hamas’s false narrative that Palestinian victimization has been caused primarily by Israeli actions

³⁰ See United Nations report on an April 24, 2024 meeting of the Security Council, at <https://press.un.org/en/2024/sc15679.doc.htm#:~:text=Since%207%20October%202023%2C%20over,to%20Israeli%20authorities%20ongoing%20efforts>.

³¹ See, e.g., Matthew Rosenberg and Maria Abi-Habib, “As Gazans Scrounge for Food and Water, Hamas Sits on a Rich Trove of Supplies,” *The New York Times*, October 27, 2023, at <https://www.nytimes.com/2023/10/27/world/middleeast/palestine-gazans-hamas-food.html>

³² See, e.g., Israel’s presentation at a January 12, 2024 hearing before the International Court of Justice on, at <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-ora-01-00-bi.pdf>.

³³ Quoted in *Report of the International Panel of Experts*, at paragraph 13 (May 20, 2024) at <https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf>.

rather than by Hamas's own actions in (1) starting the war, (2) intentionally putting Palestinian civilians in harm's way while waging war, and (3) refusing to end the war by laying down its arms and surrendering (as both Israel³⁴ and the United States³⁵ have long urged it to do, in order to "end this war tomorrow,"³⁶ and as the World War II Allies insisted Nazi Germany do, as a prerequisite to ending that catastrophic war of aggression).

12. In January 2024, in a perhaps unprecedented action, Prosecutor Khan assembled a panel of eight outside experts in international law to examine evidence shared by OTP and to advise whether there are "reasonable grounds to believe" that the persons named in the proposed warrants committed crimes within the ICC's jurisdiction. In a May 20 report³⁷ quickly made public by OTP, they concluded unanimously in the affirmative as to each warrant. The Prosecutor's selection of the experts has been criticized for including persons who had already demonstrated "a longstanding bias against the Jewish state" by "publicly condemning Israel and declaring it guilty of war crimes for years," and for not including even one expert who had publicly questioned the Court's jurisdiction or voiced sympathy for Israel's predicament in combatting an armed death cult. "By picking experts who had taken clear positions on the questions they were being asked to consider," the critique continued, the panel's selection "seems to violate the ICC Code of Conduct for the Office of the Prosecutor" and "further undermined the credibility and neutrality of any prosecution."³⁸

13. In addition to unfair double standards evidenced in OTP's treatment of Israel as compared with that given, *inter alia*, Hamas, Russia, and Colombia, there is the example of OTP's treatment of the United States. In a June 2021 interview, outgoing Prosecutor Fatou Bensouda stated that OTP was "working on some kind of reset" between OTP and the United States administration, given that Joe Biden had succeeded Donald Trump and had recently removed sanctions imposed on OTP by the Trump Administration, whose National Security Advisor had publicly condemned OTP's pursuit of its investigation of torture and other crimes widely attributed to U.S. military and intelligence personnel following the invasion of Afghanistan during the George W. Bush Administration. In the same speech, he had declared

³⁴ See, e.g., Israel's presentation at a January 12, 2024 hearing before the International Court of Justice on, at <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-ora-01-00-bi.pdf>.

³⁵ See, e.g., Statement of U.S. Secretary of State Antony Blinken, January 29, 2024, at <https://www.state.gov/secretary-antony-j-blinken-at-a-press-availability-45/>.

³⁶ *Ibid.* (Secretary of State Blinken January 29, 2024 statement.)

³⁷ The text of the report was made public at <https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf>.

³⁸ Eugene Kontorovich, "The ICC's Brazen Anti-Israel Bias: Prosecutor Karim Khan Selects Advisers and Experts Who are Openly Hostile to the Jewish State," *The Wall Street Journal*, June 9, 2024, at <https://www.wsj.com/articles/the-iccs-brazen-anti-israel-bias-69e31511>.

that “the ICC is already dead to us.”³⁹ According to OTP’s public reporting,⁴⁰ that investigation focused on U.S. detention and interrogation sites within Afghanistan and at locations, including CIA “black sites,” elsewhere. In a September 2021 announcement,⁴¹ Prosecutor Khan, seven months after succeeding Ms. Bensouda, cited “limited resources” in indicating that he was “deprioritizing” his office’s long-running investigation of U.S. conduct in connection with the Afghanistan situation. The Prosecutor’s decision to set aside the investigation of U.S. personnel was made notwithstanding the fact that in 2010, former President Bush acknowledged in his published memoir⁴² that he had personally authorized the use during interrogations of so-called “waterboarding” (that is, simulated drowning) – a notorious form of torture that had been prosecuted successfully by U.S. military authorities against Japanese perpetrators after World War II⁴³ and that the U.S. Justice Department had successfully prosecuted in a 1983 criminal case in which a jury convicted a Texas sheriff, James C. Parker, and two of his deputies who had waterboarded prisoners to coerce confessions.⁴⁴ (The Justice Department resorted to employing a civil rights statute to prosecute the Texas case, because a federal criminal torture statute was not enacted by Congress until 1994.) Six years *before* President Bush publicly acknowledged his own responsibility, the names of senior political appointees in his Justice Department who had informed the CIA and the U.S. Defense Department that their interrogators could lawfully employ waterboarding were already widely known, including through public disclosure of internal U.S. government memoranda⁴⁵ that they had authored and signed. President Bush’s immediate successor, President Barack Obama, even acknowledged publicly in 2014 that the United States had “tortured some folks” in the aftermath of the 9/11 attacks.⁴⁶

14. Prosecutor Khan’s grand “reset” gesture succeeded. For example, in June 2023, U.S. Attorney General Merrick Garland became the first U.S. Cabinet official in history to visit the

³⁹ BBC News, “John Bolton threatens ICC with US sanctions,” September 11, 2018, at <https://www.bbc.com/news/world-us-canada-45474864>.

⁴⁰ See, e.g., ICC Office of the Prosecutor, Report on Preliminary Examination Activities (2016), at https://www.icc-cpi.int/sites/default/files/161114-otp-rep-PE_ENG.pdf.

⁴¹ The text of the Prosecutor’s announcement is available at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>.

⁴² See, e.g., Steve Holland (Reuters), “In Book, Bush Strongly Defends Use of Waterboarding,” November 4, 2010, at <https://www.reuters.com/article/idUSTRE6A3530/>.

⁴³ See cases cited in Evan Wallach, “Drop by Drop: Forgetting the History of Water Torture in U.S. Courts” (2007) at http://lawofwar.org/drop_by_drop.htm.

⁴⁴ See “Texas Lawmen Guilty in Torture Case,” *The Washington Post*, Sept. 14, 1983, at <https://www.washingtonpost.com/archive/national/1983/09/15/texas-lawmen-guilty-in-torture-case/8cbf6049-6c04-4b4d-8f78-ba88978d6b74/>.

⁴⁵ See, e.g., Wikipedia entry “Torture Memos,” at https://en.wikipedia.org/wiki/Torture_Memos.

⁴⁶ See video of statement by President Obama at <https://www.youtube.com/watch?v=5YBinnWqABQ>.

ICC, where he met with Mr. Khan.⁴⁷ And in a “stunning” shift⁴⁸ in U.S. policy, with bipartisan Congressional support, President Biden authorized the sharing of evidence with OTP regarding crimes relating to Russia’s February 2022 full-scale invasion of Ukraine.

15. While the U.S. Government deserves praise for the bipartisan efforts undertaken to disclose post-9/11 abuses and to put barriers in place to prevent their repetition, the fact is that the U.S. has not prosecuted any senior official who was involved in approving or ordering waterboarding, or other acts of alleged torture, despite the passage of fully twenty years since the first “DOJ torture memos” were made public – inaction that many have argued satisfies the ICC “complementarity” requirement. And although a veritable mountain of evidence has long been available to OTP – much of it publicly disclosed by the U.S. Government itself – OTP’s passivity continues, to the point that Prosecutor Khan has effectively shut down the investigation – a move widely interpreted as being at the heart of his successful attempt to reset the ICC’s previously rocky relationship with the U.S., and especially to ensure renewed OTP access to important assistance from U.S. authorities in major investigations.

16. Unfortunately for Israel’s officials, their small country cannot come anywhere close to matching the vast law enforcement, intelligence, and diplomatic resources of the United States that are potentially available to assist the Office of the Prosecutor in its worldwide investigations. Israel, unlike the United States (which, moreover, has never fought a war in which its people were credibly targeted for annihilation), is therefore expendable to OTP.

III. Conclusion

17. With OTP’s credibility on the line, the Prosecutor should be required by Your Honors to satisfactorily address the questions raised herein regarding apparent bias, including whether OTP has unfairly applied to its Israeli targets standards that it has not applied to others.



Eli M. Rosenbaum

Dated this 6th day of August 2024
At McLean, Virginia, United States of America

⁴⁷ See Agence France-Presse, “US attorney general Garland on ‘historic’ visit to ICC,” June 20, 2023, at <https://nation.africa/kenya/news/world/us-attorney-general-garland-on-historic-visit-to-icc-4276620>.

⁴⁸ “Stunning shift”: Alexandra Ward and Laura Seligman, “Biden orders U.S. to share evidence of Russian war crimes with international court,” POLITICO, July 26, 2023, at <https://www.politico.com/news/2023/07/26/biden-russian-war-crimes-international-court-00108416>