

International Criminal Court
Office of the Prosecutor, Mr Karim Khan
Post Office Box 19519
2500 CM The Hague
The Netherlands

Also sent by e-mail for urgency: OTP.InformationDesk@icc-cpi.int

Copy to:
International Crimes Unit, The Netherlands
Postbus 100
3970 AC Driebergen

Also sent by e-mail for urgency: warcimes@politie.nl

EXTREMELY URGENT

Amsterdam, 9th of March 2024,

Dear Mr Khan,

I address this letter to you in exercise of my profession of attorney and on behalf of the individuals representing two Dutch Jewish associations; Erav Rav, an informal association of antizionist Jews in the Netherlands that form a community organization that supports Palestinian liberation, and Een Ander Joods Geluid, a foundation of jews in the Netherlands that aims to promote public debate and critical thinking of the State of Israel, in conformity with the international legal order. I address you as the responsible Prosecutor of the International Criminal Court (“ICC”). In order to facilitate the execution of a possible arrest warrant, I will send a copy of this letter to the International Crimes Unit (*Team Internationale Misdrijven*) of the Dutch police force. As the representative of said clients I am filing this criminal complaint against Mr Yitzhak Herzog, President of Israel (“Mr Herzog”), for the following crimes:

Genocide (Article 6, Rome Statute)

Genocide by 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, d) imposing measures to prevent births within the group; all of these with the intent to destroy, in whole or in part, the Palestinians in the Gaza Strip.

Crimes against humanity (Article 7 Rome Statute)

Moreover, I also file this criminal complaint for the following crimes against humanity committed against the Palestinians in the Gaza Strip: a) murder, b) extermination, d) deportation or forcible transfer of population, e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, f) torture, h) persecution against Palestinians in the Gaza Strip in connection with any act referred to as a crime in the Rome Statute, i) enforced disappearance of persons, j) the crime of apartheid, k) other inhumane acts of a similar character, causing great suffering, or serious injury to body or to mental or physical health.

War crimes (Article 8 Rome Statute)

Finally, I file this criminal complaint for war crimes, as part of a plan or policy or as a part of a large-scale commission of such crimes. I refer to the Rome Statute, and the Geneva conventions of 12 August 1949, namely Article 8 Rome Statute, sub 2 (a) grave breaches, ad (i) willful killing, (ii) torture or inhumane treatment, (iii) willfully causing great suffering, or serious injury to body or health, (iv) extensive destruction and appropriation of property, not justified by military necessity, (vi) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, and (b) other serious violations of laws and customs applicable in armed conflict, ad (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, (ii) intentionally directing attacks against civilian objects, (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance, (iv) intentionally launching an attack in the knowledge that this will cause incidental loss of life or injury to civilians or civilian objects or natural environment which would be clearly excessive in relation to the military advantage anticipated, (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives, (viii) the transfer, directly or indirectly, by the occupying power, of parts of its own civilian population, into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside of this territory, (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments hospitals, and places where the sick and wounded are collected, provided they are not military objectives, (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war, (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party, (xvi) pillaging a town or place even when taken by assault, (xviii) employing asphyxiating, poisonous or other gasses, and all analogous liquids, materials or devices.

Visit to the Netherlands and possibility for the ICC to render an arrest warrant

Mr Herzog is visiting the Netherlands to open the National Holocaust Museum on 10 March 2024. My clients, as Dutch Jewish nationals and Jews residing in the Netherlands, believe his presence as the head of a state currently committing genocide, is a provocation against the dignity of the people of Palestine currently undergoing that genocide, an insult to the memory of the genocide committed against Jews by Nazi Germany and its many accomplices in the Netherlands and the West at large, and a breach of the promise to “never again” tolerate genocide, which should be at the heart of said museum. “Never again Auschwitz” means never again for anybody, including the Palestinian people. This is why it is of the utmost historic, moral and legal importance to ensure that nobody, including the President of Israel, in conformity with the objectives of the ICC, is above the most important articles of our international Rule of Law system - put in place to make true on the promise of ‘never again’.

Thus, we call on the ICC, to issue an arrest warrant in conformity with article 56 of the Rome Statute to arrest Mr Herzog at this occasion, to guarantee that it is in fact “never again” for Palestinians as well. We iterate that the Dutch authorities have an obligation under this article to cooperate with this request, and therefore we copy this letter to the Dutch International Crimes Unit, to act upon such an arrest warrant and coordinate the arrest with the ICC.

Applicability of Statute of Rome to Palestine

The government of Palestine has lodged a declaration under article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC in the Occupied Palestinian territory since 13 June 2014.

On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force for Palestine on 1 April 2015.

On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, Palestine referred the situation in Palestine for investigation by the Office of the Prosecutor and specifically requested the Prosecutor “*to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine*”, specifying that “[*t*]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [*which*] includes the West Bank, including East Jerusalem, and the Gaza Strip” (see *Palestine Article 14 Referral, fn. 4*).

On 20 December 2019, the Prosecutor announced that following a thorough, independent and objective assessment of reliable information available to the Office, the preliminary examination into this situation had concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation had been met. The Prosecutor also clarified that the Office is satisfied that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip.

On 22 January 2020, the Prosecutor made a request to Pre-Trial Chamber I for a ruling to clarify the territorial scope of the Court's jurisdiction in this situation, considering the complex legal and factual issues attaching to this situation (“Prosecutor’s Request”).

On 5 February 2021, Pre-Trial Chamber I, after considering the Prosecutor’s Request, as well as submissions from legal representatives on behalf of victims, States, organizations and scholars, decided, by majority, that the Court’s territorial jurisdiction in the situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

On 3 March 2021, the then ICC Prosecutor, Ms Fatou Bensouda, confirmed the initiation of an investigation by her Office into the situation in Palestine.

Already on 29 October 2023, ICC Prosecutor Karim Khan issued a statement on the situation in the State of Palestine and Israel saying inter alia: *“This morning, I saw trucks full of goods, full of humanitarian assistance stuck where nobody needs them, stuck in Egypt, stuck on Rafah and away from the hungry mouths or the bleeding wounds. These supplies must get to the civilians of Gaza without delay. And in the same way, I underline to Hamas and anybody who has control in Gaza, that when Inshallah, such aid reaches Gaza, it's imperative that the assistance gets to the civilian population, and is not misused or diverted away from them.”*

Palestinians are starving as I write to you five months later, in March 2024, as food trucks are halted by Israeli civilians and by the Israeli government. Making the words of the ICC Prosecutor that follow, as relevant as they were in October 2023, even more relevant today.

The words of the ICC Prosecutor in October called for prosecution of the responsible: *“I fear that if we fail collectively to hear the call of our humanity, if we fail to listen to the reproaching soul of our hearts, to be better than we are, to be more just than we've been, to fight for things not based upon people's religion or tribe or nationality, their wealth or their poverty, but simply because we want to live in a world where there is equality so that we do not fall completely into the abyss. We want to live in a world where there is justice. We have to do better than*

we are doing right now. There are so many that are crying, and there are so many that are in pain. Collectively, the law and the quest for justice is essential to move out of the misery that we see all around us.”

On 17 November 2023, the ICC Prosecutor issued a statement on the receipt of a referral of the situation in the State of Palestine from the following five States Parties: South Africa, Bangladesh, Bolivia (Plurinational State of), Comoros and Djibouti (“17 November 2023 Statement”).

I conclude that the Rome Statute is more applicable than ever and that as the situation in Palestine is referred to the Prosecutor’s office, it is necessary to take the next step, or, as one could also state, it would be unacceptable to not do so. As the only Court that can prosecute a sitting head of state, it is upon the ICC to prosecute the culpable head of State.

Case at the International Court of Justice and applicability of Genocide Convention

As you know, the current situation in the Gaza Strip has been referred to the International Court of Justice (“ICJ”) by the Republic of South Africa claiming the State of Israel is acting in violation of the Genocide Convention. The ICJ has ruled that the Genocide Convention is applicable, and that Israel should take all precautions to prevent Genocide, incitation included. I refer to the ICJ verdict, especially the provided provisional measure in paragraph 78:

78. The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, 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. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.

After the judgment, Israel has not acted upon the provisional measures. The bombardment of civilians and the denial of humanitarian assistance to the civilian population has continued. Israel seems to apply a genocide by starvation, act b) of genocide; *causing serious bodily or mental harm to the group*, and c) *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*, as Israel continues to largely block the entry of basic supplies (food, water, medicine, fuel) into Gaza. It has also sought to undermine the continued operations of the main aid agency, the United Nations Relief and Works Agency for Palestine Refugees (“UNRWA”), by spreading allegations without evidence.

Case Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem

After the ruling of the ICJ on the Genocide Convention, the ICJ has heard another case, about the legal consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. I ask you to involve the results of that case with this criminal complaint.

Organizations that address the violations for a long time in numerous reports

Over the past decades, different UN bodies and UN Special Rapporteurs have documented and reported on violations of the Rome Statute allegedly perpetrated by the Israeli army and settlers against Palestinians. Also, numerous international, Palestinian and Israeli organizations have reported above mentioned violations. These groups include PCHR, Al-Haq, Adameer, Btselem, Amnesty International, and Human Rights Watch.

UN General Assembly condemns settlement building

Since Israel's occupation of the West Bank, Gaza and the Golan Heights, numerous General Assembly resolutions have called upon Israel to withdraw from the occupied territories. Many such resolutions specifically condemn settlement building by Israel as a flagrant violation of international law. As such, this issue is also included in the ongoing ICC investigation into war crimes committed on Palestinian territory.

Mr Herzog's involvement in the crimes of Article 6, 7 and 8 of the Rome Statute

Mr Herzog has been President of Israel since the 7th of July 2021. The role of President in Israel is a ceremonial role. The Israeli President symbolizes the unity of the State and is -as the Head of State- the one that appoints the judiciary power. He has a ceremonial and formal function: he signs every law and should -normally- be apolitical as is the role of President in most parliamentary democracies. A president is responsible for forming a government. Mr Herzog however, has definitely had a function in the execution of the crimes.

Under Article 25 of the Rome Statute individuals can be held liable and the ICC has jurisdiction over natural persons. Article 27 iterates that there is no immunity for Heads of State.

Article 25 sub 3 states:

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:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (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. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Mr Herzog is one of the responsible people in government for the actions in the Gaza bombardments, and in the targeting of civilians. He publicly made clear that there is no difference between civilians and combatants. By doing so, he has -as a head of state- furthered and normalized the commission of the war crime of targeting civilians in Article 8 and by doing so he has also incited to destroy (part of) the Palestinians in Gaza, as it relates in Article 8 of the Rome Statute, "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities". By doing so, in the context of civilian population not only being targeted, but also being killed, he violated Article 7 of the Rome Statute, namely the murder of these civilians. And as this has been in the context of the intent to killing or causing bodily harm to members of the 'Palestinians in Gaza' group with the intent to destroy in part or in whole, also Article 6 (genocide) of the Rome Statute applies.

Mr Herzog citations in the context of the conflict

The words of Mr Herzog incite action against civilian population, making them responsible for the actions of Hamas:

"It's not true this rhetoric about civilians [being] not aware, not involved," Mr Herzog said in the middle of an unprecedented Israeli bombing campaign in retaliation for Hamas's massacre of Israeli civilians last week. "They could have risen up, they could have fought against that evil regime which took over Gaza in a coup d'etat."

"And we will uproot evil so that there will be good for the entire region and the world. For the last two(?) years we enabled a huge economic growth in Gaza, for the first time we enabled tens of thousands of Palestinians from Gaza to work in Israel, to bake bread, to enjoy life, what happened? There's no justification, it is

simply an ISIS-type of ideology that wants to eliminate us of the ground and therefore they need to be eliminated of the ground.”

At another event Israeli President Mr Herzog justifies the mass killing of Palestinian children by holding up the book Mein Kampf and claiming it was found in a "children's living room." [from the video: “this book was found just a few days ago in Northern Gaza, in children's living room, which was turned into a military operation base of Hamas, on the body of one of the terrorists and murderers of Hamas, and it’s even marked.”]

Context of the government statements

Mr Herzog has rendered these statements in the context of the mass killing of the civilian population of Gaza, in a context where many other members of his government have incited about killing not only civilians but everyone, including women and children.

Yoav Gallant, Defense Minister said:

“I have ordered a complete siege on the Gaza Strip (...) There will be no electricity, no food, no fuel, everything is closed,” he said. “We are fighting human animals, and we act accordingly.”

Mr Israel Katz, member of the Government, Minister of Energy and Infrastructure said:

“For years we supplied Gaza with electricity, water and fuel. Instead of saying thank you, they sent thousands of human animals to slaughter, murder, rape and kidnap babies, women and the elderly - that's why we decided to stop the flow of water, electricity and fuel and now their local power station has collapsed and there is no electricity in Gaza. We will continue to tighten the siege until the Hamas threat to Israel and the world is removed. What was will not be.”

“So far we have transferred 54,000 cubic meters of water and 2,700 megawatts of electricity to Gaza per day. Ends. Without fuel, even the local electricity will shut down within days and the pumping wells will stop within a week. This is how he will do to a nation of murderers and butchers of children. What was will not be.”

Mr Netanyahu, Prime Minister of Israel, has stated:

“You must remember what Amalek has done to you, says our Holy Bible. (...) Our heroes troops, they have one supreme main goal, to completely defeat the murderous enemy and to guarantee our existence in this country”.

1 Samuel 15:3

“Now go and smite Amalek, and utterly destroy all that they have, and spare

them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass"

There are many more citations of government officials and of army men and women singing about Amalek. By singing and repeating the messages, they are saying they understood the messages of the government officials.

Actions of the State of Israel

The acts committed by the State of Israel, headed by Mr Herzog, leave today more than 31.303 Palestinians killed, more than 12.500 children and 8.400 women, more than 8.000 missing people that have not been found in the rubble. Then we are not even talking about the Palestinian civilians dismembered and handicapped for life, the traumatized, the orphaned. There are to date more than 72.402 wounded.

In the Westbank 424 people were killed by the Israeli state, including 113 children.

More than half of the residential homes have been destroyed, which amounts to 360.000 residential units. 392 educational facilities have been destroyed, 12 out of 35 hospitals are partially functioning, 132 water wells are damaged or destroyed.

Although this is not relevant in the light of the allegations against Mr Herzog, in Israel government officials revised the death toll in Israel on 7 October from 1.400 deaths to 1.139, with 8.730 wounded.

Urgent request for Arrest warrant and arrest by Dutch authorities this weekend

The prosecutor has recently warned Israel on the Rafah assault and has urged Israel to follow international law in Gaza and said that his office is investigating the conflict "as a matter of the utmost urgency."

It is clear that it is of the utmost importance to deter and prevent further atrocities being committed. It is also clear that international intervention is really the only chance for the (potential) genocide in Gaza to be prevented or stopped. My clients, Dutch Jewish Organizations and their members, request the ICC to issue an arrest warrant for Israeli president Mr Herzog as one of the main responsible people within Israel. His visit to the Netherlands presents us with an opportunity to arrest Mr Herzog as the Netherlands is a State Party to the Rome Statute and has an obligation to the International Criminal Court to cooperate.

Kind regards,

Wout Albers, Attorney