

January 18, 2021

Mr. Saklaine Hedaraly
Head of the Independent Oversight Mechanism
International Criminal Court
The Hague, Kingdom of the Netherlands

Dear Mr. Hedaraly,

1. We respectfully bring to your attention, and request your office's intervention with two, interlinked, issues regarding the Prosecutor's office policies and conduct.
2. The first issue is the Prosecutor's office lack of transparency as to the status and fate of communications submitted to her office, including those made by victims, and the lack of material feedback to the submitters of these communications.
3. As we will explain in this letter, we believe that the lack of transparency and feedback, which are further amplified by a *lacuna* in the Rome Statute in regard to the judicial oversight over the Prosecutor in these matters, may result in the erosion in the ICC's relevance, effectiveness, efficiency and image of impartiality.
4. The second issue relates to the shadow casted over the Prosecutor's impartiality in considering issues in the communications we submitted to her office, and an alleged unethical misconduct which we have witnessed.
5. The two issues are interlinked. The lack of transparency and material feedback to communications may portray a *prima facie* image of bias conduct, even if such did not exist. And, *vice versa*, a bias conduct may exist, but the lack of feedback and transparency does not allow legal, public and judicial review of that.
6. We believe these subjects fall within the mandate of the Independent Oversight Mechanism (IOM), which you head, both in respect to the procedural deficiencies and to the alleged misconduct by ICC officials.
7. Our letter proceeds as follows: after a short introduction of ourselves, we will elaborate on our experience with Prosecutor office. Then, we discuss the procedural deficiencies in the Prosecutor's policies and the alleged misconduct by the Prosecutor, which we have witnessed.

About Shurat HaDin

8. Shurat HaDin (SHD) is an independent civil rights non-governmental organization focused on representing terror victims¹, Israeli civilians discriminated against based on their ethnicity and national origin², the use of social media as a platform to incite terror³ and countering terrorist financing.
9. Over the last 15 years, SHD has brought numerous lawsuits, both in the United States and in Israel, against state-sponsored terror,⁴ terror groups, the Palestinian Authority (PA) liability for terrorist acts,⁵ financial institutions which provided financial platform for terrorists,⁶ and politically oriented business and financial discrimination of Israelis.⁷
10. Over the last five years we increased our interaction with the ICC, both in respect to the preliminary examination of the "situation in Palestine" which was conducted by the Prosecutor, and in respect to the situation in Northern Cyprus, which has (regrettably, in our opinion) not even passed this barrier. During this time, we filed numerous communications to the Prosecutor regarding the situation in Palestine and assisted submissions regarding the situation in Cyprus. We also submitted an *amicus curia* in the Pre-Trial Chamber on the issue of the "situation in Palestine" and another observation by victims of Palestinian Terror in this case.

¹ Including abduction by states, such as in the case of Reverend Kim Dong Shik, who was kidnapped by North Korean agents from his missionary work assisting North Korean refugees in China; Kim et al. v. Democratic People's Republic of China, Civil No.09-00648 (D.D.C.).

²Shurat HaDin-Israel Law Center and Ors v. Lynch, No. 2235/2013, Federal Court of Australia, New South Wales.

³ Stuart Force, et al., v. Facebook, Inc., Civil No. 16-00-05158 (E.D.N.Y.) (Writ of Certiorari to the U.S. Supreme Court pending); Anne Cameron Cain, et al. v. Twitter, Inc., Civil No. 17-02506 (MEJ) (N.D.CA); Cohen et al., v. Facebook, Inc., Civil No. 16-00-04453 (E.D.N.Y.)

⁴ See: Calderon-Cardona v. Democratic People's Republic of Korea, Civil No. 08-1367 (FAB) (D. P.R.); Leibovitch, et al., v. Kerry, et al., Civil No. 15-06133 (S.D.N.Y.); hlomo Leibovitch, et al. v. The Syrian Arab Republic, et al., No. 08-C-1939 (N.D. II) ; Fraenkel, et al. v. Islamic Republic of Iran, et al., Civil No. 15-1080 (RMC) (D.D.C.); Braun, et al., v. Islamic Republic of Iran, et al., Civil No. 15-01136 (BAH) (D.D.C.)

⁵ Case 2538-00 (Jerusalem) Norz'its Litbac et al. vs. The Palestinian authority; Sokolow v. The Palestinian Liberation Organization, et al., Civil No. 04-003697, (S.D.N.Y.)

⁶ Kaplan, et al. v. Central Bank of Iran, et al., Civil No. 10-483 (RCL) (D.D.C.) ; Kaplan, et al. v. Democratic People's Republic of China, Civil No. 09-646 (RCL) (D.D.C.); Rot, et al., v. Bank of China, et al., Index No. 157475/2012, (Sup. Ct. N.Y.); Linde et al., v. Arab Bank, PLC, Civil No. 04-2799 (E.D.N.Y.); Almog, et al., v. Arab Bank, PLC., Civil No. 04-05564 (E.D.N.Y.); Wultz, et al., v. Bank of China, Ltd., Civil No. 11-01266 (S.D.N.Y.); Licci, et al., v. Lebanese Canadian Bank, Index No. 505931/2015 (Sup. Ct. N.Y. Kings County).

⁷ Samuel Silber, et al., v. Airbnb, Inc., Civil No18 -01884-RGA (D. Del).

SHD experience with the Prosecutor's office

11. In September 2014, SHD filed a communication against Jordanian National Hamas leader Khaled Mashal, who acted in violation of Articles 8 (2) (c) (iv) and 28(2) of the Rome Statute, criminally responsible for Hamas's War Crime of execution without due process of tens of Palestinian civilians, including innocent protesters against Hamas rule in Gaza who were arrested and executed⁸.
12. In November 2014 SHD filed a communication against Mr. Mahmud Abbas – President of the Palestinian Authority (PA) and Chairman of the Palestinian Liberation Organization (PLO)⁹, in respect to his criminal responsibility for the indiscriminate attacks against Israeli civilians through the firing of thousands of rockets and mortars upon Israeli towns and villages by the FATAH armed group, a PLO subordinate group under his command, during the 2014 Gaza operation. According to this communication, as chairman of the PLO and head of FATAH, Mr. Abbas is responsible for the acts of his subordinates, who boasted on deliberately firing hundreds of rockets and mortars on civilian population in Israel¹⁰.
13. In January 2015, SHD filed another three communications to the Office of the Prosecutor:
 - a. Against Mr. Majid Faraj, head of the Palestinian General Intelligence Agency (GIA), for the torture of innocent Palestinians in clandestine PA facilities, as part of a widespread or systematic attack directed against the civilian population present in PA-administered areas.
 - b. Against Mr. Jibril Rajoub, deputy secretary on the Central Committee of FATAH, in regard to his criminal responsibility of the firing of rockets and mortars upon Israeli towns and villages by the Al-Aksa Martyrs' Brigade (AAMB) - a military group within and controlled by the FATAH.
 - c. Against Mr. Rami Hamdallah, who served as Prime Minister and Minister of the Interior of the Palestinian Authority, who was criminally liable for the rampant torture of Palestinians undertaken by the Protective Security Service of the Ministry of the Interior¹¹.

⁸ Prosecutor's Office confirmation: OTP-CR-285/14.

⁹ Again, the communication, which was submitted prior to the Palestinian referral to the ICC, was based on Abbas' Jordanian Nationality. However, the issue of jurisdiction (whether it is based on his nationality or the Palestinian referral) should not matter, considering the prosecutor's position as to the ICC jurisdiction over the situation in Palestine.

¹⁰ Prosecutor's Office confirmation: OTP-CR-346/14.

¹¹ Prosecutor's Office confirmation: OTP-CR-71/15, OTP-CR-72/15, OTP-CR-73/15.

14. In April 2018, SHD submitted to the Office of the Prosecutor, a communication against Hamas leaders - Mr. Khaled Mashal, Mr. Saleh al-Arouri and Mr. Zaher Jabarin. Pointing out, Hamas deliberately enlisted children to participate in the hostilities during the “Great March of Return” on the Gaza border¹².
15. In September 2018, SHD submitted to the Office of the Prosecutor, another communication against Hamas Leaders - Mr. Khaled Mashal, Mr. Saleh al-Arouri and Mr. Zaher Jabarin, regarding the wanton destruction of civilian property and the natural environment by incendiary devices which burnt thousands of acres of nature reserves, agricultural and residential property in Israel. This communication was made in representation of victims of the alleged crimes - Israeli farmers in southern Israel who were attacked by these incendiary devices, and 50,000 civilians worldwide¹³.
16. The letters of confirmation we received regarding our communications have, in general, repeated the following wording:

"It appears that your communication relates to a situation already under preliminary examination by the Office of the Prosecutor. Accordingly, your communication will be analysed in this context, with the assistance of other related communications and other available information....

As soon as a decision is taken on whether there is a reasonable basis to proceed with an investigation, we will advise you promptly and we will provide reasons for the decision"¹⁴

17. As no material feedback from the Office of the Prosecutor has been received for over **five years**, we wrote to Prosecutor in November 2019, raising several issues¹⁵:

a. The lack of material feedback to our communications

"Since we submitted our communications, officials of the PA, Hamas and other Palestinians, including the individuals whom we have communicated to you, have continued to flout international humanitarian law with impunity. Only two weeks ago, we have witnessed hundreds of rockets fired on Israeli civilian towns and villages, including Tel-Aviv. These are merely the latest addition to the thousands of rockets, mortars and other terrorist attacks against civilians which Palestinians, including the said individuals, have directed since 2014.

¹² Prosecutor's Office confirmation: OTP-CR 116/18

¹³ Submitted by our emails from Sep. 14, 2018 and Dec. 12, 2018 (Attached). Despite our request, no conformation letter received.

¹⁴ *Id.*

¹⁵ Our letter dated Nov. 25, 2019 (attached). As no confirmation received, it was resent with our letter, dated Jan 19, 2020; Prosecutor's office confirmation: OTP-CR-79/20, received on two letters (dated 3/2/20 and 19/2/20).

...

Despite the severity of the crimes described in our communications – we have received no feedback from your office. Furthermore, you have not contacted us to “seek and receive the views of the victims” whom we represent, as required by the regulations of your office and in the spirit of the pre-trial chamber decision from 13 July 2018 (ICC-01/18-2”).

b. The issue of impartiality and misconduct

"While your office has ignored our communications detailing the victimization of Israeli civilians, you have repeatedly met with other NGO's, which have solicited against Israel and/or filled complaints against Israel.

Furthermore, you have met PA officials responsible for that victimization. Specifically, you met with PA President Mahmud Abu Abbas (Abu-Mazen) on Oct. 30, 2015, despite the clear evidence which we presented in our communications, concerning President Abbas's personal criminal liability for FATAH rocket fire at Israeli civilians and civilian objects.

We respectfully note the impropriety of the collegial meeting you held with PA President Abbas. Such meeting, between a prosecutor and a person against whom the law requires dispassionate consideration of a valid allegation of criminal conduct, seriously degrades the actual and perceived impartiality of the prosecutor's office." (emphasis added - NDL)

c. More information of War Crimes – the "Pay to Slay" scheme

"Furthermore, PA officials administer a "pay-to-slay" scheme in which the PA directs payments from the Palestinian Authority Martyr's Fund to convicted terrorists. These payments thus incentivize war crimes because the size and duration of the PA's "martyr's payments" are dependent upon the severity of the attack. The PA pays the largest "martyr's payment" to the most egregious violators of international humanitarian law in consequence of the wantonness of the violation.

The United States, the Netherlands, Australia, Norway and other governments have halted or reduced financial support to the PA because of the outrageous and unlawful nature of the "pay-to-slay" scheme. Yet, the ICC prosecutor's office has chosen not to consider at all the grave breach of international humanitarian law which the "pay-to-slay" scheme constitutes. This is highly discordant and may represent a perverse application of the principle of gravity, as your office devotes significant resources to the investigation of alleged subsidies to "settlers", but simultaneously ignores the patently unlawful PA "martyrs" payments, which are direct subsidies for the murder of civilians.

The "pay-to-slay" scheme is only part of a larger theme, laying the ground to further violence, war crimes and crimes against humanity. In this context, the PA's Ministry of Education systematically incites to War Crimes and Crimes Against Humanity through a curriculum which includes the demonization of Jews and Israelis, the delegitimization of the right of Israel to exist and the praise of the murderers of innocent civilians."

18. In our letter, we ask the Prosecutor as follows:

"Pursuant to your regulations and the decisions of the pre-trial chamber, we ask you to meet with us in person, in order to:

- 1) Update us on the status of our communications.
- 2) Examine the need for further information and evidence we can provide in support of our communications.
- 3) Receive further information concerning the criminal activity of officials of the PA and of Hamas who are within the jurisdiction of the court.
- 4) Examine the need to hear the views of Israeli victims whom we represent."

19. **We have not received a response to our requests in this letter.**

20. In December 2019, the Prosecutor submitted her request to the Pre-trial Chamber on the question of the Court's jurisdiction under art. 19(3), in which she also referred to the subjects of the intended investigation¹⁶. **None of the issues raised in our communications is included.**

21. In January 2020, we approached, once again, the Office of the Prosecutor. In our highly detailed and lengthy letter, we focus on the 'Pay to Slay' scheme, supplying the Prosecutor with hundreds of pages of evidence of the PA administered scheme, and also analyzing the criminal responsibility of PA officials for this scheme¹⁷.

The Prosecutor's Annual reports on Preliminary investigations and the subjects of her investigation

22. As no material feedback to our communications has been received, and in an effort to understand the status of our communications, we tried to follow the annual reports published by the Prosecutor and her submissions to the Pre-trial Chamber.

23. Five reports have been published by the Prosecutor since the initiation of the Preliminary Examination in 2015. The last report (2019) was published on December 5, 2019, just weeks before the Prosecutor concluded her Preliminary

¹⁶ ICC-01/18-12, Para. 94-96

¹⁷ Our letter dated Jan. 8, 2020 (attached). Prosecutor's office confirmation: OTP-CR-79/20, received on two letters (dated 3/2/20 and 19/2/20).

Examination. Subsequently, the Prosecutor detailed the subjects of her intended investigation in her request, pursuant to article 19(3), for a ruling on the Court's territorial jurisdiction in Palestine to the Pre-Trial Chamber¹⁸.

24. The following picture can be drawn from reading the Prosecutor's reports and submissions to the Pre-Trial Chamber, in respect to the issues raised in our communications:

1) **Illegal executions**

Illegal executions, which is the subject of our first communication from September 2014, is included in the prosecutor's report in 2015¹⁹. Although, not relating to all incidents brought in our communication, it does refer to the execution of 20 civilians during the 2014 Gaza operation. The issue has been abandoned and not included in subsequent reports, or in the cases the Prosecutor announced she will investigate.

2) **Abbas' and Rajub's responsibility for PLO attacks against civilians in the 2014 operation**

The Prosecutor, in her report, does not address any PA officials' involvement/responsibility for the rocket attacks against Israeli civilians in the 2014 Gaza operation. The cases the Prosecutor announced she will investigate, focus solely on the "Palestinian Armed groups".

In the case of PA official's criminal responsibility, the Prosecutor prefers not to address the criminal responsibility of superiors for the acts of their subordinates. This constitutes a failure to comply with Prosecutor's own policies of investigation, such as focusing on initiating prosecutions of the leaders who bear most responsibility.

3) **Kites and incendiary devices**

The Prosecutor addresses the release of kites and incendiary devices only in the context of the "Marches of Return" on the Gaza border. This is regardless of the fact that "Balloon Bomb" terror has been conducted independently and continuously for years and is continuing to this day. This issue has not been included in the issues the Prosecutor announced she will investigate.

On September 6, 2020, we wrote to the Prosecutor, saying:

¹⁸ Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine ICC-01/18-9 and ICC-01/18-9-AnxA Dec. 2019, para. 94-96 [Prosecutors' Request]

¹⁹ Report on Preliminary Examination Activities (2015), Para. 66

"Your decision to grant Palestinians with impunity for these crimes has served as an incentive to continue and escalate the attacks: In the last weeks, the terror balloon is once again striking southern Israel. Hundreds of Balloon Bombs have been sent into Israel, causing tens of fires daily, once again causing damage to agriculture fields, property and the natural environment. The numbers are alarming²⁰.

4) **The use of children in hostilities**

The Prosecutor chose to completely ignore this issue and includes only the Israeli response to the Gaza Border riots as part of her investigation.

5) **As to the allegations of both torture in PA facilities and the "Pay to Slay" scheme**, the Prosecutor wrote in her final report (2019):

"These as well as any other alleged crimes that may occur in the future require further assessment".

We note that the communications regarding torture in PA facilities were submitted by us in **March 2015**, immediately at the beginning of the Prosecutor's preliminary examination. In other words, the Prosecutor chose to **drag her feet for over five years in considering the issue**.

As to the "Pay to Slay" scheme, we note that this issue is widely known and has gained international condemnation (as detailed in our letter), before our communication was submitted. This includes public statements made by high rank officials all over the world, and even in the security council²¹. The Prosecutor has chosen to disregard/ignore ample information of this scheme.

Note: SHD's support to a communication regarding the situation in Northern Cyprus

1. In July 2014 SHD assisted European Parliament Member Mr. Costas Mavrides and "Cypriots Against Turkish War Crimes", file a communication to the Prosecutor regarding the Turkish transfer of population into occupied Northern Cyprus.
2. According to the communication, it is estimated that over a third of the population in occupied Northern Cyprus are mainland Turks whose settlement has been "actively organized and supported" by the Turkish government. According to the communication, Turkey provides settlers with job opportunities and financial aid, and allocates houses and land, most of which belonged to Greek Cypriots who fled in the wake of the Turkish invasion to Northern Cyprus.

²⁰ Our letter, Sep. 6, 2020.

²¹ See: https://en.wikipedia.org/wiki/Palestinian_Authority_Martyrs_Fund

This issue has never passed the Preliminary examination barrier. Even though more than six years have passed since the submission of this communication, and despite the fact the Court has undisputed territorial jurisdiction over this situation since 2002, nothing has been done by the Prosecutor's office.

3. We note this fact, since another issue of similarity has been preferred and prioritized by the Prosecutor over this issue, namely, the Palestinian referral of the issue of the "settlements". This was only brought before the Prosecutor after this communication, and the Prosecutor already concluded her Preliminary examination.

Conclusions – the handling of our communications by the Prosecutor

1. Our Conclusions:

- a. **The Prosecutor has either ignored or stalled the examination of the issues included in our communications, some for more than five years:** The complaint against the execution of tens of civilians by Hamas was abandoned; the complaint against the torture in PA Facilities has only appeared in the Prosecutor's last report, five years after SHD submitted two communications in this regard, and the infamous "Pay-to-Slay" scheme has only "caught the attention" of the Prosecutor five years into the preliminary examination, thus not sufficient to include in the subjects of her investigation.
- b. **A *prima facie* selective and unbalanced case selection was made** ignoring communications regarding Turkish Transfer of Population and prioritizing the Palestinian issue.
- c. **A *prima facie* selective and unbalanced choice of subjects of investigation was made, ignoring communications regarding Palestinian responsibility to War Crimes and focusing mainly on Israeli alleged crimes.** Despite the intention to investigate rocket attacks against Israel in 2014, PA officials have gained impunity in respect to their criminal responsibility for the acts of their FATAH subordinates. The "Balloon Bomb terror", and the use of children in hostilities have been ignored, while Israeli actions over the same period of time (and context) are subject to investigation.
- d. **Although the case selection by Prosecutor and her decision not to include a subject in her investigation may be legitimate, no material response has ever been received from her office, explaining the reasons for such a decision (as promised in her letters).** Furthermore, we have never been approached by the Prosecutor and asked for further information regarding our submissions, including those made in representation of

victims, and our request to receive an update, or even meet with her to discuss the communications, has been ignored.

Deficiencies in the Prosecutor's Office handling of our communications

2. The aforementioned experience with the Prosecutor's office, **stretching over six years and ten different communications**, raises several problems and issues of concern as to the conduct of the Prosecutor's office. These include:
 - 1) Failure to consider information provided in communications.
 - 2) Failure to conclude the evaluation of communications within reasonable timetables.
 - 3) Failure to respond materially to communications.
 - 4) The need for judicial review over the Prosecutor's office decisions.

Subsequently, **the outcome of these failures is a deeply troubled impression of an unbalanced and unjust case selection, and of a biased handling of a situation which has been selected, contrary to the Prosecutor's own declared strategies and policies**²². Even if this impression is the outcome of procedural deficiencies in the Prosecutor's office (i.e., not intentional), it may still result in the erosion of the ICC's relevance, effectiveness, efficiency, and image of impartiality.

3. As to issue of case selection, despite the fact that the situation in Northern Cyprus has been under the jurisdiction of the Court since 2002, and despite the fact our communication came before the Palestinian referral, and the Preliminary examination of the Israeli "settlements" and the "situation in Palestine and the developing "situation in Ukraine", it was left untouched and out favored by other situations of resemblance.
4. In the case of "the situation in Palestine", the impression is of turning a blind eye from serious crimes perpetrated by one side and providing certain individuals with impunity.
5. This impression is further amplified by the Prosecutor's well publicized appearances together with Palestinian Officials, some even subjects of our

²² See, for example: [Statement of Core Values](#), Sep. 4 2015 ("Integrity is the quality of acting honestly, **transparently and justly** in accordance with strong moral principles. This Core Value requires us not only to have strong moral principles, **but to demonstrate these principles in our daily activities**, both in the office and outside, and in our dealings with staff members of the Office, others in the Court and **with all with whom we interact**" – my emphasis NDL); [Policy paper on case selection and prioritization](#), 15 September 2016; [Policy on Children](#), November 2016 (as to the enlistment and use of children under the age of fifteen years to participate actively in hostilities

communications, and other Pro-Palestinian NGO's, while ignoring Israeli NGO's, such as ours.

6. We will now elaborate the importance of the different deficiencies mentioned.

Failure to consider information provided in communications

7. The Prosecutor's duty to consider information regarding alleged War Crimes and Crimes against Humanity within the jurisdiction of the Court is unquestioned. It derives directly from the responsibilities under the Rome Statute²³ and it is also mentioned in the Regulations of the Office of the Prosecutor²⁴ and the Prosecutor's office policies. For example, the Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications writes:

"Article 15.2 provides that "the Prosecutor shall analyse the seriousness of information received" and that for this purpose "he or she may seek additional information". It is clear that the Office must analyse all communications received, and that discretion is provided as to when the seeking of additional information is warranted".²⁵

8. Furthermore, the Rome Statute acknowledges that not only the issues referred by states may require ICC intervention²⁶. Sometimes, states have no interest in referring a certain issue to the ICC, which may even regard their own leaders' criminal responsibility. In some cases, including the "situation in Palestine", the investigation refers to highly complex political controversies, and not all the parties involved are necessarily Member States.
9. Yet, the Prosecutor's duty to examine a situation is neither dependent on the identity referring side, nor it is bound by the topics referred to her. Therefore, As the Prosecutor's duty is to investigate "the situation", as a whole, she cannot depend merely on information supplied by one side only.

Thus, in a case such as "the situation in Palestine", where a referring party (the Palestinians) apparently provided her office with information supporting their allegations, but the other party (Israel) is not a member state, and chooses not to fully cooperate, the Prosecutor's duty to investigate "the situation", as a whole, leads to an **enhanced duty not to rely solely on Palestinian or Pro-Palestinian sources, but to actively seek information and take under consideration the information supplied in communications regarding Palestinian conduct.**

²³ See: Rome Statute, art. 15.

²⁴ See regulations in Section 3.

²⁵ For example, see [Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications"](#)

²⁶ See art. 15.

10. In fact, what we should have seen from the Prosecutor is the complete opposite to her actual conduct. When enjoying full cooperation from the Palestinian side, instead of giving even more room for Palestinian NGO's, she should have taken steps to ensure that her office received an unbalanced and full picture of the situation, including an extra emphasis on communication received about alleged Palestinian crimes.

Failure to act in reasonable timetables required for such consideration

11. Even though the Rome Statute and the Regulations of the Office of the Prosecutor do not set a rigid timetable to consider communications, and despite the legitimate limitations of the Prosecutor's office, there is no question as to the Prosecutor's duty to "strive to complete all analyses as expeditiously as possible".²⁷
12. As to the importance of the promptness of the investigation of War Crimes, the Israeli Turkel committee wrote:

"The principle of promptness dictates that an investigation should begin as soon as practically possible after the alleged incident and that unreasonable delays in the investigation must be avoided. The Commentary on Article 146 of the Fourth Geneva Convention asserts that while dealing with serious violations, States should act as quickly as possible, in order to ensure that an alleged perpetrator is arrested and brought to justice with all due speed. Human rights law also places a strong emphasis on the need for investigations to be undertaken without delay. Time is a major factor that affects the ability to collect and preserve evidence, since crime scenes change, evidence disappears, memories fade, and witnesses may be threatened or might collude. Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done. Important fora have noted this connection between promptness and public confidence in the law²⁸".

13. With all due respect, we find it unreasonable that the prosecutor has not concluded her consideration of any of our ten communications, some submitted more than five years ago.

²⁷ *Id.*

²⁸ The Public Commission to Examine the Maritime Incident of 31 May 2010, second report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (The Turkel Committee, second report), p. 132. Also see the committee's comparative research as to the relevant time frames under EU Law and the Inter-American Commission of Human Rights at 132-134.

14. Furthermore, we find it unreasonable that the prosecutor has no policy of issuing updates; especially if the handling of a communication is dramatically prolonged.

Failure to respond materially to communications

15. Even though the duty to respond to communications is apparently acknowledged by the Prosecutor and the Prosecutor's office includes such a commitment in its formal letters of confirmation, we find it important to emphasize the importance of this duty.
16. The duty to provide reasoning for the Prosecutor's decision not to open an investigation in cases referring to War Crimes has been discussed by the Israeli Turkel committee, which has pointed at three main purposes for the existence of such a duty, **public review**, **legal review** and the ability to **appeal** such a review:

"The Commission recommends that every decision of the MAG not to open an investigation shall state the reasoning for that decision. This is important from a public and legal perspective, as well as a practical perspective, because such reasoning enables appeal and review of the MAG's decision"²⁹.

17. As we will explain, the Rome Statute provides only partial judicial review over decisions not to open an investigation. Considering this apparent flaw, the need for "public" and "legal" review is even more dominant, as transparency is necessary to preserve trust.

Lack of Judicial Review

18. Under the Rome Statute, there may be no judicial review over Prosecutor's decisions not to open an investigation in cases which do not serve the interests of the referring state. Art. 53(1) writes:

"At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c)³⁰. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."

²⁹ *Id.*, at 386

³⁰ These are cases when the decision not to investigate/prosecute are based on the "interests of justice".

19. Thus, while the **referring state** may request the Pre-Trial Chamber to review the Prosecutor's decision (in case it is not satisfied), there may not be any judicial review in cases where the Prosecutor has disregarded communications **against** the referring state, which are not in cases which are based solely on policy consideration.
20. In other words, in the cases where the complaint is not based on a referral by a member state or the Prosecutor's decision serves the interests of that state, the Prosecutor's decisions and reasons will never be reviewed by the Court.
21. Therefore, in such cases, the only way to conduct an objective evaluation of the Prosecutor's decisions can be based on her supplying the reasons for her decisions to the submitters of the relevant communications.

The issue of misconduct

22. As mentioned, the Prosecutor's duty to investigate "the situation", as a whole, leads to an enhanced duty to not rely solely on Palestinian or Pro-Palestinian sources, but to actively seek information and take under consideration the information supplied in communications regarding Palestinian War Crimes. In this respect, we find it disturbing that the Prosecutor has chosen to disregard our communications and our request to meet her, while frequently meeting with other pro-Palestinian NGO's³¹.
23. As the Prosecutor's Office "core values" paper reads, in order to fulfill the obligation to act with integrity, transparency and justly, the Prosecutor needs to "demonstrate these principles in our daily activities".

Endorsing one side of the conflict and disregarding the other, is not the right way to achieve this.

24. But another, more serious, line has been crossed. As we elaborated, some of our communications have dealt with alleged PA officials' criminal responsibility for War Crimes. These have included President Mahmoud Abbas Abu-Mazen, whose PLO subordinates fired rockets in civilian population in Israel during the 2014 Gaza operation. As detailed in our communication, the evidence for these crimes has been made public by the PLO group's own public statements, taking responsibility for these actions. These are not unfounded allegations.
25. We note that the issue of Palestinian Armed Groups' rocket attacks against Israeli civilians during the 2014 Gaza operation has been included in the intended investigation by the Prosecutor. In other words, the Prosecutor acknowledged that these actions were allegedly War Crimes, which must be investigated.

³¹ See: [Bias in ICC Prosecutor Bensouda's Meetings and Citations](#), NGO Monitor, January 15, 2020.

26. Yet, despite the fact that our communication was submitted in November 2014 and was in the hands of the Prosecutor when she opened the Preliminary Examination of the "situation in Palestine" in January 2015, the Prosecutor found it appropriate to **invite President Abu-Mazen to the ICC and meet with him in September 2015**.³²
27. As we noted in our letter to the Prosecutor, "Such meeting, between a prosecutor and a person against whom the law requires dispassionate consideration of a valid allegation of criminal conduct, seriously degrades the actual and perceived impartiality of the Prosecutor's office".
28. With all due respect, we believe that such conduct, which would be deemed unethical in any criminal judiciary systems and lead (at the very least) to disciplinary measures or even disqualification from further handling of the relevant case, should be dealt with seriously by the IOM.

Conclusions

29. A lot has been written about the importance of the proper conduct of prosecutorial discretion by the ICC's Prosecutor, to which transparency serves as a critical requirement. As **Ambos** and **Stegmiller** wrote:
- "The selection and prioritization of cases to be prosecuted before the ICC, while necessary and legitimate given the existing capacity constraints and the goals of the Court to prosecute the "most serious crimes" of the "most responsible", runs the risk to bring the Court into disrepute if not done properly, i.e., in a transparent and rational way"³³
30. Five years have passed since submitting our first communication to the office of the Prosecutor, ten communications submitted, another year has passed since our reminder letter, and still no response whatsoever.
31. With all due respect to any "capacity restraints" of the Prosecutor's office, **the mailing address of the Prosecutor's office cannot turn into a black hole**. Our communications seemed to have 'disappeared'. No material response has been provided to us for more than six years.
32. Furthermore, while ignoring our communications, we have been left with the impression of not only a highly biased case selection, but of very troubling and

³² [President of Palestine, H.E. Mr. Mahmoud Abbas visits the ICC Prosecutor](#), ICC Press Release, 30 October 2015.

³³ Kai Ambos and Ignaz Stegmiller, *Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?* 58 Crime Law Soc. Change 391, 392 (2012)

- problematic conduct, according to which only Pro-Palestinians gain audience with the Prosecutor and the Prosecutor holds meetings with the same people against whom our submissions were made.
33. Whether this impression is the outcome of procedural deficiencies or of actual misconduct, the result is that the Prosecutor's office does not live to the expectation to act impartially.
34. Therefore, we ask for your office's intervention in these issues. Should your office conclude that bias handling of our communication has been made and/or the Prosecutor has indeed acted inappropriately, we urge your office to take the necessary steps and procedures to ensure the ICC fulfills its mandate and remove from office those responsible for such misconduct.
35. We appreciate your prompt reply.

Respectfully,



Nitsana Darshan-Leitner
President, Shurat HaDin Israel Law Center